

Decision No. 17

H. J. Polak,
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, Vice President, R. Gorman, N. Kumarayya, E. Lauterpacht and C. D. Onyeama, Members, was seized on August 22, 1983 of a complaint by H. J. Polak against the International Bank for Reconstruction and Development. After the usual exchange of pleadings, the case was listed on February 9, 1984.

The relevant facts:

2. On January 22, 1975 the Applicant took up a regular appointment at level L with the Bank in the Secretary's Department (SEC). His work consisted mainly of writing tasks, such as preparation of minutes and draft speeches. The Applicant's interim evaluation of July 2, 1975 indicated that he had quickly grasped and settled into his duties. During his preemployment interviews, the Applicant had expressed interest in undertaking operational assignments in several years' time. He received a good Anniversary Evaluation (AER) for the period January 1975-January 1976. His appointment was confirmed as regular on February 18, 1976.

3. The Applicant received a good AER for the period January 1976-January 1977, although a problem with timeliness of work was noted. He stated in that AER that he found little satisfaction in his work, found it increasingly difficult to summon the necessary concentration and wished to explore the possibility of becoming a loan officer in the West Africa Region. He was interviewed for at least one loan officer position during 1977.

4. He received a very good AER for the period January 1977-January 1978. In December 1977 the Applicant was seconded for several months as an Operations Officer to the Land Settlement and Transmigration Unit in the East Asia and Pacific Region where he performed well.

5. By memorandum to his supervisor dated January 29, 1979 the Applicant expressed frustration at his lack of success in being assigned to a position in operations and at what he viewed as defects in the personnel placement system itself. Effective August 1, 1979, however, he was appointed to a loan officer position in the East Africa Programs Department (EAI).

6. The Applicant's AER issued by SEC and covering the period January 1978-summer 1979, indicated a lesser standard of performance of his duties than previously, particularly with respect to quantity and timeliness.

7. The Applicant's AER issued by his new department for the period January-December 1979 was devoted mainly to evaluating his performance in his new position. The Applicant acknowledged that it was taking longer than he or his Division had expected for him to pick up the orderly processing and documentation aspects of his job. His managers stated that he needed to improve markedly in several areas in order to handle loan officer work satisfactorily.

8. The Applicant's AER covering the period January-December 1980 issued in the summer of 1981 stated that his performance fell short in key areas and was, on balance, unsatisfactory. The Applicant's performance shortcomings had been discussed with him by his managers on a number of occasions during this time. The Applicant received less-than-norm merit increases for 1980 and 1981.

9. In this last AER and in discussion with the Applicant concerning it, the Applicant's Department Director stipulated that the Applicant's assignments over the next six months were to be "carefully structured and monitored in an effort to turn his performance around" and that at the end of the six month period a performance review would be carried out. The Director suggested that the Applicant should team up with another staff member in his Division who would provide day-to-day support and advice, and the Director proposed to monitor the Applicant's progress at roughly two month intervals. Although the Applicant was in fact teamed up with a senior loan officer in August 1981, a formal program was not set up until the beginning of November 1981.

10. By memorandum of November 2, 1981 the Applicant's Division Chief outlined the Applicant's work program for the period November 1981 through April 1982. He reiterated that the senior loan officer would provide day-to-day guidance and noted that he himself would be reviewing program and performance about every two weeks. The Division Chief met with the Applicant in mid-January, early February, late March, and early and mid-April for review of program and performance. The Director of the Department met at least once separately with the Applicant, on June 25, 1982. He also reviewed the Applicant's performance with the Division Chief and the Applicant's Personnel Officer.

11. The trial period having ended on April 30, 1982, the Personnel Management Department (PMD) by memorandum of May 5, 1982, made a formal request for a performance evaluation. In this connection, the Division Chief asked the senior loan officer to commit his observations to paper. On May 13 the senior loan officer left with the Division Chief a draft memorandum, the substance of which had earlier been discussed with the Applicant, although it was understood that it was not a finished product. The senior loan officer's overall assessment was that while the Applicant had made some progress during the trial period, considerable added improvement, particularly in the areas of attitude, judgment and cooperativeness, was required if the Applicant was to function independently and fully satisfactorily as a loan officer in the Bank. The Applicant responded to his Division Chief by memorandum dated May 25, 1982, in which he took a number of exceptions to the senior loan officer's assessment. On June 21, 1982, the latter provided the Division Chief with a somewhat revised and expanded version of his May 13 draft in which he reached essentially the same conclusions regarding the Applicant's performance as he had in his earlier draft.

12. On June 23, 1982, the Division Chief submitted his own evaluation to his Director. It was shown to and discussed with the Applicant. The conclusion in this evaluation was that the Applicant's performance during the six months had not turned around sufficiently to measure up fully to that expected of an L-level loan officer. The Division Chief requested that the Applicant be transferred from the Division by October 1, 1982.

13. After reviewing the documents and conferring with the Division Chief and the senior loan officer, the Director met with the Applicant on June 25 to discuss his evaluation. The Director stated to the Applicant that he saw no evidence during the past six months that the Applicant had been able to overcome what he considered to be the basic deficiency, *viz.* that the Applicant was temperamentally not suited to the tasks and demands of a loan officer's job. He went on to advise the Applicant that he accepted the Division Chief's recommendation with respect to transfer, that the Regional Vice President would be so informed and that the matter should be taken up with PMD.

14. On July 2, 1982 the Applicant met with his Personnel Officer to discuss the evaluation. The latter advised the Applicant that PMD concurred with the Director's decision and was not prepared to pursue reassignment for him as a loan officer. The Personnel Officer offered to seek administrative job opportunities for him, but noted that there would be no forced placement. He further pointed out that the Applicant should himself also pursue reassignment and that failure to be placed within the next month or two would result in notice of termination. PMD then began to seek opportunities, first, in light of the Applicant's background and experience, in the Information and Public Affairs Department (IPA), International Relations Department (IRD), and SEC. The Applicant met with his Personnel Officer on August 13, 1982 to review the situation with respect to reassignment. By memorandum of August 23, 1982, his Personnel Officer advised the Applicant of a possible opportunity as a Public Affairs Specialist and suggested he seek an interview for it.

15. Concurrently, by memorandum of August 4, 1982, the Applicant put his case before the Vice President for his region. A meeting was held on August 19, 1982 attended by the Applicant, the Vice President, and the Applicant's Personnel Officer at which the Applicant again had an opportunity to state his case. The Vice President subsequently advised him by memorandum of August 23, 1982 that he, the Vice President, had concluded that there was insufficient reason to reverse the Director's decision and that the Applicant should seek an assignment more in keeping with his strengths and inclinations.

16. By memorandum of September 2, 1982, the Applicant lodged a complaint against his Division Chief with the Vice-President, Personnel and Administration (PA), for allegedly cruel treatment. On September 14, 1982 the Applicant filed an Appeal with the Appeals Committee challenging the decision to remove him as loan officer from EA1. The Vice President, PA, responded that he would look into the complaint made by the Applicant and requested the Applicant's Vice President to look into the Applicant's allegations. By memorandum of December 7, 1982 the Vice President, PA, notified the Applicant that he had now been advised of the Applicant's filing of an appeal with the Appeals Committee and that the substance of the Applicant's complaint would therefore appropriately be dealt with in that forum.

17. In the meantime, because the Applicant had requested that termination proceedings be deferred, PMD extended by sixty days the period in which reassignment could be explored and advised the Applicant that if by the end of that period (i.e., November 30, 1982), he had not been selected for a vacancy, a sixty days' notice of termination would then be sent to him.

18. PMD's attempts to reassign the Applicant met with no success. The Applicant had indicated at one time that if offered an assignment in IPA he would turn it down. In mid-October, PMD arranged for the Applicant's temporary assignment to the World Development Report (WDR). It was understood that the Applicant's services would be available to WDR through January 1983. The question whether a permanent position at WDR would be possible was raised but it was the opinion of WDR that it would be necessary to fill the few positions that might become available with economists.

19. As November ended without either PMD or the Applicant finding a vacancy or obtaining a commitment to a permanent position, notice of termination was delivered to the Applicant placing him on three months' special leave effective December 1, 1982. The Applicant, in a memorandum to the Director of Personnel, dated December 7, 1982, objected to the notice. On December 17, 1982, the Director of Personnel postponed the date of termination of the Applicant's services to April 30, 1983.

20. The Applicant amended his original Statement of Appeal to the Appeals Committee so as also to challenge his termination from Bank employment. The Appeals Committee issued its Report to the Vice President, PA, on May 13, 1983. By letter of May 19, 1983 the Vice President, PA, notified the Applicant of the Committee's Report and of his acceptance of the Committee's recommendation that the decision to terminate the Applicant's employment be upheld. The Respondent paid the Applicant an amount equal to three months' salary. The Applicant's employment with the Respondent terminated on May 31, 1983.

The Applicant's main contentions:

21. The Respondent failed in its obligation adequately to train the Applicant and monitor the performance of his duties so that he could perform to the best of his ability. Particularly, the management of the Respondent improperly delegated its responsibilities of supervision to a senior loan officer, thus failing to act in accordance with Personnel Manual Statement (PMS) No. 4.01 and the "Guidelines for Managers". PMD also failed in its duties to monitor the evaluation system.

22. The Respondent failed in its obligation to assess the performance of the Applicant fairly and with due process.

23. The Respondent failed to apply to the Applicant without discrimination the contractual conditions of employment of the Bank.

24. The Respondent's termination package hardly compensated for benefits already due and arbitrarily denied. It only permitted the Respondent to recoup with one hand payments made with the other.

25. The following decisions should be rescinded:

(i) the decision taken on December 6, 1982 and later modified on December 17, 1982 and May 26, 1983, to place the Applicant on special leave with reduced benefits from December 1, 1982 through May 31, 1983; and

(ii) the decision taken on December 6, 1982 and later modified and confirmed, to terminate the Applicant's employment with special leave.

26. The Applicant claims:

(i) accrued leave and other benefits until the end of actual work for the Respondent, i.e. February 28, 1983;

(ii) two years net salary to compensate for (i) loss of employment; and (ii) mishandling of the special training period, which led to the termination;

(iii) a declaration that the evaluation was mishandled to the point of being invalid, and non-existent; and clearing of the Applicant's personnel file;

(iv) reimbursement of legal costs incurred in the Appeals Committee because of termination, i.e. \$4,300; and

(v) legal fees in the amount of \$2,500.

The Respondent's main contentions:

27. The training of the Applicant and supervision and evaluation of his performance were carried out in accordance with the policies, procedures and guidelines specified in the Personnel Manual. The Applicant's weaknesses and shortcomings were constantly brought to his attention and discussed with him by his managers, recorded in his AERs and reflected in his less than norm merit increases.

28. Special leave is not an entitlement of staff members and the Applicant cannot claim it as a matter of right from the Bank. Further, the compensation package granted to the Applicant on termination of his employment was not ungenerous. In addition to those sums due on termination of their employment to staff members generally, namely payment of accumulated leave and the termination grant, he received a lump sum payment equal in amount to three months salary.

29. The Applicant's request for rescission of decisions taken in regard to him should be rejected.

30. The Applicant's claims for relief and costs should be rejected.

Considerations:

31. This case arises from the termination of the Applicant's employment with the Bank for unsatisfactory performance subsequent to a special evaluation period provided for by his supervisors pursuant to PMS 4.01. The Applicant contends that the carrying out of the special evaluation program by the Respondent was defective to an extent that amounts to a deprivation of due process of law constituting a non-observance of his contract of employment and the terms of his appointment.

32. In order to decide upon the applicant's main contentions, the Tribunal has, first, to determine the pertinent

regulations and rules by which the Respondent's action in terminating the Applicant's employment should be measured and, second, to examine the different flaws alleged by the Applicant in the implementation of the special evaluation program.

33. Both the Applicant and the Respondent are in agreement that PMS 4.01 is the principal text determining the conditions and requirements of staff evaluation in general and the Applicant's special evaluation program in particular. Annex B to PMS 4.01 stipulates under the title "Performance Counselling and Re-evaluation", in paragraph 15, that:

"Immediate supervisors have the primary responsibility for giving advice aimed at improving the job performance of staff members identified as unsatisfactory. Where appropriate they should develop a special program with the agreement of the staff member in order to improve the effectiveness of job performance to an acceptable level within six months. Supervisors should continually review the staff member's performance during this period and then evaluate performance formally at its conclusion."

In the Tribunal's opinion the principal obligation of the management vis-a-vis a staff member whose performance has been identified as "unsatisfactory" is to give advice and provide guidance aimed at improving his job performance. The setting up of a special program is only specified as one possible mechanism of carrying out the obligation "where appropriate".

34. However, if management deems the development of a special program to be appropriate, it should follow the procedures and conditions of said program as prescribed by Annex B to PMS 4.01. The main objective of the special program is not just to reevaluate the staff member but also to help "improve the effectiveness of his job performance to an acceptable level within six months." Two requirements are attached to the carrying out of the program, namely: that supervisors should continually review the staff member's performance during this period and that a formal performance evaluation be made at the conclusion of the program.

35. The record of this case does not substantiate the Applicant's contention that the requirements of PMS 4.01 were not fulfilled in the development and implementation of the special program set up for the Applicant. The Tribunal notes rather that the following measures were carried out as parts of said special program:

(a) The Applicant's assignments over the special period were carefully structured by the Respondent. In a memorandum to the Applicant by his Division Chief, dated November 2, 1981, the Applicant was explicitly informed of the major tasks he should carry out during the period November 1981 through April 1982;

(b) He was teamed up with a senior member of his division whose assistance, advice and support were made available to the Applicant on a daily basis throughout the six month period of the program;

(c) Throughout the six month period, the Applicant's performance was the subject of continuous monitoring by his supervisors. The Applicant's Division Chief conferred occasionally with the senior staff member appointed to provide advice and support to the Applicant. The Respondent asserts that the Division Chief met with the Applicant in mid-January, early February, late March and early and mid-April for review of program and performance, and the Applicant does not challenge that assertion. The Applicant's Department Director met with him on October 30, 1981, and reviewed with him different aspects of the process of special evaluation;

(d) At the end of the special evaluation period on April 30, 1982, the Applicant's supervisors began the required formal evaluation process. Although it was the Applicant himself who took the first step in this direction by memorandum to his Division Chief, dated May 6, 1982, both the Division Chief and the senior staff member (in charge of regularly advising the Applicant) started consulting with each other on the evaluation of the Applicant's performance during the special training period. By memorandum of June 23, 1982, the Division Chief prepared his formal evaluation and submitted it to the Department Director after discussing it with the Applicant. The Department Director subscribed to the conclusion reached by the Division Chief, namely, that the Applicant's performance during the six month period had not "turned around

enough”, and that by reason of the Applicant’s attitude and performance he (the Division Chief) did not feel confident that the Applicant could be counted on “to carry out a responsibility reliably and adequately on his own”. He concluded his evaluation by requesting that the Applicant be transferred from the division by October 1, 1982. The final formal evaluation was discussed with the Applicant in a meeting between him and the Department Director on June 25, 1982;

(e) Pursuant to the formal evaluation at the end of the six month special evaluation period, PMD undertook to reassign the Applicant and have him interviewed for appropriate positions; and

(f) As a result of the failure of both the Applicant and the Respondent to secure the Applicant’s reassignment, a memorandum dated December 6, 1982, by the Division Chief, PMD, formally notified the Applicant that his employment with the Bank would end as of the close of business, February 20, 1983.

36. It can be fairly inferred from the above that the basic requirements of PMS 4.01 have been fulfilled in the implementation of the special program carried out in an attempt to turn the Applicant’s performance around. His teaming up with a senior loan officer of the same department who made himself available for day-to-day advice and guidance, together with the fact that throughout the six month period the Division Chief conferred periodically with the senior staff member, satisfy the requirements for continuous review of the staff member’s performance during the special program period.

37. The Tribunal does not subscribe to the Applicant’s literal interpretation of the terms of the special program and particularly to his insistence that failure of the Division Chief to live up to his undertaking to review the Applicant’s performance about every two weeks renders the program seriously defective. To interpret the terms of the program so literally would indeed put the management in a strait jacket and would deprive it of the right to exercise discretion in the implementation of PMS 4.01. As long as the Respondent undertakes some meaningful performance evaluation, discretion is indispensable for a proper individualization of the treatment of different cases according to their own circumstances, and such individualization does not violate the basic requirements of PMS 4.01 and the special evaluation program established under it. The very fact that the Division Chief did not live up to his undertaking of a performance review every two weeks may have been partly due to the difficulties arising in the direct discussion of the Applicant’s performance review, and partly to the fact that both were at times away on different missions. Moreover, during the six month period the Applicant had access to the day-to-day guidance of a senior staff member and his performance was the subject of continuous monitoring in the form of several communications between the senior staff member and both the Division Chief and the Director of the Department.

38. The Applicant maintains that in carrying out the Special Evaluation Program, the Respondent was bound not only by PMS 4.01 but also by the procedures, conditions and guidelines included in the Respondent’s brochure entitled Managing People – Guidelines for Managers of the World Bank Group, the second edition of which was issued in February 1982 and widely publicized among the staff. It is true that the words “Contract of Employment” and “Terms of Appointment” include all pertinent regulations and rules in force at the time of the alleged non-observance, as is explicitly provided by Article II of the Statute of this Tribunal. This Tribunal decided, however, in its very first decision (de Merode, WBAT Reports 1981, Decision No. 1, paragraph 22) as follows:

“...[N]ot all the provisions of these manuals, circulars, notes and statements are included in the conditions of employment. Some of them have the character of simple statements of current policy or lay down certain practical or purely procedural methods of operation. It is, therefore, necessary to decide in each case whether the provision constitutes one of the conditions of employment.”

A careful study of the brochure Managing People leads to the conclusion that, as applied to the facts of this case, the guidelines elaborated in the brochure purport merely to confirm the more specific provisions of PMS 4.01 which remain the controlling terms of appointment.

39. The Applicant also complains that the main responsibility for carrying out the special program was put in the hands of a senior loan officer within the division who was not and could not be a substitute for management. However, the Tribunal does not find in this designation of the senior officer a violation of PMS 4.01 as long as management continued to carry out its main responsibilities under the special evaluation process in conformity with PMS 4.01.

40. The Applicant contends that the final evaluation of his performance did not incorporate some of the favorable assessments of his supervisors. However, the Tribunal finds that the final evaluation did in fact incorporate a number of positive assessments, did not seriously overlook the strong points of the Applicant's performance, and therefore provided a balanced appraisal.

41. In conclusion, the Tribunal must now focus more closely on the following questions determining the validity of the decision to terminate the Applicant's employment: First, were there sufficient grounds on which the Respondent could reasonably reach the conclusion that the Applicant's performance was unsatisfactory? Second, did the Respondent in terminating the Applicant's employment act fairly and in conformity with due process?

42. An examination of the Applicant's AERs demonstrates that, starting with the one covering the period 1978-79, dated August 24, 1979, the Applicant's level of performance began to decline. In the AER reviewing the period January-December 1980, the Division Chief and Department Director both concluded that the Applicant's performance fell short in key areas and on balance was unsatisfactory. It is noteworthy that the same shortfalls referred to in this AER led to the Applicant's receiving less than norm merit increases, which is additional evidence of his less than satisfactory performance. At the end of the special evaluation program the Respondent concluded that although the Applicant's performance had improved in some respects, his overall performance continued to fall short of that expected of an L-level loan officer.

43. In light of the above, the Tribunal concludes that there were sufficient grounds for the Respondent reasonably to determine that the Applicant's performance was unsatisfactory. It is an established rule of judicial review by this and other similar tribunals that the reviewing tribunal may not substitute its own judgment for that of the management as to what constitutes satisfactory performance.

"The Administration's appraisal in that respect is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure." (Suntharalingam, WBAT Reports 1982, Decision No. 6, paragraph 27.)

In the present case the conclusion by the Respondent that the Applicant's performance was unsatisfactory was not vitiated by any abuse of discretion.

44. As to the allegation by the Applicant that the Respondent did not act fairly and in conformity with the requirements of due process the Tribunal finds this not to be substantiated by the record. Despite the difficulty of communication discussed above, it cannot be fairly said that the Applicant was kept unaware of his continued unsatisfactory performance before or during the special evaluation period. Nor does the Respondent's failure to send Form No. 1165 to the Department Director as required in Annex B, para. 16(f) of PMS 4.01 justify the rescission of the decision to terminate the Applicant's employment.

45. The Applicant complains that the financial arrangements for terminating his employment were insufficiently generous, particularly in light of the legal expenses he incurred in presenting his case before the Appeals Committee and this Tribunal. The Tribunal does not agree with that contention for, in addition to the statutory termination grant provided by the pertinent personnel manual statement, he was paid a lump sum amounting to three months' salary.

46. As to the Applicant's contention that his terms of employment were violated by restrictions imposed on his taking of home leave and by the terms and conditions of his special leave, the record does not substantiate either contention. At no time was the Applicant forbidden to take home leave. He was only advised that

exercising his right to that leave might not be wise at a moment when he needed to devote himself to seeking a suitable assignment. As to the special leave, the Tribunal notes that a staff member is not entitled to special leave as a matter of right and that the terms and conditions set out for the Applicant's special leave in this case do not depart from the standard conditions attached to special leave arrangements in similar situations.

Decision:

For these reasons, the Tribunal unanimously decides to reject the application.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, England, June 5, 1984