

Decision No. 359

**Shyamalendu Pal,
Applicant**

v.

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

1. The present 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, Robert A. Gorman and Sarah Christie, Judges. The application in this case was received on 28 July 2006.

2. The Applicant claims that the Bank acted arbitrarily and unfairly when it denied him past pension credit for his service prior to 1 January 1983. The Bank objects that the Tribunal lacks jurisdiction over the Applicant's claims. This judgment disposes of that objection.

Relevant Facts

3. The Applicant began working for the Bank in 1974. After several consultancy assignments, the Applicant became a Regular staff member in March 1988 and thereupon commenced his participation in the Staff Retirement Plan (SRP). He retired pursuant to a Mutually Agreed Separation in December 2004.

4. Before March 1988, the Applicant was not eligible to participate in the SRP under the then-existing Staff Rules because he was not a Regular staff member, and so his prior service did not count towards pension benefits.

5. In the aftermath of *Prescott* (Decision No. 253 [2001]), the Bank decided to grant past pension credit to Non-Regular Staff (NRS) meeting certain criteria. This policy change was approved by the Executive Directors on 17 September 2002. The resulting changes to the SRP were likewise approved by the Board on 12 December 2002, and became Schedule F of the SRP. Under the new policy, the two relevant conditions for eligibility for NRS past pension credit are as follows:

(i) eligible staff must have 731 calendar days or more of continuous NRS service (defined as Long Term Consultant, Long Term Temporary, Local Long Term Consultant, or Local Long Term Temporary appointments) prior to 15 April 1998; and

(ii) any breaks in service (meaning either no employment by the Bank or Short Term Consultant or Short Term Temporary appointment) of 121 or more days will disqualify prior NRS past pension credit accrual.

6. Human Resources (HR) reviewed the career records of the Applicant in the fall of 2002 to determine his eligibility for past pension credit. After the review, HR concluded that only the Applicant's NRS service from 1 January 1983 until 1 March 1988 would be considered for past pension credit. HR determined that the Applicant's service prior to 1983 would not qualify for past pension credit because the Applicant had had a break in his NRS employment of more than 120 days immediately prior to 1 January 1983. More specifically, HR concluded that there had been a break in the Applicant's service as a Long Term Consultant from August to December 1982, during which the Applicant had worked as a Short Term Consultant.

7. HR informed the Applicant about its decision with respect to his past pension credit in September 2002. On 23 September 2002, the Applicant sent an e-mail to HR disagreeing with its determination. The Applicant stated:

I believe the records do not reflect all my services with the Bank. I can definitely prove that the consultant

appointment, which was apparently terminated on 7/31/82 according to the records, was actually extended at least until 8/8/82. It was extended until the end of 82, but I do not have the copy of that extension any more

My services between June 19, 1978 and Jan 1, 1980 are also not recognized. ... Once again, I have proof that I was working with the Bank, but I do not have copies of all the contracts. I did not visualize that something that happened 20 years ago would be so critical, especially since it was not my mistake.

8. On 25 November 2002, Ms. Anne Finigan, from HR, wrote to the Applicant as follows:

After a careful review and comparison of your paper file and our database, I am afraid we cannot substantiate a period of long-term consultant employment for the break in service from July 31, 1982 to January 1, 1983 currently showing in the HR database. Neither the paper records we have for you nor your Payroll records show a long-term consultant contract for that period. As this break is longer than 120 days, it disqualifies any NRS work history prior to it. At best it looks like a short-term consultant period, but even for that we do not have a contract, just the request for a contract.

Without contractual evidence to the contrary, I cannot change your records. If you have any documentation for that specific period which would show an extension of the long-term consultant contract in effect prior to July 31, 1982, I urge you to contact me immediately. Otherwise, your past pension credit will remain as it stands today.

9. In January 2003, the Applicant and Ms. Finigan again exchanged e-mails on the subject of whether the Applicant had been a Long Term or Short Term Consultant from 31 July 1982 to 1 January 1983. In particular, on 23 January 2003, Ms. Finigan reiterated that:

Since the only references to your appointment type for the period between August 8, 1982 and December 31, 1982 are that of a Short Term Consultant (request for daily rate contract on file) and the fact that during that period you were not paid by payroll, I cannot request for a change to the database to extend your Long Term Consultant appointment to the end of 1982.

10. It appears that the Applicant ceased pursuing the matter after January 2003. In November 2004, however, while cleaning out his office in preparation for retirement in December 2004, he found payroll statements for July and August 1982, and original time sheets for September through December 1982. The Applicant believed that these documents constituted evidence that he was a Long Term Consultant during the period in question. The Applicant brought these documents to the attention of HR.

11. Mr. William Silverman, an HR Program Manager, responded by e-mail on 8 December 2004, stating:

We have reviewed your request that we reconsider the November 25, 2002 decision regarding the amount of your past pension credit, including the documents that you have submitted. We found that these documents on their face would not establish that your break in service in late 1982 was shorter than 121 days. We therefore decided not to reopen your case. I regret that we cannot provide you a more favorable response.

12. On 20 December 2004, the Applicant sent another e-mail to Mr. Silverman advising him that he was still waiting for a decision regarding his past pension credit. In an e-mail dated 28 December 2004, Mr. Silverman replied:

As promised we did meet one last time with Legal to review your file. I regret to inform you that we once again concluded that there was not sufficient justification to reconsider our original decision of November 25, 2002.

13. On 24 March 2005, the Applicant filed a Statement of Appeal with the Appeals Committee challenging the alleged Bank decision to exclude a certain period of his NRS service from eligibility for past pension credit. The Bank filed its Challenge to Jurisdiction on 8 April 2005. On 5 July 2005, the Appeals Committee concluded that it had jurisdiction to hear the Applicant's claim. According to the Appeals Committee, "if the Bank reviews a matter previously decided, accepts and considers new evidence in that process, and reaches a conclusion based on its review of the new evidence, it has in fact made a new administrative decision, which is

appealable.” The Committee concluded that although the Bank reached in December 2004 the same conclusion it had reached in November 2002, it accepted and considered new evidence in the process. Accordingly, Mr. Silverman’s 28 December 2004 e-mail constituted a new and appealable administrative decision.

14. After a full hearing and consideration of the new documents, the Appeals Committee on 1 March 2006 issued its report concluding that the Bank had not abused its discretion in reviewing the Applicant’s employment record and determining that the Applicant was ineligible for past pension credit prior to 1983. The Committee recommended that all of the Applicant’s requests be denied, and this recommendation was accepted by the Vice President, Human Resources, on 7 March 2006.

15. The Applicant filed his application with the Tribunal on 28 July 2006, claiming mainly that the Bank had acted arbitrarily and unfairly when it denied him past pension credit for his service prior to 1 January 1983. The Applicant demands appropriate compensation.

The Bank’s Jurisdictional Objections

16. According to the Bank, the application should be dismissed on jurisdictional grounds for the following reasons.

17. First, the Applicant did not exhaust internal remedies in a timely fashion as required under Article II of the Tribunal Statute. The Applicant failed to file his appeal with the Appeals Committee within 90 days of the Bank’s administrative decision of 25 November 2002. Starting from this date, the Applicant had 90 days under Staff Rule 9.03 to appeal, but instead waited more than two years, until March 2005. While the Applicant expressed unhappiness with the 25 November 2002 decision in January 2003 by contacting HR, he did not pursue the matter further by filing an appeal. The Applicant has offered no explanation as to why he did not initiate the grievance process, such as by resorting to the Tribunal like other staff members who in 2003 timely challenged before the Tribunal HR’s decisions regarding their past pension credit eligibility.

18. Second, once the Applicant’s appeal rights expired, they were not revived merely because he produced a stack of time sheets in November 2004. The time sheets, as well as the related pay stubs, failed to address the pivotal issue in this case, namely the nature of his appointment from August to December 1982. Assuming the authenticity of the time sheets, they would only establish that the Applicant worked in some capacity for the Bank during this period. This point has never been in dispute because the Bank had concluded that during the period in question the Applicant was a Short Term Consultant who was paid a daily rate. The Bank reasonably concluded on this basis that the additional documents did not adduce any new material facts, and therefore did not justify reopening the case.

19. Third, it is unreasonable for the Applicant to interpret Ms. Finigan’s e-mail of 25 November 2002, which invited him to contact her “immediately” if he wished to submit additional documentation, as an open-ended waiver of the 90-day time limit on appeals that allowed him to wait two years before submitting such documentation. Additionally, the fact that HR thereafter examined the Applicant’s November 2004 submission as well as his career file does not in itself constitute a “reconsideration” of his case. HR reviewed the career histories of over 1,300 staff in the fall of 2002, and neither Ms. Finigan nor Mr. Silverman could responsibly examine the Applicant’s submission of additional documents two years later without refreshing their memories and examining the Applicant’s case file to see what was at issue. To accept the Applicant’s view that the Bank’s examination of his November 2004 submission was a “reconsideration” merely because HR reviewed his case file and sought legal advice would either allow claimants to circumvent the time limitations of the grievance review process by submitting immaterial or irrelevant documents after deadlines, or force the Bank to ignore those submissions without comment. The latter result would deter responsible administration, and would be unfair to those claimants who discover new material facts that were not considered by the original decision-maker. As the Tribunal pointed out in *Tucker*, Decision No. 238 [2001], para. 27, such a result could cause the Bank “to treat reconsideration requests with less than an open mind.”

20. Finally, in *Mahmoudi (No.4)*, Decision No. 259 [2001], and *Agerschou*, Decision No. 114 [1992], the Tribunal stated that it would make “a mockery” of the 90-day time limit if the time period for submitting an appeal were to begin anew every time an applicant asked the Bank to reconsider an earlier decision. The Applicant in the present case cannot cure his failure of timely exhaustion of internal remedies by invoking *Tucker*, Decision No. 238 [2001], and *Sharpston*, Decision No. 251 [2001]. The Applicant’s reliance on these cases is misplaced for three reasons: (i) in both cases, the Tribunal dismissed the application on jurisdictional grounds; (ii) in *Tucker*, while the Tribunal entertained the possibility that the carefully considered decision of the Pension Benefits Administration Committee (PBAC) denying a request for reconsideration of an application for a disability pension could itself be viewed as an appealable decision, it noted that such a ruling might encourage peremptory rejections of requests for reconsideration, and declined to adopt such a conclusion; and (iii) in *Sharpston*, the Tribunal focused on the fact that Mr. Sharpston in his request for reconsideration had provided the Bank’s Health Services Department with “a number of details – and concrete suggestions for further investigation – which were not before” it previously. Here, even if the Bank’s decision declining to reopen the present Applicant’s case were a reviewable decision (which it was not), the Bank was reasonable in concluding that the new evidence showing that the Applicant was working for the Bank in late 2002 did not establish any new facts that HR failed to consider when it last examined the matter in November 2002 and January 2003.

The Applicant’s Response

21. In the Applicant’s view, the Bank’s jurisdictional objections should be rejected on the following grounds.

22. First, the Applicant appealed from a decision issued by the Bank on 28 December 2004. Based on the Bank’s consideration of new material evidence submitted by the Applicant, that decision constituted an administrative action that stood apart from the decision that had previously been issued on the same claim. The Applicant properly filed his appeal on 24 March 2005, within 90 days of the 28 December decision.

23. Second, *Agerschou* and *Mahmoudi (No. 4)* do not apply to the present case because their facts were different. The current Applicant presented new evidence to the Bank when so requested for the purpose of reconsideration, whereas in the prior two cases the applicants either did not submit any “additional comment or documentation,” or relied upon “unsupported accusations” and “distortions of fact.”

24. Third, *Tucker* and *Sharpston* support the Applicant’s position on jurisdiction. In both cases, the applicants proffered new evidence in support of their requests for reconsideration, and the Bank reviewed them and issued rulings. In *Tucker*, the Tribunal found that “[t]he PBAC thus could be viewed as having indeed made a new substantive decision that should start a new ninety-day period for seeking review by the Tribunal.” *Tucker*, Decision No. 238 [2001], para. 27. (The Applicant acknowledges, however, that the Tribunal in *Tucker* did not definitely determine whether the response of the Bank to the additional evidence constituted a second administrative decision that could be separately appealed.)

25. More importantly, so the Applicant contends, *Sharpston* clearly applies to the present case. There, the PBAC had denied the applicant’s request for compensatory relief. Two years later, after being informed that the Bank would re-examine the matter if the applicant “could supply evidence corroborating his account,” the applicant submitted evidence which the Director, Health Services Department (DHS) considered. The Tribunal in para. 42 held:

Of course the DHS would be entitled to take the view that this purported “corroboration” was implausible or irrelevant, but he could not *disregard* it. Even though the Applicant’s purported corroboration came rather late in the day, the DHS was bound to give it consideration because he had affirmed to the Applicant that he would do so. In that sense, the January 20, 1999, letter must inevitably be considered as a separate decision upon reconsideration. (Emphasis in original.)

26. In light of its decision in *Tucker*, the Tribunal in *Sharpston* then dealt with the issue whether the materials provided by the Applicant “could reasonably have been considered by the DHS to have been immaterial with respect to the considerations that had caused him to reject the grievance [originally], with the result that he was

acting within the permissible limits of his discretion when he refused to reopen that decision.” (*Id.* at para. 45.) On the basis of the proffered materials, which provided “a number of details – and concrete suggestions for further investigation,” the Tribunal concluded that the DHS “was bound to reach a decision which could not be a mere reiteration of his initial rejection.” (*Id.* at para. 46.) It then found that this new decision “was susceptible to administrative review, or to challenge before the Appeals Committee.” (*Id.* at para. 47.)

27. The Applicant contends that the facts of the present case are similar to those of *Sharpston*. Here too the Bank invited the Applicant to submit additional evidence. The Applicant did so, and the Bank determined after a review that this evidence was insufficient for the Bank to reverse its original decision. However, like the documents which the applicant presented in *Sharpston*, the current Applicant’s evidence could not have been “reasonably ... considered by the [Bank] to have been immaterial with respect to the considerations” that had caused it initially to deny his claim.

28. The documents which the Applicant produced in November 2004 are, he asserts, clearly material to resolving the critical issue of whether he held a Long Term or Short Term Consultancy from August to December 1982. The Applicant proffered in November 2004 a statement from the Payroll Department recording the salary he had received for the entire month of August 1982. In addition, time sheets for August through December 1982 which he likewise submitted in November 2004 contain numerous entries showing that he took leave for vacation, holidays and sickness. According to the Bank’s rules and practices then in place, besides staff on Regular appointments, only Long Term Consultants were placed on the payroll, received regular paychecks, and were eligible to take vacation, holiday and sick leave.

29. The Bank’s claim that the documents do not in any way indicate that the Applicant was paid a monthly or annual salary as a Long Term Consultant cannot, in the Applicant’s view, be reconciled with the content of those documents. Being paid a monthly or annual salary was not, in any event, the only indicium of a Long Term Consultancy. At any rate, the August 1982 payroll statement lists the Applicant’s salary for that month. In addition, the timesheets reveal that the Applicant received benefits to which only Long Term Consultants were entitled. Since the Bank cannot reasonably contend that the documents proffered by the Applicant are wholly immaterial, the only issue presented is the degree of their materiality. As in *Sharpston*, once the Bank considered such evidence, it “was bound to reach a decision which could not be a mere reiteration of [its] initial rejection.”

30. Finally, the Applicant asks the Tribunal to note that at the time of the Bank’s November 2002 decision, the Bank recognized that it had either failed to create or failed to retain the kind of documents that it would normally produce in the Applicant’s situation. Without any concrete evidence, the Bank concluded that “[a]t best it looks like” the Applicant had had a Short Term Consultancy during the period in question. The Bank recognized that it did not have truly dispositive evidence, and thus invited the Applicant to provide additional information. Once the Applicant discovered the additional documents in November 2004, he immediately brought them to the attention of the Bank as he had been advised. The Bank did not reject the new evidence on the ground of untimeliness, and in fact agreed to consider it.

The Tribunal’s Analysis

31. The issue before the Tribunal is whether the Applicant’s 90-day period for filing an appeal with the Appeals Committee started on 25 November 2002 or on 28 December 2004, a date which could potentially be taken as the new trigger date for the purposes of determining the time limit for his appeal.

32. In ordinary circumstances, the 90-day time period in which to file an appeal in this case would start from 25 November 2002, when the Bank unequivocally informed the Applicant that it would not grant him past pension credit for his NRS service prior to 1983. The Tribunal’s well-established principle is that “applicants may not extend deadlines for seeking internal remedies by the expedient of requesting reconsideration of the initial decision.” *Sharpston*, Decision No. 251 [2001], para. 36. Likewise, the Tribunal cautioned in *Agerschou*, Decision No. 114 [1992], para. 42, and *Mahmoudi (No. 4)*, Decision No. 259 [2001], para. 8, that it would make a “mockery” of the Tribunal Statute and Rules relating to the timeliness of applications if staff members were

allowed “to ask time and again for a reconsideration of their cases and to argue that the subsequent confirmation by the Respondent of its previous decisions reopen[ed] the ... time limit for applying to the Tribunal.” Accordingly, in ordinary circumstances, the Applicant would be out of time because he failed to file his appeal with the Appeals Committee within 90 days of 25 November 2002. The 28 December 2004 refusal by the Bank to reconsider its earlier decision would not trigger a new date to file an appeal with the Appeals Committee.

33. *Tucker*, Decision No. 238 [2001], and *Sharpston*, Decision No. 251 [2001], however, indicate that in certain circumstances a refusal to reconsider may be deemed a separate decision triggering a new 90-day period. And in *Sharpston*, the Tribunal provided some guidance with respect to identifying such situations. The relevant question is whether *Sharpston* is congruent with the Applicant’s circumstances.

34. The applicant in *Sharpston* worked for the Bank from 1972 to 1996. He alleged that he had experienced work-related stress during his service with the Bank. He had received psychiatric help from the Bank’s Health Services Department in the 1980s. Only days before his retirement in 1996, referring to the events affecting him in 1980-82, did he ask the Bank for compensation for the allegedly improper care he had received from the Health Services Department. On 7 November 1996, the Director, Health Services Department (DHS) denied the claim for compensation.

35. The applicant continued sending letters to the DHS, and in February 1998 he approached the Ombudsman. The Ombudsman contacted the DHS to discuss the matter. The DHS informed the Ombudsman that the Department had no evidence other than the applicant’s allegations, since the Bank’s own relevant files had been lost or destroyed in the intervening years. The Ombudsman subsequently informed the applicant that the DHS would nevertheless be willing to re-examine the matter if the applicant could provide corroborating evidence. Nine months later, the applicant wrote a letter dated 5 November 1998 to the DHS, and with that letter submitted a report as “corroboration” of his version of events. After reviewing the letter and its “accompanying recitation,” the DHS again denied the claim for compensation on 20 January 1999. The issue before the Tribunal was whether the critical administrative decision in the case was that of 7 November 1996 or that of 20 January 1999.

36. In addressing the issue in *Sharpston*, the Tribunal developed a two-step analysis of the circumstances to determine whether the rejection of a request for a reconsideration could be deemed a separate decision triggering a new 90-day period. First, the Tribunal determined whether the Bank had previously agreed to reconsider its earlier decision, or whether it had otherwise informed the applicant that it would do so in the event the applicant provided additional evidence. Second, if the applicant met the test posed under the first step, the Tribunal would then look into whether the additional evidence could have reasonably been considered by the Bank to have been immaterial to the factors which had caused the Bank to reject the grievance earlier, with the result that the Bank acted within the permissible limits of its discretion when it refused to reopen the earlier decision.

37. A review of *Sharpston* shows how the Tribunal employed the above-mentioned two-step analysis. For example, in para. 37 of *Sharpston*, the Tribunal confirmed that “[u]nilateral reiterations of a grievance, addressed to the author of the initial decision, ... cannot have the effect of extending the time limits within which a complainant is required to seek redress against that decision.” In the next paragraph, the Tribunal added that “[t]his raises the issue of the consequences of a manager’s apparent *acceptance* to reconsider a matter, and whether under that hypothesis his or her ultimate confirmation of the initial decision may, in and of itself, be deemed a reviewable or appealable decision.” (Emphasis in original.) The Tribunal took into account the fact that the DHS had orally agreed to re-examine the matter if the applicant could supply corroborating evidence, which the applicant apparently did. The Tribunal then concluded that the DHS could not have disregarded this purported corroboration, and that “[e]ven though the Applicant’s purported corroboration came rather late in the day, the DHS was bound to give it consideration because he had affirmed to the Applicant that he would do so. In that sense, the January 20, 1999, letter must inevitably be considered as a separate decision upon reconsideration.” (*Sharpston*, para. 42.)

38. The Tribunal went on to the second step at para. 43, when it observed that “this conclusion does not suffice to replace November 7, 1996, with January 20, 1999, as the starting point for the Applicant’s search for redress. As seen in *Tucker*, it may be invidious, and of doubtful benefit to staff members generally, to attach prejudicial legal significance to the willingness of managers to reconsider their decisions.” The Tribunal then observed (paras. 44-47):

In *Tucker*, the Tribunal considered that the claim was time-barred, on the grounds that even if one accepted that the challenge was directed against the refusal to reconsider, that refusal was “well within [the PBAC’s] discretion,” inasmuch as the complainant’s request for reconsideration was not based on “new relevant information.”

The question then arises whether the materials provided by the present Applicant on November 5, 1998, could reasonably have been considered by the DHS to have been immaterial with respect to the considerations that had caused him to reject the grievance in 1996, with the result that he was acting within the permissible limits of his discretion when he refused to reopen that decision.

The Tribunal believes that the DHS, having now received the product of an earnest effort by the Applicant to provide a number of details – and concrete suggestions for further investigation – which were not before him in 1996, was bound to reach a decision which could not be a mere reiteration of his initial rejection.

The Tribunal thus finds that the January 20, 1999, letter constituted a decision which, under the Rules then in force ..., was susceptible to administrative review, or to challenge before the Appeals Committee.

39. The Tribunal will now examine whether the Applicant in the present case has satisfied the requirements posed by the two-step test employed in *Sharpston*. With regard to the first, on 25 November 2002, the Bank informed the Applicant by e-mail that “[i]f you have any documentation for that specific period which would show an extension of the long-term consultant contract in effect prior to July 31, 1982, I urge you to contact me immediately.” The Bank argues that this e-mail cannot reasonably be construed as an open-ended waiver of the 90-day time limit on appeals that allowed the Applicant to wait two years before submitting the new documentation.

40. The Tribunal nevertheless concludes that the Applicant has met the requirements of the first step of *Sharpston* because the Bank at least apparently agreed to reconsider its decision of 25 November 2002 once the Applicant provided additional documentation. The Bank did not set an explicit cut-off date within which the Applicant had to submit such documents. Moreover, when the Applicant submitted those documents in November 2004, the Bank did not reject them on the ground of untimeliness. Indeed, the e-mail of Mr. Silverman dated 8 December 2004 clearly indicates that the Bank did review the newly submitted documents.

41. It could be argued that since Ms. Finigan included the word “immediately” in her e-mail of 25 November 2002, the offer to reconsider her decision had to be acted on without any delay, and that when the Applicant came back two years later he was too late. It could further be argued that the delay in finding the new documents was due to a lack of diligence on the Applicant’s part. Diligence is a factor which the Tribunal takes into account when it examines an application for revision of a judgment under Article XIII of its Statute. The Tribunal notes that in *Sharpston*, the applicant took nine months to submit corroborating evidence after the Bank had agreed to re-examine the matter if the applicant could provide such evidence. The Tribunal did not reject such evidence on the ground of untimeliness. Having regard to the difficulties that the present Applicant had to face when trying to retrieve documents that were created some 20 years before, a task which the Bank made even more difficult because it did not keep a complete record of the Applicant’s employment history and other related documents, the Tribunal concludes that under the present circumstances the Applicant has satisfied the first criterion of *Sharpston*.

42. As to the second, the Tribunal will now turn to the question of whether the additional corroborating evidence could have reasonably been deemed by the Bank as immaterial to the considerations which had caused it to reject the Applicant’s grievance in 2002. When the Applicant submitted the additional documents (i.e., payroll statements for July and August 1982, and original time sheets for September through December 1982), Mr. Silverman on 8 December 2004 told him that the “documents on their face would not establish that your break

in service in late 1982 was shorter than 121 days. We therefore decided not to reopen your case.” On 28 December 2004, Mr. Silverman reiterated this conclusion: “As promised we did meet one last time with Legal to review your file. I regret to inform you that we once again concluded that there was not sufficient justification to reconsider our original decision of November 25, 2002.”

43. The Bank argues that even if its decision declining to reopen the Applicant’s case were a reviewable one (which the Bank disputes), it reasonably concluded that the new evidence did not establish any new facts that HR had failed to consider when it last examined the matter in November 2002 and January 2003.

44. The Tribunal is unpersuaded by the Bank’s argument that the new documents could reasonably have been considered by the Bank to be immaterial to the considerations which caused it to reject the Applicant’s pension credit request in 2002. The reasons for this conclusion are several. First, the Bank’s Staff Rules define a Long Term Consultant (LTC) as follows:

For periods of employment before April 15, 1998, “Long Term Consultant” means a staff member of the Employer holding a Consultant appointment, the initial duration of which was six months or longer, and which provided for the accrual of annual leave and for compensation stated as a monthly or annual amount.

The new documents, particularly the payroll statement of August 1982, apparently show that the Applicant’s compensation was stated in monthly terms. This is relevant because the Applicant contends that it is indicative of LTC status.

45. Second, the documents apparently show that the Applicant completed a monthly time sheet. It appears that only LTCs did so during that period. The record also seems to indicate that Short-Term Consultants (STCs) of that time filled out a separate form for each day of work, and were compensated at a daily rate.

46. Third, in January 2003, Ms. Finigan of HR concluded that the Applicant had worked as an STC because during the period in question (i.e., between 8 August 1982 and 31 December 1982), he had not been paid by the Payroll Department. Yet the August 1982 payroll statement seems to indicate the contrary – at least for that month.

47. Moreover, the Bank itself acknowledges that it could not certify with “great certainty” what type of appointment the Applicant held during the period in question, and in denying the Applicant’s claim it concluded that the period in question “[a]t best ... looks like a short-term consultant period.” In view of the Bank’s lack of conclusive evidence and the other factors just stated, the Tribunal finds that the documents submitted in November 2004 could not reasonably have been considered by the Bank to be immaterial to its original decision, and that as a result the Bank abused its discretion in refusing to reopen the Applicant’s case.

48. The Tribunal thus concludes that the Bank, having received relevant documents which were not before it in 2002, was bound to reach a decision that could not be a mere reiteration of its initial rejection. On such a basis, the Bank’s second decision (i.e., that of 28 December 2004) could be considered a new decision susceptible to challenge before the Appeals Committee, and was indeed timely challenged within 90 days.

49. The Tribunal emphasizes that cases of this nature are highly fact-specific. The circumstances of individual cases may, moreover, have countervailing implications. For example, in the present case Ms. Finigan’s written invitation that the Applicant “contact me immediately” if he had any relevant documentation in support of his contention suggests that there was an inherent limitation on the Bank’s offer of reconsideration. But on the other hand, it is also true that the Bank had contributed to the Applicant’s difficulties by failing to keep (or make available) relevant records; that the Applicant could hardly have anticipated a retrospective change of the pension regime with respect to which the onus would lay on him to produce proof going back two decades; and that when he did submit the records he had found the Bank did not reject them on the basis that he was out of time. Were circumstances otherwise, the failure to avail one’s self of an invitation to supply additional records over a period of two years could well be deemed to violate an implicit requirement of “reasonable time.” In the interest of giving staff members the fullest chance to demonstrate their entitlements, managers should not be discouraged from reconsidering their decisions for fear that their willingness to do so will be construed as an

open-ended invitation to neutralize effective decision-making. In this particular case, however, after assessing all of the circumstances, the Tribunal considers that the Applicant was not foreclosed.

50. Finally, the Tribunal wishes to emphasize that it is mindful of its earlier observations in *Agerschou* and *Mahmoudi* (No. 4) to the effect that applicants should not be allowed to extend deadlines for seeking internal remedies by the expedient of requesting reconsideration of an initial decision. In the present case, the Tribunal has not accepted a plenary reconsideration *de novo*. It has opened only a narrow door to determine whether the documents the Applicant sought to adduce in November 2004 in and of themselves created a basis for reaching a different conclusion as to his employment status in 1982.

Decision

For the above reasons, the Tribunal decides that:

- (i) the Bank's request to declare the application inadmissible for lack of jurisdiction is denied;
- (ii) the Applicant is awarded costs in connection with the jurisdictional phase of these proceedings in the amount of \$5,000; and
- (iii) 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/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington, DC, 3 February 2007