

Decision No. 121

Catherine Farvacque,
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 Catherine Farvacque 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, a French national, was appointed to the staff of the Respondent on a fixed term appointment on November 22, 1985, as a Research Assistant, level 19. The Applicant had previously indicated in the forms relating to her application for employment that in effect she had pending an application for a permanent resident visa. On inquiring she was informed by the Respondent at the interview for employment that she could not withdraw her application for a permanent resident visa in order to secure a G4 visa. In her letter of appointment the Respondent stated:

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

The Applicant accepted the terms and conditions of the letter of appointment by letter dated November 22, 1985. By that time she had received her permanent resident status.

5. 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."

6. 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.

7. On or about December 3, 1990, responding to the request of the Applicant for administrative review, filed on November 14, 1990, the Director, PERPP, rejected the Applicant's request. In the response to a similar request for administrative review by another staff member in permanent residence status the Director, PERPP, had stated "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."

8. 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.

9. Several such appeals were filed by staff members, including the Applicant. Of these the Appeals Committee heard and declined jurisdiction in four. The appeals which were not heard, including the Applicant's appeal, were withdrawn, with the understanding that the appellants could then proceed to the Tribunal.

10. 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:

11. The Applicant instituted her claim for administrative review against the Respondent over six years after the expatriate benefits policy was established and five years after she entered on duty and became affected by that policy. She waited too long to raise the issue she brings before the Tribunal.

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

13. 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.

14. 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.

15. 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.
16. 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.
17. 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.
18. 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.
19. 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.
20. The Applicant fails to state a claim that falls within the Tribunal's competence because her challenge is of a condition of employment in effect when she joined the Bank.

The Applicant's main contentions on the jurisdictional issue:

21. 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 her application in time, on August 20, 1991.
22. The Appeals Committee did not give as a reason for refusing to assume jurisdiction the failure of the Applicant to seek her remedies in a timely manner.
23. 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.
24. 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.
25. The Respondent is incorrect when it asserts that the Applicant did nothing for six years. She 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.
26. 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.
27. 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:

28. The Bank, effective January 1985, declared ineligible for expatriate benefits all new staff members "if they held PR (Permanent Resident) status on appointment, had been in PR status at any time in the year preceding appointment, or had applied for PR status at any time in the year preceding appointment." The Applicant was appointed to the staff of the Bank in November 1985 for a two-year fixed term appointment, which was converted into a regular appointment in March 1988. At the original time of hiring, the Applicant had a pending application for a permanent resident visa. Accordingly, her letter of appointment stated:

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

In all other pertinent respects, the facts of this case are the same as those in Briscoe, Decision No. 118 [1992].

29. The Applicant challenges the Respondent's rule effective January 1985 regarding expatriate benefits, its alleged application to her in her November 1985 contract of employment, and its reaffirmation by the VPP, on August 24, 1990.

30. For the reasons set forth in Briscoe, the Tribunal concludes that it is without jurisdiction to adjudicate the validity of a general rule of the Respondent rather than the application of that rule in a particular case so as adversely to affect the Applicant in the form of "some detriment to his own status, compensation or working conditions resulting from a specific Bank decision affecting him." (Agodo, Decision No. 41 [1987], para. 29)

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