

Decision No. 53

Anne Harrison,
Applicant

v.

International Bank for Reconstruction and Development,
International Finance Corporation,
International Development Association,
Respondents

1. The World Bank Administrative Tribunal, composed of E. Jiménez de Aréchaga, President, P. Weil and A. K. Abul-Magd, Vice Presidents, and R. A. Gorman, E. Lauterpacht, C. D. Onyeama and Tun Suffian, Judges, has been seized of an application, received June 30, 1987, by Anne Harrison against the International Bank for Reconstruction and Development (the Bank), the International Finance Corporation (IFC), and the International Development Association (IDA). The Tribunal decided that oral proceedings requested were unnecessary and should not be ordered. After the usual exchange of pleadings the case was listed on October 1, 1987.

2. Several procedural decisions were taken in this case:

(i) Since the Applicant's application was submitted with fourteen other applications relating to similar subject matter, including the application of the World Bank Staff Association, the Applicant submitted in explanation of her application a consolidated memorandum covering all fifteen cases. The Respondents objected to the consolidation of the cases. The President ordered that the cases not be consolidated and that legal memoranda be submitted by each Applicant in each case separately but that "in order to economize on documentation, when identical legal arguments are made and corresponding annexes are filed in more than one case, cross-references in an individual application to arguments made and annexes filed in another application which has been submitted on the same date, are acceptable."

(ii) in view of the Applicant's request for expedited hearing of her case and the Respondents' willingness "to discuss mechanisms for expediting" the case the President shortened the time limits for the submission of pleadings and modified the application of the relevant Rules with a view to having the case decided at the next session of the Tribunal.

(iii) In response to the Applicant's request for provisional measures the Tribunal, considering the arguments of the parties and because the question of the validity of the release was pending before it, the Tribunal would rule on the validity and interpretation of the release clause and, no irreparable harm to the rights of the Applicant would result from the application of paragraph 12.01 of Staff Rule 5.09, decided that there was no need to issue the provisional measures requested, namely the suspension of the application of paragraph 12.01 of Staff Rule 5.09.

The relevant facts:

(a) The background of the reorganization:

3. The general facts relating to the reorganization are as stated in paragraphs 3 to 42 of Decision No.40.

(b) The particular facts of the case:

4. The Applicant was employed by the Bank in April 1984 in the position of Data Administrator in the Office of the Vice President, Economics and Research Staff (VP, ERS) at an ungraded level. As a result of the Job Grading Exercise carried out during 1984-86, her position was initially graded at level 24 and then adjusted to

level 25. Her responsibilities in this position included advising the VP, ERS and the Director, Economic Policy Analysis and Coordination, on matters relating to the provision of economic data to ERS and to the Bank generally; being responsible for creation of the data base of economic and social data for Bank-wide use; and discharging a range of other activities relating to data administration and systems.

5. As part of the reorganization of the Bank in 1987, the functions and activities formerly performed in ERS were incorporated within a newly created Senior Vice Presidency on Policy, Planning and Research (PPR). It was contemplated that the Applicant's functions would be dispersed among several positions in PPR. According to the Respondent, those of her functions which continue in existence are now performed by several officers. Because the Applicant was without an assignment, she would in normal course have proceeded, pursuant to Staff Rule 5.09, through the selection process.

6. Prior to the commencement of that process, however, on or about June 9, 1987, the Applicant questioned her Senior Personnel Officer, PPR, as to whether she was not a "manager" within Staff Rule 5.09 who, because managerial selection had taken place earlier, would be entitled to qualify for the Enhanced Separation Package without proceeding further through the selection process. At that time, she indicated that she did not wish to go through that process. Consistent with that preference, the Respondent decided that she should be permitted forthwith to opt for the Enhanced Separation Package, and the Applicant was so informed on June 17, 1987. On June 23, she signed a form expressing her intent to take that Package, and she was thereupon permitted to undertake two trips at the Bank's expense to search for employment elsewhere.

7. Later, during Round 1 of the staff selection process, the Director, International Economics Department, PPR, advised the Applicant that he was prepared to offer her a level 24 position in either the Data Division or the Systems Division. The Applicant, however, indicated that she was not interested in either position.

The Applicant's main contentions:

8. The Applicant makes the same general contentions as were made by the Applicant in Decision No.40 and which are stated in paragraphs 43 to 63 of Decision No.40.

9. Further, the Applicant, in bringing this action on her own behalf and on behalf of all other staff members, contends in her application that:

(a) she has standing to sue as a member of the staff;

(b) Staff Rule 5.09 was issued without appropriate consultation with the Staff Association and contains provisions amounting to a unilateral change of employment conditions which cause excessive and unnecessary harm to her and the staff generally;

(c) an essential element of the Applicant's terms and conditions of employment, the right of review and access to the Tribunal has been challenged and imperilled by paragraph 12.01 of Staff Rule 5.09;

(d) her former position was given to another staff member but no criteria for this selection process were ever provided to the Applicant; and

(e) because of exceptional circumstances the requirement that internal remedies be exhausted should be waived.

10. In her reply the Applicant, additionally, contends that:

(a) she was not offered a specific position at level 24; and

(b) she had been a manager, although she was considered a non-manager for the purposes of the reorganization, and her position was not suppressed, but continues to exist.

11. The Applicant requests the following relief:

(i) An order granting the following interim measures to be effective as of May 19, 1987, and until the Tribunal renders a final decision:

(a) suspension of the Bank's effort to obtain releases or waivers or in any other manner implement paragraph 12.01 of Staff Rule 5.09; and

(b) holding in abeyance the enforcement or use by the Bank in any way of releases or waivers given or signed by Bank staff pursuant to acceptance of any Separation Package offered by the Bank in the course of implementing its 1987 reorganization which is targeted to be completed, so far as termination of employment contracts is concerned, by September 30, 1987.

(ii) Consideration of this application on its merits on an expedited basis by convening a special plenary session, as provided for in Rule 5(2) of the Tribunal, or forming a panel to consider this case, as provided for in Article V of the Statute and Rule 6 of the Tribunal.

(iii) A declaration that the Bank, during the reorganization and particularly with regard to the preparation of Staff Rule 5.09, has not observed its obligation to engage in effective and meaningful consultations with the staff through their representative, the World Bank Staff Association, concerning matters affecting staff employment conditions.

(iv) An order that the Bank suspend to the extent necessary the application of Staff Rule 5.09 until modified in a manner that will ensure selection of qualified staff, and by implication termination of staff, on the basis of objective criteria, including detailed position and skills descriptions made known to staff, in a process designed to be free from prejudice, favoritism and discrimination.

(v) An order that the Bank revise the scope and availability of the Separation Packages as required to remove elements of discrimination and retroactive prejudice against staff members, including, but not limited to, provision for eligibility of staff at grade levels 26 and above for the Standard Separation Package, availability of the Enhanced Separation Package's increased payments for length of service to all staff who have accrued the necessary service, and extension of tax reimbursement to all staff who are subject to tax on receipt of payments under the Separation Packages.

(vi) An order that the Bank engage in meaningful and effective consultation with the Staff Association for the purpose of preparing appropriate amendments to Staff Rule 5.09 to correct the deficiencies noted in sub-paragraphs (iv) and (v) above.

(vii) An order that paragraph 12.01 of Staff Rule 5.09 be rescinded.

(viii) An order that the Bank cease and desist from any attempts to implement paragraph 12.01 of Staff Rule 5.09, or to obtain releases and waivers from individual staff members who are voluntarily or involuntarily leaving the service of the Bank as a result of the reorganization.

(ix) An order that the Bank make available to the staff the 1987 reorganization Separation Packages without requiring or implying a release of claims against the Bank or waiver of the right to review administrative decisions, including access to this Tribunal.

(x) An order that the Bank reimburse the Applicant for all fees, costs and disbursements incurred by the Applicant in connection with this application, including reasonable attorney's fees.

The Respondents' main contentions:

12. The Applicant has no standing because she has not exhausted internal remedies as required by the Staff Rules. There are no exceptional circumstances which warrant the waiver of the requirement that internal remedies be exhausted.

13. The Applicant does not claim individual relief but requests declaratory relief as does the Applicant in Decision No. 40. The Tribunal has no power to grant such relief.

14. The Applicant has no standing to bring a claim on behalf of staff members other than herself.

15. The application against IFC and IDA should be dismissed, since the Applicant is not a staff member of either.

16. Since the Applicant has opted for the Enhanced Separation Package, her application will be barred because of the release of all claims against the Bank which constitutes an integral part of the package and is valid.

17. The reorganization reflects a proper exercise of discretion, good faith, a proper consideration of the relevant facts, careful study of the proposed changes and the adoption of safeguards to avoid unnecessary or excessive harm to the staff. It was undertaken far from hastily. The formulation and implementation of the reorganization are consistent with the Bank's Articles of Agreement, the Principles of Staff Employment and the principles enunciated by the Tribunal in paragraph 31 of the de Merode decision.

18. The Bank's consultations with the staff and representatives of the Staff Association not only fully complied with Principle 10 and Staff Rule 10.01, but because of their frequency and the involvement of the Staff Association representatives in all aspects of the implementation process, went far beyond the requirements of the relevant provisions of the Principles of Staff Employment and of the Staff Rules. The principle of consultation was not infringed because Bank management decided to adapt the process followed for the adoption of Staff Rule 5.09 to the circumstances and to decide that it was reasonable to provide a period of less than a week for consultation.

19. The tax allowance system and its operation does not discriminate in an unjustifiable manner against the Applicant or among staff members of different nationalities or residence. The Applicant's claim relating to tax allowances is not ready for adjudication and in any case it would not be covered by the release clause associated with the Enhanced Separation Package.

20. The Applicant should not be awarded costs, because she has not specified or substantiated expenditures and, even if a party wins, she is not entitled to costs save in exceptional circumstances.

Considerations:

21. The Applicant challenges the validity of Staff Rule 5.09 which sets forth the basic procedures for the comprehensive Bank reorganization. She claims that the rule was issued without meaningful consultation, that it is substantively discriminatory and otherwise unfair, and that in particular its provision for a release of claims on the part of staff members accepting certain compensation packages upon separation from Bank service is a violation of staff members' fundamental rights. To the extent that the Applicant purports to challenge Rule 5.09 as that rule adversely affects staff members other than herself, the Tribunal has determined that such an application is inadmissible. Agodo, Decision No.41 [1987].

22. The Applicant also, however, alleges that she has suffered a particular violation of her own contract of employment as a result of the reorganization and the implementation of Rule 5.09. She claims that the dispersion of the functions of her former position as Data Administrator, and her consequent inability gainfully to serve in that position, were effected unfairly, without discernible criteria, and without explanation to her. The Respondent contends that the application must be dismissed for at least two pertinent reasons:

(i) The Applicant, subsequent to her displacement from her position as Data Administrator, signed a separation agreement, in which she chose to accept the Enhanced Separation Package and to release the Bank from all preexisting claims and to waive access to all channels of review including the Appeals Committee and the Administrative Tribunal; and

(ii) Should the release for any reason not be enforced, the Applicant must in any event first exhaust her internal Bank remedies, including the Appeals Committee, before filing her claim with the Administrative Tribunal.

23. Because these arguments have been raised as challenges to the jurisdiction of the Tribunal, it is incumbent upon the Tribunal to resolve them at this time. Whether a release has been the product of duress or is otherwise unenforceable, or whether it does not embrace the claim at hand, are issues that the Tribunal has held must always be subject to consideration by the Tribunal, and are not themselves extinguishable by the release: Mr. Y, Decision No.25 [1985], Kirk, Decision No.29 [1986], Gamble, Decision No.35 [1987]. Moreover, they are not issues that must be resolved by the Appeals Committee as a precondition of consideration here. There is no requirement, like that regarding claims, that defenses of the Bank must be asserted first to the Appeals Committee; indeed, in the case of Kirk, the Bank chose not to raise a release as a defense before the Appeals Committee, and the Tribunal considered and upheld that defense anyway. The Tribunal must also itself decide whether, as the Applicant here contends, there are “exceptional circumstances” that warrant not requiring her first to exhaust her internal remedies within the Bank. This exception to the requirement of exhaustion, and the Tribunal’s obligation to construe it, are both set forth in Article II, para. 2, of the Statute of the Tribunal.

24. The Applicant’s agreement to release all claims against the Bank – including the claim asserted here of improper termination of her position and her employment – was secured in exchange for her leaving the Bank with the Enhanced Separation Package. That the first was the indispensable quid pro quo for securing the second was dictated by the Bank in a formal and general provision, paragraph 12.01, of Staff Rule 5.09, issued in May 1987. That rule, on its face, gave neither the Bank nor a staff member leaving employment with the Standard Separation Package (Package A) or the Enhanced Separation Package (Package B) any choice in the matter of the release or indeed of any other terms of the separation agreement. The Bank in paragraph 12.01 made it a fixed condition of the acceptance of either compensation package that the departing staff member renounce the right to seek redress before the Appeals Committee or Administrative Tribunal for any preexisting claims, those deriving from the reorganization as well as those altogether unrelated to it.

25. The Tribunal has held, in de Merode, Decision No. 1 [1981], that the availability to staff members of an impartial adjudicator of claims of non-observance of contracts of employment and terms of appointment is to be regarded as an essential condition of employment:

[T]he decision of the Board of Governors to establish this Tribunal introduced into the conditions of employment of Bank staff the right of recourse to this Tribunal, in accordance with the conditions laid down in the Statute. This right forms an integral part of the legal relationship between the Bank and its staff members. (para. 21)

The need to retain the availability of such an agency for reviewing the decisions of the Bank is particularly pressing in the context of the reorganization, which in form has affected every one of the Bank’s nearly 6,000 staff members and will result in the separation, over a period of merely weeks, of hundreds of staff members. Any possibility, in the eyes of adversely affected staff members, of staffing decisions being made on the basis of personal favoritism or of other improper criteria, is ordinarily one that can be reviewed, on the basis of an evidentiary record, by the Tribunal. For the Bank unilaterally to determine by way of a general rule, apparently not subject to individual adjustment, that any staff member without limitation who accepts Package A or Package B must forego access to the Tribunal for all claims undermines an essential condition of employment. As the Bank has no power unilaterally to alter a fundamental and essential condition of employment, this rule cannot be sustained, see de Merode, Decision No.1 [1981], paras. 41 ff.

26. The Bank responds that the release of claims and the waiver of access to the Tribunal have already been sustained by the Tribunal in several cases, citing Mr. Y, Kirk and Gamble; and that, as in those cases, the release and waiver here are enforceable because the Applicant has knowingly and voluntarily subscribed to them in exchange for special monetary benefits which the Bank was prepared to offer as a means of avoiding the investment of time and resources in protracted staff litigation arising from the reorganization.

27. The cited cases are, however, distinguishable. Indeed, they point toward a very different outcome in this case. The release agreements in those cases were characterized by a personalized negotiation between the

staff member and representatives of the Bank. In each case, the parties arrived at a compensation settlement that could take account of such factors as the individual's seniority and responsibilities within the Bank, the quality of the service he had rendered for the Bank, the staff member's family situation and needs, the possible burdens of resettlement to another country, and the like. A freer environment existed in which to place a fair value upon the staff member's relinquishment of his right to challenge his separation from the service of the Bank. In the present case, however, the value equivalent to the staff member's release was determined not by individualized negotiations but rather by an inflexible and general rule covering potentially all staff members employed by the Bank, regardless of the special circumstances of their Bank position or service, or their personal situation. The absence of freedom to negotiate about terms was starkly reinforced by the very widespread concern and dislocation among the staff that would necessarily follow from any top-to-bottom reorganization, no matter how fairly and painstakingly implemented.

28. Because, therefore, of the generality of the rule unilaterally issued by the Bank regarding the relinquishment of access to all internal remedies, including the Appeals Committee and the Tribunal, the absence of individual negotiations, and the very special circumstances confronting staff members at this time of major dislocation and mass separations, the Tribunal concludes that paragraph 12.01 of Staff Rule 5.09 is invalid. Therefore, the release signed by the Applicant upon her separation from the Bank is inoperative. In view of this finding the question whether paragraph 12.01 of Staff Rule 5.09 has been adopted with or without proper consultation with the Staff Association becomes irrelevant.

29. It therefore follows that staff members believing that their separation from the Bank as part of the 1987 reorganization resulted from decisions that violated their contracts of employment or terms of appointment may continue to press their claims through the usual channels.

30. It does not, however, follow that the staff member or this Tribunal may disregard the fact that the staff member has signed a separation agreement embodying Package A or Package B, both of which provide for severance pay and benefits exceeding those ordinarily available to staff members leaving the Bank on account of redundancy. For example, certain staff members whose employment is terminated under conditions of redundancy will in normal circumstances be entitled under section 8 of Staff Rule 7.01 to severance pay calculated as one month's pay for each year of employment with the Bank; under the Enhanced Separation Package, those same staff members receive 1.25 month's pay for each year of employment. The Bank would presumably not have offered those additional benefits – or at least the better part of them – had the staff member leaving on account of the reorganization not signed a release of claims. Any staff member, therefore, who has signed such a separation agreement and who nonetheless intends to pursue any claim that such separation was a violation of his or her employment contract must understand that the increment in pay and benefits received under Package A or Package B must be taken into account in determining the extent to which the staff member has in fact already received compensation should the Tribunal determine that there was a non-observance leading to injury. Only when the entitlement to compensation for the injury thus suffered is demonstrably in excess of the contractual increment received by the staff member beyond the pay and benefits ordinarily payable under section 8 of Staff Rule 7.01 can any additional payment be envisaged.

31. There is no convincing reason, however, why any such claims arising from the organization may be heard directly and immediately by the Tribunal. Before the Tribunal may hear any claims of non-observance of a staff member's contract of employment or terms of appointment, the staff member is required by Article II, para. 2, of the Statute of the Tribunal to exhaust internal Bank remedies. That requirement operates as much with respect to claims arising from the reorganization as to any other claims. It has been held this day in Berg, Decision No.51 [1987], that no exceptional circumstances exist that warrant departure from the exhaustion requirement. The Applicant fails to point out any circumstances in her own case that distinguish her case from that of Berg. Therefore the Tribunal declares the application inadmissible, pending the Applicant's recourse to internal Bank remedies, including the Appeals Committee. As in the Berg case, the Tribunal infers from the Respondent's position on the matter of exhaustion of remedies that the passing of time since the filing of the Applicant's application will not bar her on that ground, provided she proceeds within the prescribed time limits after receiving the decision in this case.

Decision:

For these reasons the Tribunal unanimously decides that the application is inadmissible.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, England, October 27, 1987