

Decision No. 26

Susana Mendaro,
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, N. Kumarayya, E. Lauterpacht and C.D. Onyeama, Judges, has been seized of an application, received December 27, 1983, by Susana Mendaro against the International Bank for Reconstruction and Development. After the Respondent filed its answer in which it raised an objection to jurisdiction on the ground that the application was time barred, the Tribunal decided that, before consideration could be given to the substance of the application, a decision had to be taken as to whether the Tribunal had jurisdiction in this case. Consequently, it ordered the Applicant to reply on the issue of jurisdiction and the Respondent to file a rejoinder on the same issue. The Applicant made a request for certain documents for the purpose of replying but this was refused by the President for the reason that the documents requested were not relevant to the jurisdictional issue. After a further exchange of pleadings and the filing, at the parties' requests, of additional written statements by the Applicant, on April 29, 1985, and by the Respondent on May 10, 1985, the case was listed on May 28, 1985.

The relevant facts:

2. On August 12, 1977, the Applicant, an Argentine national, was offered an appointment by the Respondent for a period of 26 weeks, starting on September 6, 1977, as a Researcher assigned to the Development Economics Department. The appointment was extended twice, then in April 1979 it was further extended so as to expire on June 30, 1979. As from March 26, 1979, she was assigned to the Urban Projects Department. On several occasions the Applicant had requested that she be classified as a Consultant, but had been told that, because of her lack of the required experience, this could not be done. By a memorandum dated June 21, 1979, the Applicant was informed by her Division Chief that, as he had already told her in May, there were no openings for permanent staff and no suitable additional assignments in the division in which she was working. He therefore stated that her appointment would expire in accordance with its terms on June 30, 1979.

3. On June 25, 1979, shortly before her appointment was due to expire, the Applicant, confirming a previous conversation with one of her supervisors on June 22, 1979, addressed a memorandum to her Assistant Director alleging professional and sexual harassment on the part of her colleagues during a mission in Mexico from June 1 to June 15, 1979. She also complained that, while on that mission, she had been excluded from various meetings with government officials and that her skills had been under-utilized. She further complained that while in Washington, D.C. she had been subjected to unreasonable working conditions, such as attendance record-keeping and inadequate office space, and had received an ethnic slur from her Division Chief's secretary.

4. The Assistant Director of her Department immediately conducted a thorough investigation of her charges and allegations. All the members of the group mission to whom the Applicant had referred in her complaint were requested to comment in writing on the Applicant's allegations. After the investigation, the Assistant Director reported to the Applicant that he was unable to find any corroboration of her allegations and suggested that it was not in the Applicant's interest to pursue the matter further. The Personnel Department (PD) then conducted its own investigation and informed the Applicant on August 9, 1979 that there was no evidence to support her allegations of discrimination, that the incident giving rise to the allegation of ethnic slur had been taken out of

context and there was no justification for her to have felt insulted, and that her allegations of sexual harassment “were either unsupported, unverifiable or occurred under circumstances such that mal intent cannot be attributed to the participants.” Consequently, the Personnel Department concluded that there were no justifiable grounds to pursue the matter further.

5. On September 4, 1979, the Applicant met with the Vice President, Personnel and Administration (PA), and the Acting Director, PD. They told her that they had reviewed her allegations, that they had found no evidence to support them and that nothing further would be done.

6. By letter of May 5, 1980, the Applicant’s counsel informed the Respondent that on December 13, 1979 the Applicant had filed a charge with the United States Equal Employment Opportunity Commission (EEOC), claiming that the Respondent had discriminated against her because of her sex and national origin; that on February 13, 1980 the EEOC had dismissed her charge on the ground that the Commission did not have jurisdiction over the Respondent; and that the Applicant intended to file suit in the United States courts.

7. On May 8, 1980, the Vice President and General Counsel of the Respondent informed the Applicant’s counsel that the establishment of the World Bank Administrative Tribunal had been approved by the Board of Governors of the World Bank and enclosed a copy of its Statute. He added that the Tribunal was created “to afford a member of the staff judicial recourse against an action by the institution which is alleged to violate the legal rights of the staff member” and that the Applicant’s exclusive recourse would be before that forum which was expected to commence functioning in July 1980. Nevertheless, on May 9, 1980, the then Counsel for the Applicant advised as follows:

We have concluded, however, that the creation of the Tribunal does not preclude our client from filing an employment discrimination suit against the Bank.

Consequently, the Applicant filed a complaint in the United States District Court for the District of Columbia. The case was dismissed on the ground that the court had no jurisdiction over the Respondent which was an international organization. The judgment of the District Court was affirmed on September 27, 1983 by the Court of Appeals for the District of Columbia Circuit .

8. On December 27, 1983, the Applicant filed her application with the Tribunal.

The Respondent’s main contentions on the jurisdictional issue:

9. The application was not filed in a timely manner, and the Statute of the Tribunal provides no allowance for the Applicant’s delay. Article XVII and not Article II of the Tribunal’s Statute is applicable to the case, because the acts of which the Applicant complains all took place before July 1, 1980, the date on which the Statute came into force. That Article requires that this Application should have been filed no later than September 29, 1980.

10. The decision of the United States Court of Appeals for the District of Columbia Circuit cannot be regarded as the “event” giving the Tribunal jurisdiction under Article II of the Statute which pertains to applications in respect of events which took place after July 1, 1980.

11. Article XVII does not provide for the filing of applications after September 29, 1980 on the ground that exceptional circumstances existed which warranted such delayed filing.

12. Even if Article XVII permitted the filing of applications after September 29, 1980 because of exceptional circumstances, such circumstances did not exist in this case, because (i) the Applicant was advised by the Respondent’s Vice President and General Counsel just before the Tribunal was established that she should have recourse to the Tribunal which was an exclusive remedy, (ii) the Applicant could not contend that she was confused as to the need for the exhaustion of prior remedies, because the administrative appeals procedure was clear and the Respondent had never challenged her failure to exhaust prior remedies, (iii) the Applicant

cannot reasonably maintain that she was not regarded as a staff member, (iv) there is no substance in the Applicant's argument that, because her contract of employment did not expressly prohibit sexual discrimination and sexual harassment she was excused from filing her application in a timely manner, and (v) it was unreasonable for the Applicant to believe that the United States courts were the proper forum for her complaint and to fail to take prudent and timely measures to preserve her rights before the Tribunal.

13. To give the Tribunal jurisdiction the Applicant invokes Article 31(a) of the United Nations Convention on the Privileges and Immunities of the Specialized Agencies which requires a specialized agency to "make provision for appropriate modes of settlement" of "disputes arising out of contracts or other disputes of a private character to which the specialized agency is a party....." However, this Article does not apply here, because (i) it refers to disputes of a private character, which employment disputes are not, since they are governed by public law, (ii) in any case, the existence of procedures for administrative review within the Bank satisfied the requirements of that Article, and (iii) it is not for the Tribunal to establish "modes of settlement" but rather for the Respondent's President, Executive Directors and Board of Governors to do so.

The Applicant's main contentions on the jurisdictional issue:

14. The application is admissible under Article II because the Applicant reasonably believed that the United States courts were the appropriate forum for her complaint and she did not receive notice that the Tribunal was the exclusive forum for her complaint until September 27, 1983, when the United States Court of Appeals for the District of Columbia Circuit rendered its decision. Her application to the Tribunal was filed within 90 days after the court's decision.

15. Under Article XVII there were exceptional circumstances which permitted the filing of the application after the time limit mentioned in that Article. In fact, the application was filed within 90 days of receiving notice from the United States Court of Appeals that the Tribunal was the appropriate forum.

16. Under both Articles, the filing of a claim in a local court that does not have jurisdiction should be regarded as extending the time limits for filing of an application before the Tribunal until the Applicant receives notice from that court that it is not competent to hear the case.

17. Exceptional circumstances which warrant the assumption of jurisdiction under both Articles II and XVII are the following:

(i) because the Applicant was not a regular staff member, it was not clear whether there were prior internal remedies to be exhausted;

(ii) it was not clear that the Applicant's contract of employment prohibited sexual discrimination and sexual harassment and therefore there was no certainty that the Applicant could show that her contract of employment or terms of appointment had been violated;

(iii) it was not clear that the Tribunal had jurisdiction over the application because the relevant events took place between September 1977 and June 1979 and Article XVII of the Statute gave the Tribunal jurisdiction only over causes of complaint arising after January 1, 1979; and

(iv) the United States courts reasonably seemed to be the only forum open to the Applicant at the time she had recourse to these courts.

18. Article 31 of the United Nations Convention on the Privileges and Immunities of the Specialized Agencies, which requires that specialized agencies of the United Nations make provision for appropriate modes of settlement of disputes of a private character, makes it necessary for the Tribunal to consider the Applicant's case.

Considerations:

19. The main issue raised by the Applicant is whether there has been a non-observance of the conditions of her employment because of alleged discrimination on the basis of sex and sexual harassment, imputable to the Respondent.

20. It is clear that the Tribunal's jurisdiction includes adjudication of claims of sexual discrimination or harassment. In its decision in de Merode, WBAT Reports 1981, Decision No. 1, the Tribunal stated that the conditions of employment include "certain general principles of law" (paragraph 25), and the Tribunal has included in those principles "the principle of non-discrimination" (paragraph 34). In the Tribunal's words, the Respondent "must not discriminate in an unjustifiable manner between individuals or groups within the staff" (paragraph 47).

21. The Respondent's Principles of Staff Employment similarly provide:

The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members. They shall not differentiate in an unjustifiable manner between individuals or groups within the staff ... (para. 2.1).

The Respondent's Principles are framed so as explicitly to confirm the jurisdiction of this Tribunal, for the Preamble states that the Principles "embody the general principles and terms of employment" and para. 9.1(b) provides:

The World Bank Administrative Tribunal shall, as prescribed in its Statute, hear and pass judgment upon applications from staff members alleging non-observance of their contracts of employment or terms of appointment, including these Principles and all pertinent Staff Rules of the Organizations.

22. The Respondent has recognized these principles in the present case, for it has stated in its pleadings:

No person authorized to speak on behalf of Respondent has ever asserted that the condonation of sexual discrimination or sexual harassment is consistent with a staff member's contract of employment and, in Respondent's view, the Tribunal's power to deal with a timely complaint based on non-observance of the implicit duty not to practice such discrimination or harassment is not and never has been an issue.

23. In the present case, however, the Tribunal cannot pass judgment upon the Applicant's claim of sexual discrimination and harassment, because her application was not filed in time and is therefore not admissible under the Statute of the Tribunal.

24. The Statute has two provisions--Articles II and XVII--governing the time within which an application must be filed. Article II, paragraph 2, provides:

No application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless: (i) the Applicant has exhausted all other remedies within the Bank Group ... ; and (ii) the application is filed within ninety days after the latest of the following: (a) the occurrence of the event giving rise to the application (or) (b) receipt of notice, after the Applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted ...

Article XVII provides:

Notwithstanding Article II, paragraph 2 of the present Statute, the Tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to January 1, 1979, provided, however, that the application is filed within 90 days after the entry into force of the present Statute.

The Tribunal has previously ruled upon the scope and relationship of these two provisions.

25. In Kavoukas and Parham, WBAT Reports 1981, Decision No. 3, Smith Scott, WBAT Reports 1981, Decision No. 4, and Novak, WBAT Reports 1982, Decision No. 8, the Tribunal examined the “general rule” set out in Article II and concluded that: “Article II applies only to applications concerning causes of complaint that arise after the entry into force of the Statute on July 1, 1980.”

26. As for Article XVII, the Tribunal decided in Novak as follows:

This Tribunal has determined, in Kavoukas and Parham v. International Bank for Reconstruction and Development (Decision No. 3) that Article XVII “provides for a limited exceptional retroactive application of the remedies introduced by the Statute,” as would normally be required by Article II, paragraph 2; but that this limited exception applies only when the cause of complaint arose after January 1, 1979 and before July 1, 1980, the date the Statute entered into force, and only if the application is filed within 90 days after July 1, 1980, i.e. by September 29, 1980. (Novak, WBAT Reports 1982, Decision No. 8, paragraph 13).

27. It is obvious that the present application does not fall within Article II, because none of the events which the Applicant alleges to have given rise to her claim of sexual discrimination and harassment occurred after the entry into force of the Statute on July 1, 1980. The Applicant, however, attempts to bring her case within that Article by invoking the decision of the United States Court of Appeals of September 27, 1983, and the filing of her application with the Tribunal within ninety days thereafter. The Tribunal cannot accept this argument. The decision of the Court of Appeals cannot be regarded as “the occurrence of the event giving rise to the application” mentioned in paragraph 2(ii)(a) of Article II, because this language clearly refers to action adverse to a staff member that is taken by the Respondent. Nor can that court’s decision be regarded as representing an exhaustion of the “remedies available within the Bank Group” mentioned in paragraph 2(ii)(b) of the same Article.

28. Because all of the pertinent events giving rise to the application took place prior to July 1, 1980, the application in order to be timely must fall within the conditions set forth in Article XVII, which require that the cause of complaint must have arisen subsequent to January 1, 1979, and that the application must have been “filed within 90 days after the entry into force of the present Statute,” that is, by September 29, 1980. As an exception to the general principle laid down in Article II, which “reflects a desire to bring cases to the Tribunal without delay,” Article XVII cannot be construed so as to “render the time limits of the Statute almost ineffective.” (Novak, WBAT Reports 1982, Decision No. 8, paragraph 17).

29. To the extent that the application alleges that certain facts giving rise to her complaint arose prior to January 1, 1979, the requirements of Article XVII are not met: Smith Scott, WBAT Reports 1981, Decision No. 4, paragraph 16.

30. To the extent that other facts giving rise to her complaint took place subsequent to January 1, 1979, the application to be admissible should have been filed by September 29, 1980. It was in fact filed on December 27, 1983--more than three years after the time limit expressly set forth in Article XVII of the Statute.

31. The Applicant, however, attempts to bring her case within that Article by asserting the existence of “exceptional circumstances,” and by claiming that such circumstances justify an extension of the time limitation in Article XVII in a manner parallel to that explicitly provided for in Article II. The Tribunal concludes, as it did in Kavoukas and Parham, WBAT Reports 1981, Decision No. 3, and Novak, WBAT Reports 1982, Decision No. 8, that without pronouncing on the question whether the Tribunal has a discretionary power to consider applications filed beyond the date fixed by Article XVII of the Statute, it does not find that in this case exceptional circumstances are present.

32. In essence, the exceptional circumstances alleged by the Applicant relate merely to her doubts whether the Tribunal would assert jurisdiction in her case and rule in her favor. She had doubts whether her position as a researcher qualified her as a staff member entitled to invoke the jurisdiction of the Tribunal under the Statute. She had doubts whether the Tribunal could hear claims arising from the period of her employment prior to January 1, 1979. She had doubts whether her conditions of employment included protection against sexual

discrimination and harassment. She believed, instead, that her only forum for asserting her claims was the United States courts.

33. The record clearly shows that none of these doubts could in any way be regarded as exceptional circumstances. In a letter of May 8, 1980, to the Applicant's attorney, the Vice President and General Counsel of the Respondent wrote as follows:

We wish to inform you that on April 30, 1980 the Board of Governors of the World Bank, which includes the United States, approved the establishment of the World Bank Administrative Tribunal, a copy of the Statute of which is attached. According to the report of March 4, 1980 of the Executive Directors to the Board of Governors, which was accepted by the Governors, the Tribunal was created by the Bank "to afford a member of the staff judicial recourse against an action by the institution which is alleged to violate the legal rights of the staff member." The report also states that "It is intended that this recourse be exclusive in nature."

In view of the foregoing, we wish to point out that if your client feels she has a grievance against the World Bank arising out of her terms and conditions of employment, her remedy is to file an application before the World Bank Administrative Tribunal, which is expected to commence functioning in July of this year.

The Tribunal notes, in this connection, that in Novak, WBAT Reports 1982, Decision No. 8, it refused to treat as an "exceptional circumstance" the Applicant's alleged unawareness that the Tribunal had been established subsequent to the termination of his employment with the Respondent. The Tribunal there held that the Applicant was in fact put on notice of the likely creation of the Tribunal, that he should have inquired about the establishment of the Tribunal, and that he could not fairly invoke his failure to do so in order to avoid the strictures of Article XVII. In the present case, the Respondent expressly notified the Applicant, through her attorney, that the Tribunal had been created and that it was, beginning July 1980, an available forum – and indeed the exclusive forum – to hear claims of violation of "the legal rights of the staff member." That the Applicant decided, nonetheless, not to file her application by the September 29, 1980 deadline fixed in the Statute was the result of a conscious choice on her part and could in no way be attributed to exceptional circumstances. In any event, doubts regarding the outcome of proceedings before a judicial body – whether jurisdictional or relating to the merits – cannot reasonably be regarded as warrant to ignore the pertinent statutory time limits; rather, these doubts are properly to be submitted in a timely manner for decision by that body. Otherwise, all statutory time limits would be rendered meaningless.

34. There is a final point which needs to be added. The Applicant incorporated as annexes to her pleadings a number of documents which she described as "letters to the Tribunal and/or the President of the World Bank supporting my efforts for a fair and open hearing on the merits of my case of sex discrimination and sexual harassment in employment." The introduction of these documents by the Applicant obliges the Tribunal to observe that for non-parties to address to the Tribunal or to the President of the World Bank communications seeking to influence the outcome of a case pending before the Tribunal is an improper and unacceptable attempt to interfere with the mission of the Tribunal.

Decision:

For the reasons stated in paragraphs 19 to 33, the Tribunal unanimously decides that the application is inadmissible.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Paris, France, September 4, 1985