Decision No. 301

John Lavelle,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on February 5, 2003, by John Lavelle against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Francisco Orrego Vicuña (President of the Tribunal) as President, Robert A. Gorman and Jan Paulsson, Judges. The usual exchange of pleadings took place. The case was listed on June 24, 2003.

2. This case involves a complaint of the Applicant in respect of the decision of the Respondent excluding a period of his service from the past pension benefit accruing to Non-Regular Staff (NRS) pursuant to the policy approved by the Executive Directors on September 17, 2002 and the corresponding Schedule F added to the Staff Retirement Plan (SRP) on December 12, 2002.

3. The Applicant joined the Bank as a Long-Term Consultant on November 7, 1988, accepted a Fixed-Term appointment on March 30, 1990, and began his participation in the SRP when the latter appointment became effective on April 2, 1990. A year later, on April 1, 1991, the Applicant's appointment was confirmed and he became a Regular staff member with continued participation in the SRP.

4. On the date noted in paragraph 2 above, Schedule F was introduced into the SRP as a consequence of the approval of the "Post-Retirement Benefits Policy: Amendments to Staff Retirement Plan and Trust." Under this Schedule, a participant in the SRP who on January 1, 2002 held an appointment eligible for participation and who was "employed by an Employer on a Non-Regular appointment before April 15, 1998," was allowed a credit for the period of time he or she had held an NRS appointment, during which he or she was therefore ineligible for participation in the SRP. This credit, however, was allowed only for the time in excess of 730 days (i.e. two years) that he or she had been an NRS and was subject to other conditions. This meant in fact that the first two years of NRS service with the Bank were not credited.

5. The Applicant had 511 days of NRS service before he began his participation in the SRP, and thus fell short of the two-year cut-off period specified in Schedule F. The Applicant's complaint is that he should be treated in the same manner as those NRS who have met the requirement of the rule, and accordingly should be allowed to purchase past pension credit for the full 511 days of his NRS service with the Bank. Alternatively, the Applicant requests a lump-sum payment upon retirement of $190,000.

6. The Applicant has made a number of arguments in support of his position which are based partly on his knowledge of the Bank's policy development concerning NRS, in which the Applicant claims to have directly participated. The Bank has opposed such arguments and provided the Tribunal with its understanding of the meaning of the rule and the underlying policy.

7. The starting point of the Applicant's arguments is that the Bank misled the Tribunal about what precisely the Executive Directors had discussed and approved in the context of the Human Resources Policy Reform that

came into effect on April 15, 1998. It will be recalled that on this date NRS began participation prospectively in the SRP. As expressed by the Tribunal in *Yang*, Decision No. 252 [2001], para. 8, and in *Prescott*, Decision No. 253 [2001], para. 8, "the Executive Directors expressly decided that no past service credit would be granted." The Applicant believes this not to be true and accordingly considers that the question of past pension credit was left open for future decision. The Tribunal rejected the Applicant's request for the production of the pleadings in the *Yang* and *Prescott* cases, as these are confidential documents of proceedings to which only the concerned parties are privy.

8. The Bank has opposed the discussion of this claim on jurisdictional grounds. It argues that the Applicant was not a party to either *Yang* or *Prescott* and hence has no standing to request a revision of these judgments; moreover, even if he had, his request is now untimely. In addition, the Bank argues that none of the conditions for revision stated in Article XIII of the Tribunal's Statute are met in the circumstances. The Tribunal accepts the jurisdictional objection and accordingly will not entertain the Applicant's argument as to the meaning of what the Executive Directors did or did not do in their discussion of the 1998 Reform.

9. In any event, the parties in the *Yang* and *Prescott* cases handled their disputes before the Tribunal with meticulousness, and the Applicant's view that the Bank attorneys misled the Tribunal on this matter cannot be accepted. The Tribunal examined in those cases all the pertinent records and came to the conclusion that the Executive Directors had ruled out the granting of past pension credits for NRS. In fact, the 1998 Reform granted pension credits for NRS participation only prospectively. To conclude that the Executive Directors had approved something different flies in the face of the record and the rules, particularly in view of the fact that the Directors were unequivocally confronted with the issue of credits for past service as part of the Reform. Whether the issue was left open for the future is a different question, but in any event the Bank's management and Executive Directors can consider such an issue at any time, as they did in 2002. This, however, has no implication whatsoever for the meaning of what they approved in 1998.

10. The Applicant has emphasized the point that the decision of the Executive Directors adopted in September 2002 should be viewed as the first express decision of the Board on past pension credit. Otherwise, the Applicant fears, this decision could be seen as merely superceding and qualifying the 1998 decision on the matter. The Tribunal has great difficulty in understanding the relevance of this argument, but it does not disagree with the view that the September 2002 decision is the first to allow for past pension credits. This confirms to the Tribunal that no such benefit was available before the 2002 amendment of the SRP.

11. The second legal argument put forth by the Applicant to challenge the Bank's decision with respect to him is that it unjustifiably differentiates between individuals and groups. In the Applicant's view, all staff members with NRS service were treated as an undifferentiated group before the enactment of the 2002 amendments. Because of the need to defuse a major labor dispute, the Applicant alleges, the Bank decided to treat staff with more than two years of NRS service as entitled to the new benefits, while those falling short of this period, including the Applicant, were denied the benefit.

12. The rationale for this differentiation, the Applicant's argument continues, is that staff with more than two years of NRS service are presumed to have served in positions for lengths of time inconsistent with the original intent of their NRS service, while those with less than two years are presumed to have been hired for discrete tasks involving only short periods of service. This, the Applicant states, is inconsistent with the fact that a number of staff members were regularized in the same positions they held even before the two-year period had passed for them. The Applicant also contrasts the Bank's decision with the approach followed by the International Monetary Fund (IMF) extending full past pension credits to all NRS without differentiation. The Applicant concludes that denying him such a benefit constitutes a breach of Principle of Staff Employment 2.1 as it amounts to unjustifiable differentiation of past service that was previously identical in contractual terms.

13. The Tribunal notes that the Bank had in fact various options to handle the issue of past pension credit. One option was to extend this benefit fully to all staff with NRS service, as the IMF did. Another option was to proceed on a case-by-case basis, examining the nature of the service of each NRS and granting or withholding the benefit depending on whether or not the service had really been temporary or was intended to last for long.

Not to do anything, the Applicant argues, was also an option that did not differentiate between staff. The Bank, however, opted for a different approach establishing the two-year cut-off period.

14. The Tribunal notes, however, that the option to do nothing was hardly realistic from the moment the Bank decided to solve this point of contention with the staff. Moreover, had the Bank chosen this option, it could have been argued – at least as readily as the Applicant argues his claim here – that this unfairly discriminated against longer-serving NRS who, after all, would be denied SRP credits to a much greater extent than those who served as NRS for only a short period of time. Equally, the Bank had reasons not to extend the benefit fully to everyone, particularly in view of the numbers of NRS involved and the concomitant cost. The situation in this respect is quite different from that of the IMF, and the Tribunal has ruled in the past that the policy of parallelism cannot be followed blindly when circumstances do not justify it. (*See Crevier*, Decision No. 205 [1999], paras. 35-36.) It is also understandable that an endeavor to examine each staff member's career history would result in an administrative nightmare, not to mention the practical difficulties and a much greater risk of arbitrary differentiation between like staff members.

15. The issue then boils down to one simple question: whether the two-year cut-off period applied is lawful. The Applicant, as noted, has strong views opposing this solution, and believes that it is the perfect example of unjustifiable differentiation. The Bank sees the question differently. A two-year period was, at the relevant time, the minimum anticipated duration of an assignment allowing the Bank to appoint staff to pension-eligible, Fixed-Term appointments. Time served for a lesser period was excluded from the new benefit for all NRS. Any period in excess of this threshold would qualify for the benefit, as then the presumption would be that the NRS concerned was in a Non-Regular position for reasons other than the nature of the service required. Such reasons could include cost savings, easier recruitment or uncertainty about the actual length of the service needed.

16. The Tribunal does not see anything wrong with a decision that grants benefits to the staff pursuant to certain criteria, including those related to the number of years served. In fact, this is what is normally done in any pension system or for other employment benefits. This is so much so that the very policy for triggering the benefit of regularization applied by the Tribunal in the *Prescott* decision was based on, among other elements, a four-year period of service. This was not arbitrary or capricious. It was a valid threshold that the Bank decided to apply in the search for regularization, given its discretionary powers. Here too, the two-year period identified as a threshold cannot be considered arbitrary or unlawful. It is reasonably related to the nature of the duties, and to the expected duration of service, of Short-Term NRS.

17. This is not, however, the end of the matter. The Applicant has raised the argument of unjustifiable differentiation in the terms expressed above. The Tribunal addressed the legal extent of this issue in *Crevier*, holding that "discrimination takes place where staff who are in basically similar situations are treated differently." (*Crevier*, Decision No. 205 [1999], para. 25.) Were all NRS in basically the same situation in respect of past pension benefits? Most certainly they were not. There were, for example, NRS who had been regularized and others who had not, some earlier in their careers and some later, some remaining in the service of the Bank and some who had left. As with every human community, all sorts of different situations are present in a given matter.

18. As noted above, periods of service are of the essence of pension and benefits arrangements. Not all beneficiaries qualify under a given set of terms. Once the Bank opted for the two-year threshold, those qualifying met the criteria, while those not qualifying were in a different situation. The Applicant argues that therein lies the discrimination, as this differentiation did not happen before the 2002 amendments. This is not really the meaning of different situations, since otherwise the Bank or any other institution would have its hands tied forever in terms of extending new benefits to certain categories of staff. The only option then would be either to apply the benefit to all, irrespectively of time served and other factors, or else to do nothing, a proposition that the Applicant appears not to dislike. This latter result would, however, be patently absurd. Was there an unjustifiable differentiation in respect of all staff who did not qualify under the four-year policy threshold that benefited Mr. Prescott? The Tribunal does not believe so. Differentiation there may occur as long as it is justified. It is unjustified when, for example, the benefit would have been extended to some with NRS service in

excess of two years and not to others also having service in excess of two years.

19. The Applicant has also argued that the Bank deprived him of compensation earned for services he had already rendered, thus violating Principle of Staff Employment 2.1(c). The Respondent has argued that the meaning of this Principle is related to past compensation and benefits to which the staff member had a right, but does not refer to benefits unavailable at the time the service was rendered. This is the view which the Tribunal has taken in the past. In *de Merode*, Decision No. 1 [1981], para. 46, the Tribunal stated:

> First, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals.

This principle also holds valid in the circumstances of the present case.

20. Other arguments invoked by the Applicant are equally unconvincing. The Applicant's implication that the Bank has failed to develop and maintain compensation conducive to high standards of performance, apparently in violation of Principle of Staff Employment 2.1(e), is hardly supported by the facts. There is no foundation to the argument that the Bank maintains a policy that de-motivates staff and distracts them from their core work. And the allegation that the Bank fails to provide adequately for retirement under Principle of Staff Employment 6.2(d) is entirely unsustainable, particularly in the light of the amendments to the SRP made in 1998 and 2002.

21. A different issue raised by the Applicant is that, in enacting the new NRS amendments, the Bank has undercut the benefit provided under the Rule of 50 in the 1998 amendments, particularly insofar as the non-recognition of his past NRS service nullifies the incentive to retire early on a voluntary basis. This is presumably because the total amount available to build the Applicant's pension is less than if such recognition had been made. This result might be mathematically true, but as long as the new rules do not undercut either the Applicant's right to retire at a certain point or the benefits defined for that pension, the amendment introduced has no bearing on his entitlement. The Tribunal notes that the Applicant's rights under the SRP in connection with retirement under the Rule of 50 remain unaltered.

22. The Applicant also asserts that while he could have challenged his early NRS appointment as a question of misclassification, as other staff members did, his current arguments are unrelated to that issue in that the Bank's amendments are solely based on the two-year threshold and not on classification. On this point, the Tribunal concurs. The issue of misclassification is in the circumstances irrelevant and would have been in any case out of time.

23. The Applicant believes that the approach of the Bank to the question of NRS service has shifted from contractual rights and obligations and has entered "into the land of fundamental equity and fairness in fact." The fairness test, the Applicant believes, has not been met. The Bank of course believes otherwise.

24. The notion of fairness has given rise to the doctrine of legitimate expectation. (*See* the English court case *R v. IRC*, *ex parte MFK Underwriting Agencies Ltd*, [1990] 1 WLR 1545, at 1569-70.) Fairness is not loosely defined. On the contrary, it is measured by strict standards. While in its origins the doctrine was applied only to procedural shortcomings, it has evolved into an examination of the reasonableness of decisions and policies. As stated by Lord Russell at the end of the nineteenth century, a court's solicitude does not extend to regulations "if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men." (*Kruse v. Johnson*, [1898] 2 QB 91, [1895-99] All ER Rep 105.) In a recent formulation, an English court has held:

> Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest

> relied upon for the change of policy. [Emphasis in original.]

(*R v. North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850, 871-2, para. 57.)

25. Although this Tribunal does not necessarily follow the standards of national law, the formulation of legitimate expectation stated above does summarize the essence of the doctrine invoked. This was the very reasoning underlying the judgment of the Tribunal in *Prescott*.

26. When applied to the instant case, legitimate expectation leads to a conclusion opposite to that argued by the Applicant. First, there is no question of procedural flaws in the newly defined NRS policy, and none has been invoked. Second, legitimate expectation assumes that those who invoke its operation oppose a change in policy and had at the very least "relied, and have been justified in relying, on a current policy or an extant promise." (*Id*. at para. 65.) This latter circumstance would be why the policy could not later be changed.

27. Did the NRS regime established in 2002 affect the Applicant in a manner that was manifestly unjust, made in bad faith or so gratuitous and oppressive that no reasonable person could think it justified? The Bank's management, the Executive Directors and the Staff Association do not seem to believe so, nor do the thousands of staff members who have benefited from the amendments. Neither could the Applicant have relied on the substantive benefits of a policy that did not exist and that had not been promised. If he so relied, this was indeed not justified.

28. As the Tribunal has held, it cannot judge whether a given policy could have been wiser. In *Crevier*, Decision No. 205 [1999], para. 17, the Tribunal stated:

> It is not within the competence of the Tribunal to consider which alternative would have been best or more effective to attain the desired objectives of the reform. This is a matter that is solely within the discretion of the Board of Directors. The Tribunal is empowered only to decide whether the solution … can be applied lawfully to the Applicant in the light of his rights as a staff member.

The Tribunal has no doubt in concluding that the policy defined did not entail an abuse of power or frustrate a legitimate expectation.

29. The Tribunal must consider lastly the question of contractual rights. The Applicant is right in arguing that the two-year threshold defined is not related to contractual rights. However, this is the very reason why neither he nor anyone else can today invoke it as a contravention of a right, as it regulates a benefit not existing at the time of his employment contract and, moreover, was expressly ruled out in NRS contracts. In the end, after all, freely accepted contracts are meant to be honored. This is what justifies the view of the Bank that the benefit, not being a contractual right or a duty causing the Bank to be under any legal obligation to grant it, can only be in the nature of an *ex gratia* benefit.

Decision

For the above reasons, the Tribunal decides to dismiss the application.

/S/ Francisco Orrego Vicuña
Francisco Orrego Vicuña
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Paris, France, July 19, 2003