



**World Bank Administrative Tribunal**

**2009**

**No. 400**

**Mario Fischel,  
Applicant**

**v.**

**International Finance Corporation,  
Respondent**

**World Bank Administrative Tribunal  
Office of the Executive Secretary**

**Mario Fischel,  
Applicant**

**v.**

**International Finance Corporation,  
Respondent**

1. This judgment is rendered by the Tribunal in plenary session with the participation of Jan Paulsson, President, and Judges Francisco Orrego Vicuña, Sarah Christie, Florentino P. Feliciano, Zia Mody, Stephen M. Schwebel and Francis M. Ssekandi. The Application was received on 25 November 2008.

2. This case is about the Applicant's entitlement to receive an unreduced pension at age 50 under the rules of the Staff Retirement Plan ("SRP") in conjunction with a Pension Transfer Agreement ("Transfer Agreement") between the World Bank and the Asian Development Bank ("ADB").

#### FACTUAL BACKGROUND

3. The Applicant joined the World Bank Group on 17 July 1989 in the Young Professionals Program and began participation in the SRP. In September 1990 he was appointed to the International Finance Corporation ("IFC"). In November 1992 he resigned from IFC to take up an appointment with ADB. He rejoined IFC in May 1997. Upon commencing service with ADB he had his pension credits transferred to that organization pursuant to the terms of the Transfer Agreement. During his employment with ADB he contributed to its retirement plan. His pension contributions had the benefit of continuity as contemplated in the Transfer Agreement and were thus not affected by any gap or interruption.

4. Upon his return to IFC the Applicant received a Letter of Appointment, dated 4 April 1997, which specified his rights of employment and related benefits. This letter specifically indicated that he would be able to transfer his pension from ADB under the Transfer Agreement, and also stated that “[i]f you have participated in the Bank Plan during prior Bank service, this service will automatically be restored, provided you did not make a withdrawal upon leaving service.”

5. Shortly thereafter, the Bank adopted the 1998 pension system reform, which introduced the benefit of an unreduced pension at age 50 (“Rule of 50”). After consultations and exchanges concerning the Applicant’s situation in terms of pension entitlement and the pertinent transfer arrangements, the Manager of the Pension Administration Division (“Pension Administration”) confirmed on 31 May 2000 that the Applicant was ineligible for the Rule of 50 pension. All Transfer Agreements were terminated by the Bank effective 1 March 2000. The Applicant, however, had resigned from ADB and elected to have his pension transferred from the ADB plan to the SRP before that date. The issue remained dormant for some time as the Applicant had not yet reached age 50.

6. Soon after the Applicant turned 50 the issue resurfaced. The Applicant negotiated in 2008 an “early opt-out” package, in the context of which he had renewed discussions with his managers about his entitlement to an unreduced pension at age 50. Because these discussions were inconclusive he applied to the Pension Benefits Administration Committee (“PBAC”) for the Rule of 50 pension on 3 June 2008. PBAC denied this request on 29 July 2008. The Applicant thereafter filed an appeal against this decision

before the Tribunal, requesting its invalidation and rescission and an order that PBAC award him the unreduced pension at age 50. He seeks damages and costs.

#### THE CONTENTIONS OF THE PARTIES

7. The parties' arguments arise against the background of the following texts. Section 3.3(a) of the SRP ("Unreduced Early Retirement Pension") provides in pertinent part:

... a participant who, on or after April 15, 1998, ceases to be a participant before his normal retirement date .... shall be retired on an unreduced early retirement pension if he (i) is at least fifty years old or has at least 1,095 days of service; (ii) was on April 14, 1998 either a participant in service (*other than service credited pursuant to Article 15*), or a participant not in service during a period of leave without pay or external service without pay approved in advance by the Employer; (iii) has not received a severance payment from the Employer (and has waived any right that may exist thereto) upon termination of employment; and (iv) has elected to receive the unreduced early retirement pension under this Section .... (Emphasis added.)

8. Section 15.1(a) ("Agreements for Transfer of Service") of the SRP provides:

The Bank, with the approval of the Administration Committee, may enter into agreements with other international organizations and with member governments for the transfer and continuity of pension rights of participants transferring between the Employer and other international organizations or member governments. Such agreements shall have effect as if they were expressly set forth in the Plan ....

9. Section 15.1(b) of the SRP was added in 1998 and reads:

Persons who *first commence participation* after April 14, 1998 under the terms of an existing agreement described in subsection (a) that has not been amended or newly adopted after such date shall participate under Article 2 [of the SRP] *but in no event shall such a person be deemed eligible for the unreduced early retirement pension described in Section 3.3*. All [transfer agreements] that are amended or newly adopted on or after April 15, 1998 shall provide that persons subject thereto shall participate under Article 2A. (Emphasis added.)

10. Finally, Article 4.2 of the Transfer Agreement provides:

If a participant in the Asian Bank Plan is granted leave of absence without pay by the Asian Bank for the purpose of rendering service to the World Bank (or the International Finance Corporation), *such participant shall not be eligible to become a participant in the World Bank Plan during such leave and the period of such leave shall be included in the participant's participating service in the Asian Bank Plan.* The World Bank shall deduct the participant's contribution from his remuneration for each pay period and shall pay to the Asian Bank an amount equal to three times the contribution so deducted or such other amount as may from time to time be determined by agreement of the Administration Committees of the World Bank Plan and the Asian Bank Plan. (Emphasis added.)

*The Applicant's contentions*

11. The Applicant asserts that he meets all the requirements indicated in the Letter of Appointment; he had participated in the Bank Plan during prior Bank service between 1989 and 1992, and did not make any withdrawal upon leaving IFC service (under the SRP or the ADB plan) because all contributions had been transferred first to ADB and then back to the SRP under the Transfer Agreement. The Applicant argues that he was thus entitled to have this service automatically restored and to include an unreduced pension at age 50.

12. The Applicant also asserts that he qualifies under the provisions of the SRP and the Transfer Agreement governing the benefit discussed. He argues that he qualified for the benefit under Section 3.3(a) of the SRP because on 14 April 1998 (the relevant date under the pension reform) he was a participant not in service during a period of leave without pay or external service without pay approved in advance by the Employer. He explains that he did not receive a severance payment and that he expressly requested the unreduced pension. Although Section 3.3(a) excludes service credited pursuant to Article 15 of the SRP, this exclusion applies only to persons "who first commence participation"

in the SRP after 14 April 1998. The Applicant had first commenced participation in 1989.

13. The Applicant thus argues that he was grandfathered by the pension reform, and that its purpose was not to alter any of the benefits available to existing staff members who had not served long enough to qualify either for a normal pension at age 62 (or for the so-called “Rule of 85” pension under the prior system, when the numbers of their years in service and their age added up to 85). Rather, the reform intended to provide flexibility in the pension entitlements of such staff members by, *inter alia*, allowing them to retire with an unreduced pension before attaining the normal retirement age. This purpose, the Applicant continues, was also protected by the Transfer Agreement, which aimed “to secure continuity of pension rights of staff members transferring between these organizations.”

14. In the Applicant’s view, PBAC erred in denying his unreduced pension entitlement under the Rule of 50 because it did not take account of the fact that the Applicant had “first” commenced participation in the SRP in 1989 and not at the time of his resumed participation in the SRP in 2000. The Applicant argues, moreover, that because IFC could only offer him a Fixed-Term position in 1997, as opposed to the Regular appointment he had held in his previous service, he was forced to take a leave of absence from ADB between 19 May 1997 and 29 February 2000, in order to preserve his employment security there. This arrangement was approved by IFC. The Applicant argues that because the Transfer Agreement requires staff members to participate in the ADB pension plan during a leave of absence from ADB, and because such staff are not eligible for SRP participation, he was prevented from participating in the SRP prior to 14

April 1998. In any event, even if he could have resumed participation only in 2000, that participation had first commenced much earlier and this fact has to be understood within the overall objective of the Transfer Agreement to secure “continuity of pension rights.”

15. The Applicant explains that he is neither challenging the substantive legal validity of the pension reform, as was the case in *Crevier*, Decision No. 205 [1999] nor alleging misclassification, as was the case in *Thomas*, Decision No. 232 [2000]. Nor does his case involve cessation of participation or a withdrawal of benefit, as was discussed in *Baartz (No. 2)*, Decision No. 258 [2001]. His claim is that PBAC erred in applying the pertinent rules as it ignored the date he first commenced participation in the SRP, and did not take account of the fact that his external service was approved by IFC and that he was entitled to continuity of pension rights under the Transfer Agreement.

16. Moreover, the Applicant maintains, the PBAC decision is based on the statement that “not all that service was accrued as an active participant in the Bank’s pension plan.” He argues that this is wrong and inconsistent with SRP Section 1.1(i) which defines a person as a participant “whether or not the person is making contributions, and whose participation has not ceased.” The Applicant argues that during his leave of absence from ADB between 1997 and 2000 he was prevented from resuming participation in the SRP by Article 4.2 of the Transfer Agreement; this leave of absence was previously approved by IFC and cannot now be invoked against him to say that he was not a participant on 14 April 1998. The Applicant also states that the fact that a different transfer agreement might come into force or that none is currently in effect cannot defeat the rights he acquired under the earlier transfer agreement, as long recognized by the Tribunal’s jurisprudence (*de Merode*, Decision No. 1 [1981]).

17. In addition, the Applicant argues that the PBAC decision violates Principle 2.1 of the Principles of Staff Employment in differentiating between staff members who have had continuity of their pension contributions without transferring to other organizations and staff members that have a right to continuity under a transfer agreement specifically recognized under the applicable rules; it improperly allows the former to apply for an unreduced pension but not the latter.

*The Bank's response*

18. The Bank counters that the Applicant is ineligible for the unreduced pension benefit at age 50 in view of the fact that he did not satisfy the essential requirement of being a participant in the SRP on 14 April 1998. It points out that the Executive Directors of the Bank, in explaining the reform, expressly indicated that it was available only to "current participants" at the date noted. Furthermore, the Applicant was informed of his ineligibility under Section 3.3 of the SRP in a timely manner.

19. The Bank explains that the Applicant, before joining ADB in 1992, requested IFC to allow him to take leave without pay or possibly external service that would ensure the continuity of his service with IFC, but this request was rejected. The Applicant then tendered his resignation from IFC effective 13 November 1992, as acknowledged by the Personnel Manager. This is reflected in the Applicant's career record. There was no right of reemployment or reentry guarantee.

20. The Bank states that the Applicant's participation in the SRP accordingly ended at that time. He elected to have his service transferred to the ADB plan under the Transfer Agreement and was so credited by the ADB plan. On rejoining IFC in 1997, he received a new appointment as reflected in his Letter of Appointment. Such a letter would not



have been issued upon return from “leave without pay” or “external service.” ADB granted him leave without pay for two years while he worked for IFC as the Applicant requested in order to keep the security of his employment given the fact that at first IFC would only employ him on a Fixed-Term appointment.

21. Under Article 4.2 of the Transfer Agreement, while on leave without pay from ADB, the Applicant had his service credited to the ADB plan and was not “eligible to become a participant in the World Bank Plan during such leave.” In fact, the Bank would deduct his ADB contributions and remit them to that organization.

22. The Bank also asserts that the Gross Pension plan in force before the reform was as of 15 April 1998 closed to all new participants joining the SRP on or after that date. Because the transfer agreements were still in force and had not been amended, Section 15.1(b) of the SRP allowed a temporary exception so that new participants transferring under an existing agreement could enter the Gross Plan until any such agreement was amended to reflect the new system. However, transferees were expressly excluded from the Rule of 50 pension as it was provided that “in no event shall such a person be deemed eligible for the unreduced early retirement pension described in Section 3.3.” The Bank explains that this was purposefully done to prevent staff from the International Monetary Fund or other organizations to transfer service to the Bank prior to retirement to obtain Rule of 50 pensions.

23. The exclusion was also reflected in Section 3.3(a) of the SRP; the benefit required participants to be in service on 14 April 1998, “other than service credited pursuant to Article 15.” This is the section specifically addressing transfer agreements. Only if on

leave without pay or external service approved in advance by the Employer could a participant not in service qualify for the benefit.

24. Because the Applicant was on a Fixed-Term appointment with IFC he continued on leave without pay from ADB. As transfer agreements would be discontinued after 1 March 2000, the Applicant chose to transfer his pension credits to the SRP in February 2000 in spite of the fact that his type of appointment had not changed. In answer to his inquiries about the transfer and his pension rights, the Applicant was expressly informed on 17 February 2000 by Pension Administration that upon completing his transfer he would join the Gross Pension plan and be governed by its provisions, with the exception of the “unreduced pension at 50 (which only applies to staff who were in contributory service with the World Bank Staff Retirement Plan on 4/14/98).” This was reiterated by the Manager of Pension Administration on 31 May 2000.

25. The Bank explains that at the time negotiations with his managers began in 2008 to agree on an “early opt-out separation,” the Applicant, in spite of being aware of his ineligibility for the Rule of 50 pension, raised the issue. As Pension Administration was not involved in those discussions, the Applicant’s managers assumed that he was eligible, but later referred him to Pension Administration on this point. The Applicant submitted an inquiry to Pension Administration which reiterated his ineligibility for the Rule of 50 pension but advised him of his right to pursue the matter with PBAC. The Applicant submitted his request to PBAC to be considered eligible for the Rule of 50 pension. As seen above, this request was denied.

26. The Bank explains that in spite of this ineligibility the Applicant is in any event entitled to an early retirement pension at age 55, or earlier if the number of his years in

service and his age add up to 75, under the so-called “Rule of 75.” However, if he retired before age 62, the pension would be actuarially reduced. In any event, the benefits would be based on his full pension service, including that in the ADB plan.

27. The Bank concludes its arguments by noting that the Applicant was not a participant in the SRP on 14 April 1998 and cannot be deemed to have participated in the SRP on that date on account of service credited pursuant to a transfer agreement, as expressly provided in SRP Section 3.3(a)(ii) and Article 15. Nor would the Applicant qualify under the exception extending the benefit to persons who were not in service during “leave without pay” or “external service without pay approved in advance.” The Bank maintains that the Applicant’s situation was the converse as he was on leave without pay from ADB – and not from the Bank or IFC – at the critical date while employed on a Fixed-Term position by IFC.

#### THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

28. In the exercise of its appellate jurisdiction under the SRP, the Tribunal has the duty to determine whether PBAC was correct in denying the Applicant’s pension entitlement to an unreduced pension at age 50.

29. As the facts are not disputed, the immediate question is whether the Applicant qualifies for an unreduced pension at age 50 under SRP Section 3.3(a), which sets out four requirements: (i) to be at least fifty years old or to have at least 1,095 days of service, (ii) to have been on 14 April 1998 either a participant in service (other than service credited pursuant to Article 15), or a participant not in service during a period of leave without pay or external service without pay approved in advance by the Employer; (iii) not to have received a severance payment from the Employer (and to have waived

any right that may exist thereto) upon termination of employment; and (iv) to have elected to receive the unreduced early retirement pension under this Section.

30. The Applicant has attained 50 years of age, and thus qualifies under (i) of that Section. He has not received a severance payment either from ADB or the SRP, and therefore qualifies under (iii) of the Section. And there is no dispute that he has sought to receive the unreduced pension as provided in (iv).

31. The dispute arises under requirement (ii), which established 14 April 1998 as the critical cut-off date for entitlement. The question is whether the Applicant was a “participant” in service at that date, or if not in service whether he was on leave without pay or external service without pay approved in advance by the Employer (*i.e.* IFC).

32. The Applicant believes that because at the critical date he was on leave without pay from ADB and he was in fact employed by IFC on a Fixed-Term appointment, he therefore qualified as a participant not in service under the Rule of 50. The Bank argues to the contrary that his situation is the converse from that envisaged under the Rule in question as it envisages leave without pay from the World Bank Group while employed elsewhere.

33. The Tribunal agrees with the Bank. Section 3.3(a)(ii) refers to leave or external service while working at a different organization as approved in advance. Before the Applicant joined ADB it appears that he unsuccessfully requested such a detachment. At any rate, there could be no such approval in the context of the Applicant resigning from IFC to join ADB, as affirmed by the Personnel Manager on the occasion noted above.

34. The Bank’s interpretation is confirmed by Article 4.2 of the Transfer Agreement:

If a participant in the Asian Bank Plan is granted leave of absence without pay by the Asian Bank for the purpose of rendering service to the World

Bank (or the International Finance Corporation), such participant shall not be eligible to become a participant in the World Bank Plan during such leave and the period of such leave shall be included in the participant's participating service in the Asian Bank Plan.

35. The next issue is whether the Applicant was a participant in the SRP at the critical date. Section 3.3(a) expressly excluded "service credited pursuant to Article 15" of the SRP. Article 15 refers to transfer agreements and provides in paragraph (b) that persons "who first commence participation after April 14, 1998 under the terms of an existing agreement .... that has not been amended or newly adopted after such date" shall participate in the SRP, "but in no event shall such a person be deemed eligible for the unreduced early retirement pension described in Section 3.3."

36. The Bank has persuasively explained that these exclusions of service under transfer agreements in respect of the Rule of 50 pension were devised so as to prevent participants in the pension plans of other international organizations from transferring their pension service to the Bank shortly before retirement. Such exclusions are not only explicit in the text of the rules noted but also in the explanations that accompanied the pension reform in 1998. The purpose of the pension reform was to facilitate mobility and flexibility in the pension rights of Bank staff members, who were in contributory service on 14 April 1998 by providing them with the option of leaving before the normal retirement age, or under the previous "Rule of 85," without any reduction for early retirement; the purpose was not to grant this privilege to former participants who, like the Applicant, had ceased contributory service before 14 April 1998.

37. The fact that a Transfer Agreement was in force at all relevant times between the Bank and ADB is not disputed. It was terminated as of 1 March 2000, together with all such agreements, but this does not affect its operation in respect of the Applicant since he

requested a transfer on 29 February 2000. That the transfer materialized some months later is not relevant as to his rights; it was merely a matter of administrative delay.

38. The issue can then be narrowed down to the specific and proper meaning of the reference that Section 15.1(b) makes to persons who “first” commence participation after 14 April 1998. The Applicant believes that this does not apply to his situation as he had commenced participation in the SRP in 1989 and had since been continuously in service either under the SRP or under the ADB pension plan as per the Transfer Agreement. The Applicant emphasizes that the preamble of the Transfer Agreement states that “it is desirable to secure continuity of pension rights of staff members transferring between” the Bank and ADB. It follows, in the Applicant’s view, that he should have the same entitlement to pension rights under the SRP, including the Rule of 50, as if he had never left service.

39. The Tribunal is satisfied that the text of the relevant rules is unequivocal, as are the explanations that accompanied the pension reform in 1998. The critical date for entitlement to the Rule of 50 pension was established for staff both in the SRP as of 14 April 1998 and in the service of the Bank at that time, with the exception of staff on “leave without pay or external service without pay approved in advance by the Employer.” “Employer” in this context is defined in the Plan to mean the International Bank for Reconstruction and Development, IFC and the Multilateral Investment Guarantee Agency. Transferees to the Plan based on the existing Transfer Agreements after 14 April 1998 were excluded. The Applicant falls in this category. While he was in service with the IFC on 14 April 1998, having been appointed on 19 May 1997, he was barred from participation in the SRP by the terms of the Transfer Agreement while he

remained a participant in the ADB Plan. It will be recalled that the Applicant retained his ADB permanent appointment and obtained leave without pay from ADB in order to take up the two-year Fixed-Term appointment with IFC. His pension service was transferred to the SRP only in 2000. He could have transferred his service before 14 April 1998 but chose not to do so for what appeared to him reasonable grounds at that time in the light of having only a Fixed-Term appointment with IFC. He cannot fault the SRP for a choice he made, now that it is less attractive.

40. Were the Tribunal to view Section 15.1(b) in isolation the Applicant's interpretation would have some appeal. The Applicant's case might thus have been stronger if Section 3.3(a) of the SRP had referred to Section 15.1(b) in particular. Instead, Section 3.3(a) refers to Article 15 in its entirety. The inference is that Section 3.3(a) purely and simply disqualified persons receiving credited pensions under the concept of "Transfer of Service" with the sole exception there included. The generality of the reference to Article 15 in Section 3.3(a) is sufficient to sustain the Bank's position.

41. Reading the relevant texts as a whole, in light of the policy which they were intended to implement, the Tribunal perceives that the purpose of the scheme set out in the SRP was clearly to restrict the availability of the Rule of 50 pension to staff members who were currently in service at the cut-off date. The intent was to provide flexibility in the pension entitlements of these staff members by, *inter alia*, allowing them to retire with an unreduced pension before attaining the normal retirement age. The rules are clear: if the Applicant was not in contributory service as of that date, he does not qualify for the Rule of 50 benefit. It is immaterial that his transfer back to IFC was done in good faith and not artificially to take advantage of the Rule of 50 pension.

42. The Applicant's entitlement to rejoin the SRP was duly respected. He now claims something else, namely entitlement to a new benefit created for staff members in actual contributory participation at the critical date, at which time he was contributing to a different organization. The Bank was not required to make the new benefit available to persons in the Applicant's position. As noted, the Bank explicitly excluded such persons from the new Rule of 50 pension.

43. The Applicant was notified of his ineligibility for the Rule of 50 pension in a timely and explicit manner on no less than three occasions: on 17 February 2000, 18 February 2000 and 31 May 2000. This is quite different from the situation that drew critical comments from the Tribunal when it found in *Baartz (No.2)*, Decision No. 265 [2002], paras. 27-32 that the information provided by the Bank was incomplete and unhelpful.

44. The Letter of Appointment issued on the Applicant's reincorporation to IFC, while indicating that prior Bank service would be automatically restored upon his pension transfer, does not address the question of the Rule of 50 pension. Nor did the Bank, in this respect, make any commitment in the subsequent negotiations concerning the "early opt-out" arrangements as described in paragraph 6 above.

45. The Bank may well at times have felt uncertain about the proper interpretation of the rules in the context of the Applicant's arguments and requests. When explaining the Applicant's ineligibility to such benefit, Pension Administration wrote on 23 May 2008 that the Applicant might "request [PBAC] to review [his] case." So too PBAC's official denial on 29 July 2008 explained that some Committee members "viewed your case sympathetically." As late as in its Rejoinder, the Bank wrote that:



“[The Bank] acknowledges that [the] Applicant’s situation is somewhat anomalous, in that the typical transferee after April 15, 1998 also commenced Bank Group employment after that date. In contrast, [the] Applicant had already been employed by the Bank Group for three years before he elected transfer in 2000. However, the crucial fact remains that he did not participate in the Staff Retirement Plan on April 14, 1998 .... ”

46. The Tribunal concludes that the critical date of 14 April 1998 is indeed at the heart of the benefit and cannot be ignored. To do so would contradict the policy which it was intended to effect. As the Tribunal has stated in its jurisprudence, it is not within its competence “to consider which alternative would have been best or more effective to attain the desired objectives of the reform”; it can only decide whether the solution adopted “can be applied lawfully to the Applicant in the light of his rights as a staff member.” (*Crevier*, Decision No. 205 [2001] para. 17.)

47. The Applicant argues that granting the benefit to staff members participating in the SRP at the critical date and not to those who rejoined under a transfer agreement entails discrimination and unjustified differentiation. This argument is strained. The Tribunal stated in *Crevier*, para. 25, that

discrimination takes place where staff who are in basically similar situations are treated differently. As an example, discrimination would occur if only some, but not all, members of a group of eligible redundant staff members were allowed to opt for an unreduced pension under the Rule of 50.

Similarly, in this case, unjustified differentiation would occur if some participants transferring from another organization were allowed the benefit while it was denied to others who had also transferred their pension rights, all being in the same factual situation of prior contributory service.

48. The Tribunal concludes that PBAC did not fail to consider all the relevant facts in determining the Applicant’s ineligibility for the Rule of 50 pension. The PBAC’s

conclusion was neither discriminatory nor otherwise tainted by arbitrariness. There are no grounds to invalidate or rescind the 29 July 2008 decision of PBAC.

DECISION

For the reasons given above, the Tribunal dismisses all of the Applicant's claims.

/S/ Jan Paulsson  
Jan Paulsson  
President

/S/ Olufemi Elias  
Olufemi Elias  
Executive Secretary

At Washington, DC, 1 July 2009