

Decision No. 175

Vincent G. Carter,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on July 31, 1996, by Vincent G. Carter against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of E. Lauterpacht (President of the Tribunal) as President, P. Weil, A.K. Abul-Magd and Thio Su Mien, Judges. The usual exchange of pleadings took place. The case was listed on September 30, 1997.

2. In his application Mr. Carter contests, and requests rescission of, the Bank's decision of June 22, 1995 not to renew his consultant fixed-term contract after its expiration date. This decision, he maintains, was made "on the basis of racial discrimination." The Applicant also contests, and requests rescission of, the Report of the Appeals Committee of May 7, 1996 which, he complains, failed "to recommend awarding of relief." The Applicant finally contests, and requests rescission of, the decision of May 9, 1996 by which the Vice President, Human Resources, decided to accept the Appeals Committee's recommendation; this decision, the Applicant maintains, failed to "fully consider the section titled REASONS in the Report ... which clearly indicated an abuse of discretion, improper practices, and evidence of racial discrimination on the part of the respondent."

3. The Bank raised various jurisdictional objections and requested separation of the jurisdictional issues from the merits. The President of the Tribunal granted this request. Consequently, the present judgment will deal exclusively with the jurisdictional issues.

THE RELEVANT FACTS

4. The relevant facts are simple and uncontested. Mr. Carter was appointed in 1984 as consultant to the Facilities Planning and Design Division in the Administrative Services Department. The letter of appointment, signed by him, stated that "[y]our appointment is for twelve months." Subsequently, his appointment was extended several times over more than ten years. On June 22, 1995, his Division Chief advised him that "[a]n analysis of the staffing needs of the Division has led to the conclusion that the work of the ... section ... can be accomplished with fewer people" and that "[a]ccordingly, I have decided not to renew your consultant contract, which expires June 30, 1995." The Applicant, however, was offered a four-month assignment in another section of the Division until October 31, 1995. This he accepted.

5. After an unsuccessful request for administrative review, the Applicant filed an appeal with the Appeals Committee against the Respondent's decision not to renew his contract and also against the statement in Section 2 of his Performance Record for the period of July 1, 1994 to June 30, 1995 according to which he was considered as being "generally ineffective in applying [certain] competencies during the review period." He also requested that the Appeals Committee recommend compensation on various grounds as well as a "[f]ormal apology in front of my former colleagues to set the record straight."

6. On October 31, 1995, the Appeals Committee issued a Report on the question of jurisdiction and on a request for provisional relief in which it stated that, since the Bank was under no obligation to renew a fixed-term contract after its expiry, no question arose of a breach of the Applicant's terms of appointment or conditions of employment and that the Committee had, therefore, no jurisdiction to hear the issue. In notifying

the Applicant of the Appeals Committee's findings, the Secretary to the Appeals Committee informed him that while the Committee had found that it had no jurisdiction on the issue of the non-renewal of his contract, it would, however, "proceed with the processing of the issue concerning ... [his] performance evaluation."

7. The Appeals Committee issued its Report on this latter question on May 7, 1996. The Committee found that "[a]lthough performance assessment is a discretionary process,... there was not sufficient evidence for a manager to decide that the Appellant's performance, when it came to client orientation, communication and initiative, was generally ineffective." The Committee concluded that the evaluation of Mr. Carter's performance in these competencies as "generally ineffective" constituted an abuse of discretion and recommended that his Performance Record for July 1994 to June 1995 be amended so as to state that Mr. Carter "could have been more effective" (instead of "was generally ineffective") in the quoted competencies. The Committee furthermore noted that problems of performance had arisen only in connection with Mr. Carter's work as client representative for the Europe and Central Asia Regional Office (ECA) and that no problem had arisen in connection with his work for the Middle East and North Africa Regional Office (MNA). It recommended, accordingly, that the words "ECA/MNA" in the Performance Record for 1994-1995 be replaced by "ECA."

8. Two days later, by a letter dated May 9, 1996, the Vice President, Human Resources, informed the Applicant that she had accepted the Appeals Committee's recommendations and that she had requested that the changes in the 1994-1995 Performance Record be made.

**THE BANK'S DECISION OF JUNE 22, 1995
NOT TO EXTEND THE APPLICANT'S APPOINTMENT
AT THE EXPIRATION OF HIS FIXED-TERM CONTRACT**

9. As stated above, the Applicant first contests, and requests rescission of, the Respondent's decision of June 22, 1995 not to renew his contract after its expiration on June 30. The Respondent raised two jurisdictional issues in this regard, one *ratione materiae*, the other *ratione temporis*.

The Tribunal's jurisdiction ratione materiae

10. The first jurisdictional objection raised by the Respondent runs as follows: a fixed-term contract expires by itself on the last day of its predetermined term, and the Respondent is under no obligation to offer an extension of such a contract beyond its expiration date; therefore, the Bank's decision not to renew a fixed-term appointment on its predetermined expiration date does not raise any question of "the non-observance of the contract of employment or terms of appointment" and the Tribunal has no jurisdiction under Article II(1) of its Statute to hear and pass judgment upon Mr. Carter's application.

11. The Tribunal cannot uphold this objection. It rests on the erroneous assumption that at the expiration of a fixed-term contract the legal relationship between the institution and the staff member completely lapses and disappears.

12. According to Staff Rule 4.01, paragraph 2.01(f), a consultant appointment is
a periodic appointment for a maximum of two years for full-time or part-time work to carry out specific assignments which require specialized professional experience, or to satisfy a work program need of limited duration.

A consultant appointment of less than six months is called a short-term consultant appointment, while a consultant appointment from six to twenty-four months is called a long-term consultant appointment. Mr. Carter's appointment, therefore, was a long-term consultant appointment.

13. Staff Rule 7.01, paragraph 3.01, provides that

[a] staff member's appointment shall expire on the completion of an appointment for a definite term, as specified in the staff member's letter of appointment, or as otherwise amended.

No doubt, therefore, as the Tribunal has previously found, “[a] fixed-term contract is just what the expression says: it is a contract for a fixed period of time” (Mr. X, Decision No. 16 [1984], para. 35; Atwood, Decision No. 128 [1993], para. 35). As a matter of principle, consequently, the staff member whose contract has expired has no right either to the renewal or extension of his appointment or to the conversion of his fixed-term appointment to a permanent one. In Mr. X, the Tribunal has ruled, however, consistent with the prevailing decisions of all international tribunals, that “[t]he possibility exists ... that there may be something in the surrounding circumstances which creates a right to the conversion of a fixed-term appointment to a permanent one” (para. 38). Likewise, there may be something in the surrounding circumstances which creates a right to the renewal of a consultant appointment.

14. In its Advisory Opinion of 1956 relating to the Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, the International Court of Justice found that, in light of the circumstances of the case before it, it should reject

an interpretation of the contract of employment which, by considering exclusively the literal meaning of its provision relating to duration, would mean that on the expiry of the fixed period a fixed-term contract cannot be relied upon for the purpose of impugning a refusal to renew it (I.C.J. Reports 1956, p. 92).

The Court added that

the complainant, in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment (p. 94).

15. Even when the circumstances of the case do not warrant any right to a renewal of a fixed-term contract, the Bank’s decision not to renew the contract at the expiration of its predetermined term, however discretionary, is not absolute and may not be exercised in an arbitrary manner. According to the principle laid down in *de Merode*, “[d]iscretionary power is not absolute power.” The Bank would abuse its discretion, for instance, if it were to base its decision not to renew a fixed-term contract at its expiration, discretionary as such a decision may be, on considerations unrelated to the functioning of the institution, such as racial discrimination.

16. It follows that the Respondent’s assertion that the absence of the renewal or extension of the Applicant’s contract cannot constitute “non-observance of the contract of employment or terms of appointment” within the meaning of Article II, paragraph 1, of the Statute of the Tribunal is mistaken. The Respondent’s objection to the jurisdiction *ratione materiae* of the Tribunal has to be rejected.

17. The question whether there are in this case particular circumstances that would make the Applicant’s nonrenewal unlawful relates to the merits of the case. So also does the question whether, even absent any such right, the Bank’s decision not to extend his appointment constituted an abuse of discretion because, as the Applicant alleges, it was racially, that is to say, improperly, motivated. It has to be recalled that in its Advisory Opinion quoted above the International Court of Justice asked the question “[d]oes that relationship [between the renewal and the original appointment] go so far as to create in his favour, as has been claimed, a definite right to renewal?” To this question the Court’s answer was that it is a “question which pertains to the merits...” (ICJ Reports 1956, p. 94). It is, therefore, only at the stage of the merits that the Tribunal would be able to examine whether Mr. Carter had any right to a renewal of his contract and whether the Bank’s decision not to renew his contract was tainted by an abuse of discretion. At this preliminary, purely jurisdictional, phase the Tribunal has not to enter into this question.

The Tribunal’s jurisdiction ratione temporis

18. The Respondent has raised another objection to the jurisdiction of the Tribunal. The Respondent argues that the Tribunal has no jurisdiction with respect to the Bank’s decision of June 22, 1995 not to renew the Applicant’s contract after its expiration because the application was out of time and, hence, does not comply with the requirements of Article II(2) of the Statute of the Tribunal. Even though the Applicant did not even attempt to rebut this objection to the jurisdiction *ratione temporis* of the Tribunal, it is the duty of the Tribunal to examine it.

19. According to Article II(2) of the Statute of the Tribunal, no application is admissible, “except under exceptional circumstances as decided by the Tribunal,” unless “filed within ninety days after ... receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted.” The Respondent maintains that the memorandum sent to the Applicant by the Secretary to the Appeals Committee on October 31, 1995 constituted notice that the relief asked for will not be granted and that, consequently, the Application filed on July 31, 1996 was out of time by six months.

20. As a matter of principle, the task of the Appeals Committee is purely advisory (see Guya, Decision No. 174 [1997], para. 3). According to Staff Rule 9.03, its competence is to consider appeals, to advise management on appeals, to make recommendations, to submit its report to management on appeals, and it is for management to “review the recommendation of the Appeals Committee and make a decision on the appeal.” There is one issue, however, on which the Appeals Committee is called upon to make a decision proper, namely on its own competence (Staff Rule 9.03, paragraph 4.03). In deciding on October 31, 1995 that it lacked jurisdiction with regard to the non-renewal of the Applicant’s contract, the Appeals Committee made a “decision,” the purport and effect of which was to confer finality on the Respondent’s decision of June 22, 1995 against which the appeal before the Appeals Committee had been lodged. There was no need, and it would have been to no avail, for the management to make a further separate and specific decision with a view to confirming its previous decision of June 22, 1995. The letter of the Secretary to the Appeals Committee communicating the text of the Committee’s Report to the Applicant put him on notice that the Bank’s decision had become final-- which meant that the Applicant had ninety days from October 31, 1995 to file with the Tribunal. Filed as it was on July 31, 1996, and absent any exceptional circumstances--the Applicant does not invoke any-- the application, insofar as it is directed against the Respondent’s decision of June 22, 1995, is inadmissible.

THE REPORT OF THE APPEALS COMMITTEE OF MAY 7, 1996

21. As mentioned above, the Applicant also contests, and requests rescission of, the Report of the Appeals Committee of May 7, 1996 which, he complains, failed to mention certain testimonies and to recommend the awarding of relief.

22. Insofar as the application filed on July 31, 1996 is directed against the Appeals Committee’s Report of May 7, 1996, notified to the Applicant on May 9, it is within the time limit of ninety days, and it is, therefore, admissible in this regard. The Tribunal has, however, to recall once again that “[t]he Tribunal is not a court of appeal from the Appeals Committee and does not review the manner in which the Appeals Committee has dealt with a case before it” (de Raet, Decision No. 85 [1989], para. 54). The task of the Tribunal is to pass judgment upon the Bank’s decision and not to review the Report of the Appeals Committee (Lewin, Decision No. 152 [1996], paras. 37 and 43-45; Guya, Decision No. 174 [1997], para. 3). Moreover, given that the Appeals Committee’s task is purely advisory, subject to the exception recalled above, there is no such thing as an Appeals Committee’s “decision” which could be challenged before the Tribunal. The Tribunal has, therefore, no jurisdiction to deal with this second aspect of the application.

23. It is to be noted, furthermore, that, contrary to the Applicant’s allegations, the Appeals Committee did not fail to recommend the awarding of relief. The Appeals Committee did, indeed, recommend that the most important of the reliefs Mr. Carter had requested, namely the two amendments to his Performance Record for 1995-1996, be granted. It is only his other requests (for monetary compensation, for a letter of explanation, and for a formal apology of the Bank in front of his colleagues) of which the Appeals Committee recommended the denial.

THE VICE PRESIDENT’S DECISION OF MAY 9, 1996 TO ACCEPT THE RECOMMENDATIONS OF THE APPEALS COMMITTEE

24. Finally, the Applicant challenges the decision of the Vice President, Human Resources, of May 9, 1996 to accept the Appeals Committee’s recommendations and, consequently, to request the Director of the General Services Department to make the changes to the Applicant’s Performance Record recommended by the Committee. As already mentioned, the Applicant alleges that this decision failed “to fully consider the section

titled REASONS in the Report ... which clearly indicated an abuse of discretion, improper practices, and evidence of racial discrimination on the part of the respondent.”

25. Insofar as the application is directed against the Vice President’s decision of May 9, 1996 to accept the recommendations of the Appeals Committee, there is no objection to its admissibility on the grounds of the ninety-day time limit requirement. However, contrary to the Applicant’s allegation, the Vice President has, without doubt, “considered” the REASONS Section of the Committee’s Report according to which “[a]lthough performance assessment is a discretionary process ... there was not sufficient evidence” for an evaluation of the Applicant’s performance as “generally ineffective” in certain fields. Not only did the Vice President “consider” these “reasons,” but she decided fully to accept and implement the Committee’s recommendations based thereon. Insofar as the application is directed against the Vice President’s decision of May 9, 1996 it does not, therefore, allege any non-observance of the Applicant’s contract of employment or terms of appointment and is inadmissible under Article II(1) of the Statute of the Tribunal.

26. Even though the Applicant did not dispute in his application that the Respondent has accepted the Appeals Committee’s recommendation that his Performance Record be amended, the Applicant nevertheless complains in a subsequent brief that he was not asked immediately to sign the revised evaluation, and adds that when he was invited some time later to sign it he refused to do so. This, he alleges, “is further evidence of the Respondent’s departures from established procedures, further demonstrating its bias, prejudice and manifest unreasonableness ... [and] further evidence of racial discrimination.” Consequently, he requests the Tribunal in this brief to declare the whole of his 1994-1995 Performance Record invalid and to order its removal from his file. The Tribunal observes that neither this complaint nor this request had been formulated either in the Applicant’s request for administrative review, in his appeal before the Appeals Committee or in his application to the Tribunal (which, quite to the contrary, explicitly states “N/A” under the heading “[a]ny other relief requested by the Applicant”). This particular request, therefore, does not comply with the requirement of exhaustion of internal remedies and is inadmissible under Article II(2) of the Statute of the Tribunal.

THE OTHER RELIEFS AND PROVISIONAL MEASURES REQUESTED

27. In his application Mr. Carter claims compensation on various grounds as well as costs. He also requests oral proceedings in order, so he explains in a subsequent brief, to “allow witnesses to confirm or deny allegations of racial discrimination.” He requests, finally a salary equity analysis which, so he maintains, would show that he was underpaid in comparison to his colleagues and provide evidence of racial discrimination.

28. The Tribunal having concluded that the application is inadmissible under Article II, paragraphs 1 and 2, of its Statute, these other claims and requests do not fall to be considered.

DECISION

For the above reasons, the Tribunal unanimously decides that the application is inadmissible.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At Washington, D.C., November 18, 1997