

Decision No. 74

Donneve Rae,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Jiménez de Aréchaga, President, P. Weil and A. K. Abul-Magd, Vice Presidents, and R. A. Gorman, E. Lauterpacht, C. D. Onyema and Tun Suffian, Judges, has been seized of an application, received June 18, 1987, by Donneve Rae, against the International Bank for Reconstruction and Development. The Tribunal rejected the Applicant's request for discovery of certain documents. The usual exchange of pleadings took place. The case was listed on April 6, 1988.

The relevant facts:

(a) The Job Grading Program

2. The general facts relating to the Job Grading Program are stated in paragraphs 2 to 10 of Decision No. 56.

(b) The particular facts of the case

3. The Applicant, an Editorial Assistant in the Latin America and Caribbean Projects Department, prior to the job grading exercise was holding a position at level 4 which is the equivalent of grade 17 in the new grade structure.

4. During the Grading Exercise the Applicant's position was individually evaluated by Evaluation Committee 6 on the basis of a job description dated March 1985 written by the Applicant and subsequently reviewed by her supervisor and her Department Director. On October 7, 1985 the Applicant received written notification of the grading decision to allocate her position to level 17.

5. On December 31, 1985 the Applicant submitted a memorandum to the Job Evaluation Unit (JEU) stating that, after having reviewed the rationale for the grading decision, she found that a number of job functions had been overlooked or perhaps had not been clearly stated. The Applicant prepared a synopsis of the areas she felt needed to be reevaluated or more fully described. The Applicant's Department made the following remark on the certification sheet concerning the information provided by the Applicant:

We have certified much of the additional information provided; however, we have excised certain statements which would ascribe to the job greater responsibilities or skills requirements than management intends. The revised statement is attached, together with a copy of the incumbent's draft, with excised materials marked in yellow.

6. On January 3, 1986 the Applicant filed an appeal for administrative review. On April 4, 1986 she was notified that the original decision had been confirmed by the Evaluation Committee with the concurrence of the JEU on the ground that all additional duties described in her request for review, as well as the primary editorial functions of her position, had been taken into account in the original evaluation.

7. On May 5, 1986 the Applicant filed an appeal with the Job Grading Appeals Board (JGAB) requesting it to recommend that her position and all similar positions be reevaluated to ensure internal equity in keeping with

both job content and the standards of the profession.

8. On October 9, 1986 the JGAB in its report stated, inter alia, that the grading methodology had not been correctly applied and that there was a discrepancy between the Know-How rating and the number of points awarded for Know-How. The Board concluded that:

.... [T]he grading of the Appellant's position had involved an erroneous application of the grading methodology to the extent that the exercise of discretion was arbitrary.

The Board recommended that the Applicant's position be allocated to grade 18.

9. On October 14, 1986 the Secretary of the JGAB informed the Applicant that on October 10, 1986 the Panel had submitted its written report to the Vice President, Personnel Administration (PA).

10. On December 5, 1986 the Vice President, PA, in a memorandum to the Chairman of the Panel, mentioned that he had asked the Compensation Department to comment on the Board's findings and that in the light of these comments he was asking the Board to give further thought as to whether the original grading decision was correct, despite the acknowledged discrepancy in the documentation. He also asked the Board to provide him with a detailed analysis if, after further review, it considered a higher grade warranted.

11. On December 22, 1986 the Chairman of the JGAB Panel replied that the Panel, having examined the documentation, recognized that its original report of October 10, 1986 did not fully reflect its key finding which was the "lack of internal equity and comparability of the Appellant's grade vis-à-vis other higher graded positions of similar title, which on the basis of the position description were prima facie similar". Furthermore, the Chairman stated that the clerical inconsistencies highlighted in the original panel report were in fact not a primary concern, and that a major concern was the Bank's grading of the "benchmark" position at level 18, as well as the perceived need for equity and comparability. The Board amended its October 10, 1986 report accordingly and issued a new version which was dated December 22, 1986. The new version remained, however, identical to the October version as far as the substance of the Board's findings and recommendations were concerned.

12. Some time after having received the JGAB's second report the Vice President and Controller, who dealt with the Applicant's case after the Vice President, PA, had disqualified himself, referred the case to the JEU, seeking technical advice. Because the JGAB had raised the "issue of equity and comparability", the JEU made an analysis of the grades assigned to all editorial positions throughout the Bank. The JEU made an examination of existing editorial positions and their grading and identified 'a three-level stream with a perceptible differentiation between editorial positions at one grade level, versus the next higher level.' On the basis of this analysis the Applicant's position would be at grade 17, the higher levels having additional requirements not included in the job description of the Applicant's position.

13. On March 23, 1987 the Vice President and Controller transmitted to the Applicant a copy of the revised version of the JGAB report stating that he could not accept the Board's recommendation for an upgrading of her position on the grounds that:

- (i) the grading of her position was the result of the application of the Hay methodology in a technically correct manner;
- (ii) her position was used as a key comparator typical of a grade 17 editorial position; and
- (iii) an editorial position stream definition placed the Applicant's position at grade level 17.

The Applicant's main contentions:

14. The Respondent violated Staff Rule 9.04 and Principle 2.1 of the Principles of Staff Employment, and denied the Applicant due process, by reopening the proceedings before the JGAB after the latter had submitted

its report to the Vice President, PA.

15. The JEU should not have been allowed to undertake a second review. Its findings are based on facts and analyses that were not introduced into the process at the proper time, viz. during the administrative review, and were not given to the Applicant and the JGAB for the purposes of the appeal conducted under the Staff Rules. They were never produced and disclosed to the Applicant and, if they are in existence, should not be retained by the Respondent.

16. The document on the career stream resulted from inquiries made between December 22, 1986 and March 23, 1987 and therefore its contents cannot be retroactively applied in the allocation of the grade to the Applicant's position as of October 1985.

17. Had any such career stream document existed prior to the Vice President and Controller's request to the JEU, it should have been communicated to the Applicant at the time of administrative review and appeal, and to the JGAB in the course of its deliberation pursuant to Staff Rule 9.04.

18. The question arises whether the "facts" on which the JEU "corrected" the case were extant at the time the Applicant's position was graded, since more than five months had elapsed between the time the JGAB presented its recommendation to the Vice President, PA, and the time the Vice President and Controller conveyed his decision to the Applicant.

19. The Applicant's position was individually evaluated by Evaluation Committee 6 and Hay points were awarded by analyzing the functions of the position set out in the position description using the Hay methodology, which does not use comparators. It was this awarding of points that the JGAB found to be arbitrary.

20. Moreover, the basic grading document entitled Procedures Guide for Managers does not set out any mechanism for returning to comparators in order to assign grades to unique positions once the decision has been made that they are indeed unique. The "analysis" prepared by the JEU is based on circular logic and, far from proving that the Applicant's position should be graded 17, it proves that there is not just one position wrongly graded but five.

21. The use of a "key comparator" was not part of the original grading exercise. It was introduced at the time of the second and illegal JEU review together with the so-called "career stream exercise" which is subsequent to and separate from the job grading exercise and has never been completed.

22. The Respondent has used criteria secretly, retroactively, and in a discriminatory manner in applying, after the conclusion of the appeals process in 1986, a career stream still in draft as of May 8, 1987 to the grading of the Applicant's position effective October 1985.

23. The Respondent, by withholding a decision on grade from the Applicant for nearly six months, clouded the Applicant's employment status, since level 17 is considered a support level position while levels 18 and above are considered professional levels.

24. The Vice President's memorandum to the Chairman of the Panel dated December 5, 1986, supplying technical considerations not presented to the Applicant or to the Panel during its deliberations and asking the Panel to reconsider its recommendation, is a clear violation of Staff Rule 9.04, Annex B, para. 19.

--[P]rior to submitting a Report, the Panel may, in exceptional circumstances, reopen the written proceedings or the oral proceedings on any manner it sees fit, provided it is satisfied that (a) new evidence is forthcoming which, if believed, would be of such a nature as to constitute a decisive factor in the preparation of the Report, or (b) there is vital need for clarification on any matter.

25. The disqualification of the Vice President, PA, for whatever reason, should have taken place in the most

preliminary phases of the process and not only in the final stage.

26. The Respondent acted improperly when it raised the issue of institutional inconvenience, had the Panel persisted in recommending the upgrading of the Applicant's position. The only issue before the Panel was, and now before the Tribunal is, whether the grade allocated to the Applicant's position is correct.

27. The Respondent committed several procedural irregularities in violation of both the Principles of Staff Employment and the Staff Rules governing the Job Grading Program.

28. Because of the improper grading of her position, the Applicant has suffered injuries during the Reorganization because of the prevailing prejudice against selecting staff members in "support" level positions for "professional" positions. Although the Applicant applied for 19 suitable positions graded at level 18 or above, she was offered only one position for Space Planning Assistant, grade 17, a position for which she had not applied and for which she was unqualified. It appeared that the only criterion for selection was that her position as editorial assistant was also grade 17.

29. The Applicant should be awarded damages, for the injuries sustained due to the misgrading of her position, the clouding of her employment status, the loss of appropriate salary and benefits, and her selection for an unsuitable position during the Reorganization.

30. The Applicant requested the President and the Tribunal to use their powers of discovery to:

- (a) have the designated official submit to the Tribunal and to the Applicant his motivations for remanding the decision of the JGAB to the JEU;
- (b) have the Respondent supply the "aggregate data material to the grading of jobs in the same occupation category" as specified in Staff Rule 9.04, para. 2.02, and which has never as yet been supplied to the Applicant;
- (c) have the Respondent supply all other documents bearing on the case, including the "additional clarifications and analyses" referred to by the Respondent in its letter dated March 23, 1987.

31. The Applicant requested the Tribunal to:

- a) quash the decision of the designated official based on the illegally produced findings of the JEU review as arbitrary, frivolous and discriminatory;
- b) direct the Respondent to accept the recommendation of the JGAB Panel and to grade the Applicant at level 18 with effect from October 1985 (and for salary purposes from May 1984);
- c) direct the Respondent to place the Applicant in a suitable position or, if this is impossible after diligent search, to award her one year's salary; and
- d) award her
 - (i) 12 months net salary as damages for the clouding of her employment status and the prejudicial situation in which she was placed; and
 - (ii) 12 months net salary as compensation for intangible injury for the arbitrary, frivolous and discriminatory actions she was subjected to and for the lack of timeliness of decisions by the Respondent.

The Respondent's main contentions:

32. The correctness of the grading decision is not at issue before the Tribunal at all. Position classification is a discretionary decision which according to this Tribunal's jurisprudence is not reviewable unless "it constitutes an abuse of discretion, being arbitrary, improperly motivated or carried out in violation of a fair and reasonable procedure." By none of these tests was there an abuse of discretion in the Applicant's case.

33. Likewise, the Vice President and Controller's decision not to accept the JGAB's decision is a discretionary decision which the Applicant has failed to demonstrate was tainted.

34. The fact that the Applicant's position had been used as a key comparator was entirely consistent with the grading program's procedures and practice, since about 70% of the positions were graded by "matching" the description of their duties and accountabilities to a benchmark description or a set of occupational criteria which had previously been assigned a grade or grades.

35. It was appropriate and within the prerogative of the Vice President and Controller to seek technical advice on the issue of correctness and objectivity of the application of the grading methodology in the Applicant's case since that issue was raised in the JGAB's report. By doing so the Vice President and Controller demonstrated his intention to see that his decision was neither arbitrary nor frivolous.

36. The Applicant had made the erroneous assumption that the Vice President and Controller used as a criterion in the grading of her position a notional occupational stream which as of May 1987 was only in draft form.

37. The Vice President and Controller referred to an analysis undertaken by the JEU of the grading of all editorial positions throughout the Bank, in response to the issue of "internal equity and comparability" which was raised by the JGAB. It was on the basis of this extensive JEU analysis which included 31 positions Bank-wide – compared with the JGAB analysis of Editorial Assistant positions, which examined a small and random sample of eight positions – that the Vice President and Controller concluded that he could not accept the Board's recommendations and that the Applicant's position had been correctly placed at grade 17.

38. Had the Vice President and Controller accepted the Board's recommendation, the considerations of "internal equity and comparability" to which the Board referred would have required raising the level of other grade 17 positions with functions similar to those of the Applicant's position, raising existing grade 18 editorial positions to grade 19, and so on.

39. The decision to allocate the Applicant's position to grade 17 was fully justified. The Vice President and Controller had committed no error in consulting the JEU analysis; there was no reason why the Applicant should have been informed at the time that he had done so; there had been no "clouding of her employment status"; the Applicant had not been placed in a "prejudicial situation"; she had not suffered any intangible injury meriting compensation.

40. The Vice President and Controller took full account of the recommendations of the JGAB and no abuse of discretion can be inferred from the fact that he did not accept them.

41. No procedural irregularity was committed by reopening the proceedings at the request of the Vice President and Controller, after the JGAB had submitted its report, since the basis of the Board's recommendation was not clear to the decision maker and therefore he had to ask for a detailed analysis.

42. The Applicant's alleged misgrading, and her assertions that she was deprived of the benefits of the Enhanced Separation Package and thereby not selected for either of the two Staff Officer positions in the Secretary's Department, are speculative and hypothetical and do not provide support for her claim of compensation.

Considerations:

43. The Applicant in this case raises two main issues:

- (i) She contends that the Respondent's decision (taken by the Vice President and Controller in lieu of the Vice President, PA) to allocate the job grade 17 to her "Editorial Position" was faulty and should be

rescinded for the three grounds mentioned in Staff Rule 9.04 Section 3.01 (a), (b), and (c). She requests the Tribunal to direct the Respondent to accept the recommendation of the Job Grading Appeals Board and to grade the Applicant at level 18 with effect from October 1985;

(ii) The Applicant also contends that the impugned decision of the Respondent was tainted by a series of serious violations of a fair and reasonable procedure and, equally for these reasons, should be quashed by the Tribunal.

44. Although the Tribunal does not subscribe to the sweeping statement made by the Respondent to the effect that the "correctness of the grading decision is not before the Tribunal at all", it is now well established that this Tribunal will not substitute its own judgment for that of the Respondent as to the merits of an exercise of discretionary power. The reviewing power of this Tribunal, however, extends to a decision taken in exercise of discretionary power by the Respondent to ensure that such exercise is not vitiated by an abuse of discretion, by reason of the action taken in a concrete case "being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure". (Saberi, Decision No.5 [1982], para. 24 and Pinto, Decision No.56 [1988], para. 36). The Tribunal, therefore, is not in a position to take sides in the dispute between the JEU and the Vice President, on the one hand, and the Applicant and the JGAB, on the other, concerning the proper grade to be assigned to the Applicant's position. Whereas both the Applicant and the JGAB maintain that the grading of the Applicant's position had involved an erroneous application of the grading methodology, the Vice President and Controller insists that the grading of the Applicant's position was the result of the application of the Hay methodology in a technically correct manner. All that the Tribunal has to determine is whether the decision of the Respondent taken by the Vice President and Controller reveals an abuse of discretion.

45. The Tribunal notes that from the time the Applicant expressed her dissatisfaction with the grading of her position by the JEU, the Respondent took a series of measures aimed at confirming and consolidating the decision to grade the Applicant's position at level 17. Many of these measures fell short of meeting the requirements of due process and a fair and reasonable procedure.

46. At the stage of administrative review corrections had been made to the Applicant's submission without the prior involvement or knowledge of the Applicant, thereby unduly depriving the Applicant of an opportunity to comment on the intended revision. On December 31, 1985 the Applicant submitted a memorandum to the JEU enumerating the areas she felt needed to be re-evaluated or more fully described. The Applicant's Department made the following remarks on the certificate sheet:

"We have certified much of the additional information provided; however, we have excised certain statements which would ascribe to the job greater responsibilities or skills requirements than management intends. The revised statement is attached, together with a copy of the incumbent's draft, with.... materials marked in yellow."

47. When the Vice President, PA, of the Respondent revised the decision of the JGAB recommending that a higher grade ought to be assigned to the Applicant's position, the Vice President, PA, on December 5, 1986 wrote to the President of the Panel that made the recommendation requesting the JGAB to give "some further thoughts as to whether the original grading decision was correct". He went on to say "if after further review, the Board considers a higher grade to be warranted, I would like to have the detailed analysis of this so that I can make a decision on the case". The Vice President, PA, ended his letter by emphasizing the "importance of getting these matters as clear as possible because of the potential effect one grading decision has on other positions".

48. Staff Rule 9.04 dealing with Job Grading Appeals does not stipulate for any such right of the Vice President, PA, to refer back to the JGAB or to the Chief of its panel to reconsider the decision taken. The Vice President may be free to seek whatever advice he deems useful or helpful for taking his decision as to whether he should go along with the recommendation of the JGAB. He should not, however, without advising the Applicant, involve the JGAB, which is entrusted with a quasi-judicial mission of deciding on appeals seeking

review of the grading decision. Moreover, the Vice President's letter of December 5, 1986 was sent even before the decision of the JGAB itself was communicated to the Applicant. In these circumstances the Tribunal finds the action of the Vice President, in referring back the decision of the JGAB for reconsideration of its substance to be in violation of Principle 2.1 of Staff Employment which states that:

"The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members."

49. After receiving the second decision of December 22, 1986, of the JGAB confirming its original decision, recommending the allocation of grade 18 to the Applicant's position, the Vice President and Controller requested the JEU to undertake a second review of the case. That referral to the JEU was not communicated to the Applicant, depriving her of the opportunity of participating in that second and crucial review. Indeed, the Applicant was not informed of this referral until she received the letter of March 23, 1987 from the Vice President confirming the Respondent's decision to allocate grade 17 to her position.

50. In the same letter the Vice President and Controller refers also to the fact that after the JGAB had made its decision recommending the grading of the Applicant's position at level 18, the JEU was requested to make further inquiries into the definition of an editorial position stream based on common core elements and criteria for the individual grade levels. According to the Vice President and Controller "these inquiries resulted in the identification of a three-level stream with perceptible differentiations between editorial positions at one grade level versus the next higher level". He added that he had "recommended to the VPA, that the job stream description for editorial positions should be finalized as soon as possible." He then concluded that "this stream definition places your position at grade level 17".

51. The Tribunal finds nothing wrong or arbitrary in the criterion of career level stream itself. The flaw in this case results from the fact that the mechanism was applied to the Applicant retroactively. It was in fact applied before being finalized by the Respondent.

52. In the light of the above the Tribunal concludes that the Respondent's decision to grade the Applicant's position at level 17 and to reject the recommendation of the JGAB was taken as a result of a series of measures carried out in violation of fair and reasonable procedures. As a result of these measures the Applicant was deprived of her right effectively to participate in the grading exercise and to be notified in good time of the measures, communications and decisions taken affecting different aspects of her employment with the Respondent. Consequently, in these circumstances the decision should be quashed and remanded to the Respondent, and compensation should be granted to the Applicant for the tangible and intangible injury suffered by the Applicant as a result of the irregular procedure followed in determining the grade of her position.

Decision:

For the above reasons the Tribunal unanimously decides that:

1. the decision of the Respondent, dated March 23, 1987, confirming the grading of the Applicant's position at level 17 is quashed and the case is remanded to the Respondent for reconsideration according to prescribed rules and proper procedures;
2. the Respondent shall pay to the Applicant an amount equivalent to four months net salary; and
3. all other pleas are dismissed.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, November 7, 1988