

Decision No. 155

Sidney F. Thomas,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R. A. Gorman and F. Orrego Vicuña, Vice Presidents and P. Weil, A.K. Abul Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on November 6, 1995, by Sidney F. Thomas, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on June 18, 1996.

The relevant facts:

2. The Applicant was employed by the Respondent as Industry Unit Chief in the Country Operations, Industry and Finance Division of the India Department at Level 25. By memorandum, dated May 10, 1994, and titled "Separation Agreement" from the Chief Personnel Officer (CPO) for the India Department the Applicant was informed of the conditions of his leaving the service of the Bank upon the abolition of his position. The memorandum stated, inter alia,:

[T]he Bank will be prepared to finance specific outplacement counselling, or special training activities, agreed in advance, up to a maximum of three months equivalent of net salary for a reasonable period to be determined by the Bank provided that you elect to take advantage of these by May 23, 1994....

3. By memorandum to the Director, Personnel Management Department (PMD), dated May 12, 1994, the Applicant requested commutation of the benefit referred to in the memorandum of May 10 as "outplacement counseling or special training activities, agreed in advance, up to a maximum of three months equivalent of net salary", because he planned to become self-employed. By memorandum, dated May 25, 1994, the Employment Ending Officer (EEO) advised the Applicant that the Director, PMD, had not approved the Applicant's request for commutation of the costs of outplacement counselling or special training activities, because there was no provision in the Staff Rules for such commutation. The EEO pointed out that Staff Rule 5.09 to which the Applicant had referred in his May 12 memorandum applied only to the implementation of the Reorganization of 1987 and was inapplicable to other cases of redundancy. By memorandum to the EEO, dated May 30, 1994, the Applicant cited Staff Rule 7.01, paragraph 14.02 which stated:

The Director, Personnel Management Department, shall also determine at his discretion which, if any, of the following kinds of assistance, and how much, should be granted to staff members whose separation from service is expected to occur within a reasonable period of time:

(a)

(b)

(c) such outplacement counselling and other assistance as may be appropriate.

The cost of all the assistance under (b) and (c) above plus the subsistence component of any travel provided under (a) above shall not exceed three months' net pay Staff members whose employment is being terminated because it is redundant shall be entitled to the assistance mentioned in items (a) and (c).

He stated that it lay within the discretion of the Director, PMD, to determine what transitional assistance and how much should be granted in each case of separation from service.

4. By memorandum, dated June 24, 1994, an officer in the office of the Director, PMD, confirmed that costs other than for the purchase of equipment related to establishing the Applicant's own business could be considered under outplacement provisions. It was stated that the costs must be actually incurred and could be, for example, costs establishing contacts with client groups, limited software, initial costs of self promotional material, office support costs while legally establishing the business and legal costs to establish the business. By memorandum to the same officer, dated July 5, 1995, the Applicant sought clarification as to what would be included in the costs that could be covered. There followed an exchange of E-mails between the EEO and the Applicant's Personnel Officer which were copied to the Applicant to which the Applicant responded making certain clarifications of the points made by the EEO. By E-mail to the Applicant, dated July 25, 1994, the officer in the office of the Director, PMD, informed him that inter alia, an overseas trip for the purpose of client contact would be permitted, subject to certain cost limitations and administrative requirements, that reimbursement for software acquisition would be made on a case-by-case basis, and that claims for reimbursement should be pre-approved and applications directed to her.

5. By letter to the Director, PMD, dated October 14, 1994, the Applicant requested administrative review of the Bank's decision relating to outplacement assistance. The Acting Director, PMD, by letter to the Applicant, declined to undertake the review of the decision of the Director, PMD, not to allow lump sum payment of outplacement assistance, on the ground that the request for the review was out of time.

6. The Applicant filed a statement of appeal, dated December 12, 1994, with the Appeals Committee. By decision, dated March 8, 1995, the Appeals Committee assumed jurisdiction in the case, notwithstanding the Respondent's challenge to timeliness, because in its opinion the Applicant had sought administrative review in time. The Committee in its report, dated August 3, 1995, found that the limitations which the Respondent placed on reimbursing costs associated with starting a business were appropriate, particularly in the light of consistent application of such limitation to all staff. The Committee recommended that the relief sought by the Applicant, namely commutation of his outplacement assistance to a lump sum, be denied. However, it also recommended that the Applicant

[S]ubmit to the Respondent within the period covered by his severance payments, that is by November 10, 1995, an itemized list of the costs he incurred in setting up his business so that the Respondent can analyze the list and determine which of the items are eligible for reimbursement under the Respondent's policies and that the Respondent reimburse such of the items as it deems to be eligible within one month after receipt of such list.

7. By letter to the Applicant, dated August 8, 1995, the Senior Vice President, Management Personnel Services, stated that he accepted all the recommendations of the Appeals Committee.

The Applicant's main contentions:

8. The request for administrative review was filed in time because the relevant date of the critical administrative decision was July 25, 1994.

9. The Applicant was entitled to costs related to establishing a business which covered "seed capital".

10. Given a free external subvention, there can be no natural limit in any cost category to the amount that may be expended in establishing a business.

11. Under the relevant Staff Rule 7.01, paragraph 14.02, the Applicant was entitled particularly to "appropriate assistance" which involved the exercise of a discretion on the part of the Respondent.

12. Limiting the reimbursement method for "appropriate assistance" under the Staff Rule by excluding a lump

sum payment was arbitrary, capricious and an abuse of discretion and unreasonable. In any event the Staff Rule does not expressly or by application exclude such payment.

13. There was a lack of indispensable clarity in the treatment of the Applicant.

14. The argument that all staff similarly situated were treated in the same way is specious, because it is no defense that all staff were equally treated in an unlawful manner.

15. It is discriminatory to treat staff members declared redundant during the 1987 Reorganization under Staff Rule 5.09 in a manner different from those declared redundant under Staff Rule 7.01.

16. The Applicant made the following pleas:

- (i) payment of a lump sum of 3 months' net salary, i.e., \$26,112.50 as "appropriate assistance" either as specific performance or compensation;
- (ii) general damages in the amount of \$26,112.50;
- (iii) exemplary damages in the amount of \$26,112.50;
- (iv) interest, reckoned from May 23, 1994 in the amount approximately of \$3,000; and
- (v) reasonable legal fees in the amount of \$2,000.

The Respondent's main contentions:

17. The Applicant failed to request administrative review in time, that is, within the 90-day requirement of Staff Rule 9.01, after he was advised in May 1994 of the Respondent's decision relating to his request for commutation of his outplacement assistance.

18. The Respondent operates its outplacement assistance program by reimbursing only for expenses actually incurred and will not commute outplacement assistance to a lump sum cash payment, since outplacement funds are meant to be used only for outplacement activities. Nor are monies under Staff Rule 7.01, para. 14.02 provided for "seed capital" as that term was used in Staff Rule 5.09 which governed the 1987 Reorganization. Nor, since the principal purpose of the program from its inception has been to make available outplacement counselling and retraining, are monies provided for capital equipment such as computer hardware, office furniture or other such hard goods.

19. The Respondent did not concede that "seed capital" could be reimbursed in the Applicant's case, even by implication. The Applicant's contention that having agreed to pay him seed capital, the Respondent must do so by a lump sum cash payment or be in breach of an obligation to act reasonably in the circumstances is baseless, because in the first place the Respondent did not agree to pay him such capital.

20. The claim that, even if the Respondent may insist on a reimbursement method, it abused its discretion in the Applicant's case by placing limitations on various types of assistance, which he suggests may have been retaliatory on the EEO's part, and by failing to provide him indispensable clarity as to what he could expect, is without foundation.

21. The Applicant is not entitled to have outplacement assistance administered without regard to the Respondent's purpose in providing such assistance and to the established policy in administering it. The purpose of such assistance is to help departing staff to locate employment elsewhere, principally focusing on counselling and retraining. The Applicant cannot have it both ways: he cannot refuse to submit a proposal which others similarly situated routinely provide and decline even to submit ex post an itemized list for the Respondent's consideration and then be heard to complain that he has wrongfully been denied outplacement assistance, when his own conduct has precluded the Respondent from providing it.

22. The Applicant should not be paid legal fees because, inter alia, he has not submitted an itemized statement of costs.

Considerations:

23. The issues for determination by the Tribunal are (i) whether the administrative review sought by the Applicant was time-barred with the result that he had failed to exhaust internal remedies, (ii) whether the Respondent in making a determination on the appropriate assistance to be given to the Applicant pursuant to paragraph 14.02 of Staff Rule 7.01 acted arbitrarily and thus abused its discretion, and (iii) whether the Respondent in making such determination had discriminated against the Applicant vis-à-vis those staff members retrenched pursuant to the 1987 Reorganization of the Bank.

24. On the first issue, the Applicant was informed of the conditions of his leaving the service of the Respondent in a memorandum dated May 10, 1994 referring to outplacement counselling or special training activities. The Applicant pointed out that the aforesaid benefits were inappropriate in his case where he was seeking to establish his own business. He referred to Staff Rule 7.01, paragraph 14.02, which gave the Respondent a discretion to provide "other assistance as may be appropriate" and suggested that the appropriate assistance was the commutation of the benefits into a lump sum cash payment. In a series of communications in which the Applicant sought further clarification of the Bank's interpretation of the pertinent Staff Rule the Respondent, while rejecting the Applicant's claim, provided a list of the kind of claims that may be brought under the "appropriate assistance" rule. The Tribunal finds that the Respondent's communication dated July 25, 1994 was the critical administrative decision which brought finality to the on-going communications. The Applicant's request for administrative review was made within the 90 day period following and the Tribunal is, therefore, of the view that the Applicant's request for administrative review was not time-barred.

25. The answer to the second question--whether the Respondent, in the exercise of its discretion to provide "assistance as may be appropriate" to the Applicant under Staff Rule 7.01, paragraph 14.02, acted arbitrarily, and whether its action was an abuse of discretion--turns on the interpretation of Staff Rule 7.01, paragraph 14.02, which provides:

The Director, Personnel Management Department, shall also determine at his discretion which, if any, of the following kinds of assistance, and how much, should be granted to staff members whose separation from service is expected to occur within a reasonable period of time:

(a)

(b)

(c) such outplacement counselling and other assistance as may be appropriate.

The cost of all the assistance under (b) and (c) above plus the subsistence component of any travel provided under (a) above shall not exceed three months' net pay Staff members whose employment is being terminated because it is redundant shall be entitled to the assistance mentioned in items (a) and (c).

26. The Respondent in its memorandum of May 10, 1994 to the Applicant, stated, inter alia,

The Bank will be prepared to finance outplacement counseling, or special training activities, agreed in advance, up to a maximum of three months equivalent of net salary for a reasonable period to be determined by the Bank provided that you elect to take advantage of these by May 23, 1994

27. The Applicant's response to this memorandum was to request commutation of the above-mentioned benefit into a lump sum cash payment on the ground that, because he was planning to be self-employed, the

outplacement counselling and like benefits available under Staff Rule 7.01, paragraph 14.02 were inappropriate, that the Respondent had a discretion to provide other appropriate assistance and, in the circumstances of his case, a lump sum cash payment was the most appropriate assistance.

28. He cited as precedent the grant of seed capital by the Respondent to staff members retrenched under Staff Rule 5.09, pertaining to the Reorganization of the Bank in 1987. He argued by analogy that the payment of seed capital to him was appropriate in the circumstances of his case and that the Respondent had impliedly recognized that such assistance was appropriate when it conceded that the Applicant was entitled to some costs related to establishing a business. As a result, the Applicant argued, he was entitled to commutation of the benefit into a lump sum cash payment.

29. The Respondent rejected the Applicant's contention that, by offering to consider reimbursement for certain costs relating to establishing his business, the Respondent had conceded that seed capital was appropriate in his case. It argues that at the most it had advised the Applicant that it would see if it could be flexible in addressing the Applicant's situation within the framework of the policy applicable to all staff requesting outplacement assistance under Staff Rule 7.01, paragraph 14.02. The standard procedure adopted by the Respondent was that the staff member could put up a proposal setting out the expenses to be incurred in establishing the proposed business and thereafter, to the extent that the proposed expenditure was approved by the Bank and actually incurred by the staff member, the Respondent would reimburse the staff member such costs. The Respondent gave the Applicant a list of the kind of claims that may be made by a staff member seeking to set himself up in self-employment.

30. However, the Applicant did not submit his proposal for the Respondent's approval but instead sought administrative review alleging that the Respondent had abused its discretion by insisting that it could only provide assistance by way of reimbursement of pre-approved items for establishing a business and that the Respondent should have exercised its discretion in favor of a commutation of his outplacement assistance to a lump sum cash payment.

31. The Tribunal finds that there is compelling evidence that the Respondent had not conceded that the Applicant was entitled to a lump sum payment. The fact that the Respondent had conceded that "appropriate assistance" could cover certain costs related to establishing a business does not mean that it had agreed to a commutation of benefits to a lump sum cash payment.

32. The Respondent had adopted the policy of providing assistance to staff members for pre-approved costs of setting up a business and of reimbursing such costs as had been actually incurred. The purpose of providing assistance in this way through reimbursement was to ensure that funds were used for their intended purpose and no other. In the implementation of this policy in no case had an exception been made to allow commutation into cash. The Tribunal, in light of the justification given by the Respondent, views these pre-approval and documentation requirements as not being unreasonable and notes that the Applicant failed to comply with them.

33. Furthermore, the Appeals Committee had recommended that the Applicant be permitted to submit to the Respondent an itemized list of the costs he had incurred in setting up his business, for the Respondent to determine which items might be reimbursed. The Respondent accepted this recommendation and yet the Applicant failed to comply but continued to insist on a lump sum cash payment. The Tribunal, thus, concludes that the Respondent in reaching its decision not to commute the outplacement assistance into a lump sum cash payment did not act arbitrarily or abuse its discretion but rather acted consistently with the general policy set out for outplacement assistance.

34. As for the Applicant's allegation of discriminatory treatment vis-à-vis staff members who were separated from the Bank in the 1987 Reorganization, the Tribunal's view is that the earlier benefits constituted an enhanced separation package designed to take account of the special circumstances of the Reorganization. It is not discriminatory not to apply it to other cases of redundancy. Thus, the Applicant's allegation of discrimination is not made out.

Decision:

For the above reasons the Tribunal unanimously dismisses the application.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, D.C., October 22, 1996