

Decision No. 235

Marie Oben,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of Robert A. Gorman, President, Francisco Orrego Vicuña and Thio Su Mien, Vice Presidents, and A. Kamal Abul-Magd, Bola A. Ajibola, Elizabeth Evatt and Jan Paulsson, Judges, has been seized of an application, received on February 28, 2000, by Marie Oben against the International Bank for Reconstruction and Development. The Respondent filed a request on March 21, 2000 to separate jurisdictional issues from the merits and to file an answer limited to the jurisdictional issues. This request was granted and the usual exchange of pleadings thereafter took place on the issue of jurisdiction. In addition, a filing by the World Bank Group Staff Association of an Amicus Curiae Brief was accepted by the Tribunal and both parties were given an opportunity to comment on this Brief. The case was listed on July 20, 2000.

2. This case concerns a claim by the Applicant about the unfair denial of participation in the Staff Retirement Plan (SRP) and related benefits for the whole period of her service with the Bank as a Long-Term Temporary and as a Long-Term Consultant. This claim also raises questions of misclassification.

Relevant facts

3. The Applicant commenced employment with the Bank on June 27, 1983, as a Temporary in the Information Resource Management Department. Her appointment was classified as non-regular, and under the Staff Rules as in effect at that time she was not eligible to participate in the SRP or to qualify for retiree medical benefits. She was not entitled to make contributions to the SRP and her period of service in this category did not count towards pension benefits. She was, however, entitled to participate in the Medical Insurance Plan and to accrue annual and sick leave. The Applicant's appointment was regularly renewed over the period of her employment and she received positive assessments. In 1993, the Applicant received a Long-Term Consultant appointment, also a Non-Regular Staff (NRS) position.

4. In 1998, significant reforms to the Bank's Human Resources Policy were enacted. These reforms included changes to the SRP, and in particular the right of NRS to participate in the pension scheme as from April 15, 1998 and to qualify for retiree medical coverage. During the consideration of these reforms, the Staff Association had requested that pension credit be granted to NRS for their past service prior to the introduction of the reforms. This request, however, was denied as the Executive Directors expressly decided that no credit would be granted for past service of NRS prior to April 15, 1998. The Applicant commenced participation in the SRP on that date.

5. As part of the same series of reforms to the Bank's Human Resources Policy, a process was begun of phasing out NRS appointments by selecting qualified staff for conversion to Term or Open-Ended positions. The Applicant received an Open-Ended appointment as an Information Analyst, effective August 1, 1999 and thus became regularized.

6. On October 28, 1999, the Applicant sent an e-mail message based on a form prepared by the Staff Association to the Vice President of Human Resources and the Pension Benefits Administrator. Similar messages were sent by other staff members.

7. In her message, the Applicant referred to her recent conversion from an NRS position to an Open-Ended appointment, and to the fact that she had “recently been informed that I would not accrue pension benefits, retiree medical benefits or other benefits attributable to my past service as an NRS.” The message also stated that the Applicant was considering requesting such benefits for her time of service as NRS, but that she wanted to await the decisions of the Tribunal in the Caryk (Decision No. 214 [1999]) and Madhusudan (Decision No. 215 [1999]) cases, and sought to this effect an extension of time in which to file a request for administrative review or PBAC review of the denial of benefits for her past service as NRS. In the alternative, she requested that her communication be regarded as a request for administrative review and PBAC review of the denial of those benefits.

8. On November 29, 1999, the Applicant and other staff who had made a similar claim received a response to their e-mail from the Vice President of Human Resources, indicating that it was too late to challenge their terms and conditions of employment that existed prior to April 15, 1998 or the decision that NRS would be ineligible to receive pension credit for their period of service before that date. This reply stated that staff members holding NRS appointments before April 15, 1998 were informed at the time of their initial employment that the terms of their appointment did not include pension plan participation or eligibility for retiree medical benefits. The changes made on April 15, 1998 were not retroactive and this decision had been communicated to staff. The requests of the Applicant and the other staff members were accordingly denied.

9. The reply mentioned above also stated that the Applicant might attempt to file an application directly with the Administrative Tribunal, but that the Bank would assert that such application should be considered untimely and inadmissible on jurisdictional grounds. It would not, however, raise jurisdictional objections on account of the failure after the date of the Respondent’s November 29, 1999 letter to exhaust administrative remedies “either internal to the Bank Group or with the PBAC.”

10. On February 28, 2000, the Applicant filed her Application before the Tribunal, requesting credit, for the purposes of the SRP, for the entire time of her past NRS service, and requesting that this service also be counted towards retiree medical benefits. Alternatively, she claims the monetary equivalent of such benefits.

11. The decision contested is the alleged improper denial of participation and credit in the SRP and in determining the retiree medical eligibility for the whole of the Applicant’s past service. The date of the decision contested is stated by the Applicant to be that of the conversion to an Open-Ended appointment, that is August 1, 1999. The date of denial of relief is that of the response to her e-mail request, that is November 29, 1999.

Objections to jurisdiction

12. The Respondent has objected to the Tribunal’s jurisdiction in this case on the ground that the Applicant has failed to contest the circumstances of her appointment as NRS in a timely manner, as is required by Article II, paragraph 2, of the Tribunal’s Statute.

13. The Respondent submits that the Applicant must have been aware for a considerable time that she would not receive credit for the whole of her period of employment as NRS. Nevertheless, she took no action until October 1999. The failure of the Applicant to pursue her claim regarding the circumstances of her appointment as NRS in a timely manner makes it now, in the Bank’s view, inadmissible.

14. The Applicant relies on the Tribunal’s reasoning in Caryk and Madhusudan to support her claim that she initiated administrative review at the appropriate time, that is within 90 days from the date on which her Consultant appointment was converted to Open-Ended; this conversion, she argues, was an acknowledgement by the Bank that it had misclassified her. She also asserts that there is no time limit for requesting review by the Pension Benefits Administration Committee (PBAC) and that staff are, therefore, entitled to request review of their pension entitlement or benefits at any time.

15. The Staff Association has submitted an Amicus Curiae Brief in support of the Applicant. This Brief submits

that the starting point for initiating administrative review must be an individual and not a policy decision. Therefore, it also argues that it was not until the Applicant received an individual decision of conversion to an Open-Ended appointment that the limitation period for administrative review began to run. The decision relating to the conversion of the Applicant was the proper starting point for her individual complaint and such decision was timely contested.

16. The Staff Association also argues, relying on the Asian Development Bank Administrative Tribunal (ADBAT)'s judgment in Amora, that the "appropriate appeal period applicable to claims of entitlement to pension credits for misclassified past service does not expire until 90 days after staff members depart the Bank." (For the ADBAT's discussion of this issue, see Amora, ADBAT Decision No. 24 [1997], paras. 47 and 48.)

17. The Respondent has answered the Staff Association's submission, arguing that the Applicant should have taken steps while she was holding NRS appointments before April 15, 1998, to request the prospective conversion of her non-regular appointment type, as was possible in accordance with stated criteria under Staff Rule 4.01 during that period. She might then have been in the position to appeal any resulting denial of the requests. Having failed to do so, she cannot now for the first time contest her earlier NRS appointments.

18. The Respondent further submits that the conversion of NRS appointments to Term or Open-Ended appointments in 1999 does not establish any presumption that the Applicant had earlier been improperly classified. The conversion decisions, the argument follows, were not relevant to that issue. In the Bank's view, the Applicant must have been aware much earlier of the public discussion concerning the Bank's policy on NRS appointments, which had continued for several years, and is therefore precluded from an untimely claim about misclassification or the benefits attached to each type of appointment.

Considerations

19. Pursuant to Article II, paragraph 1, of its Statute, the Tribunal is empowered to pass judgment "upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member." As the Tribunal held in Briscoe (Decision No. 118 [1992], para. 30), "a claim of non-observance of a staff member's contract or terms of appointment must be directed not against the organization's promulgation of some general rule or policy but rather against an application of that rule or policy – be it reflected in an action or an omission – that directly affects the employment rights of a staff member in an adverse manner." (See also Agodo, Decision No. 41 [1987], paras. 27 and 29.)

20. In the present case, the Applicant specifies as the decision contested in her Application "the improper denial of participation and service credit for all of [her] long term temporary and long term consultant service from June of 1983 until August 1, 1999 in both the World Bank Staff Retirement Plan ... and in determining her retiree medical eligibility." She states that the date of the decision contested is August 1, 1999, that is, the effective date of the conversion of her appointment to Open-Ended. It was by way of the decision taken on this date, so alleges the Applicant, that the Bank acknowledged that it had misclassified her throughout her career as NRS.

21. The Tribunal observes that the decision to convert the Applicant's appointment to Open-Ended can in no way be considered adverse. It is not a decision that "directly affects the employment rights of a staff member in an adverse manner." (Briscoe, Decision No. 118 [1992], para. 30.) On the contrary, the decision clearly benefited the Applicant. Further, such decision did not involve any denial of accrual of past service or related benefits. It had no effect whatsoever on her pension service.

22. This, however, does not end the matter as the Tribunal has held that "it is its duty, as it is the duty of every international tribunal, 'to isolate the real issue in the case and to identify the object of the claim...; this is one of the attributes of its judicial functions' (*Nuclear Tests (Australia v. France)*, *Judgment of 20 December 1974*, *I.C.J. Reports 1974*, p. 262)." (McNeill, Decision No. 157 [1997], para. 26.) The Applicant's claim that she was

denied pension benefits for her past service as NRS brings into issue the question whether she was misclassified as NRS.

23. In regard to that issue, the difficulty is that there is no adverse decision regarding the classification of the Applicant's appointment to which the Applicant can point. If the Applicant had raised a claim regarding her classification while she was NRS, a decision would have been made by Bank management, which decision the Applicant could have then challenged through administrative review and the Appeals Committee processes, subject to the time limits provided thereunder. However, the absence of any particular adverse decision regarding her classification is not necessarily fatal to the Applicant's claim. As mentioned above, she relies on the Tribunal's reasoning in Caryk (Decision No. 214 [1999]) and Madhusudan (Decision No. 215 [1999]) in support of her submission that her appointment "ultimately matured into an impermissible retention of the Applicant in an inappropriate classification." She further argues that she meets jurisdictional requirements because it was only when the Bank converted her position to that of regular staff that she became aware that there could be an issue concerning the propriety of her classification at an earlier time. This, she submits, was the first point at which she could reasonably have been aware of her potential claim.

24. The Bank has argued that the conversion of the Applicant's NRS appointment to Open-Ended in 1999 does not establish any presumption that the Applicant had earlier been improperly classified. The conversion decision, the argument follows, was not relevant to that issue.

25. The Tribunal accepts that there is no such presumption. The burden would remain on the Applicant to establish her claim of misclassification on the merits, if the Tribunal finds that her claim meets jurisdictional requirements.

26. The Respondent also argues that the Applicant was aware of her situation from the very beginning and ought to have challenged her classification long before October 28, 1999 (the date of her e-mail) if she regarded it as inappropriate or discriminatory.

27. The Tribunal considers, however, that there is merit in the Applicant's submission that the situation in this case is similar to that described in Caryk and Madhusudan. It was not reasonable to expect the Applicant to challenge the situation as of April 15, 1998 since the decision to extend the benefits of the Staff Retirement Plan to NRS had no consequences at all for her classification. In fact, many NRS benefited from the general policy decision and consequently it is difficult to conclude that any individual staff member could have mounted a successful claim in respect of the non-retrospectivity of their inclusion in the SRP.

28. In the light of the above, the Tribunal concludes that the Applicant's claim of October 28, 1999 was not untimely because it was made within 90 days of the date of her conversion of August 1, 1999. While the conversion was not in itself an adverse decision, it was an event which should have brought to her attention the possibility that there could have been an earlier misclassification.

29. Having reached this conclusion, the question that arises is whether the Bank had an obligation to convert the Applicant's appointment earlier than it did on the basis of an alleged misclassification. As noted earlier, this is a question that goes to the merits of the case and thus can be addressed only through the conventional exchange of pleadings. The Tribunal's findings and conclusions here do not give rise to a presumption that there was a misclassification. Accordingly, the parties should direct their further submissions to the issue of misclassification.

30. In regard to the Applicant's assertion that there is no time limit for requesting review of pension or other entitlements by the PBAC, the Tribunal reiterates its finding that there are time limits both under the normal grievance process and in relation to claims in respect of pension entitlements under the SRP. (See Mitra, Decision No. 230 [2000], paras. 12-14.) The Tribunal has concluded that misclassification claims, such as those raised here, are properly to be challenged through the normal grievance procedure.

Decision

For the above reasons, the Tribunal unanimously decides that:

- (i) the Bank's request to declare the application inadmissible for lack of jurisdiction is denied; and
- (ii) the Applicant is awarded costs in connection with this jurisdictional phase of the proceeding in the amount of \$2,509.73.

Robert A. Gorman
President

Nassib G. Ziadé
Executive Secretary

At Washington, D.C., November 10, 2000