Decision No. 306

John A. Elder,
Applicant

v.

International Bank for Reconstruction
and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of Francisco Orrego Vicuña, President, Bola A. Ajibola and Elizabeth Evatt, Vice Presidents, Robert A. Gorman, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges, has been seized of an application, received on May 16, 2003, by John A. Elder against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place and the case was listed on October 15, 2003.

2. This case concerns a decision of the Bank to deny the Applicant pension credit for past service as a Non-Regular Staff (NRS) because of a break in service which intervened between two periods which he spent as a Long-Term Consultant.

3. The Applicant began his career in the Bank on January 1, 1989 as a Short-Term Consultant for periods of time respectively extending for 80 days, 26 days and 15 days. Beginning on or about September 4, 1990, the Applicant accepted appointment as a Long-Term Consultant for an initial six-month period. This appointment was subsequently extended for roughly annual periods until February 29, 1996. On this last date, his appointment was extended for only an additional four-month period, until June 28, 1996, because of budget difficulties which the Bank faced. Sometime after April 4, 1996, the Applicant was informed that his appointment would not be extended further and his appointment was in fact terminated on or about June 28, 1996.

4. The Applicant at this time proposed a work program that would allow for a further one-year extension, but his proposal was not accepted and he was only able to obtain a Short-Term Consultant appointment for about 28 days beginning on July 1, 1996. His status as a Short-Term Consultant apparently continued until June 30, 1997. On July 14, 1997, the Applicant was reappointed as a Long-Term Consultant; thereafter, due to the 1998 Human Resources Policy Reform, he commenced prospective participation in the Net Plan of the Staff Retirement Plan (SRP) on April 15, 1998. On May 18, 1999, the Applicant's appointment was converted to Open-Ended and he has since continued participation in the SRP.

5. In the aftermath of the *Prescott* decision (Decision No. 253 [2001]), the Bank decided to grant past pension credit to NRS meeting certain defined criteria. This policy change was approved by the Executive Directors on September 17, 2002, and the resulting changes to the SRP were likewise approved by the Board on December 12, 2002, and became Schedule F of the SRP. The key aspect of this amendment as relevant to the present case is that, among other elements, qualifying NRS would have to be in continuous service with a pensionable appointment lasting until January 1, 2002, with service occurring before a break of more than 120 days not taken into account.

6. The "Break in Service" rule is defined in Schedule F as a "period of more than 120 consecutive calendar days before January 1, 2002 during which the individual did not hold (i) a Non-Regular Appointment …." In turn, Schedule F defines a Non-Regular Appointment as including Long-Term Consultants and other specific Long-Term appointments. Short-Term Consultant appointments do not fall under this definition. Moreover, the Schedule specifically provides that if the participant "incurred one or more Breaks in Service, no days on or before the last day of the latest Break in Service shall be considered, or included within, a Period of Eligible

Employment."

7. In applying these rules to the Applicant's case, the Bank concluded that he was not entitled to past pension credit as there had been a break in his service of more than 120 days, during which time the Applicant held the Short-Term Consultant appointment referred to above. Consequently, any time of service prior to July 14, 1997, the date of his reappointment as a Long-Term Consultant, would not be taken into account pursuant to the new rules. The Applicant's 2,125 days of service as a Long-Term Consultant from 1990-1996 were thus disregarded.

8. The number of days that followed July 14, 1997 until April 15, 1998, the date of his commencing SRP participation, could not be computed as supplemental service qualifying for credit under the new rules because from any such period the sum of 730 days had to be deducted and only the balance credited. The 730 days figure is the equivalent of a two-year work period in which a staff member could be considered to have held Short-Term appointments not allowing for supplemental service. Between July 14, 1997 and April 15, 1998, the Applicant's number of days of eligible employment was less than 730.

9. The Bank informed the Applicant of this conclusion on September 19, 2002, and this is the decision now contested before the Tribunal. The Bank agreed, pursuant to Article II(2)(i) of the Tribunal's Statute, to have the case brought directly to the Tribunal without the Applicant having to exhaust other internal procedures.

10. The first issue the Tribunal must examine is the Applicant's principal contention that in enacting the new policy on past pension credit for NRS, the Bank committed a *détournement de pouvoir*. The Applicant argues in this connection that the Bank has the duty to act with fairness and impartiality, and must not differentiate in an unjustifiable manner between individuals or groups of staff. The new policy is, in his view, arbitrary because it perpetuates the distinction between Long-Term and Short-Term NRS.

11. In the Applicant's view, a particularly irrational aspect of the policy is that if he had spent the same period of time as a Short-Term Consultant earlier, followed by his original period of time as a Long-Term Consultant later, he would be entitled to a substantial past pension credit even though the service to the institution would have been identical in both the actual and hypothetical cases.

12. The Tribunal does not believe that it is arbitrary for the Bank to establish reasonable limits and conditions on the benefits allowed under the rules which it enacts from time to time. To exclude a 730-day or two-year period of service as NRS from the calculation of supplemental service on the assumption that a staff member might have held Temporary appointments is not in itself wrong, as the Tribunal concluded in a prior case (*Lavelle*, Decision No. 301 [2003], para. 16). Similarly, it is not necessarily wrong to exclude a break in service from the calculation of supplemental service.

13. It is possible indeed to discuss whether the definition of "break in service" involves a period that is too long or too short, but the 120-day cut-off figure has not been shown to be arbitrary and it may be noted that this limit responds to specific needs. In fact, as explained by the Respondent, this figure was designed to encompass such periods as the normal time taken for processing the renewal of an NRS appointment, short periods of absence, and other situations that were specifically mentioned during the preparation of the policy, including the views expressed by the Staff Association in this respect.

14. The Applicant does not complain about a misapplication of the rule in his case, but simply asserts that the end results are not equitable. In fact, the Applicant argues that his unit, his job responsibilities and salary remained the same irrespective of the type of appointment he held and that, in effect, his service was uninterrupted, unchanged and a part of a single, longer continuum of work which existed even during the period between his two Long-Term appointments.

15. In the Applicant's view, his change in status was unrelated to his work but resulted from changes in the budgeting process and his unit's management. In any event, the Applicant believes, the Bank violated its own rules in giving him a Short-Term appointment while knowing in advance that his work would last beyond five

months, the maximum then allowed for this type of appointment. Only a Long-Term appointment would have been called for in such circumstances.

16. The Applicant concludes this line of argument by submitting that the Bank should not have strictly applied a rule of general application but should have provided for the review of the particular circumstances that gave rise to the break in service in his case, in order to ensure that its application did not result in inequitable treatment. The Applicant further argues that the Bank applied the rule to him without regard to the equities of his case and that a blind application of the rule is inherently arbitrary.

17. The Tribunal is not persuaded by the arguments made by the Applicant. As stated in *Crevier*, it is "not within the competence of the Tribunal to consider which alternative would have been best or more effective to attain the desired objectives of the reform" and the Tribunal can only decide whether the solution retained "can be applied lawfully to the Applicant in the light of his rights as a staff member." (*Crevier*, Decision No. 205 [1999], para. 17.)

18. The Bank is quite evidently not under an obligation to develop individualized exceptions for each staff member who may have held a Short-Term appointment. This exercise would, like individual consideration of all potential instances of NRS past pension service eligibility, be administratively unmanageable and might end up being unfair in itself. (*See Lavelle*, Decision No. 301 [2003], para. 14.)

19. The merit of general rules lies precisely in granting the same treatment to all staff members falling within the same category. The Bank's differentiation between Short-Term and Long-Term appointments had a clear business justification in the Bank's practice and was a topic considered throughout the discussion concerning NRS past pension credit. Moreover, in this particular case, it is evident that there was no other option at the time of the Applicant's appointment to a Short-Term position or else the Applicant would have had to leave the Bank's service altogether.

20. The Applicant claims continuity of his work responsibilities and salary. While it is true that his unit remained the same during the relevant period, the evidence shows that his job responsibilities do not appear to have followed the same pattern. A succession of Short-Term assignments is quite different from a Long-Term program of work, and while the Applicant proposed a longer commitment this was clearly not accepted in view of the budgetary constraints of the time.

21. More important is perhaps the fact that his salary was not the same in each appointment. While serving as a Short-Term Consultant in the period 1996-97, the Applicant received fees totaling $96,300, representing 214 days of work, while his immediately preceding gross salary as a Long-Term Consultant was at an annual rate of $79,560. Such higher Short-Term Consultancy fees are designed to compensate for the loss of other benefits.

22. The change in status which the Applicant experienced corresponded to the legitimate business needs of the Bank, that were connected with both the budgetary situation and the work program of his unit. There was nothing discriminatory or arbitrary in this change. While the Applicant in his pleadings appears to suggest that there might have been a question of misclassification involved, he does not pursue the matter, and it is quite evident from the record that he would have had either to weather the situation on the terms that were offered or else to leave the Bank altogether.

23. The Tribunal must note that continuous service is a normal requirement in all pension plans and has in the context of staff regularization been recognized as valid in other cases. (*See Yang*, Decision No. 252 [2001], paras. 19-20; *Lavelle*, Decision No. 301 [2003], para. 16, citing *Prescott*, Decision No. 253 [2001].) The SRP applies this requirement in many situations and the Bank has no discretion to treat Short-Term service in a different manner.

24. The Applicant argues that the SRP's provisions for the restoration of service by staff members resuming participation is evidence that restoration is admitted also in cases of discontinuity. The actual situation, as

explained by the Respondent, is somewhat different. In cases of restoration of service, only time accrued during an earlier period of participation in the SRP counts and no new service is granted. For the same reason, participants cannot “buy back” time not previously served in the SRP.

25. The Tribunal must also note that restrictions of this kind are common in pension plans. In fact, the Bank’s rule was drafted very tightly so as to restrict the scope of beneficiaries. In fact, as stated by the Respondent, the SRP trust assets must be distributed strictly in accordance with the rules of the Plan.

26. The reason underlining the Bank’s restrictive policy is that the more the SRP allows for exceptions, the more the funds belonging to others are adversely affected and this cannot be considered quite fair. Although the Applicant has advanced arguments about the differences between the SRP’s Gross Plan and Net Plan, and has requested past pension credits in the former, this distinction is immaterial as in either case he would not be entitled to the credit he seeks under the rules in force.

27. The Applicant made a serious allegation on October 20, 2003, after the case was listed, that he had received information that the Bank had applied its discretion in making exceptions to the past pension credit rules in twenty to thirty cases, and that this meant that the Bank had taken individual circumstances into consideration in some cases instead of mechanically applying the relevant rules. The Applicant relies on an affidavit of October 17, 2003, of a Staff Association Alternate Delegate who attended a meeting of the Staff Association and who declared that the Vice President of Human Resources had made this admission there. Although the case was listed, the Tribunal accepted the letter and affidavit submitted by the Applicant, and in turn asked the Bank for its comments. In so doing, the Tribunal specifically requested an affidavit from the Vice President of Human Resources addressing this allegation.

28. The Bank’s response and the requested affidavit were submitted on November 7, 2003. It appears from such that the situation is entirely different from that alleged by the Applicant. Various requests for exceptions were indeed made to the Bank, but only five were granted. Even then, relief was provided only in the form of an *ex gratia* payment made in lieu of pension credit. These payments were made from the Bank’s administrative budget and not from the SRP or its assets.

29. Each of the five cases in which a payment was made involved a staff member who because of age was precluded from joining the SRP on April 15, 1998, and who was later terminated as NRS when his or her appointment was entirely phased out. As a result, they would have left the Bank without any pension or other benefits whatsoever. These persons had never participated in the SRP, and so the provisions of the SRP were not applicable to them. Consequently, no exceptions were made to the application of the Bank’s rules. The Tribunal is fully satisfied that the Bank did not bend, and could not have bent, its rules in these particular circumstances.

30. In sum, since the Applicant has failed to demonstrate that the Bank acted arbitrarily in applying its general rule to his particular case, and in the absence of exceptional circumstances, the application must fail.

Decision

For the above reasons, the Tribunal decides to dismiss the application.

/S/ Francisco Orrego Vicuña

Francisco Orrego Vicuña
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington, DC, December 12, 2003