World Bank Administrative Tribunal

2009

No. 395

Eugene Nyambal (No. 2),
Applicant

v.

International Bank for Reconstruction
and Development and International Finance Corporation,
Respondents

World Bank Administrative Tribunal
Office of the Executive Secretary

Eugene Nyambal (No. 2),
Applicant

v.

International Bank for Reconstruction
and Development and International Finance Corporation,
Respondents

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 Francisco Orrego Vicuña, Sarah Christie, and Florentino P. Feliciano. The Application was received on 25 August 2008.

FACTUAL BACKGROUND

2. The Applicant was employed as a Long-Term Consultant from October 1995 until the termination of his appointment on 31 August 2000. Thereafter, he received three months of administrative leave with salary and benefits until 30 November 2000. In 2002, he challenged, *inter alia*, the decision of the Bank not to have selected him for an Open-Ended position. He also complained of career mismanagement, alleging in particular harassment as well as discrimination in promotion, salary and career advancement opportunities. The Tribunal upheld the Bank's objection to the admissibility of the Applicant's claims on career mismanagement and examined on the merits the question of his non-selection to an Open-Ended position, concluding that the decision had been taken for valid business reasons (*Nyambal*, Decision No. 276 [2002]).

3. During the time he was on administrative leave with the Bank, the Applicant found a position with the International Monetary Fund ("IMF") as Advisor to the Executive Director which he occupied until December 2003. Thereafter, the International Finance

Corporation ("IFC") hired the Applicant in February 2004 as a Senior Strategy Officer in the Latin America and Caribbean Department on a Short-Term contract. In April 2004 his appointment was converted to a two-year Term appointment. Because he had renewed his participation in the Staff Retirement Plan ("SRP"), the Pension Administration Department sent the Applicant on 9 June 2004 a first restoration notice allowing him to refund a withdrawal benefit he had received from the SRP for his service at the Bank from 1998 to 2000 (pursuant to the 1998 Human Resources Policy Reform) upon termination of his prior employment with the Bank in 2000.

4. In the present Application, the Applicant first complains that on 31 January 2007 his employment was improperly terminated for the second time for alleged business reasons in spite of his strong performance and experience, after he had been induced to sign a Memorandum of Understanding ("MOU") in unfair circumstances. The MOU contained a waiver of his rights of recourse to the Bank's dispute-settlement bodies, including this Tribunal. The Applicant now challenges the validity of this MOU.

5. On 1 July 2007 the Applicant rejoined the IMF and requested from the Bank's Pension Benefits Administration Committee ("PBAC") the restoration of his pension and its transfer to the IMF pension fund. The Applicant asserts that the IMF accepted the transfer of his pension. On 27 March 2008, however, PBAC denied the Applicant's pension restoration request. This decision is also the subject of appeal in the present Application.

6. It follows from the above that the Respondents in this case are both IFC (in respect of the MOU and related issues) and the Bank (in respect of PBAC's decision on denial of pension restoration). The Respondents have raised a preliminary objection only with

respect to the Applicant's claim regarding his separation from IFC and the validity of the MOU. This decision deals with that preliminary objection.

THE PENSION CLAIM

7. PBAC sent a restoration notice to the Applicant on 9 June 2004, informing him that, in accordance with the SRP, the restoration option and refund of pension benefits "must be exercised within five years from the date of this e-mail or your subsequent termination date, whichever is earlier." The Applicant thus had until 8 June 2009 or the date of termination of his employment, whichever was earlier, to exercise this option and refund the benefits he had obtained during his earlier employment with the Bank.

8. The termination of the Applicant's employment in January 2007 was the earlier event. At that time, the Applicant had not exercised the restoration option. On this basis, PBAC on 27 March 2008 denied the Applicant's request for pension restoration pointing out, in addition, that because his last months with IFC had been under short-term incremental appointments, this "should have been an indicator of the limiting time for you to restore your previous service."

9. The Applicant explains that he was prepared to refund the withdrawal benefit, but because he was not expecting termination, because his last two months of service had been without salary, and because he was subsequently unemployed, he had expended the funds put aside for restoration on his mortgage and family needs. In view of this hardship and unfair treatment, the Applicant explains that he was convinced that he had until June 2009 to refund the withdrawal benefit.

10. The Bank has not objected to the admissibility of the challenge to the PBAC decision.

THE PARTIES' CONTENTIONS REGARDING THE WAIVER OF CLAIMS

11. The Respondents, on the other hand, have objected to the admissibility of the claim relating to the Applicant's separation from IFC. They argue that he signed the MOU and the waiver it contains, as a consequence of which he benefited from the agreement by remaining a staff member of IFC through 31 January 2007, using this period to pursue a job search.

12. The Applicant as noted complains about the termination of his employment with IFC on 31 January 2007. His employment contract had already been extended twice since its scheduled expiry in April 2006 and had been due to end on 30 September 2006. He was then offered a two-month extension with pay and a further two-month extension without pay, as recorded in the MOU signed on 29 September 2006, by which the Applicant also agreed to "fully and finally settle and release all claims he might otherwise have against the Bank Group arising out of the circumstances relating to the termination of his employment contract." Pursuant to this agreement, the Applicant furthermore waived recourse to the dispute resolution bodies of the Bank, including this Tribunal, with respect to matters covered by the MOU.

13. The Applicant believes that the explanation given for the termination of his employment, i.e. "business reasons," was a misrepresentation because other colleagues were promoted to the position he held. The Applicant also asserts that he would not have signed the MOU if he had realized at the time that no business reasons were in fact involved. Furthermore, he asserts that his 2005 Performance Evaluation Plan ("PEP") was contradictory, because while it stated that his contract would not be extended, it contained his manager's recommendation to have his appointment confirmed because of his good performance. In addition, his 2006 PEP stated that opportunities for the Applicant had become fewer, thus impairing his ability to find a new position in the Bank Group;

however at this time IFC was expanding significantly. The Applicant therefore argues that IFC did not act with fairness and impartiality as required by the Principles of Staff Employment.

14. The Applicant contends that a release or settlement of claims should not be given effect if concluded under duress. He argues that such was the case here, as he was facing the expiry of his visa and a number of family problems that would flow from termination. Duress, it is argued, was compounded by the secret promotion of some of his colleagues. The Applicant specifically requests that the MOU be nullified on the basis of the circumstances of its signing.

15. In the Respondents' view, the promotion of other staff members to unspecified functions invoked by the Applicant as a reason for nullifying the MOU does not undermine the existence of a business rationale and is in any event irrelevant to the validity of the MOU.

16. The Respondents also assert that there was no duress or coercion in connection with the signature of the MOU, which was facilitated by the Office of Mediation. The Respondents argue that since no specific instance of coercion or intimidating behavior on the part of management have been alleged, this ground could not provide an exceptional circumstance in terms of the implementation of requirements for the admissibility of the Application. The fact that the Applicant was unsuccessful in his job search within the Bank Group similarly cannot justify any exception, particularly in view of the fact that he was on notice of the non-extension of his contract months before that search began. With respect to the Applicant's allegation that racial discrimination was involved in his case, the Respondents assert that, apart from this allegation being unsubstantiated, it has no bearing on justifying the existence of exceptional circumstances.

17. The Respondents accordingly request that the Tribunal enforce the waiver of claims and dismiss the Applicant's claim concerning his separation from IFC.

THE PARTIES' CONTENTIONS REGARDING THE NON-EXHAUSTION OF INTERNAL REMEDIES

18. The Respondents also object that the Applicant failed to exhaust internal Bank Group remedies in respect of his grievances in a timely manner prior to the filing of his Application, and has shown no exceptional circumstances.

19. The Applicant has invoked various reasons as an excuse for his failure to exhaust internal remedies in a timely manner. In addition to those discussed above in the context of the Applicant's arguments challenging the validity of the MOU, he relies on the argument that no time limits can be required in circumstances where the Respondents have concealed or misrepresented information which is both harmful and discriminatory to the staff member. The Applicant observes that the MOU included a clause to the effect that both a job search and a continued dialogue on policies and processes could be pursued with the Bank Group and that no time limit was set in this respect. He also asserts that the contradiction in his 2005 PEP, entailing both confirmation and termination at the same time, created a confusing process that prevented him from resorting to a formal grievance procedure.

20. In the Respondents' view, none of these arguments justify or excuse an 18-month delay to assert the Applicant's employment claims, nor the bypassing of the Appeals Committee process. The insertion of a general clause in the MOU relating to the continuance of a dialogue with the Respondents does not override the explicit waiver of claims he accepted and does not provide any exceptional circumstances excusing the failure to exhaust internal remedies in a timely manner. The Respondents' arguments

regarding the validity of the MOU and the allegation of exceptional circumstances in that context have been examined above.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

21. This is not the first time a grievance about release agreements and waiver of claims is brought to the Tribunal. The Tribunal has consistently enforced such agreements and waivers. If the Bank Group could not negotiate, in exchange for concessions on its part, the promise that claims will not be pursued further, there would be no incentive to compromise, and instead unyielding attitudes would prevail, to the detriment of the interests of the staff members involved (*Mr. Y*, Decision No. 25 [1985], para. 26).

22. The Tribunal has also remarked, after reiterating the importance of compromise in the context of agreed settlements, that "no release or settlement of claims should be given effect if concluded under duress" (*Mr. Y*, Decision No. 25 [1985], para. 32; *T*, Decision No. 376 [2007], para. 44). The essence of any such agreement is that the parties negotiate and conclude them as an expression of their own free will; they are not imposed on the staff member under duress, and any such circumstance would have to be specifically proven. A change of mind after reconsideration does not evidence duress. Similarly, the considerations of a general nature invoked by the Applicant, such as visa difficulties, schools and mortgages, are not enough to establish duress that could invalidate such agreements.

23. The Tribunal has had the occasion to decide many cases in which duress has been invoked as a reason for the invalidity of release agreements. It has held in this respect that in consenting to the proposed agreement the staff member "must have been under certain pressures leading him to opt for what appeared to him to be the more advantageous alternative. This kind of pressure is inherent in the process and cannot be treated as by

itself constituting duress." (*Kehyaian (No. 2)*, Decision No. 130 [1993], para 26. *See also Kirk*, Decision No. 29 [1986], para. 35). The Tribunal has consistently refused to invalidate release agreements on the basis of dissatisfaction on the part of the staff member which may have been acute, but does not amount to duress either in a legal or a moral sense.

24. The Applicant's consent to the release agreement in question is not different. The Tribunal notes that the agreement was negotiated with the intervention of the Office of Mediation. This suggests that the interests of the staff member were taken into account, and that the agreement does not reflect only the interests of IFC. Without this agreement, the Applicant's appointment would inevitably have been terminated four months earlier on terms less favorable to him. In other words, the process worked to his advantage.

25. Nor is this a case like *Harrison*, where the settlement was effectuated not by a personalized negotiation but by an "inflexible and general rule covering potentially all staff members" (*Harrison*, Decision No. 53 [1987], para. 27), a factor that led the Tribunal to conclude in that case that the relevant paragraph of the Staff Rule was invalid.

26. The Tribunal can find no exceptional circumstances that might justify impugning the validity of the release and waiver agreement on grounds of duress. The Applicant's argument as to the alleged misrepresentation of the business reasons invoked by IFC for the termination of his employment and the related promotion of some other staff members is similarly unpersuasive. While they demonstrate the dissatisfaction of the Applicant with the termination of his employment, the required connection between the promotions and requested annulment of the agreement has not been established. Accordingly, the Tribunal finds that the Respondents' preliminary objection to the admissibility of the Applicant's claim is upheld.

27. The Tribunal turns now to the examination of the question of failure to exhaust internal remedies in a timely manner. It seems unnecessary to reiterate the importance the Tribunal has constantly attached to the timely exhaustion of internal remedies as noted in a host of cases (*Klaus Berg*, Decision No. 51 [1987], para. 30; *Prescott*, Decision No. 253 [2001], para. 18), including specifically cases involving the challenge of release agreements (*Vick*, Decision No. 295 [2003], para 25; *Malik*, Decision No. 333 [2005], para. 21).

28. It is appropriate, however, to recall that in *Nyambal*, the Tribunal dismissed the Applicant's arguments about the failure to observe the timeliness of the exhaustion of internal remedies, holding that the "delay in bringing the Applicant's complaints to the Appeals Committee was the result of the Applicant's conscious choice…due to the Applicant's casual treatment of the relevant legal requirements, and is not excused by exceptional circumstances under Article II of the Statute" (*Nyambal*, Decision No. 276 [2002], para. 40). Particularly aggravating is the fact that, yet again, the Applicant has treated the relevant legal requirements casually, and has ignored the clear import of the Tribunal's decision in his first case.

29. It is also to be noted that the Tribunal has found that in cases like the present one which entail parallel complaints on appointment issues that concern the Bank and pension matters that concern PBAC, the time-limits applicable to the former kind of claim cannot be circumvented by including them in a claim of the latter kind (*Mitra*, Decision No. 230 [2000], para. 13; *Mandeep Singh*, Decision No. 240 [2001], para. 22). The nature of the claims is different, as is the procedure to be followed as well as the jurisdiction bestowed upon the Tribunal. The fact that the pension claim is admissible accordingly has no bearing on the timeliness of the appointment claim.

30. The jurisprudence of the Tribunal is well-established regarding the treatment of exceptional circumstances. In all such cases the Tribunal has followed a strict approach so as to prevent the undermining of statutory limitations. Exceptional circumstances cannot be based on allegations of a general kind but require reliable and pertinent "contemporaneous proof" (*Mahmoudi (No. 3)*, Decision No. 236 [2000], para 27), which is lacking in this case. Alleged unawareness of the grievance mechanisms or ignorance of the law do not constitute such exceptional circumstances (*Dey*, Decision No. 279 [2002], paras. 16 and 17; *Means*, Decision No. 298 [2003], para 12).

31. As for the allegation of discrimination invoked by the Applicant in the present case as an exceptional circumstance, a claim of discrimination is also subject to the requirement of timely exhaustion of internal remedies (*Carter*, Decision No. 175 [1997], para. 26).

32. Because the Applicant has not complied with any of the rules requiring the timely exhaustion of internal remedies, and because there are no excuses that the Tribunal finds persuasive, the Respondents' preliminary objection to the admissibility of the Applicant's claim is also upheld on this ground.

DECISION

For the reasons given above, the Tribunal decides as follows:

(i) the Applicant's claim against PBAC regarding restoration of his pension benefits is admissible;

(ii) the Applicant's claims regarding the termination of his employment and related issues are inadmissible, and these are accordingly dismissed in their entirety;

(iii) legal costs are reserved in respect of the pension claim and are denied in respect of the termination of employment claim; and

(iv) the dates for the filing of pleadings on the merits will be determined by the President of the Tribunal and communicated to the parties.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 25 March 2009