

Decision No. 92

C. Noel Lindsay
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of P. Weil, President, A. K. Abul-Magd and E. Lauterpacht, Vice Presidents, and F. K. Apaloo, R. A. Gorman, E. Jiménez de Aréchaga and Tun Suffian, Judges, has been seized of an application, received April 18, 1989, by C. Noel Lindsay against the International Bank for Reconstruction and Development. The President of the Tribunal rejected the Applicant's request for additional documents, and, because the time limit for filing the Reply had expired, asked the parties to file additional written statements in order to complete the proceedings, so that the Tribunal could reach an informed decision. The case was listed on April 13, 1990.

The relevant facts:

(a) The Reorganization

2. The general facts relating to the 1987 reorganization are as stated in paragraphs 5 to 40 of Decision No. 40.

(b) The particular facts of the case

3. The Applicant, an Irish national, joined the Bank on February 21, 1984. At the time of the Reorganization he held the position of Chief, Institutional Development Strategy and Human Resources Unit (IDSHR), Technical Assistance and Special Studies Division, Europe Middle East and North Africa (EMENA) Projects Department, level 25. As a result of the Reorganization, the Applicant's division was abolished and a smaller unit, the Technical Cooperation Unit (TCU) with administrative and coordinating functions was created in the EMENA Technical Department (EMT), while the technical functions of IDSHR were assumed by the sector divisions in the new EMT.

4. During Round 1 of the staff selection process the Applicant was not offered any position and he did not exercise his option to apply for Package A. Consequently, he participated in Round 2 of the staff selection process.

5. On September 25, 1987 the Applicant was offered the position of Principal Technical Co-operation Officer (PTCO) in the TCU at level 25, which he accepted on October 1, 1987 with the following reservation: "subject to further consideration of my placement in a Human Resources Unit".

6. Meanwhile, on September 29, 1987 the Director, EMENA Country Department III (EM3), in a memorandum to the Chief Personnel Officer requested approval to appoint the Applicant to the position of Principal Education Specialist in EM3, Population and Human Resources Operations Division, at level 25 in a T-slot until December 1989, the Applicant's mandatory retirement date. A T-slot position is a temporary position which for budgetary purposes is created for a limited period of time when no authorized position exists. However, it was decided that the Region should not create a T-slot at that time because of budgetary constraints and work uncertainties in the Population and Human Resources (PHR) sector and the possibility that the Applicant would join TCU.

7. On October 7, 1987 the Applicant informed the Chief Personnel Officer that he was unable to accept the

position offered at TCU because of incompatibility and effective downgrading and that consequently he was withdrawing his conditional acceptance of the job offer. The Bank offered the Applicant a mutually agreed separation arrangement which the Applicant accepted on October 27, 1987, after having stated his objection to the release clause which was incorporated in the separation agreement. Under the terms of the agreement the Applicant was to receive two months notice and a lump sum equivalent of six months net pay.

8. The Applicant sought administrative review of the decision denying him the Enhanced Separation Package (Package B), but the Vice President, Personnel, denied his request. Subsequently the Applicant filed an appeal with the Appeals Committee.

9. The Appeals Committee on December 29, 1988 rendered its report stating that:

(a) the position offered to Appellant at the end of Round 2 was not a valid offer for purposes of disqualifying the Appellant from the Enhanced Separation Package, as the job did not exist before or after this offer and it is at least debatable whether it warranted a Level 25;

(b) the Separation Agreement entered into between the World Bank and the Appellant was not entered into by the Appellant in a sufficiently voluntary manner as to make it a genuine "mutually agreed" separation.

The Committee recommended that the Applicant be awarded \$50,000 to achieve the right balance between the full amount of the Package B and the payment already made to the Applicant.

10. On January 13, 1989 the Vice President, External Affairs and Administration, informed the Applicant that he did not agree with the basis upon which the Committee reached its decision and, consequently, did not accept the Committee's recommendation.

The Applicant's main contentions:

11. The offer of the position of PTCO made to the Applicant was not valid because its object was to deprive the Applicant of his entitlement to the Enhanced Separation Package (Package B) and enable the Respondent, because of financial constraints on its resources, to avoid its obligation to offer the Applicant Package B. The offer was, therefore, improperly motivated.

12. The Respondent, further, abused its discretion in grading the PTCO position at level 25, because that grade did not reflect the position's purpose, function and level of responsibility, as was required by the Respondent's policy, but was instead calculated to circumvent the Respondent's obligation to offer the Applicant Package B. Therefore, the Applicant was not obliged to accept the only position offered to him during the Reorganization, though it was graded at the same level as his previous position. That the grading of the position was improper is proved by the fact that after the Applicant declined the position the Respondent did not interview others to try to fill the PTCO position which was never filled.

13. The Applicant requested the following relief:

(i) rescission of the decision to grade the position of PTCO at level 25;

(ii) separation under the terms of the Enhanced Separation Package;

(iii) compensation in the amount of three months net salary; and

(iv) award of attorney's fees.

The Respondent's main contentions:

14. The Applicant was a talented and valuable employee with a good performance record whose services the Respondent did not wish to lose. Therefore, the management of the EMENA Technical Department in

collaboration with the Region's Personnel Officer towards the end of Round 2 tailored, with the Applicant in mind, the position of Senior Technical Cooperation Officer (STCO) which had earlier been established at level 24/25. Consequently, the position was offered to the Applicant with the title of PTCO at level 25. The requirements and selection criteria of the position offered to the Applicant match the selection criteria for a level 25 Technical Specialist. This has been confirmed by a Senior Job Evaluation Officer. There was, therefore, no improper motivation or abuse of process by the Respondent in offering the Applicant the PTCO position at level 25.

15. It is the Respondent's prerogative to determine the requirements of the workplace and the deployment of staff to perform these requirements. The Respondent did not have to offer the Applicant a position equivalent in all respects to the position held prior to the Reorganization. The Applicant had occupied a level 25 managerial position and he was offered a senior professional position at level 25 which he rejected without justification.

16. Since the Applicant was offered a position at his current level and rejected it, he became ineligible for Package B.

17. The Applicant's claim for costs and attorney's fees should be dismissed since there are no circumstances in this case warranting a departure from the Tribunal's normal practice of denying costs and fees.

Considerations:

18. During Round 2 of the Reorganization the Applicant was offered and accepted, subject to a reservation that is not relevant here, the position of PTCO graded at level 25, i.e. at the same level as his previous position. He subsequently resigned the post and entered into a separation agreement on terms more favourable to him than those normally applicable to a voluntary termination. In the present proceedings he contends that the grading of the PTCO position at level 25 was an abuse of discretion by the Respondent in that it was adopted for an improper motive. He also claims that the grading was procedurally defective. In consequence, the Applicant argues, the original offer of that position to him must be regarded as a nullity and he requests its rescission. It then follows, he contends, that the Respondent must be regarded as not having made him any offer in Round 2. He maintains that he should, therefore, be entitled to separation on the terms of the Enhanced Separation Package contemplated in the scheme of reorganization rather than the lesser terms actually accepted by him. He also argues subsidiarily that the separation agreement to which he actually consented was not "mutually agreed".

19. The case thus raises three distinct but closely related questions: (1) did the Respondent act in accordance with prescribed procedures in grading the position of PTCO at level 25; (2) did the Respondent otherwise act in an improperly motivated manner; and (3) did the Respondent err so seriously in the substantive grading of the PTCO position that its decision was manifestly unreasonable?

(I) The grading procedure

20. The Applicant contended that Staff Rule 5.09, Section 8, sets out a detailed procedure for the grading of new positions and asserted that, in the case of the PTCO position, there is no evidence that this procedure was followed. The Applicant did not develop this argument in full detail but instead included in his application three interrogatories and two requests for documents in which he sought information and documents closely reflecting the procedural requirements set out in Staff Rule 5.09, para. 8.03.

21. The Respondent did not expressly meet these requests. Instead, it contended that the scope of operation of Staff Rule 5.09, para. 8.01 was limited to situations where "positions were judged to be new or significantly changed in content." The Respondent then stated that "it was not deemed necessary to request grading under Section 8 of Staff Rule 5.09." However, the Respondent did not claim that the PTCO position was judged not to be new or significantly changed in content. Nor did it claim that the procedures prescribed in Staff Rule 5.09, Section 8, were followed. Indeed in a letter to the President of the Tribunal, it admitted that they were not: "As it had not been deemed necessary to request grading of the position under Section 8 of Staff Rule 5.09, no

documents were forwarded to or received from a grading committee.”

22. In these circumstances, the Tribunal finds it impossible to conclude either that the procedures laid down in Staff Rule 5.09, Section 8, were not applicable to the PTCO position or that the conduct of the Respondent satisfied those procedures. The consequences of this procedural irregularity will be considered later in this judgment.

(II) The question of motivation

23. The Applicant questions the motivation of the Respondent in offering him the position of PTCO, contending that it “reflected the Respondent’s hope of avoiding its obligation to offer the Applicant separation under the terms of the Enhanced Separation Package, as a result of constraints on available resources for such purpose.”

24. The evidence adduced by the Applicant in support of this contention is no more than circumstantial and consists principally of the fact that the post was newly created, that the job description was precisely tailored to suit his qualifications and that, after he declined it, the post was not offered to anyone else. However, apart from the procedural irregularity that the Tribunal already found (question (I) above), the only real evidence on the point is the statement in a memorandum from Mr. Dyck to the Applicant: “of course... the Region was also cognizant of Senior Management’s desire to place as many qualified staff as possible at their level before the end of Round 2”. This observation must be read in its context, as following a sentence describing the objective justification for offering the post to the Applicant: “... the Region offered him this position by virtue of his past experience and expertise as a Project Specialist (and his knowledge of technical assistance) including but not limited to the human resources section.”

25. Even if it were true that the Bank was in difficulty in dealing with all the Enhanced Separation payments within the limits of its budget, the Tribunal cannot see that fact as by itself supporting the allegation that, if otherwise correct, an act of the Bank was improperly motivated. Nor is there, in itself, any evident impropriety in the Bank tailoring a position to meet the circumstances of an officer of experience and quality whose services the Bank understandably wished to retain.

26. The Applicant has also sought to support his general contention by claiming that when he left the PTCO position it was not again advertised and no attempt was made to fill it. The Respondent has explained that the functions of the position were then redistributed over a number of other posts.

27. The Applicant then suggests that this development confirms the arbitrariness of the establishment and grading of the post, a situation which he feared might have led, if he had remained in the post, to the Bank deciding that the post had no real role to perform and that its incumbent should be declared redundant. The Respondent has replied that there is nothing to support this speculation. The Tribunal agrees.

(III) The question of substantive misgrading

28. The Applicant also argues that the PTCO position was substantively wrongly graded at level 25 and that this was because it was tailored for him, that he had been at level 25 and that, therefore, the level at which the position was graded was pre-determined by his level, not by the nature of the position.

29. That the PTCO position was tailored for the Applicant is admitted by the Bank. But this fact does not by itself mean that the position was wrongly graded. The grading of positions is a matter of Bank management in which the Bank exercises a discretion. The Tribunal will review such matters only for the purpose of ensuring that the Administration has behaved in a procedurally correct way and that it has not reached a substantive conclusion that is not reasonably sustainable. It is not the task of the Tribunal to substitute its own assessment for that of the Bank.

30. The Applicant argues that the Respondent’s decision to grade the PTCO position at this level did not reflect

the position's "purpose, function and level of responsibility so as to provide a sound and equitable basis for the remuneration of staff members". He dismisses as "a meaningless post hoc exercise" the filing by the Respondent of a statement by the Senior Job Evaluation Officer, PERPD, that "the job could be considered as equivalent to the grading criteria for technical specialists at level 25". The Applicant does not, however, grapple with the substance of that evaluation. The Job Evaluation Officer's statement concludes with the words: "I have indicated the key phrases in the job description which support this match". On comparing the job description (on the basis of which the Applicant accepted the post) with the portion of the Career Progression Summary for Technical Specialists that relates to "Principal (Technical) Specialist: Grade 25", the Tribunal can find no real discrepancy between the two, certainly none to suggest that the Evaluation Officer's assessment was manifestly unreasonable. For example, it may be observed that the indications in the Career Progression Summary that the specialist at Grade 25 would serve as lead authority to other staff and would lead major sector or appraisal missions is matched in the position description by the statement that the PTCO may, under the overall direction of the TCU chief, have a lead role and responsibility for one or more countries and would take the principal lead in identifying and resolving broad policy and institutional problems affecting the implementation of the TCU strategy. Similarly, there are elements in the "Qualification/ Requirements" paragraph of the Career Progression Summary at Grade 25 which correspond to some of the items in the "Skills/Abilities" section of the Selection Criteria that appear in the PTCO position description.

31. The Tribunal is, therefore, unable to conclude that the level accorded to the PTCO position departed from previously established standards for grading positions at level 25 so as to be manifestly unreasonable.

32. The content of the PTCO position was, no doubt, different from that of the Applicant's previous position. The substantive range of the new position appears to have been somewhat narrower than that of the old, as was the scope for the immediate exercise of managerial responsibility. But the job content of positions graded at the same level is inherently bound to differ and the fact that one position at a given level may have a different degree of managerial content than another graded at the same level does not mean that one or the other of them is manifestly wrongly graded.

(IV) The question of a "mutually agreed" Separation Agreement

33. Lastly, the Applicant makes an issue of the manner in which his Separation Agreement was concluded, saying that he was tendered a memorandum the contents of which he was not permitted to negotiate and that he had no viable choice but to accept its terms. However, provided that the consensual will is present (as it was here), an agreement is no less an agreement because it follows a form established and even insisted on by one of the parties. The adverb "mutually" that qualifies the verb "agreed", and to which the Applicant appears to attach importance, really adds nothing to the verb. Every agreement is "mutually" agreed. A non-mutually agreed agreement is a juridical impossibility. The Applicant does not, it may be noted, argue that he was subject to any duress in the conclusion of the separation agreement; any such argument could not, on the facts of this case, have been supported.

(V) Conclusions

34. The Tribunal has determined in paragraph 22 above that the Respondent did not follow the procedure prescribed in Staff Rule 5.09, Section 8, for the grading of the new position, but has rejected the other grounds of the Applicant's complaint. The first determination does not necessarily lead to a finding that the decision reached by the Respondent after failing to follow the prescribed procedure is a nullity. As the Tribunal recalled in its decision in Broemser (Decision No. 27 [1985], para. 40):

There have been a number of cases in which the Tribunal, though finding that there has been a procedural irregularity in the Bank's treatment of a staff member, has concluded that the rescission of the decision contested or specific performance of the obligation invoked was not a remedy appropriate to the injury done... Instead, the Tribunal has ordered the payment of the staff member of compensation for the intangible injury thus suffered.

35. In the present case, the Tribunal can find no basis on which to say that the Applicant was unjustly or harshly treated. The Tribunal notes that the Applicant was, in fact, originally offered in Round 1 the position of Chief of the Technical Cooperation Unit, a post immediately above that of PTCO, and declined it; that the Applicant had presumably understood the position description for PTCO before he accepted that position; and that, when the Applicant resigned the position after less than a week, he cited family reasons for wishing to leave the Bank, in addition to his feeling that the job did not meet his interests or professional skills.

36. In these circumstances the Tribunal considers it appropriate to award compensation in respect of the intangible injury suffered by the Applicant from the non-observance by the Respondent of the procedure for grading laid down in Staff Rule 5.09, Section 8.

Decision:

For the above reasons, the Tribunal unanimously decides that:

- (i) the Respondent shall pay the Applicant compensation equal to three months' net salary;
- (ii) the Respondent shall pay the Applicant costs in the amount of \$3,000; and
- (iii) all other pleas be dismissed.

Prosper Weil

/S/ Prosper Weil
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, May 25, 1990