

Decision No. 29

Alexander Frederick Kirk,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal composed of E. Jiménez de Aréchaga, President, A.K. Abul-Magd and P. Weil, Vice Presidents, and R.A. Gorman, E. Lauterpacht, C.D. Onyeama and Tun M. Suffian, Judges, have been seized of an application received July 29, 1985, by Alexander Frederick Kirk against the International Bank for Reconstruction and Development. On August 14, 1985 the Respondent filed a request to separate the jurisdictional issues from the merits, and to file an Answer limited to the jurisdictional issues on the ground that the Applicant entered into a full and final release and settlement of all claims against the Respondent in exchange for payments of money and other consideration. The Tribunal in an Order dated September 3, 1985 requested the Applicant to submit his comments on the Respondent's request, which the Applicant did on October 1, 1985. The Tribunal on October 23, 1985 ordered the parties to "confine their pleadings to the preliminary issue which has been raised in this case." The Applicant's request for an oral hearing under Article IX of the Statute of the Tribunal was denied by the Tribunal as unnecessary. After the usual exchange of pleadings, limited to the preliminary issue, the case was listed on June 11, 1986.

The relevant facts:

2. On July 25, 1963, the Applicant joined the staff of the International Finance Corporation, and he soon transferred to the World Bank, where he was employed until August 15, 1985. Effective June 1, 1978, the Applicant was assigned to the position of Division Chief, a Level N position, in the Operations Evaluation Department (OED). As Division Chief, the Applicant reported to a Director, OED, and his next-in-line supervisor was the Director General (DGO).

3. During his years of service prior to 1984, the Applicant's Anniversary Evaluations (AERs) reflected generally satisfactory performance, and he was granted full salary increases each year. In his 1980 AER, the Applicant referred to the Respondent's rotation policy for OED staff and stated his intention promptly to seek reassignment within the Bank, a proposal that was endorsed by the OED Director and by the DGO. Given the difficulties he encountered in his reassignment efforts, the Applicant in 1982 and again in 1983 stated that he was interested in considering early retirement provided suitable separation arrangements could be agreed upon; in both years, the Director and DGO stated that such an arrangement would be appropriate and desirable. In March 1984, the Applicant and representatives of the Respondent commenced discussions looking toward a mutually satisfactory separation agreement.

4. On September 6, 1984, the Applicant's supervisor stated in his AER that the Applicant's performance for the prior year was less than satisfactory. He noted a "decline in [the Applicant's] performance," a need for "more than normal supervision and follow-up," a deficiency in his quality control, and an inability "to provide the kind of creative leadership" demanded by "radically changed economic circumstances." Reference was made to the illness of the Applicant's wife, as well as to the ongoing efforts to work out a separation arrangement relating to the Applicant's early retirement. This AER was signed only by the individual who in prior years had served as the Director, OED, but who had since been given the position of Director General upon the retirement of the previous DGO on June 30, 1984.

5. Shortly after the preparation of the Applicant's 1984 AER, the new Director General confirmed the salary

increases for OED staff. Although the general salary structure adjustment was 4 percent, the Applicant was granted a salary increase of only 2 percent. The DGO explained this decision to the Applicant in a memorandum dated October 1: "Your salary increase is based on the assessment of your performance which I regretfully found as needing improvement." When the Applicant promptly protested that the new DGO should have consulted his predecessor in setting the Applicant's salary increase, the Respondent did seek the comments of the now-retired DGO, who on October 5 wrote simply that he was "saddened" to read the evaluation of the Applicant's performance in the 1984 AER.

6. On October 31, 1984, the Applicant filed an appeal with the Appeals Committee challenging the decision to grant him a salary increase which was less than the structural salary adjustment. He claimed that the decision was based on errors of fact and that it was not made in accordance with Bank procedures (in particular, with an alleged requirement that the former DGO formally participate in the determination of the salary increase).

7. While his appeal was pending before the Appeals Committee, the Applicant reached an agreement with the Respondent on the terms of his early retirement. This agreement, reflected in a memorandum signed by the Applicant on February 11, 1985, provided among other things that the Applicant would remain as Division Chief in OED until May 31, 1985, that the new Director of OED would assign the Applicant to different responsibilities in that department from June 1 to August 15, 1985, and that on the latter date the Applicant would receive a lump sum payment equivalent to 22-1/2 months net salary. In addition, provision was made for payment of up to three months salary for job search and retraining expenses, of accumulated annual leave, of resettlement benefits to London, of a termination grant, for continued participation in the Bank's medical and life insurance plan, and for other details regarding retirement and the settlement of accounts. Paragraph 2 of the February 11, 1985 memorandum provided:

In accepting these terms and conditions, you fully and finally release the Bank from any claims which you might otherwise have against the Bank. You understand that the settlement of these claims includes relinquishment of the right to appeal them to the Appeals Committee or the World Bank Administrative Tribunal. Please indicate your acceptance of this agreement by signing and returning the attached copy to me.

8. Less than two months later, on April 4, 1985, the Appeals Committee conducted a hearing in the Applicant's appeal regarding his fall 1984 salary increase. Neither party before the Committee mentioned the above-quoted release provision. On April 19, the Appeals Committee rendered its decision and recommended that the Applicant's request for a full salary structural adjustment be denied. It stated that "the DGO's decision against which Appellant has appealed does not constitute an abuse of discretion based upon arbitrary, capricious or irrelevant grounds." The Appeals Committee did, however, point out certain inadequacies in the Bank's procedures pertaining to the evaluation of performance of staff members. The Appeals Committee also stated that it was aware of the release provision contained in the February 11, 1985 separation agreement, which had been submitted by the Bank for other purposes with its Answer to the Statement of Appeal. The Committee assumed that the parties were aware of this agreement prior to the hearing of the appeal, and stated: "The Committee feels that it would have been better assisted in dealing with this Appeal if the parties had been more forthcoming in this matter." It characterized the February 11 agreement as manifesting "a mutually satisfactory separation arrangement which, in view of the release clause contained therein, represents the full and final settlement of all claims between the two parties thereto."

9. On April 30, 1985, the Vice President, Personnel and Administration, informed the Applicant of his acceptance of the Appeals Committee's recommendation that the requested relief be denied. On July 29, the Applicant filed his application with this Tribunal. Upon a request from the Respondent, a response from the Applicant, and full deliberation, the Tribunal ordered the parties to "confine their pleadings to the preliminary issue which has been raised in this case, such issue including applicant's allegations concerning the validity and/or interpretation of the provisions contained in the separation arrangements of February 11, 1985."

The Respondent's main contentions on the preliminary issue:

10. The application is barred because it is based on claims released and settled. The Applicant has freely entered into a full and final release and settlement of all claims existing against the Respondent by assenting to the separation memorandum of February 11, 1985, in exchange for payment of money and other consideration.
11. The release provision of the February 11 memorandum was intended to apply retrospectively to all outstanding claims that the Applicant might have had against the Respondent, and not merely to claims pertaining to the separation terms themselves. Therefore, complaints arising out of circumstances occurring or decisions taken on or before the date of the separation agreement are finally put to rest.
12. The Respondent's failure to invoke the release provision as a defence against the Applicant's appeal before the Appeals Committee cannot be understood as a concession that the provision was not intended to apply to the Applicant's past salary claims. The Respondent's position was based on careful consideration of several factors, among which were the fact that the Applicant's wife had recently died, that the Respondent had nearly completed its Answer on the merits before the Appeals Committee when the February 11 memorandum was signed, and that the longstanding controversy between the Applicant and the Bank would best be resolved if the release provision were not invoked before the Committee. The Respondent's decision there does not preclude it from relying upon the release in this proceeding before the Tribunal.
13. The Applicant signed the release provision freely and upon the acceptance of money and benefits. He did not act "under duress." None of the elements which define "duress" was present in the Applicant's case.
14. The release provision is not contrary to public policy. The separation agreement of February 11, 1985 can in no way be characterized as an illegal bargain or unconscionable, as those terms are defined under general principles of contract law.
15. The release provision is in no way inconsistent with or violative of Chapter 9.1 of the Respondent's Principles of Staff Employment. Neither the language nor the underlying purpose of Chapter 9.1 prohibits the negotiation of settlement agreements between the Respondent and a staff member whereby concessions are made in exchange for a release of existing claims against the Respondent. The Applicant's contentions in this respect are conclusively refuted by the decision of the Tribunal in the case of Mr. Y (Decision No. 25 [1985]).
16. The Applicant's acceptance of the release provisions was fully supported by consideration. The settlement terms to which the Respondent agreed are not mandated for all employees separated from the Bank. Separation payments and other assistance in such cases are a matter of discretionary determination, taking into account individual circumstances and the overall institutional interest. The Respondent ultimately chose to offer to the Applicant the maximum separation payments and discretionary assistance, which he accepted.
17. The Tribunal's language in para. 34 of Mr. Y supports the contention that the release provision in this case should be construed to apply to all earlier claims against the Respondent and not merely to claims relating to the separation terms themselves.
18. The Appeals Committee also concluded that the release provision was intended to be comprehensive, covering all claims between the two parties.
19. The release provision of the February 11, 1985 memorandum is dispositive of the Applicant's claim, and there is thus no need for an Answer on the merits.

The Applicant's main contentions on the preliminary issue:

20. The memorandum of separation arrangements dated February 11, 1985 relates to the terms under which the Applicant was to leave the service of the Respondent, and the normal rules governing contract interpretation therefore dictate that the release provision be construed to relate only to disputes regarding those terms. Breaches of the Applicant's contract of employment which occurred prior to the signing of the memorandum are thus not governed by its release provision.

21. The Respondent's failure to invoke the release provision before the Appeals Committee clearly indicates that the Respondent did not intend the clause to apply beyond the terms of the separation agreement, specifically to the breach of contract that occurred when the Applicant's salary increase was determined in October 1984. The Applicant's appeal from that determination to the Appeals Committee was filed more than three months before the February 11, 1985 memorandum was signed, and yet the Respondent made no attempt to invoke the release provision at the hearing of the Appeals Committee on April 4, 1985. Therefore, the Respondent must not have considered the said memorandum to have retroactive effect.

22. The memorandum of separation arrangements was signed by the Applicant under duress. The Applicant had no practical choice but to sign the memorandum, because if he failed to do so the only alternative open to him was to remain in the OED, where the Applicant was unwelcome, was deemed to be unsuited for his position, and was at odds with the Director.

23. The Respondent's invocation of the release provision is contrary to public policy because it seeks to oust the jurisdiction of this Tribunal. It is also contrary to Chapter 9.1 of the Respondent's own Principles of Staff Employment.

24. The Applicant did not receive special consideration for signing the separation memorandum. The Applicant's separation from employment with the Respondent should be treated under the Bank's pertinent separation guidelines not as a matter of "mutual agreement" but rather as an "abolition of office" or "redundancy." The terms offered to the Applicant were thus merely "standard" separation terms, and even the "discretionary assistance" offered by the Respondent is in practice granted to the great majority of people leaving Bank employment under circumstances similar to those of the Applicant.

25. Under the Tribunal's language in para. 34 of Mr. Y, which dealt with a release provision similar to that in the February 11 memorandum, that provision should be read so as to relate only to the separation arrangements between the parties. It is therefore inapplicable to the Bank's salary decision of October 1984 that is the subject of this application.

26. The Appeals Committee seemingly shared the view that neither party intended the release provision to apply beyond the terms of the separation memorandum itself, because neither party invoked the release provision during the course of the Committee proceedings.

27. Because the release provision applies only to the terms under which the Applicant agreed to leave the service of the Respondent and does not apply to his earlier claim for improper salary determination, which is the subject of this proceeding before the Tribunal, the Respondent should be directed to answer on the merits of the case.

#### Considerations:

28. The issues before the Tribunal are the interpretation and validity of the release provision contained in the agreement of February 11, 1985 in which arrangements were made for the Applicant's separation from the Bank. Initially, it must be determined whether the release was broad enough to encompass claims by the Applicant against the Respondent not directly relating to his early retirement but rather relating to the adverse salary decision made by the Respondent in October 1984. It was this salary decision that was reviewed by the Appeals Committee and that is now challenged before this Tribunal.

29. In its decision in Mr. Y (Decision No. 25 [1985], para. 25), the Tribunal observed:

The right to challenge [an adverse personnel] action through the filing of an application with this Tribunal finds its source in the Statute of the Administrative Tribunal, and not merely in the contractual agreements or personnel documents promulgated by the World Bank. The language and context of the Statute make clear the importance attached to this right, by the management as well as by the staff of the Bank. A

release or settlement of claims that might be presented to this Tribunal should therefore not lightly be inferred. Neither, however, should it be precluded altogether.

It is the conclusion of the Tribunal – applying the standard of proof articulated in Mr. Y – that the release of claims made by the Applicant on February 11, 1985 covered his salary claim originating the previous October.

30. The discussions between the Applicant and the Respondent that ultimately culminated in the separation agreement commenced in March 1984. Six months later, the Applicant received his AER, which served as the basis for the Respondent's decision in early October to limit his salary increase to only one-half of the general salary structure adjustment. The Applicant filed an appeal from this decision with the Appeals Committee on October 31, 1984. While that appeal was pending, negotiations between the Applicant and the Respondent continued in the fall and winter of 1984-85, and the separation agreement with its release provision was concluded on February 11, 1985.

31. The language of the release is broad and unqualified: "In accepting these terms and conditions, you fully and finally release the Bank from any claims which you might otherwise have against the Bank." [Emphasis added.] There is nothing in either this language or its context that suggests that the parties intended to incorporate a limit based upon the content or the timing of the claim (provided, of course, that the released claim be one that already existed at the time the agreement was concluded, as is the case here). There is no reference, express or implied, to a release of claims relating only to the financial aspects of the Applicant's separation from service. A statement in a separation agreement that a staff member is releasing claims he might "otherwise" have against the Bank appears rather clearly to encompass all preexisting claims. In view of the clarity of this language, it might have been expected that, had the Applicant sought to confine its breadth in the manner he now contends, he would have expressly sought some qualification or limitation in the wording of the contract. That is particularly true if he wished to preserve the salary claim that he had presented only some three months before to the Appeals Committee.

32. The conclusion that the broad release provision embraced the Applicant's preexisting salary claim is confirmed by consideration of the circumstances surrounding the negotiation of the separation agreement. It is difficult to believe that the Applicant's adverse September 1984 AER, his low salary increase announced in early October, and his appeal to the Appeals Committee were not in the minds of the parties when negotiations were being contemporaneously pursued regarding the Applicant's separation from the Bank. There is no reason to construe the release provision so as to exclude from its reach such a recent and vigorously presented claim against the Respondent.

33. The Applicant points out that the Bank did not call the release provision to the attention of the Appeals Committee at its hearing of April 4, 1985, less than two months after it was negotiated. He suggests that the Respondent, therefore, did not at that time understand the provision to embrace the salary dispute of October 1984. Nonetheless, the Respondent has stated a number of reasons why it did not invoke the release provision before the Appeals Committee, including the fact that at the time of the February 11 separation agreement it had nearly completed preparing its answer on the merits before the Appeals Committee, and the fact that it believed that a resolution of the salary dispute on its merits would be more constructive in light of the Applicant's professional and personal circumstances. In any event, the litigation decisions made by the Bank in presenting its case before the Appeals Committee cannot override the clear language of the agreement.

34. Having concluded that the language of the release provision of February 11, 1985 covers the salary claim arising in October 1984, the Tribunal must determine whether that provision is valid.

35. The argument that the release should be invalidated because the Applicant agreed to it "under duress" is unconvincing. By accepting the terms of his separation agreement, the Applicant secured a substantial amount of money and other benefits. The alternative to concluding that agreement--continued service in OED, where the Applicant was allegedly unwelcome and unappreciated and at odds with his supervisor--may have been unpleasant for the Applicant to contemplate, but the desire to avoid a less pleasant alternative is always the



motivation for entering into a settlement agreement, and cannot provide a basis for overturning it. As the Tribunal has previously noted: "That ... is the kind of balancing of priorities that inheres in every settlement, and it cannot properly be regarded as duress." (Mr. Y, para. 33) The Applicant was completely free to refrain from agreeing to all or any of the terms of his separation agreement, simply by choosing to remain at his post; his termination of service was effected at his own initiative, unlike that of Mr. Y, who had been informed that if he did not resign voluntarily his employment would be terminated by the Bank. (Mr. Y, paras. 8, 28.) The argument for duress, which this Tribunal rejected in the case of Mr. Y, is therefore even less convincing here.

36. The Applicant also contends that enforcement of the release provision would be contrary to public policy and to Chapter 9.1 of the Respondent's Principles of Staff Employment which provides for access to the Administrative Tribunal. To the extent that the Applicant would have the Tribunal declare generally unenforceable agreements on the part of the Respondent's staff members to release, relinquish and settle all pending claims in exchange for financial and in-kind benefits granted by the Bank, that contention has been explicitly rejected by the Tribunal in Mr. Y. As was stated in paragraph 26 of that decision:

It would unduly interfere with the constructive and efficient resolution of [a staff member's claim of improper treatment] if the Bank could not negotiate – in exchange for concessions on its part – for a return promise from the staff member not to press his or her claim further. If such an agreed settlement were not binding upon the affected staff member, there would be little incentive for the Bank to enter into compromise arrangements, and there might instead be an inducement to be unyielding and to defend each claim through the process of administrative and judicial review. It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements.

Rather than conflicting with public policy, the Tribunal's enforcement of voluntary settlement or release provisions thus advances public policy.

37. The release provision in this case by which the Applicant agreed to the "relinquishment of the right to appeal [any claims] to the Appeals Committee or the World Bank Administrative Tribunal" does not mean that the Applicant has agreed to forego all recourse to the administrative and judicial institutions created by the Bank to assure objective hearing and determination of the claims of staff members. Such a commitment, despite its broad terms, does not amount to a deprivation or denial of administrative or judicial remedies because, as shown by the present case, both the Appeals Committee and this Tribunal are and remain available to staff members to consider the interpretation and validity of release provisions in the circumstances of each case.

38. The Applicant contends, finally, that the release provision should not be enforced because it is unsupported by consideration. He asserts that the compensation and fringe benefits given to him by the Respondent were no more than those routinely granted to staff members separating from employment with the Bank in all similar previous cases; because he was thus in effect entitled to such compensation and benefits in any event, there is nothing to warrant holding him to his promise not to pursue his October 1984 salary claim. In particular, he asserts that his separation is properly to be viewed not as resulting from "mutual agreement" but rather as resulting from an "abolition of office" or "redundancy," in which case – according to the governing rules applied by the Personnel Management Department – a staff member is entitled to more generous benefits than those accompanying early retirement or other voluntary forms of separation.

39. These contentions have no basis in fact. Termination of employment resulting from abolition of office or from redundancy is, in the usual understanding of these terms, imposed involuntarily upon a staff member as a result of extrinsic exigencies. Although the Applicant's final AER, prepared in September 1984, pointed out his inability "to provide the kind of creative leadership" demanded by "radically changed economic circumstances," the "changed circumstances" were such as responsible senior staff members might be expected to address. There was, in short, no "abolition of office" or "redundancy" that dictated the Applicant's separation from the Bank. It is clear, indeed that the separation was the culmination of the Applicant's own efforts to arrange for early retirement. The agreement of February 11, 1985 explicitly refers to the Applicant's earlier discussions with the Respondent regarding "your intention to take early retirement from the Bank" and sets forth "the terms and

conditions which would apply under this mutually agreed separation agreement.” The arrangements for paid leave, for other financial benefits, and for outplacement assistance, were not entitlements of staff members retiring early; to a significant degree, the grants were within the Respondent's discretion. The only promise made by the Applicant in exchange for these benefits was expressed in the release provision he challenges here. The Tribunal therefore concludes that that promise was supported by a valid cause or consideration.

Decision:

For these reasons, the Tribunal unanimously decides to dismiss the Application.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga  
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe  
Executive Secretary

At Washington, D.C., October 31, 1986