

Decision No. 149

Ernest M. Kepper,
Applicant

v.

International Finance Corporation,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R.A. Gorman and F. Orrego Vicuña, Vice Presidents, and P. Weil, A.K. Abul-Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on July 7, 1995, by Ernest M. Kepper, against the International Finance Corporation. The usual exchange of pleadings took place. The case was listed on March 19, 1996.

The relevant facts:

2. In September 1990, the Applicant was assigned to the Tokyo office of the Respondent in Japan as IFC's Deputy Special Representative, at Level 26. By memorandum to the Applicant, dated September 27, 1990, the Manager, Personnel and Administration (PAA) set out the arrangements governing the Applicant's appointment stating, inter alia:

For the duration of your assignment, and in addition to your regular salary, IFC will pay you, in U.S. Dollars, a Post Allowance as follows:

(b) a Post Adjustment Allowance in accordance with Staff Rule 6.17, paragraph 4.01. The percentage factor for the computation of the Post Adjustment Allowance in effect for Tokyo on the date of this memorandum is 41.10% which will be applied to 50% of your monthly net salary. This factor represents the percentage differential in the cost of living in Washington and in your duty station as measured by U.N. Post Adjustment Indices. Any revisions resulting from a semi-annual review of the percentage factor will increase or decrease this allowance effective April 1 or October 1, as appropriate. Any interim adjustments required as a result of major devaluations, or of revaluations by more than five percent of the local currency against the US Dollars will be computed and applied as specified in Rule 6.17 of the Staff Manual, para. 4.04.

The memorandum was signed on November 15, 1990, by the Applicant as an indication of his agreement with its terms and conditions, as required by the memorandum, and returned to the Manager, PAA.

3. In a draft report entitled "Post Adjustment System Review" prepared by the Personnel Policy Department (PPD) and dated January 30, 1991, it was recommended that a new system of post adjustment based on the U.S. Department of State Index be adopted to replace the current one based on the United Nations (U.N.) system, with the Bank Group using its own updating mechanism, the suggested implementation date being April 1, 1991. There were nine reasons given in the draft report for using the U.S. Department of State system, including (i) the breadth of the country coverage, (ii) the greater frequency of State Department surveys than U.N. surveys, (iii) the greater transparency of the methodology and the ease of communication, (iv) the use of the system by the International Monetary Fund and the Inter-American Development Bank, and (v) the fact that the State Department indices were higher than the U.N. indices for more than 90% of the countries. According to the report, "the State Department post adjustment system would cost the Bank an additional \$1,260,678, since the State Department system would lead to payment of allowances to 150 staff in 41 countries, compared to 139 staff in 38 countries under the U.N. system and the post adjustment allowance amounts would increase in 30 countries (not including the new countries that had not even been covered by the U.N. system)."

4. By an undated telex from the Director, PPD, to all Mission Heads, among others, sent in March 1991 and requesting that affected staff be advised that the proposal to modify the post adjustment system circulated to senior managers for comment and approval was awaiting formal acceptance from the regions, notice was given that, as there were budgetary implications in the new proposal, it would probably be introduced at the beginning of the next fiscal year.

5. By telex, dated June 25, 1991, to all Mission Heads, among others, the Director, PPD, advised that "it has now become evident that budget issues will take considerably longer to resolve and we are therefore unable to make proposed changes in immediate future," and stated that "in the meantime post adjustments will continue to be processed in accordance with U.N. post adjustment system as before."

6. By memorandum, dated June 16, 1992, to Mission Heads and Regular and Fixed-Term staff assigned to projects in the field, the Director, PPD, announced that the U.S. State Department private sector index would be used as the basis for calculating post adjustments and that the "change in index will go into effect July 1, 1992 with some exceptions" The memorandum explained that "while the U.N. methodology is very detailed and precise, it is the degree of complexity which made it less transparent and, thus, more difficult for us to communicate and for staff to understand." Together with a memorandum, dated July 10, 1992, from the Director, PPD, to the Mission Heads and Regular and Fixed-Term staff assigned to projects in the field, a booklet explaining the new post adjustment system was distributed.

7. By memorandum, dated October 6, 1992, after his request for administrative review had been denied on August 18, 1992, the Applicant filed an appeal with the Appeals Committee against the decision of the Respondent arising "from the change introduced by management on July 1, 1992 in the method and basis for calculating the Bank Group's Post Adjustment Allowance for the Tokyo duty station." The Committee in its report, dated April 3, 1995, denied the Applicant's claim for relief. By letter, dated April 4, 1995, to the Applicant the Senior Vice President, Management and Personnel Services (MPS), stated that he accepted the Appeals Committee's recommendation.

The Applicant's main contentions:

8. The Applicant's post adjustment allowance was held to unrealistically low levels for 18 months after the Respondent completed its review of the post adjustment system and for a total of almost 22 months after his assignment to the Tokyo office.

9. The Respondent's failure periodically to review the post allowances which are an important part of compensation of resident mission staff and thus to maintain reasonable parity in compensation between such staff and headquarters staff resulted in the Applicant's being treated unfairly and inequitably. The Respondent's reliance on the U.N. Index put the Applicant clearly at a disadvantage vis-à-vis not only the headquarters staff but also staff in some other resident missions to whom the U.N. Index caused a lesser disadvantage.

10. The Respondent should have either applied the State Department Index retroactively or compensated the affected resident mission staff on a reasonable basis for the compensation which they had lost.

11. The decision to introduce a new system is not discretionary because the failure to do so causes discrimination and inequality and permits the administrative vice of delaying the introduction of new systems or procedures for improper reasons.

12. The reason for introducing the new system was not simplicity or transparency but to provide adequate and fair compensation to field staff and to bring the Bank into line with other organizations and the private sector.

13. The argument that the Applicant contracted for the U.N. system by accepting his appointment and signing the letter of appointment is not valid. If the argument were accepted, first, the Respondent would not have had the right to alter the contract unilaterally (which it did) and, secondly, the contract would have had to be interpreted in favor of the Applicant and in the light of public policy.

14. The Applicant made the following plea: payment to the Applicant by the Respondent of a sum in compensation, of approximately \$60,000, based on his date of transfer to the Tokyo office and representing the true post adjustment allowance to be calculated on the basis of the U.S. State Department formula or any other formula which reflects accurately the true cost of living adjustment required.

The Respondent's main contentions:

15. In assessing the July 1, 1992 implementation date for the changes in the system of post adjustment allowances it should be borne in mind that (i) the Bank had determined, as a result of its review, that the U.N. system was a very detailed, precise, although perhaps overly complex, system, and that overall the U.N. system resulted in post adjustment allowances that were fair and achieved the policy objectives underlying the post adjustment allowance; and (ii) the choice of the implementation date was based on good and sufficient reasons, relating to the budgetary process and consideration of the benefits of the proposal (greater transparency and timeliness) in relation to the costs involved, which proved to be a protracted process.

16. The fact that the Applicant would have received a different (and in his case higher) post adjustment allowance under the State Department system does not mean that he a fortiori had a right to the allowance under the new system.

17. While the new system which was simpler than the U.N. system resulted in higher post adjustment allowances for many, the U.N. system was not wrong. Arguably, the latter system with its hypothetical international civil servant standard of living was a more appropriate one for the Bank Group than the State Department system which was based on an American lifestyle standard.

18. The Respondent had no obligation to change its policy and in fact it had devoted substantial time and resources to its review of the post adjustment allowance system, taking into consideration all legitimate factors including the date for the change which, the facts and circumstances show, was chosen responsibly and reasonably.

19. There was no discrimination against the Applicant, first, vis-à-vis other staff posted abroad because the system was changed for all staff at the same time, and secondly, vis-à-vis headquarters staff, because the U.N. system was truly reasonable and adequate.

20. The Respondent could change unilaterally the Applicant's conditions of employment specifically relating to the post adjustment allowance, taking into account changing circumstances. Appropriate considerations were taken into account in making the change, no improper considerations were taken into account and no improper action was taken by the Bank.

Considerations:

21. The Applicant's contention is that the Respondent abused its discretion by delaying until July 1, 1992 the implementation of its change from the so-called United Nations Index to the State Department Index for calculating his post adjustment allowance and that this delay entitles him to compensation. He relies, among other things, upon Principle 6 of the Principles of Staff Employment which provides that the "basic objectives of the Organization's compensation policy shall be to...provide levels of compensation that are equitable internally" and that levels of staff compensation shall accordingly be "periodically review[ed] as appropriate." The Tribunal must therefore determine whether the Respondent's continuation in force of the United Nations Index system and the timing of its decision to implement the State Department Index was a breach of the Applicant's contract of employment or terms of appointment.

22. One reason for rejecting the Applicant's contention is that at the time of accepting his assignment to the IFC's Tokyo office the Applicant expressly agreed in a signed memorandum to having his post adjustment allowance calculated pursuant to the United Nations Index. The memorandum states that "For the duration of

your assignment, and in addition to your regular salary, IFC will pay you, in U.S. Dollars, a Post Allowance in accordance with Staff Rule 6.17, paragraph 4.01.” The memorandum went on to state that this allowance would be “41.10% which will be applied to 50% of your monthly net salary. This factor represents the percentage differential in the cost-of-living in Washington and in your duty station as measured by the United Nations Post Adjustment Indices.” The reference to the United Nations system was derived from Staff Rule 6.17, para. 4.01, which remained in force until modified effective July 1, 1992.

23. Moreover, the Applicant’s claim that immediately upon his assignment to the Tokyo office his post allowance as calculated under the United Nations system was discriminatory and unreasonable is not supported by the record. The Respondent has argued that the United Nations Index was later abandoned not because it was found to be inadequate or unreasonable in substance, but rather because – despite its reasonableness – it was unduly detailed and complex, lacked transparency and was not easily calculable by staff members. The fact that the International Monetary Fund had concluded in 1987 that the United Nations Index was substantively inadequate does not mean that the Respondent’s decision not to do the same is an abuse of discretion. The Respondent has explained that the United Nations Index was designed to determine what allowance was necessary at any given duty station to maintain the lifestyle of a hypothetical international civil servant, while the State Department Index was designed to determine what allowance was necessary at any given duty station to maintain an American lifestyle overseas. The Tribunal finds that it was not unreasonable for the Respondent to maintain the former standard until it determined that an appropriate time had come to change it.

24. Changes in Bank policy, including the computation of salary and benefits for staff members and the timing of their introduction, are within the discretion of the Bank, but they must be made in a manner consistent with the standards announced by the Tribunal in de Merode:

Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the Staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal. (Decision No. 1 [1981], para. 47)

25. Thus, the central issue in this case is whether the Respondent abused its discretion in postponing until July 1, 1992, the implementation of its change to the State Department Index. As the Applicant states, this was some eighteen months after the change was initially recommended, in January 1991, in a draft report prepared by the Personnel Policy Department (PPD), which recommended an implementation date of April 1, 1991. It was initially the Respondent’s intention to implement the change immediately. But in March 1991 the Director, PPD, informed Mission Heads that the budgetary implications of the change were such that it would be better to institute the change at the beginning of the next fiscal year, commencing in July 1991. Then, in June 1991 he announced that coordination with the budget-making process would require further delay. The Respondent eventually decided that in light of the additional funding that would be needed for the change – some \$1.2 million – and other Bank priorities, it would be necessary to postpone the change until July 1, 1992.

26. As the above reference to the de Merode decision makes clear, the Tribunal may consider “the care with which a reform has been studied and the conditions attached to a change” in determining whether the Bank has abused its discretion in implementing a change. Among the factors pertinent to a change in policy and the timing thereof are considerations of cost-effectiveness, budget, administration and transition. The Respondent did not abuse its discretion in weighing the budgetary implications, concerning both extent and timing, of the proposed change in the post allowance index against the benefits to be derived therefrom. There is no evidence that the Bank purposely delayed the change to the State Department Index in order to deprive staff members of fair compensation or to discriminate against certain groups. It was not unreasonable for the Respondent to coordinate the implementation of the change with the budget-making process and the beginning of the fiscal year. This conclusion is reinforced by the fact, as has been determined above, that the then

existing United Nations Index system was still functioning reasonably to achieve the Respondent's objective of providing salary parity for staff members in high-cost posts.

27. The Tribunal also concludes that the requirements of the Principles of Staff Employment, upon which the Applicant relies, have been satisfied. The adoption of the State Department Index was itself a product of a "periodic review" of the levels of compensation at the Bank, and it was designed to achieve in a more easily calculable manner than before the longstanding objective of "levels of compensation that are equitable internally."

Decision:

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

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, England, May 14, 1996