

Decision No. 90

Roberto M. Fernandes,
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 April 17, 1989, by Roberto M. Fernandes, against the International Bank for Reconstruction and Development. The Tribunal ordered the Respondent to produce certain documents and to answer interrogatories. There was the usual exchange of pleadings. The case was listed on February 28, 1990.

The relevant facts:

(a) The Reorganization

2. The general facts relating to the 1987 Reorganization are as stated in paragraphs 5 to 40 of Decision No. 40.

(b) The particular facts of the case

3. The Applicant, a Portuguese national, joined the staff of the Bank on June 2, 1969, as an Economist. On November 1, 1973, he was promoted to the position of Division Chief. Prior to the Reorganization, the Applicant was serving as Division Chief, level 26, of the Europe, Middle East and North Africa (EMENA) CPI-Yugoslavia Division. As a result of the Reorganization, the number of Country Program Divisions in the EMENA Region was reduced from six to four. These four positions were filled by the Bank in the managerial-selection round of the Reorganization.

4. In the managerial-selection round, consideration was given to persons holding any one of a number of Bank-wide managerial positions, including Division Chief. Also considered were individual staff members whom the Vice President, Personnel, had identified as ready for promotion. At several different stages, Bank management within and outside of EMENA, along with senior personnel officers, assessed all eligible managerial candidates, including the Applicant, against the selection criteria for the various post-Reorganization level-26 managerial positions.

5. The Applicant was not selected as one of the four Country Operations Division Chiefs in the EMENA Region. The persons who were selected had all been Division Chiefs prior to the Reorganization; none was promoted into that position from a lower-graded position. The Applicant was informed on June 19, 1987 by the Senior Personnel Officer that he had not been selected, and that he therefore could elect either to be considered for other possible assignments in the Reorganization or to leave the Bank with the Enhanced Separation Package (Package B). The Applicant promptly confirmed his election to separate from the Bank with Package B, and he did so on September 30, 1987.

6. The Applicant later filed a timely appeal with the Appeals Committee, seeking additional compensation for alleged injuries and also clarification of his rights to benefits not here in issue. In a pertinent portion of its decision, the Appeals Committee concluded:

The Committee heard testimony relating to the selection procedure for level 26 positions. The Committee

believes that the selection process was carried out in a fair and unbiased manner as it relates to the Appellant. However, it notes that the Appellant was highly regarded for his commitment, his intellectual honesty, his hard work and his managerial skills. Thus, although the process outlined in Rule 5.09 was followed carefully and every effort was made to place him in a suitable level 26 position, the Committee shares the view expressed by the Respondent that "the system failed". The Committee regrets that, due solely to the reorganization, staff members of the quality of the Appellant had to be separated from the services of the World Bank. ... [T]he Committee concludes that ... the Appellant should not be eligible for compensation beyond the amounts received under the Enhanced Separation Package. ...

The Senior Vice President, External Affairs and Administration, accepted the recommendations of the Appeals Committee in part.

The Applicant's main contentions:

7. The Respondent violated an essential element of the Applicant's conditions of employment by terminating his employment in the course of the Reorganization solely to permit the promotion of a lower-level staff member to a position which, in EMENA or Bankwide, should have been assigned to the Applicant.

8. Rule 5.09 must be read to provide that incumbents of positions graded at the same or a higher level will be considered first for available positions, and only if no staff members in that group possess the requisite skills, or could obtain them in a reasonable period of time through training, may staff members occupying lower-level positions be promoted to fill the vacant higher level positions. The Respondent violated both this Rule and Principle 7 of Staff Employment, because the Applicant was separated on account of redundancy, even though there were vacancies for which he was eligible or could have been eligible with some retraining in a reasonable period of time. The Applicant potentially qualified for at least 10 to 15 of a total of fifty-four positions at level 26 which were filled by holders of lower level grades. Because of such widespread administrative practice the Bank must prove, case by case, with respect to the fifty-four level-26 positions at stake, that the Applicant did not have the required qualifications or could not have been re-trained to obtain the required qualifications within a reasonable period of time.

9. The Respondent admitted before the Appeals Committee that in the Applicant's case "the system failed". The system failed because it was an unlawful system which permitted staff members of a lower grade level to be selected to fill fifty-four positions at level 26, whereas the Applicant whose grade was 26, had the skills required for about 10 to 15 of these positions.

10. The Respondent's statements that close personal/social contacts with selecting managers were of significant relevance to the outcome of the selection process contradict or at least considerably weaken its repeated assertions that the 1987 Reorganization process was fair, impartial and based on objective grounds.

11. The Applicant was an extremely effective Country Division Chief in charge of one of the most difficult Country Divisions (Yugoslavia) and, therefore, the criterion of effectiveness could hardly have been applied to justify his non-selection. Further, neither the criterion of diversity in terms of national distribution nor the gender criterion could have justified the non-selection of the Applicant.

12. The absence of any "true reason" to support the Applicant's termination of employment is a clear violation of due process and of the requirement of treatment in conformity with appropriate standards of justice. The Applicant was never informed of the reason for his non-selection and the consequent termination of his services. He never received an objective and impartial assessment of his performance in terms of related skills criteria and the ensuing promotion of lower-level staff members. The only explanation he has ever received was the Director's statement before the Appeals Committee that in his case "the system failed".

13. The Applicant does not contest the Reorganization; he contests the method or system used by the Bank in the 1987 Reorganization for the selection of personnel insofar as he was affected by this method or system. It

is that method or system which allowed the replacement of the Applicant, an efficient, highly skilled staff member possessing an under-represented nationality, by a lower-level staff member.

14. The Applicant requested the following relief:

- (i) compensation in the amount of one year's net salary for substantive and procedural violations committed by the Respondent;
- (ii) permission to make contributions to the World Bank Staff Pension Plan as though he had remained a staff member and to collect the pension he would have been entitled to had he retired from the Bank at age 65 after his career had followed its natural course; and,
- (iii) \$9,781.20 for costs and attorneys' fees.

Respondent's main contentions:

15. The Applicant was separated from the service of the Bank because his position became redundant and he was not selected for any other position during the managerial selection process because there were other, more qualified candidates.

16. Throughout the reorganization process and to the extent that he chose to participate, the Applicant was treated fairly, impartially, and in a manner consistent with the applicable provisions. His separation is attributable to the Respondent's efforts to insure through reorganized structures and functions the efficient administration of the institution.

17. All four of the Country Operations Division Chiefs selected in the EMENA region were Division Chiefs prior to the reorganization. Besides, the Applicant was also considered for other positions Bankwide but was not selected. The assessment whether an individual is qualified to fill a vacant position is a responsibility entrusted to the managers responsible for those positions.

18. The Applicant was not wrongly deprived of his Bank employment by the Respondent and he was aware that the reasons for his separation were that the number of Country Operations Divisions in EMENA was reduced from six to four and that he was not selected for other positions at his grade level.

19. The Applicant himself, by opting early for separation with the Enhanced Separation Package, foreclosed the possibility of his participating in Rounds 1 and 2 and thus being selected for a position at his grade level elsewhere in the Bank. Had the Applicant elected to participate in the subsequent selection rounds, he would have risked nothing since Staff Rule 5.09 clearly stated that staff members who had not applied for voluntary separation and were not selected into a position at their former grade level would be entitled to the Enhanced Separation Package.

20. The Director, Country Department IV, EMENA, assured the Applicant that he was under consideration by that Director and other Country Directors and also encouraged the Applicant to do the obvious, that is, to express his interest in particular positions if in fact he had a special interest. The fact that the Applicant failed to do so certainly could not have helped his chances for selection. The Director's advice was not at all inappropriate and, in any event, action on the Applicant's part was not required since the selecting managers had lists of all candidates.

21. The Tribunal should deny all of the Applicant's requests for relief, since the selection process was carried out in a fair and unbiased manner as far as the Applicant was concerned. Moreover, the Applicant received a generous severance package in an amount close to \$500,000 to ease his transition from Bank service. The Applicant obviously ignored the requirement imposed by the Tribunal in Harrison on Package B recipients who seek additional compensation.

22. The Tribunal should deny the Applicant's request for costs and attorneys' fees since this application

presents no circumstances that would warrant departure from the Tribunal's practice of leaving the parties to bear their own costs.

Considerations:

23. The Applicant contends that the Respondent violated his contract of employment and terms of appointment when, after the loss of his level 26 position as Division Chief in the pre-Reorganization Bank, he was not placed in another level 26 position for which he was qualified while more than fifty level 26 positions were given to staff members who were promoted from level 25. He claims that "the selection of a lower level staff member into positions for which Applicant was qualified is per se a violation of his essential employment rights." He bases that claim on the Bank's Principles of Staff Employment, on its staff rules and past practices, and on the decisions of the Tribunal.

24. The Applicant appears not to challenge his displacement as Division Chief of the EMENA CPI-Yugoslavia Division, the level 26 position he held prior to the Reorganization. The Reorganization resulted in the reduction of Country Program Divisions in the EMENA Region from six to four. The persons selected for the four Division Chief positions had served as Division Chiefs before the Reorganization, and none of them was promoted from a lower graded position. These four were regarded by the Bank as the most qualified, and the Applicant does not appear to contend otherwise, and does not claim entitlement to any of those four positions.

25. However, during later phases of the managerial-selection rounds, in which the Applicant was considered for other management-level positions at grade 26, he was not offered any such position at his previous grade. The Applicant asserts that no serious consideration was given by the Bank's managers to his request for other level 26 positions in these later phases, but he proffers no evidence in support of that assertion. Indeed, the Appeals Committee found precisely the contrary. The Applicant claims that, of the fifty-four positions graded at level 26 for which the Bank selected staff members previously employed in level 25 positions, he was qualified for "at least 10 to 15" of them, either immediately or potentially after a reasonable period of training. He therefore challenges the Bank's promotion of level 25 staff members over him to these positions, and his resulting separation from the Bank.

26. The Applicant contends that his non-selection constitutes a violation, or improper unilateral amendment, of an "essential element" of his conditions of employment. He invokes the Tribunal's decisions in de Merode, Decision No. 1 [1981], and Harrison, Decision No. 53 [1987], which held that certain elements of a staff member's employment conditions – in those cases, periodic adjustment in salary and access to the Tribunal – are so fundamental as not to permit of unilateral change by the Bank. He asserts that a number of Bank documents and policies, in particular the Principles of Staff Employment and Staff Rule 5.09, create for staff members a right to selection for positions at their grade level that they are qualified to perform in preference to a promoted lower-level staff member. He then goes on to claim that this right is of so fundamental a character, comparable to the rights considered in De Merode and Harrison, that it too should be held by the Tribunal to be an essential element of employment for all staff members.

27. Upon an examination of the documents and policies invoked by the Applicant, the Tribunal concludes that they do not warrant the inference of any such right. It is therefore not necessary to consider whether any such right, if found, should properly be regarded as an "essential element" of employment.

28. The Applicant places great weight upon several Principles contained in the Principles of Staff Employment. Principle 2.1(d) provides, in pertinent part, that the Bank shall "provide staff members security in their employment consistent with the terms of their appointments, their satisfactory performance and conduct, and the efficient administration of the [Bank]." Principle 6.1 provides, in pertinent part: "The basic objectives of the [Bank's] compensation policy shall be to ... enable the [Bank] to recruit staff of the highest caliber appropriate to job requirements." The Tribunal concludes that these two Principles do not justify inferring a staff right to priority of assignment over a lowergraded staff member, when in the course of a comprehensive reorganization the Bank, within the range of its allowable discretion, determines that the promotable employee is in fact more qualified to perform the job.

29. Indeed, the emphasis in both of these Principles upon the “efficient administration” of the Bank and the need to “recruit staff members of the highest caliber” rather more clearly justifies the opposite conclusion: that the Bank acts reasonably when it takes into consideration, in making staff appointments in a reorganized structure, not only the grade of the competing staff members and their minimum capacity to perform a job but also their relative qualifications when weighed one against the other. The 1987 Reorganization contemplated a redirection and restructuring of Bank operations, a reassessment of the content of jobs resulting not only in changes in job requirements but also the merging of certain jobs and the elimination of others, and the selection of staff members on a Bank-wide basis after a comprehensive and fair assessment of their qualifications. These objectives, and the overall procedures by which the Bank sought to achieve them, have been sustained by the Tribunal in earlier cases. These objectives -- and the objectives of the above-quoted Principles -- would be unduly frustrated were the Bank disabled from selecting the best qualified staff members for vacancies created by the Reorganization whenever those staff members were at the time serving in lower-graded positions. This would introduce an element of rigidity inconsistent with the very objectives of a comprehensive staff reorganization.

30. The Applicant also invokes Principle 7.1(b) of the Principles of Staff Employment. That Principle deals with separation from service that is initiated by the Bank, and provides that such separation “shall be based on the needs for efficient administration and for upholding the standards of the [Bank]. Staff members separated at the initiative of the [Bank] have the right to be notified in writing of the decision and the reason for it, which shall be based on the following...:

(iii) when the [Bank] determine(s) that a position or positions are no longer necessary, or that the responsibilities of a position have changed so that the staff member is not qualified to fill it, provided that no vacant position in the same type of appointment exists for which the [Bank] determine(s) that the staff member is eligible and has the required qualifications or for which he or she can be retrained in a reasonable period of time.

The Applicant asserts that under this principle he should not have been denied appointment to a level 26 position in which he was actually or potentially qualified to serve and which was awarded to a lower graded staff member. He also claims that the Bank failed to provide him with a specific reason for his non-selection, contrary to the terms of Principle 7.1(b).

31. The Respondent, in its pleadings, appears to view the Applicant's invocation of this Principle of Employment as bearing only upon his non-selection for one of the four Division Chief positions that remained in EMENA after the Reorganization. As to that decision by the Bank, the Applicant was indeed rendered redundant with respect to his previous position; and the Applicant appears not to be challenging that decision. The Applicant invokes that Principle not with regard to his former Division Chief position but rather with regard to all remaining level 26 positions for which he contends he was qualified.

32. The Tribunal concludes that Principle 7.1(b) does not support the Applicant's contention. That Principle deals with the situation in which it is the Bank that initiates a staff member's separation from service. In this case, however, it was the Applicant who initiated his separation from the Bank, by opting to leave with the Enhanced Separation Package at a time when he could have attempted to remain in the Bank's employ. Although the Applicant claims that, had he remained in consideration for the staff-at-large selection rounds, he would have forfeited his right to Package B and that he was therefore effectively forced to separate from the Bank after his unsuccessful managerial-selection round, this claim is unfounded. Under Staff Rule 5.09, staff members who remained in the staff-at-large selection rounds but who were not selected to a position were entitled to Package B upon leaving the Bank.

33. The Applicant also contends that his claim is supported by other provisions within Staff Rule 5.09, particularly those provisions that deal with the method of selecting staff members in the managerial-selection rounds. Paragraph 1.06(c) of Staff Rule 5.09 provides in pertinent part:

[I]n the selection process ..., consideration shall first be given to candidates occupying positions graded at the level of the position to be filled, or at a higher level. If candidates with the requisite skills to fill any of the available positions or who are trainable within a reasonable period of time cannot be found among the Regular and Fixed term staff of the Bank, selection may be made through external recruitment.

The Applicant contends that this provision, which supports his claim to priority over level 25 staff members in consideration for level 26 positions, is inconsistent with and must supersede paragraph 5.03 of Staff Rule 5.09, which provides in pertinent part:

In the second stage of the selection process ... candidates will be, Bank-wide, incumbent Assistant Directors, Senior Managers, and other managers not yet selected, Advisers in or Division Chiefs or equivalent of units to be abolished or divided, incumbent Advisers or Division Chiefs or equivalent not selected during the process described in para. 5.02 and individual staff members identified by the Vice President, Personnel as ready for promotion. (Emphasis added.)

34. The Applicant contends that paragraph 5.03 of Staff Rule 5.09, which contemplates the selection of promotable lower-graded staff members in preference to qualified higher-graded staff, is inconsistent with paragraph 1.06(c) of the same Rule and that it must be regarded as superseded thereby. The Tribunal concludes that there is no inconsistency between these two paragraphs, and that the Bank in fact complied with both in its treatment of the Applicant in the 1987 Reorganization.

35. The Tribunal first notes that – when viewed in isolation – paragraph 5.03 reflects a reasonable approach to the Reorganization selection process. By providing for consideration of highly qualified lower graded employees who are “ready for promotion” to higher graded positions in the course of the Reorganization, paragraph 5.03 can be viewed as deriving from the Bank’s responsibility to attract, retain and place highly qualified staff members. This responsibility is manifested in the Principles of Staff Employment and other pertinent Bank documents and policies.

36. Moreover, the Tribunal concludes that the Respondent complied with paragraph 1.06(c) of Staff Rule 5.09. It will be recalled that that paragraph provides that in the selection process, candidates occupying positions graded at or higher than the level of the position to be filled are to be “considered” first; it does not provide that such candidates are also to be “offered” these positions first, in preference to lower-graded promotable staff members. In this case, the Bank did in fact fully consider the Applicant for selection in the managerial-selection rounds, first for one of the four remaining Division Chief positions in the EMENA Region and thereafter for other level 26 positions. It is worth noting that the Appeals Committee, while commenting most favorably upon the Applicant’s character and skills, concluded that “the selection process [for level 26 positions] was carried out in a fair and unbiased manner as it relates to the Appellant” and that “every effort was made to place him in a suitable level 26 position”.

37. The second sentence of paragraph 1.06(c) quoted above gives priority in the management-selection process to “Regular and Fixed Term staff” already employed with the Bank, as compared with persons recruited “externally”. It appears not at all to deal with the question of priorities as between full-time Bank staff members of different grade levels. By including “promotable” regular staff members in considering filling level 26 vacancies, and by filling those vacancies with staff members then graded at level 25 or 26 rather than with “external” recruits, the Bank appears to have fully satisfied its obligations under paragraph 1.06(c) of Staff Rule 5.09.

38. The Applicant contends that denying him selection to a level 26 position for which he was qualified, in order to promote another staff member, is tantamount to discharging a fully qualified staff member from his current position in order to replace him with someone whom the Bank believes to be better qualified. Such a discharge would be improper because lacking any “cause” – such as unfitness or other fault on the part of the incumbent – and so too, claims the Applicant, should be his displacement from a level 26 position through the promotion of a lower graded staff member.

39. The analogy, however, is not convincing. Once the Applicant's position as Division Chief was eliminated, he had no comparable claim upon other vacancies at the same grade level – any more so than other qualified staff members, each of whom was vying for the vacancy. The Bank, by thus making a comparative judgment about the abilities of the various candidates for the vacancy, cannot be said to be acting in a manner comparable to terminating the service of an incumbent staff member. In the process of selecting for vacancies, it is reasonable for the Bank to employ the criterion of comparative skills and abilities, unlike the case of a termination where a more “absolute” standard – such as “cause” for dismissal – is customary and correct. This seems equally to be the case whether the contenders for the vacancy are at the same grade level or whether they include highly qualified “promotables”.

40. Even assuming that the Bank could properly promote a better qualified staff member from a level 25 position in preference to the Applicant, certain questions remain with regard to the Bank's actions in this case. One is whether the Bank in fact did properly act within its discretionary authority in making particular choices among the candidates for level 26 positions in the Reorganization. As the Tribunal has frequently stated, decisions such as these are within the Bank's discretion and may not be nullified, “unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.” Saberi, Decision No. 5 [1982], para. 24.

41. There is no evidence before the Tribunal to substantiate any such finding in this case. Indeed, the Applicant's challenge to the Bank's selection of level 25 staff members to level 26 positions is based not on the particular qualifications of the former group of employees but rather upon a claim that “the selection of a lower level staff member into positions for which Applicant was qualified is per se a violation of his essential employment rights.”

42. Finally, the Applicant questions whether the Bank satisfied the requirements set forth in paragraph 7.1(b) of the Principles of Staff Employment that staff members separated from the Bank have the right to be notified in writing “of the decision and reason for it.” He claims that, when the Bank wrote to him to inform him of his non-selection in the managerial-selection round, it did not provide any reasons therefor but simply stated that he had “not been selected for a position at your grade at this stage in the selection process.” There is something to be said for the Applicant's claim that the Bank's language is more a statement of its decision than it is the provision of a reason for that decision.

43. Nonetheless, in all the circumstances of the Reorganization the Bank's notification can only be read as informing the Applicant that others in the pool of eligible staff members had been regarded as better qualified for selection to level 26 positions in the managerial-selection round. This seems to the Tribunal to constitute a sufficient initial statement of reasons for the non-selection of a staff member within a comprehensive reorganization process. Such selection process necessarily involved the subjective assessment on the part of management of a variety of skills, aptitudes and the like possessed by thousands of staff members vying for positions in the reorganized Bank. Given the nature of the process, the statement given by the Bank to the Applicant may be regarded as an adequate statement of reasons as required under Principle 7.1(b).

Decision:

For the above reasons, the Tribunal unanimously decides that the application be dismissed.

Prosper Weil

/S/ Prosper Weil
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, May 25, 1990