



World Bank Administrative Tribunal

2009

No. 399

**Bonaventure Mbida-Essama,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**Bonaventure Mbida-Essama,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, and Judges Sarah Christie and Stephen M. Schwebel. The Application was received on 20 November 2008.

2. The Bank's Pension Benefits Administration Committee ("PBAC") decided that the Applicant's election to restore his prior pension service had to be made within a five-year period which ran from the day the Bank informed him of the restoration opportunity by an e-mail message which he apparently never read. The Applicant challenges this decision.

FACTUAL BACKGROUND

3. The Applicant joined the Bank in 1979 on a Regular appointment. He joined the Bank's Staff Retirement Plan ("SRP" or "Plan") upon his entry on duty. At that time, the Plan offered only the pension scheme based on a notional gross remuneration, commonly referred to as the "Gross Plan."

4. He continued to participate in the Gross Plan until he resigned from the Bank in 1988. Although he was too young for an early retirement pension, he was eligible for a deferred early retirement pension and could have kept his benefit in the Plan. The

Applicant instead decided to exercise his right under the Plan and take a lump sum withdrawal benefit, which he was duly paid.

5. In 1998 the Bank adopted a comprehensive reform of the SRP. Staff who joined the Plan on or after 15 April 1998 participated in a new benefit scheme based on net salary, commonly referred to as the “Net Plan.” Staff who were already participants in the Gross Plan, or who retired on an immediate or deferred pension, remained in the Gross Plan. Former Gross Plan participants who took a withdrawal benefit upon ceasing participation would, if reemployed and thus eligible for SRP participation, rejoin the SRP in the Net Plan.

6. The Bank rehired the Applicant under a Term appointment commencing on 17 July 2000, and he became a participant in the Net Plan of the SRP on this date. At that time, according to the Applicant, he requested of the Bank that his “past pension service be restored but was informed that it was not Bank policy to restore past pension service.” The Bank explains that in the first few years after the 1998 pension reforms, the Bank had not yet developed a mechanism to allow staff who were reemployed and joined the Net Plan to restore prior periods of SRP service.

7. In late 2002, the Bank amended the SRP extending a restoration option to Net Plan participants. The amendments were incorporated into Section 8A of the Plan. In particular, Section 8A.1 of the Plan applies to the Applicant’s situation – a former Gross Plan participant who elected a lump sum withdrawal benefit after his earlier period of participation, but who later resumed SRP participation in the Net Plan. Section 8A.1 provides that if such a participant (like the Applicant) “within five years after the date on which the participant received notice of the restoration opportunity provided under this

section and while still a participant” refunds the earlier withdrawal payment, with interest, the participant will be credited for purposes of the Net Plan defined benefit component with the number of days of service credited to him in the prior period of participation. Additionally, his benefit under the cash balance component would be credited with 120% of the refunded amount.

8. According to the Bank, under Section 8A.1 (adopted in December 2002), the Bank notifies staff members like the Applicant about the restoration opportunity, and the staff member has a five-year restoration period running from the date of notice.

9. On 6 February 2003 the Bank’s Pension Administration Division (“Pension Administration”) sent a notice to the Applicant’s Bank e-mail account explaining his right to restore his prior period of service for purposes of his Net Plan benefit within five years, or by 6 February 2008. On 14 February 2003 Pension Administration sent a second message to the Applicant’s Bank e-mail address explaining additional details of the restoration option, and providing a calculation of the amount he would need to repay.

10. The Bank adds that Pension Administration sent its restoration notices with a “read receipt” requested, so that it would receive a read receipt by e-mail when a recipient opens a restoration notice, and the receipt would be added to the recipient’s pension files. The Bank explains that the read receipt would serve as evidence that the recipient opened the notice, but the five-year restoration period would still commence from the date on which the e-mail notice was transmitted to the participant’s e-mail account, regardless of whether or when the message was opened or read.

11. According to the Applicant, he only became aware of and saw the 6 February 2003 notice in July 2008, more than five years later. The Applicant explains that in

anticipation of his retirement in November 2009, he met with a Senior Pension Administration Officer on 31 July 2008 to discuss his retirement and pension situation. The Applicant adds that during that meeting he learned that the Bank had approved in December 2002 a provision to restore the previous service. He states that: “This is the first time I became aware of and saw the February 6, 2003 Notice of Restoration of the Pension Plan.” In that meeting, the Pension Officer, however, informed the Applicant that his option to restore his prior service had expired five months earlier, in February 2008.

12. After the meeting of 31 July 2008, on the same day, the Applicant sent an e-mail message to the Manager, Pension Administration, requesting a meeting with him and writing as follows:

I was hired again by the Bank in July 2000 as country manager in Cambodia. At the time, I inquired whether I could benefit from a restoration of my past pension. I was told that this was not part of the Bank’s policy. Subsequently, I lost all interest in the matter.

I am due to retire in November 2009 and today I asked for a meeting with [the Senior Pension Administration Officer] of the pension office to start general discussions about my pension situation. She informed me that the Bank changed its restoration policy and that I was sent an e-mail to that effect on February [6], 2003 with the request that I confirm my intention to use the restoration option by February 6, 2008. Unfortunately, I never saw the e-mail and [the Pension Officer] confirmed that she had no return receipt in the files.

She informed me however that I could write to you to request that my case be reviewed given that I am five months past the deadline. *I realize that it is not the Bank’s fault that I never opened or read the e-mail (probably due to the lost interest I had on the matter after what I was told in 2000).* (Emphasis added.)

13. The Manager met with the Applicant on 4 August 2008. The Manager explained to the Applicant that he had a right to seek from PBAC an interpretation of the notice requirement under the Plan. On 8 August 2008 the Applicant sent a memorandum

addressed to PBAC requesting an extension of his restoration period. In the memorandum he wrote:

I propose that since I never saw or read the notification [of 6 February 2003] until I saw a hard copy of the e-mail on July 31, 2008, the actual date of notice in this case be July 31, 2008 and not the original date of the e-mail notification. The fact that the pension office has no Read Receipt confirms that the notice did not come to my attention, although it was sent to me by the pension office.

14. The Manager sent the Applicant's memorandum to PBAC for its review on 10 October 2008. The Manager also wrote a memorandum to PBAC dated the same day recommending that PBAC deny the Applicant's request since the Applicant himself was responsible for his failure to open and read the notice. The Manager explained in his memorandum:

Pension Administration duly notified [the Applicant] of his option to restore by sending an e-mail to his World Bank Lotus Notes account, which is a means of communication Mr. Mbida-Essama used on a regular basis in the course of his job responsibilities. His failure to open and read the notice should not provide an excuse to extend his restoration period.

15. PBAC in its meeting of 23 October 2008 reviewed the Applicant's request to extend the deadline for his restoration period but decided to deny it. On 14 November 2008, the Manager wrote to the Applicant conveying PBAC's decision to deny his request. In his letter, the Manager explained:

[PBAC] was in some respects sympathetic to the statement you submitted, but felt that it is reasonable to expect that staff will be reading e-mail notices, and noted that you had access to the pension plan rules, especially in light of your job responsibilities during the period. [PBAC] also reflected on the decisions of the past for similar cases which were denied and, based on the merits of your case, [PBAC] decided to deny your request to extend your restoration deadline.

16. The Applicant then filed his Application with the Tribunal on 20 November 2008. The Applicant claims that the five-year time period in this case should run from 31 July

2008. He advances the following main arguments: (i) if the Bank sends notice to a staff member by e-mail then that notice should be considered received when the staff member opens that e-mail notice or becomes aware of it; (ii) the Bank should have sent the restoration notice by all other available means such as by fax, in-house special delivery, and in the case of country offices, by pouch; (iii) he was in transit when the e-mail notices were sent; and (iv) the Bank should extend the deadline considering that he would incur significant financial losses if the restoration option is not allowed.

17. The Bank contends mainly that it would be unreasonable to take the position that an e-mail notice is not received until it is opened and read, and that the Applicant has not provided any convincing arguments why the deadline should be extended in his case.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

18. Section 8A.1 of the SRP provides as follows:

Restoration for Former Gross Plan Participants Who Rejoin the Plan as Net Plan Participants.

- (a) If a former Gross Plan Participant who is ineligible to resume participation in the Gross Plan under Article 2, "Applicability", becomes a Net Plan Participant under Article 2A, the participant shall be credited with the same number of days of service (for purposes of the benefits provided under Articles 3A and 4A) as were formerly credited to the participant under the Plan and to which such payments related, only if, within five years after the date on which *the participant received notice of the restoration opportunity* provided under this section and while still a participant, the participant refunds all the payments received under Section 4.3 together with interest from the dates of payment to the dates of refund. Additionally, on the last day of the month following the month in which the participant fully refunded the payments under Section 4.3, the participant's Cash Balance account shall receive a credit in the amount of 120% of the amount so refunded by the participant, including interest paid. [Emphasis added.]

19. Section 8A.1 of the SRP enables staff members like the Applicant with gaps in Plan service to receive almost the same benefits they would receive had their service been

continuous if they repay in a timely manner any benefits received for the earlier period of service.

20. On 6 February 2003 the Bank sent a notice to the Applicant's Bank e-mail account explaining his right to restore his prior period of service within five years, or by 6 February 2008. A week later the Bank sent a second e-mail message to the Applicant explaining additional details of the restoration option. The Applicant says that he only became aware of and saw the 6 February 2003 notice on 31 July 2008, more than five years later. The legal question before the Tribunal is whether the Applicant "received notice of the restoration opportunity" on 6 February 2003 or on 31 July 2008, as the five-year period for the election of the restoration option would begin to run from that date.

21. The Bank accepts that it has an obligation to provide restoration notice to the Applicant and states that it discharged that obligation by sending the two e-mail messages to the Applicant in February 2003. The Applicant argues that sending the notification by e-mail was not sufficient and the Bank should have used all the means available to comply with its duty to notify. The Applicant states that the proper process should have been: (i) to send the notification by e-mail if this was considered desirable; (ii) regardless of whether an e-mail notice was sent or in the absence of a return receipt, to send a fax; (iii) to use the routine in-house special delivery messenger; and (iv) to send the notification by diplomatic pouch to the country office where the Applicant was posted. The Applicant claims that the Bank had a defective understanding of the duty to inform and failed to use all the means available to fulfill that duty.

22. The Tribunal notes that Section 8A of the SRP does not prescribe any specific method for delivery of notices. Therefore the question is whether sending the restoration

notice by e-mail in the Applicant's case was reasonable. The Tribunal finds that e-mail certainly is a reasonable method of communication in today's workplace, especially in the Bank. The e-mail notices in this case were sent in February 2003. It cannot be disputed that by 2003 e-mail had become a routine and familiar format for intra-office communication in the Bank. Moreover, the Applicant rejoined the Bank in 2000 and by 2003 he surely had become familiar with the Bank's e-mail system. In fact, it is not in dispute that the Applicant himself used e-mail as a means of communication on a regular basis in the course of his job responsibilities. Thus, the Tribunal finds that sending the restoration notice by e-mail was reasonable in this case.

23. The Tribunal notes that the record clearly shows that the two e-mail messages of February 2003 were delivered to the Applicant's e-mail account. The e-mail messages were sent from the Bank's Pension Administration's e-mail account. If the e-mail had not been delivered, the Pension Administration's e-mail account would have received a notice of non-delivery generated by the system. No such message of non-delivery was received in Pension Administration's e-mail account. The copies of the two e-mail notices that were sent are in the record. The Applicant himself acknowledges that the 6 February 2003 e-mail notice "was sent to me by the pension office," and admits that "I realize that it is not the Bank's fault that I never opened or read the e-mail (probably due to the lost interest I had on the matter after what I was told in 2000)." In view of the above, the Tribunal concludes that for the purposes of Section 8A of the SRP, the Applicant "received notice" of the restoration opportunity on 6 February 2003 and his five-year period to elect the restoration option ran from that date.

24. The Applicant argues that if the Bank sends a notice by e-mail it should not be deemed received until the staff member opens the e-mail stored in his or her e-mail inbox. In the Applicant's words: "An e-mail that sits in the intended addressee's electronic equipment is not received until the intended addressee has opened, although not necessarily read it." The Applicant adds that in this case Pension Administration sent the restoration notice with a read receipt requested. Pension Administration would have received a read receipt by e-mail when the Applicant opened the notice, but no such receipt was found in the Applicant's pension files. Thus the e-mail notice of 6 February 2003 should not be considered received on that day; it was received only when the Applicant actually opened that e-mail notice. The Bank answers that the five-year restoration period should commence from the date on which the e-mail notice was transmitted to the Applicant's e-mail account, regardless of whether or when the message was opened or read. The Bank adds that it has recently changed its practice; it will now send restoration notices by e-mail and require the system to generate delivery receipts rather than read receipts.

25. The Tribunal cannot accept the Applicant's contention that an e-mail restoration notice must not be considered received until the recipient opens the e-mail notice. It is common ground that the restoration notice of 6 February and the subsequent notice of 14 February 2003 were in fact delivered to the Applicant's e-mail account. For the purposes of Section 8A of the SRP, the Applicant received the restoration notice on 6 February and the five-year period for him to elect the restoration option began to run from that date. He could not stop the clock running by deciding not to open the e-mail notice or by

ignoring it. If his argument were accepted, it would mean he could keep the restoration option open indefinitely by simply deciding not to open the e-mail notice.

26. The Tribunal understands that e-mail recipients may ignore or delete messages without opening them when it appears that the messages were unsolicited or where the sender is unknown. But here the Bank sent him an e-mail notice, captioned so as to convey its import on 6 February, and another personalized and captioned follow-up message with more detailed information a week later. It was obvious to the Applicant that the two e-mail messages were sent from Pension Administration's e-mail account. The subject line of the 6 February e-mail message read "Notice of Restoration Provision of the Pension Plan," and that of the 14 February e-mail message read "Gross to Net Restoration of Past Pension Service, UPI # [the Applicant's number]/Bonaventure." The Applicant admits that he failed to open the e-mail messages or even ignored them because he had lost interest in the restoration matter (*see* paragraph 12 above). The Bank cannot be blamed for this.

27. Finally, the Applicant states that when he rejoined the Bank in 2000 he was stationed in Cambodia as Country Manager and returned to Washington in March 2003. The Applicant contends that he was in transit in February 2003 and during this time he was shuttling between Phnom Penh and Washington. Thus the Applicant argues that the Bank should have used other means of communication. The Tribunal is not convinced by this argument. The Applicant does not claim that he lacked access to e-mail during this period. In fact, he was better off receiving an e-mail notice than receiving a paper notice, since he could retrieve the e-mail messages by accessing his account from any location.

Moreover, the Applicant had a chance to open the e-mail notices and elect the restoration option until February 2008. He failed to do so.

28. In conclusion, given that the Bank routinely uses e-mail as a method for intra-office communication, that two separate e-mail notices were sent on 6 and 14 February 2003, and that they were duly delivered to the Applicant's e-mail account, the Tribunal concludes that the five-year period to elect the restoration option started to run on 6 February 2003 and expired on 6 February 2008. Moreover, given that the Applicant used e-mail on a regular basis to perform job responsibilities, that he had five years in which to open the e-mail notices, and that he admitted that he lost interest in the restoration matter, the Tribunal is not convinced that exceptional circumstances exist that warrant extension of the deadline beyond 6 February 2008. Accordingly, the Tribunal concludes that PBAC did not act unreasonably in deciding that the Applicant's restoration election period expired on 6 February 2008.

29. The Tribunal cautions, however, that its holding in this case should not be read as a general statement that the Bank's duty to notify can be discharged in all cases by simply sending an e-mail. The Tribunal's holding in this case is tied to its circumstances.

DECISION

For the reasons given above, the Tribunal dismisses the Applicant's claims.

/S/ Jan Paulsson

Jan Paulsson
President

/S/ Olufemi Elias

Olufemi Elias
Executive Secretary

At Washington, DC, 1 July 2009