Decision No. 214

Vera Caryk,
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 February 22, 1999, by Vera Caryk against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. In addition, a filing by the World Bank Group Staff Association of an Amicus Curiae Brief was accepted by the Tribunal and both parties commented on this Brief. The case was listed on July 28, 1999.

2. The case raises issues related to the entitlements of persons having served as Long-Term Temporary appointees (hereinafter "Temporaries"). Such persons received the same benefits as Long-Term Consultants, and were collectively categorized with the latter as "non-regular staff" (hereinafter "NRS"). For that reason, the rules relevant here overlap with those pertinent to Pillarisetty Madhusudan (Decision No. 215), also decided on this date, which deals with the application of a Long-Term Consultant.

3. The Applicant, who holds a diploma from a secretarial college, was first employed by the Respondent in 1981, at the age of 46, as a temporary secretary engaged through an outside employment agency. Her prior experience was as a secretary with a number of professional and commercial employers.

4. By a letter of appointment dated February 26, 1982, she was offered a temporary appointment as a Secretary in the Personnel Management Department. The brief letter twice used the expression "temporary appointment," and indicated that "the Bank will not be responsible for any expenses incurred in relocation or interview purposes." She had previously been interviewed by a recruiter who recorded that the Applicant was aware that all U.S. taxes and social security payments were her responsibility, and that the only applicable benefits under this type of appointment were annual and sick leave. The recruiter also noted that the Applicant had stated that she might seek a permanent position in the future.

5. The letter of appointment contemplated employment from March 2, 1982, until July 30, 1982. In fact the Applicant's employment with the Respondent was ultimately to extend for more than 16 years until her resignation on March 31, 1998, without conversion to permanent status. She considers that the Respondent's use of successive contracts of short durations has operated to deprive her of pension and other benefits as a de facto long-term employee, and contends that this conduct constitutes a *détournement de procédure*.

6. There is no need to engage in a detailed account of the various evaluations of the Applicant's performance throughout the years; they were all positive – indeed often superlative – and frequently included expressions of support for permanent appointment, if possible.

7. Throughout her entire period of employment with the Respondent, the Applicant remained within the Contract Temporary Assignment Program (hereinafter "C-TAP"). As the Respondent states in its answer:

> The C-TAP was designed principally as a means of recruiting individuals with good secretarial skills into the Bank, and placing them in Regular or Fixed-term positions, as appropriate. While in the C-TAP, staff would be assigned to different posts throughout the Bank to provide temporary secretarial support in vacant positions, or fill-in for support staff on leave. Since C-TAP staff were already screened to ensure that they

> satisfied Bank standards for support staff, and they became familiar with Bank practices through various short term assignments, most C-TAP staff who joined the program were ultimately selected into Regular and Fixed-Term positions throughout the Bank as vacancies arose.

But as stated, this never happened with respect to the Applicant.

8. The Applicant contends that she applied for approximately 18 Regular positions, but was offered none of them. There is no documentary evidence before the Tribunal of such applications.

9. The Respondent contends that the Applicant was twice offered permanent posts, once in 1988 and again in 1989. The first occasion is reflected in an "Assessment upon Change of Assignment," authored by the Applicant's supervisor, the Senior Adviser and Assistant to the Director of General Operations Evaluation, who explained therein that he had been eager to offer the Applicant a staff position in his office, but that she had told him that she preferred to stay in the C-TAP program. The confidential "Assessment upon Change of Assignment," written by the Applicant's supervisor, reads in its entirety as follows:

> During the period *April 18 through June 17, 1988*, Vera Caryk helped me perform my duties as senior advisor and assistant to the *Director General Operations Evaluation*. I would not have functioned without her help and was sorry that she had to go to a next assignment. Her performance clearly was superior and with her warm personality she maintained excellent relationships with the Director General[,] myself, the Senior Staff Assistant and other staff in the department. I would have had no hesitation to offer her the position of staff assistant in the DGO's office, except that when we discussed the possibility at the time, she preferred to stay in the TAP program. A pity. I have been left with fond memories of how likeable a person she was and how excellent was the performance of her job. (Emphasis in original.)

The Applicant, however, denies that she had been given an offer, and asserts that if she had been given such an opportunity, she "certainly" would have considered it.

10. The second occasion is uncontested: the Applicant was offered a Secretary position in the Multilateral Investment Guarantee Agency (hereinafter "MIGA"). The Applicant acknowledges that she applied for the position, was interviewed and intended to accept it. The Applicant claims, however, that her supervisor in Personnel insisted that the offer was only for a level 13 position and for a "mere" receptionist position. She asserts that she explained to her supervisor in Personnel that with her numerous years of experience at the Bank since 1982 and her previous experience outside the Bank she could accept no less than a level 14 position.

11. What the documents show is a memorandum dated February 16, 1989, from a MIGA officer addressed to the supervisor in Personnel, which reads (in its entirety) as follows:

> I have interviewed Ms. Caryk, who has applied for the position of Secretary in the Office of Finance and Administration in MIGA, and have found her to be knowledgeable about Bank Procedures, which would be a definite asset to MIGA. Her interpersonal skills appear to be excellent, she seems very people-oriented and most presentable. We would like to offer her the position, and have her start at MIGA as soon as possible. As discussed with Personnel, she will be on a one year probation.

A handwritten notation by the supervisor in Personnel dated the next day indicates simply that: "Ms. Caryk rejected the offer for the position because she did not want to accept the position at level 13." The Applicant indeed remained in the C-TAP program until her resignation.

12. The Applicant's final extension with the C-TAP, which was granted in July 1997, was to end on November 3, 1998. On March 24, 1998, however, the Applicant tendered her resignation, effective March 31, 1998. Soon after, effective April 15, 1998, the Respondent amended the Staff Retirement Plan (hereinafter "SRP") so as to provide that Temporaries employed on or after this date would begin to accrue pension rights.

13. The Applicant submitted a "Request for Administrative Review" to the Respondent's Human Resource Services on June 26, 1998, asking for participation in and past credits under the SRP for her entire past

service with the Bank, or the monetary equivalent of such past credits. She referred to a decision rendered by the Administrative Tribunal of the Asian Development Bank (hereinafter "ADBAT"), Amora v. ADB (ADBAT Decision No. 24 [1997]), proscribing, or so she contended, *détournement de procédure*; as well as to Section 2.1(b)(iii) of the SRP as in effect on July 1, 1997. On the same day, the Applicant sent a similarly worded request to the Pension Benefits Administrator of the Pension Benefits Administration Committee (hereinafter "PBAC"). The Bank accepted that the claim should be reviewed by the PBAC.

14. Her request was denied by the PBAC. The decision was notified by a letter dated November 24, 1998, from the Manager, Pension Administration, who informed the Applicant that she had not held "an appointment type that would have made you eligible for participation under [Section] 2.1 at any time during your Bank employment."

15. Before this Tribunal, the Applicant contests the denial of SRP participation, the denial of credit for all Bank service under the Bank's SRP, the denial of SRP retirement benefits, retiree medical benefits, and all other benefits from 1982 until her resignation.

16. The Respondent has raised a number of jurisdictional objections before the Tribunal, contending broadly that the right of action has lapsed due to the Applicant's failure to exhaust internal remedies in a timely fashion. This would imply that there was a particular moment when there was a misclassification which the Applicant could, and should, have challenged. There is, however, a difficulty in positing that the relevant date of the *détournement de procédure* is that of the alleged misclassification, because it is a central tenet of the Applicant's case that the wrongfulness of the Respondent's conduct must be evaluated retrospectively, to see if an initial ostensibly innocent appointment ultimately matured into an impermissible retention of the Applicant in an inappropriate classification.

17. The Tribunal does not, however, need to resolve whether these difficulties with respect to the Respondent's objections are decisive as a matter of jurisdiction. The Tribunal considers it to be of overriding importance that the Respondent did not raise them before the PBAC. It should be noted first of all that Section 10.2(f) of the SRP gives an exceptionally broad definition of the authority of the PBAC, to

> decide all questions of interpretation of the Plan provisions relating to participation, retirement, elections, and benefits, and any claim of any person for benefits or other payments under the Plan. (Emphasis added.)

18. The PBAC decided the claim on the merits without having any reason to consider jurisdictional impediments which were only articulated thereafter. That the Applicant initiated her action before this Tribunal in a timely fashion, by reference to the date of the PBAC's decision, is beyond dispute. Moreover, the PBAC clearly rejected the Applicant's contention that she was entitled to retrospective regularization under the Amora principle and did so on the merits. Not only did the Respondent not challenge the PBAC's authority to decide this issue, but it had indeed referred the Applicant to the PBAC in the first place.

19. As to the merits, the Applicant contends, in effect, that because she rendered services over a 16-year period that were in substance the equivalent of those rendered all about her by secretaries holding permanent or fixed-term appointments, she is entitled now to be accorded a variety of financial benefits – particularly, pension benefits – that attach to such staff members. The Applicant has relied to a considerable degree on the Amora case, which was rendered by the ADBAT. As such, the Amora decision is not binding on the present Tribunal. On the other hand, the Tribunal considers that a harmony of views of similar international jurisdictions is to be welcomed, if possible, and of course the Tribunal will be influenced by persuasive analysis whatever its source.

20. The Tribunal does in fact find the Amora decision persuasive but clearly distinguishable from the present case as the facts here are quite different.

21. The applicant in the Amora case was a clerical worker; he operated copying machines for 16 years. During all that time, the ADB treated him as an "independent contractor" until he was offered regular appointment 22

months before his 60th birthday. He was then required to retire from service at age 60 (in accordance with Staff Regulations, and against the applicant's desire to continue to age 65) with the result that he ended up with an extremely small pension.

22. In the Amora case, two features appear salient. First, the applicant was an essentially unskilled office laborer whose tasks could readily have been performed by practically anyone. To consider someone in that position to be an "independent contractor" seems an abuse of language. His work was routine and fungible, not a specific task in the framework of a mission limited in time or expected to be terminated with the achievement of particular goals, or in the context of a program, such as the C-TAP, which was explicitly designed as potentially transitional. The ADBAT properly refused to accept a characterization which did not reflect the true relationship between the parties. Secondly, Mr. Amora was never offered a regular position until a time when it was almost too late to be a practical benefit to him, given the decision to retire him within less than two years.

23. In the Amora case, there appeared to be no valid reason for having treated the applicant as an "independent contractor" and denying him the benefits of a regular staff member. Indeed, the Respondent ADB practically admitted as much in portions of its pleadings quoted in the judgment, when it spoke of "expediency" and "efficient functioning." An authority which seeks to justify its miscategorization of persons subject to its power on such grounds is likely to be found guilty of abuse.

24. The Applicant relies on the Amora decision for its invocation of the doctrine of *détournement de procédure*. *Détournement de procédure* (broadly, abuse of procedure) is a subcategory of *détournement de pouvoir* (abuse of power). *Détournement de pouvoir* is extant whenever the authority in question exercises its power for a purpose different from that for which its power was attributed to it, or whenever there appears to be no valid reason for the exercise of the power (which therefore is challengeable for arbitrariness). The ADBAT held in its Amora decision that if a label given to a relationship was merely a device to deny the employee regular staff benefits, it should be disregarded.

25. The instant case does not, however, present such a pattern. An immediately obvious contrast is that while Mr. Amora was treated as an "independent contractor," the Applicant had a staff appointment and was subject to the provisions of the Principles of Staff Employment and the Staff Rules. These texts entitled the Applicant to a range of standards by which to verify that she was treated correctly, and to a mechanism by which she could seek redress if these standards were neglected or violated.

26. Moreover, the Applicant here was never designated or treated as an "independent contractor." There was no pretence that she was working on discrete projects with her own means – as would be the case of an independent contractor, and as the ADBAT persuasively found was *not* the case with respect to Mr. Amora. The Applicant was a secretary, and recognized as such. The issue in her case is whether she was properly characterized as a Temporary throughout the entire period of her service with the Bank.

27. A significant difficulty for the Applicant here is that at least once – by her own admission – she was offered appointment as a permanent staff member in 1989. Indeed, the Tribunal views the evidence as rather convincing that she had an earlier opportunity in 1988 but discouraged an offer from being made (*see supra* para. 9). The Tribunal therefore accepts as a fact that the Applicant for reasons of her own sought to stay in the C-TAP program she had entered. As noted earlier, the Applicant's claim that there were numerous occasions where she sought permanent appointment has not been substantiated.

28. The circumstances of the Applicant's departure from assignment to the Respondent's Inspection Panel, which took place as late as July 1997, suggests that the Applicant's preference for mobility was not limited to her early years. At the time, the Chairman of the Inspection Panel wrote an exceptionally laudatory "letter of reference," referring to her as "one of the most positive elements in the dynamics of a small office," referring to her "insights, humor, wisdom, perspective, and encouragement to difficult situations as needed. … The Panel will not be the same without her presence." Whatever her colleagues' desire to have her stay, the Applicant, for her part, can hardly be said to have felt a compelling degree of attachment to her work group. On July 8, 1997, she wrote a memorandum to her program supervisor entitled "ending of assignment" and stating as follows:

> Thank you for seeing me this morning and thank you for my raise. As promised, I am getting back to you on my status in the Inspection Panel. I have informed Messrs. … and [Ms.] … that I would like to move around the Bank. I have asked [Ms.] … if she wanted me to leave right away, or if she wished me to stay for a while to help with the transition period. I told her that I would be happy to stay to the end of July. She said that it was alright with her. So my last day here will be Friday, August 1, 1997.
>
> As I mentioned to you during our meeting, I would like to take the week of August 4th as annual leave. I will call you during that week to find out where I am going.

The clear impression is that of a highly competent secretary who – far from frustrated in a dead-end assignment – is much in demand and is given her preference.

29. The Applicant joined a program – the C-TAP – which had the explicit purpose of allowing access to employment at the World Bank on a temporary basis without the difficult and lengthy screening and application process required for regular appointment, and with the explicit inducement that persons in that program might, whenever future openings appeared, more easily accede to regular appointment than pure outsiders. The evidence shows that the Applicant in fact accepted a series of assignments which were intended to be, and in fact were, temporary. It was doubtless convenient for the Respondent to allow her to do so, given her excellent reviews and the uncertainties of external short-term recruitment. But the Tribunal does not see how the Respondent can be taken to task for giving the Applicant her preference. If her pattern of accepting such assignments had the end result of depriving her of certain benefits she might have received from a more stable job, that is – not in every case, but certainly in this one – a matter of individual choice and foresight.

30. The Tribunal cannot find that there was anything abusive in the Respondent's having maintained the Applicant in this program from 1982 to 1989, when it offered her a permanent position. As the Respondent has asserted without challenge, this position would apparently have offered a salary and benefits such as SRP benefits that were quite comparable to those in the C-TAP. Yet she turned that position down, she says, because it did not correspond to her level of experience and ability. If she considered the offer invidious because she was denied a higher classification, or if she was denied, on a discriminatory basis, any other of the many positions she says she applied for, she could have brought a grievance then. Instead, she carried on within a program which she very well knew left her on her original footing: that of a Temporary. Having made that choice, the Applicant cannot now insist on a retrospective transformation of her status which it was in her power to achieve on more than one occasion in the past.

31. The Applicant's argument today that she "believed it would be patently futile for her to seek another position in the Bank or pursue a regularization appeal" is not tenable. The first branch of this contention is contradicted by the evidence. (The Tribunal is constrained to observe that the reference to the offer that was made to her in 1989 was ignored in her application.) As for the second branch, it is difficult to see how the Respondent could operate an effective internal grievance procedure if such contentions were accepted; they would justify disregard by applicants who allege vague impressions that it would have been useless to try. The Bank's staff members are in a position to seek legal advice; to seek the views of the Staff Association; or to take the matter up with the Ombudsman or an Appeals Committee counselor. There is no shortage of discreet ways to assess the viability of a grievance.

32. By May 1992, when the Applicant turned 57, she fell within the ambit of Staff Rule 4.01, paragraph 4.01, which provided: "No person under 18 or over 57 years of age may be appointed to Regular, Fixed-Term, Secondment Staff … Appointments." This provision had been in effect since 1986. It can therefore hardly be said that the Applicant suddenly found herself in an impasse; she had many years' notice of the conceivable interest she might have had in converting to permanent status.

33. In addition to asserting a claim to benefits under the SRP based upon an alleged de facto regularization over the course of her service, the Applicant has sought to rely on Section 2.1(b) of the SRP, which defines the "persons who have not reached their normal retirement dates [but] shall also be participants in the Plan," and includes among the listed categories:

(i) the President of the Bank;

(ii) an Executive Director, an Alternate Executive Director, an Advisor to an Executive Director and an Executive Director's Assistant; and

(iii) a person employed by the Employer on a Fixed-Term appointment or on a Part-Time appointment of indefinite duration or for a specified term of one year or more.

The Applicant urges the Tribunal to conclude that the Plan should be interpreted to provide for participation by NRS, as a person employed "for a specified term of one year or more."

34. In the Tribunal's view, the plain language of this provision commands a different conclusion, namely that the phrase "or for a specified term of one year or more" does not constitute an autonomous definition of the personnel covered by this provision. In its context, the phrase is plainly relevant only to staff holding Part-Time appointments. This reading is confirmed by the consideration that any other interpretation would render redundant the references to other appointment types in Section 2.1(b). The Tribunal therefore agrees with the position taken by the PBAC in its letter of November 24, 1998, that Section 2.1(b)(iii) identifies two categories only, and not a third one "consisting of persons employed by the employer 'for a specified term of one year or more.'"

35. By way of confirmation, the Tribunal notes that even if there were an ambiguity in this regard, NRS were on notice that the Respondent has always read this provision as the Tribunal now does by the following accessible documents:

- Paragraph 3 of the Personnel Manual Statement No. 3.26 (issued as early as May 1977) stated flatly: "Temporary Staff and Consultants are not eligible to participate in the Plan."

- The World Bank Group Staff Retirement Plan Handbook (in the May 1993 version submitted to the Tribunal) in its section on "Eligibility" lists the personnel as identified in Section 2.1(b), and then states clearly: "Participation in the SRP is not allowed for a staff member on any other type of appointment."

36. The Staff Association, as Amicus Curiae, has raised more general concerns relating to the Bank's employment policies. It has explained, in its Brief, that Temporaries and Consultants are not offered pension participation and certain other benefits and that such appointments were appropriate only for work of a limited, short duration. Moreover, it affirms that during a number of years an unhealthy practice developed on the part of the Bank to make hundreds of indiscriminate appointments to such positions in a manner that degenerated into a de facto circumvention of established development policies.

37. These points are worthy of consideration, and have been extensively discussed in the pleadings before the Tribunal, but are not conducive to the assessment of individual cases. By their general nature, they militate in favor of the reform of relevant rules – and in this respect they already appear to have prevailed. As of 1990, Consultants and Temporaries having served for 18 months were allowed to apply for vacancies on equal footing with Regular or Fixed-Term staff. A four-year limit was applied to new Consultants and Temporaries – it being recognized that then existing Consultants or Temporaries were anxious not to be cut off. Shortly thereafter, the Director, Personnel Policy Department, informed all staff that data had been collected from departments where Long-Term Consultants and Temporaries had been working in the same assignment for at least four years with the objective of identifying areas where the work done by Consultants would be more appropriate for Regular appointees, and that as a result a number of offers of Regular appointments had been extended.

38. In August 1991, the Bank's President issued a memorandum specifically addressing the issue of regularizing NRS. He stated that a special effort was to be made to provide Regular status to NRS who met four criteria:

(i) uninterrupted assignments in the same job for four years;
(ii) fulfillment of normal recruitment standards;

(iii) assignment of tasks of a permanent nature;
(iv) regularization consistent with a rational business purpose.

39. A report prepared by an NRS Work Group in 1994 explained that a new proliferation of Long-Term Consultants could be explained by "a highly decentralized recruitment practice" and by "dollar budgeting." It cautioned that "acquired employment rights" could become a serious issue with NRS who have served for many years. On the other hand, it noted that fees for Consultants sometimes include a margin for the lack of retirement and other benefits, and recommended that such margins should be made more explicit and transparent.

40. These examples of policy initiatives or studies from the later periods of the Applicant's association with the Respondent are not exhaustive. They show that the Respondent, far from being involved in a *détournement de pouvoir* and *détournement de procédure*, was sensitive to a wide range of different, and occasionally conflicting, factors. The task of the Tribunal cannot possibly be to judge whether the Respondent could have been wiser.

41. To determine whether individual applicants have a legitimate grievance, then, the circumstances of their particular cases must be examined. They may prevail not because the rules which governed their activity had *generally* deleterious effects, but only if they have suffered a *détournement de procédure* and *détournement de pouvoir* in the particular instance of application. This has not been demonstrated.

42. The Tribunal thus observes that when the Respondent's Director of Personnel referred to the fact that the use of Consultants, in lieu of Regular staff and without offering them pension benefits, had by 1988 become an "anomaly," this meant that there was an anomaly at the macro level of rules and policy – it did not mean that every case under the rules was itself necessarily anomalous.

43. The record in this case does not reflect a pattern of abuse amounting to a *détournement de procédure* in dealing with the Applicant. This conclusion is entirely consistent with the fact that in 1998 the Respondent decided to phase out NRS, and to allow continuing NRS to join the pension scheme of the SRP.

44. Finally, the Tribunal rejects the Applicant's undeveloped claim of discrimination on the basis of her U.S. nationality. Given the evidence adduced by the Respondent, the argument lacks substantiation.

Decision

For the above reasons, the Tribunal unanimously decides:

(i) to dismiss the application; and

(ii) to order the Respondent to pay to the Applicant costs in connection with the jurisdictional phase of the proceedings in the amount of $4,000.

Robert A. Gorman

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President

Nassib G. Ziadé

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Executive Secretary

At Washington, D.C., October 1, 1999