Decision No. 138

David Moses (No. 2),
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of A.K. Abul-Magd, President, E. Lauterpacht and R.A. Gorman, Vice Presidents, and F.K. Apaloo, F. Orrego Vicuña, Tun M. Suffian and P. Weil, Judges, has been seized of an application, received October 14, 1993, by David Moses, against the International Bank for Reconstruction and Development. There was the usual exchange of pleadings. The case was listed on July 26, 1994.

The relevant facts:

2. In Decision No. 115 the Tribunal decided to: (i) award the Applicant compensation equivalent to the salary he would have been paid during the 14 months of his special leave, less the ex-gratia payment he received upon the recommendation of the Appeals Committee; (ii) award costs in the amount of $5,000; and (iii) dismiss all other pleas.

3. By letter, dated January 5, 1993, to the Applicant's Counsel, the Ethics Officer (whose office is also in charge of the execution of Tribunal's decisions) stated that he enclosed a check in the amount of $49,866.67 which represented an amount equal to 14 months' net salary based on the Applicant's salary rate of $55,600 as of October 1, 1986, minus the $20,000 ex-gratia payment the Applicant had already received upon the recommendation of the Appeals Committee, plus $5,000 in costs. The Ethics Officer also stated that the Bank would pay the Applicant a tax allowance on the award of the Tribunal upon receipt from the Applicant of information concerning his tax status.

4. By letter, dated February 17, 1993, to the Ethics officer, the Applicant's counsel indicated that his client was entitled to a payment for the accrued annual leave in the amount of 7 weeks as well as to pensionable service and approximately 1.5 weeks termination grant in addition to the payment of 14 months' net salary, which the Tribunal had ordered that he be paid. In response, by letter, dated March 11, 1993, the Ethics Officer stated that Tribunal awards do not give rise to pension or other benefit accruals and that no additional payments were due to the Applicant beyond the tax allowance.

5. By letter, dated June 25, 1993, to the Ethics Officer, the Applicant's counsel indicated that, since the Tribunal's Decision No. 115 clearly stated that the Applicant was not on special leave during the 14 months he had worked, the only logical conclusion was that the period should be treated as regular service, and therefore, his client should be paid for the annual leave he had accrued. In response, by letter dated July 13, 1993, the Ethics Officer reiterated that the Bank did not treat Tribunal awards as giving rise to any additional benefits beyond a tax allowance, and that the time the Applicant had spent on special leave had been credited towards his separation grant payment as well as for length of service under the Pension Plan.

6. By letter, dated July 20, 1993, to the Ethics Officer, the Applicant's counsel stated that his client was entitled to 6-7 weeks of annual leave, which resulted in an amount in the area of 7 to 8 thousand dollars being due to him and that, if the Bank could not see its way clear to making the payment, then the only alternative would be to return to the Tribunal to get a clarification of its decision. In response, by letter, dated September 8, 1993, the Ethics Officer again reiterated that Tribunal awards do not give rise to any additional benefits beyond a tax

allowance, where applicable.

The Applicant's main contentions:

7. The Respondent failed to fully execute the Tribunal's Decision No. 115. Consequently, the Applicant decided to return to the Tribunal to obtain clarification and full execution of its decision.

8. It was the clear intent of the Tribunal's decision that the Applicant should receive all compensation due to him for the period October 1986 to December 1987. Annual leave is part of the Applicant's compensation. Therefore, the Respondent should compensate the Applicant for the annual leave he accrued during the period in question.

9. It is not disputed by the Applicant that Decision No. 115 is res judicata. Nor does the Applicant attempt to relitigate it, or ask that the case be reopened on the basis of previously unknown facts.

10. The Respondent must be made to bear the Applicant's costs in the amount of $1,350 in view of its extraordinarily obstinate and litigious conduct over a relatively small amount of money.

The Respondent's main contentions:

11. The Application is inadmissible because the Applicant failed to exhaust the internal remedies before filing his application with the Tribunal.

12. The term salary is clearly defined in the Staff Rules, and the Tribunal awarded the Applicant compensation of a sum equivalent solely to the salary that the Applicant would have earned.

13. The Applicant is in effect seeking revision of the Tribunal's decision by asking to be paid an amount equivalent to salary and benefits. However, Article XI of the Tribunal's Statute and the doctrine of res judicata prevent the Applicant from doing so.

14. The Respondent has complied with the Tribunal's decision fully and promptly. The Tribunal awarded the Applicant compensation equivalent to the salary he would have been paid during the 14 months of his special leave minus the ex-gratia payment he had received upon recommendation of the Appeals Committee. Nowhere did the Tribunal state that the Applicant was also to receive payment for benefits for the period in question.

15. The award of $1,350 for costs should be denied.

Considerations:

16. This case arises out of Decision No. 115 given by the Tribunal, in which the Tribunal held that the Bank should pay the Applicant compensation equivalent to the salary he would have been paid during 14 months of special leave, less the ex gratia payment he received upon the advice of the Appeals committee.

17. The Applicant contends that the payment which the Tribunal ordered was intended to cover "salary" in the sense both of payment of his nominal net salary and of an additional amount to cover a period of leave entitlement through which the Applicant had worked and which would, in normal circumstances (i.e. when a staff member was not on "special leave") have generated an additional pro rata payment. The Bank, on the other hand, contends that when the Tribunal used the word "salary" in its decision in the original proceedings it meant "salary" as that word is used in the Staff Rules and Regulations – a use which excludes payment made in lieu of leave. The latter are, in Bank parlance, called "benefits".

18. In considering the grounds which the Bank has invoked in its Answer to the Applicant, it is important to recall the reason why the Tribunal decided in the original proceedings to award the Applicant compensation equivalent to the salary he would have been paid during the 14 months of his special leave. This was because

the Tribunal found that, notwithstanding the Applicant's formal status as being on special leave during that period, it was "an uncontested fact that the Applicant .... was not required merely to perform certain specific tasks", which is the extent to which staff members on special leave normally work, but "rather he observed normal working hours and performed the usual duties of employment" (Decision No. 115 [1992], paragraph 41). The Tribunal also stated, in relation to the Applicant, that

> A staff member working in an office of the Bank, day after day, in regular hours for almost 14 months, must be presumed to be carrying out his regular activities with the tacit consent of his supervisors, so that the authorization of the Respondent with respect to that situation cannot be put in question. (Moses, Decision No. 115 [1992], paragraph 42)

The Tribunal further said:

> [T]he fact remains that the Applicant …. continued working in ITF as if he were a regular staff member and his work must have benefitted the Bank. (Moses, Decision No. 115 [1992], paragraph 43)

The Tribunal concluded:

> Consequently, the work he performed for the benefit of the Bank and with its authorization, between October 1986 and December 1987, cannot be treated as work performed under the regime of special leave and it must, therefore, be paid for by the Respondent. (Moses, Decision No. 115 [1992], paragraph 44)

This sentence was immediately followed by the formal Decision of the Tribunal, the relevant part of which has already been referred to in paragraph 2.

19. Against this background, the Tribunal turns to the preliminary issue raised by the Bank, namely, that the Applicant has failed to meet the requirements of Article II, paragraph 2(i) of the Statute of the Tribunal. This requires a staff member to exhaust the internal remedies of the Bank before filing an application with the Tribunal. The Bank's reasoning in this connection is that it has complied with the precise terms of the Decision of the Tribunal, namely, to pay the Applicant the equivalent of the salary he would have been paid during his 14 months of special leave, and that this view was conveyed to the Applicant's counsel in a letter from the Ethics officer dated March 11, 1993. The Applicant, so the Bank agrees, should have sought administrative review within a ninety day period. The Bank thus assimilates a difference of opinion between the Bank and the Applicant regarding the proper meaning of the Decision to a substantive complaint of a staff member regarding non-observance of the staff member's terms of employment.

20. The Tribunal does not find it possible to accept this assimilation. The way in which the Tribunal sees the matter is that there is a genuine difference of opinion between the Applicant and the Bank as to the correct interpretation or construction of the relevant sentence of the original Decision: does the word "salary" mean salary only, in the strict sense of the Bank's terminology, or does it also include salary payable in lieu of leave, which the Bank classifies as a "benefit"?

21. The Bank has contended that the Application says nothing about "clarification" or interpretation and, therefore, that the case is really one in which the Applicant is claiming "revision" of the Decision. True, the Application as such says nothing about interpretation or clarification. However, the letters sent to the Bank on behalf of the Applicant before the application was filed more than once use words which indicate that the difference between the two sides was as to the meaning of the words actually used by the Tribunal. The Applicant was not arguing that something had occurred which would lead the Tribunal to change its Decision. In one letter the Applicant's lawyer mentioned "the Tribunal's intent" and, having described the result of the Bank's argument, said "this was certainly not the intent". The final letter on behalf of the Applicant ended thus: "If the Bank cannot see its way clear to making this payment to settle the only outstanding issue in the Moses case, the only alternative would be to return to the Tribunal to get a clarification of its decision."

22. In the light of such correspondence, the Tribunal would be adopting an excessively formalistic view of the

situation if it were to conclude that the Applicant had not made it clear to the Bank that he was seeking an interpretation of the Decision rather than its revision. The Tribunal accordingly finds that the issue before it is one of interpretation of the original Decision.

23. The Tribunal must next consider whether a complaint by an Applicant of non-performance of a decision of the Tribunal turning on a question of interpretation is necessarily inadmissible if the Applicant has not first exhausted the internal remedies of the Bank in timely fashion. To this question the Bank gives an affirmative answer unless there has been an agreement that the matter may be submitted directly to the Tribunal or exceptional circumstances have been alleged or proved.

24. The Tribunal must reject this argument. It would, be absurd if, in the event of disagreement between the parties relating to the interpretation of a decision, an applicant were obliged to recommence the whole of the Bank's internal remedial process. The Tribunal has an inherent right, even, indeed, an obligation, to ensure that problems relating to the interpretation of a decision are swiftly resolved. Nothing could be gained by exposing such a matter to the internal processes of the Bank when it is the Tribunal, and the Tribunal alone, that has the power to give a final and binding interpretation of its decision.

25. The Bank has, however, referred to the case of Rae (No. 2), Decision No. 132 [1993], claiming that it supports the proposition that an applicant who has a complaint to make about non-performance of a decision must first exhaust the other remedies available within the Bank's system. But Rae was an entirely different case. There, the original decision which the Applicant sought to bring back to the Tribunal had not led to an award of money. The case related to a complaint regarding a decision of the Respondent concerning the Applicant's grading and the decision of the Tribunal was to remand the case for reconsideration. Some years later the Applicant invoked the Tribunal's decision as the basis for a further complaint. The issue was not one of interpretation but of the proper exercise of the Bank's discretion. The matter complained of, though having its origin in the Tribunal's first decision, was in fact a fresh grievance arising out of the Decision which, as the Tribunal said, had become a term of the affected staff member's employment. The complaint was held inadmissible in this respect because it was not filed in good time. The Tribunal is not faced by such a case here.

26. The Tribunal should add, moreover, that even if the Application were one for "revision" of the Decision (which it is not), there would be no need to exhaust the internal remedies of the Bank. Nothing in Article XIII of the Statute of the Tribunal (dealing with revision) can be read as imposing such an obligation. Indeed, the very reverse is true, for that Article expressly uses the words "request the Tribunal". These words can only be read as giving an Applicant a right of immediate recourse to the Tribunal.

27. The Tribunal comes then to the interpretation or clarification of its original Decision. The Bank has recalled that in its practice a clear distinction has been drawn between "salary" and "benefits" and, moreover, that in some of its earlier decisions the Tribunal expressed the quantum of damages to be paid by the Bank in terms of an amount equivalent to a certain number of months' salary. But in none of these cases was the function of the compensation specifically to pay the staff member for services actually rendered, as it was in this case. The object of the monetary payment in the other cases was to provide pecuniary compensation for a wrong done to the staff member. It was in relation to such cases that the Tribunal found it convenient, following the practice of a number of other administrative tribunals, to express the amount in terms of a stated number of months' salary. In following that practice in relation to the special facts of this case – which were repeatedly identified in the considerations leading to the original Decision – the Tribunal did not thereby intend to exclude the Applicant from the benefit of payment for leave accruing during the period of his de facto service.

28. It would, in truth, have been a form of discrimination against the Applicant if the Tribunal had directed that his remuneration for the period worked should be calculated on a basis different from that of other staff members. As the Tribunal understands the Bank's position, it is that the Applicant should not be paid for leave accruing as a result of his service, in contrast with other staff members who are so paid. Notwithstanding that the Applicant was de jure on special leave, he was de facto working like any other staff member. Accordingly, he should receive the salary and benefits attributable to his de facto position as a full time staff member of the

Bank staff during the period of his special leave.

Decision:

For these reasons the Tribunal unanimously decides that:

(i) the Bank should pay the Applicant a sum equivalent to the salary of the Applicant in respect of the seven weeks of annual leave that accrued to the Applicant between October 1986 and December 1987, which were worked by the Applicant but were not paid for; and

(ii) costs should be awarded to the Applicant in the amount of $1,350.

A. K. Abul-Magd

/S/ A. K. Abul-Magd
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, D.C., October 14, 1994