

Decision No. 133

N. Samuel-Thambiah,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of A.K. Abul-Magd, President, E. Lauterpacht and R.A. Gorman, Vice Presidents, and F.K. Apaloo, F. Orrego Vicuña, Tun M. Suffian and P. Weil, Judges, has been seized of an application, received January 19, 1993, by N. Samuel-Thambiah, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The Tribunal decided to reject additional written statements filed thereafter both before and after the listing of the case by the parties. The case was listed on September 20, 1993.

The relevant facts:

2. By letter, dated March 15, 1990, the Applicant was offered by the Respondent a fixed-term appointment for a period of 3 years as an Auditor Senior at level 20 in the Internal Auditing Department (IAD). He took up his appointment on July 2, 1990. The letter of appointment stated that the appointment “will be probationary for the first year and will normally be subject to confirmation on the first anniversary of your reporting for duty.”

3. In the Applicant’s interim evaluation, dated March 8, 1991, his manager concluded:

Mr. Thambiah should: i) become more familiar with the Bank’s environment, IAD policy and procedures; and ii) continue to improve his attitude by listening more, being less defensive and accepting feedback more openly. In addition, Mr. Thambiah should demonstrate that he can concentrate more on the broader aspects of audit work and identify all the major issues.

4. In the Applicant’s Performance Review covering the period July 1, 1990 through June 30, 1991 and dated August 20, 1991, his manager noted that the Applicant had been assigned to work on three audits during the period under review under the supervision of three different people. He reiterated the areas for improvement noted in the interim evaluation. He indicated that regular coaching and feedback sessions had been held with the Applicant by all three Auditors-in-Charge, especially by the Auditor-in-Charge for the Central Operations Department (COD) audit. He enumerated the training courses taken by the Applicant and stated that the Applicant had shown enthusiasm for his work, was generally pleasant to work with and had shown improvement as to attitude and acceptance of feedback. At the same time, however, the manager stated in detail the respects in which the Applicant’s performance had failed to meet the standards for an Auditor Senior. The manager stated that the Applicant needed more-than-normal supervision for someone at grade level 20, his grade level. He concluded that overall, on the basis of feedback from the three Audit Chiefs who had supervised the Applicant and reviews of draft reports and presentations of the Applicant’s findings, he was unable to recommend the Applicant’s confirmation as an Auditor Senior. Pursuant to Staff Rule 4.02, paragraph 3.01(d), he recommended that the Applicant be offered an Auditor position at a lower level and that probation be extended for a further period of six months, which he felt would improve the likelihood of confirmation. The Applicant made known his objections to this evaluation by memorandum, dated August 23, 1991, to his manager.

5. As a result of the recommendation of the IAD Management Review Group (MRG) that the Applicant be offered a position as an Auditor at level 19 subject to an extended probationary period, the Chief Personnel

Officer (CPO) initiated her own review pursuant to the Staff Rules. In a confidential memorandum dated November 11, 1991, to the Auditor General, the Director of the Applicant's department, the CPO concluded:

- (1) The documentation follows the Staff Rule so as to support the decision to extend Sam (the Applicant) at a lower grade level. Further, it seems to also reflect the expectation that Sam will find it difficult to gain confirmation even at the lower level. The predisposition is already present therefore, and colors the outcome for the next six months. This is prejudging the situation and does not give the staff member a clear and unbiased opportunity.
- (2) There appears to be a role issue vis-a-vis the Audit Chief and their (sic) supervisory responsibility vs. that of the Group Audit Manager. This could and may have resulted in mixed messages.
- (3) There does not appear to be clear understanding of work expectations, standards and performance indicators, resulting in mis-communication and confusion, both on the part of management as well as staff.
- (4) There does not appear to have been much effort expended to assist Sam in improving his performance. While the documentation follows due process and identifies areas that require improvement, there does not appear to have been much discussion or the coaching required to help Sam succeed.
- (5) There is evidence of poor communication and less than satisfactory inter-personal interactions among all parties concerned.
- (6) There does not appear to be sufficient substantiated reason to extend the probationary period at a lower level.
- (7) I am concerned that should this matter be raised to an Appeal that (sic) the Institution may be seen as being "discriminatory and arbitrary". My reason for this is my observation that there seemed to be inadequate assistance given to Sam to: (a) understand his deficiencies; as well as (b) once understood, coaching and counseling to help overcome them. In the absence of both these points, it could appear that the Institution did not demonstrate good faith towards the staff member to give him every possible advantage to learn and succeed in his job during this probationary period.
- (8) I would recommend to review this decision, taking into consideration the information I have provided. It may very well be that the decision may not change, if management is better prepared to substantiate the case for such decision.

6. The Auditor General, in his management review, dated November 14, 1991, for the Applicant's PPR stated that after careful review of the information provided by the CPO, the IAD MRG had concluded that the Applicant's probation should be extended in the position he held at level 20 as an Auditor Senior for a further period of 12 months until October 31, 1992.

7. By memorandum, dated December 23, 1991, to the Vice President and Controller, the Applicant sought administrative review of this decision which had been communicated to him. He requested confirmation in his appointment at level 21 as of July 1, 1991. By memorandum, dated February 18, 1992, the Vice President and Controller responded with his decision. He noted that he had met with the four Audit Chief s under whom the Applicant worked and that they had certain positive things to say about the Applicant, and that each had started his/her relations with the Applicant on a positive basis and had spent considerable time trying to assist and counsel him. He found that the Applicant had been kept fully informed about his performance shortcomings throughout his time at the Bank. He further found that the Manager's evaluation in the Applicant's PPR was reasonable and his conclusion that it was not possible to confirm the Applicant as an Auditor Senior at level 20 correct. He also stated that the Applicant's employment should have been terminated as of that point, and that during the period subsequent to the Applicant's evaluation his supervisors had not been able to conclude that the Applicant was suitable for permanent employment as an Auditor Senior. He concluded that the Applicant's employment should be terminated with effect from April 30, 1992. At the same time he recommended that the Applicant should be given an ex gratia payment covering the balance of his fixed-term appointment. As an alternative he gave the Applicant the option of leaving the Bank under a mutually agreed separation.

8. The Applicant filed an appeal, dated March 16, 1992, with the Appeals Committee against the decision to

terminate his employment. The Appeals Committee came to the conclusion that the Applicant's employment had been terminated "in accordance with the applicable Staff Rules" and denied his request for relief.

The Applicant's main contentions:

9. The Applicant was punished for complaining that he was underfilling the position which he held.
10. The Applicant's department was a dysfunctional department where management functions were suspect.
11. The manner in which the Applicant's probation was conducted did not meet the standards required by Staff Rule 4.02. In particular, his manager recommended extension of probation, not termination of employment.
12. The evaluation of the Applicant's performance did not conform to the requirements of Staff Rule 5.03 and Staff Rule 7.01.
13. The findings of the CPO that there were procedural defects in the manner in which the Applicant was evaluated and his probation extended corroborate the contentions of the Applicant concerning the department in which he worked and his performance evaluation.
14. The decision of the Vice President and Controller resulting from administrative review to terminate the Applicant's employment was not in accord with the provisions of Staff Rule 7.01 and was an abuse of discretion.
15. The actions of the Vice President and Controller after his decision to terminate the employment of the Applicant were arbitrary, discriminatory, improperly motivated and carried out in violation of a fair and reasonable procedure.
16. The fact that subsequent to the termination of his employment the Applicant performed satisfactorily in the Bank is further evidence that the actions of the Vice President and Controller in terminating his employment for unsatisfactory performance were an abuse of discretion.
17. The Ombudsman also found the conduct of the Vice President and Controller questionable.
18. The proceedings before the Appeals Committee were improperly conducted and its report was incomplete.
19. The Applicant's visa status is hopeless and he will be compelled to return to a country from which he is a political refugee.
20. The Applicant makes the following pleas:
 - (i) rescission of the decision that the Applicant's service was unsatisfactory;
 - (ii) rescission of the decision that the Applicant's employment be terminated;
 - (iii) extension of the Applicant's contract of employment so that he may serve a probationary period in conformity with the Staff Rules;
 - (iv) payment of 3 years salary and benefits including annual increments;
 - (v) payment of \$25,000 for the stress, anxiety, professional humiliation, pain of mind and uncertainty to which the Applicant has been subjected during a period of 18 months; and
 - (vi) payment of \$4,340 as reimbursement of travel and living expenses incurred on the Applicant's visit to the United Kingdom to seek renewal of his refugee status.

The Respondent's main contentions:

21. The administrative review conducted by the Vice President and Controller was properly conducted with observance of due process. The Applicant was made aware of his shortcomings and could have defended himself.

22. The decision of the Vice President and Controller to terminate the employment of the Applicant who was on probation was properly taken and did not constitute an abuse of discretion, particularly because renewal of a fixed-term appointment or conversion of such an appointment to a regular one is always subject to the requirement of satisfactory performance. In any event the Applicant was not punished for complaining about "underfilling" the position which he held.

23. The Staff Rules, particularly 5.03 and 7.01, were adhered to by the Respondent.

24. The Vice President and Controller found the CPO's review of the Applicant's case less than sufficient and there was nothing wrong in his informing her of this fact. In any event the CPO considered the Applicant to be a poor performer.

25. No improper actions were taken subsequent to the Applicant's being notified of the termination of his employment.

26. The Applicant's work with the Respondent while on special leave was properly terminated as a result of and soon after the Tribunal's decision in Moses, Decision No. 115 [1992].

27. There was no bias against the Applicant in the treatment given to him.

28. There was nothing wrong in the Vice President and Controller taking a different view from the Ombudsman on the manner in which the Applicant's case should have been handled.

29. The Appeals Committee proceedings were properly conducted and its report was properly issued. The Tribunal is not a court of appeal from the Appeals Committee but decides cases de novo.

30. The Applicant's visa status was not as hopeless as he made it out to be.

Considerations:

31. The first issue raised in this case relates to whether probation was conducted in accordance with the requirements of due process of law. As the Tribunal has stated:

The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.... (Salle, Decision No. 10 [1983] paragraph 50)

32. Two basic guarantees are essential to the observance of due process in this connection. First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second, the staff member must be given adequate opportunities to defend himself.

33. As to the first guarantee, the Tribunal is satisfied that it was properly observed by the Respondent, in part by means of discussions held by the management with the Applicant, and in part by means of the evaluations given the Applicant at the various stages of his performance reviews. The Applicant, therefore, was aware of the existence of such problems and criticism. Above all, the very discussion about the level of his position and the decision to extend probation were clear indications that his performance was not meeting the standards required by the management. The feedback and warnings provided by the Respondent seem clear enough for the Applicant to have had the opportunity to correct the shortcomings of his work. Probation was conducted in accordance with the applicable Staff Rules.

34. Several contentions of the Applicant in this regard are not justified. In particular, the record does not support the suggestion that the Respondent intended to punish the Applicant for having made complaints. With respect to the Applicant's contention that the management of his Department was in disarray, there is no evidence that, even if this were a fair characterization of conditions within his department, this undermined the validity of his performance evaluations. Such evaluations were generally done in due course and the delays that took place cannot in themselves be considered as constituting a procedural irregularity. It should be noted, furthermore, that a proper evaluation does not require that every person related to the Applicant's work should be consulted.

35. The Tribunal turns next to the second guarantee mentioned above, namely the availability of adequate opportunities for the Applicant to defend himself against the criticism made by the management. In addition to direct discussions held with his supervisors at least four separate procedures were available for this purpose:

- (i) review initiated by the Chief Personnel Officer (CPO) in relation to the recommendations of the IAD Management Review Group (IADMRG);
- (ii) administrative review requested by the Applicant relating to the revised conclusions of the IADMRG;
- (iii) intervention by the Ombudsman; and
- (iv) recourse before the Appeals Committee.

The Tribunal will not deal with the proceedings before the Appeals Committee since, as repeatedly stated, it is not a court of appeal from such Committee. Neither will the Tribunal discuss the Ombudsman's intervention since the Respondent is at liberty to follow or reject his advice.

36. The Tribunal has examined particularly the memorandum addressed by the CPO to the Auditor General on November 11, 1991, relating to the IADMRG recommendation that the Applicant be offered a level 19 position subject to an extended probationary period. The conclusions of the CPO are important in that they warned of potential flaws if such recommendation were to be implemented, including questions of discrimination, arbitrariness, good faith and prejudice. However, the Tribunal notes that precisely as a result of such conclusions the recommendation was revised so as to extend probation for 12 months at level 20, which is a level corresponding to an Auditor Senior position. Had the CPO's views been ignored, there could have been grounds for contending that the decision was biased or prejudged the situation, but this is not the case. Furthermore, the CPO's conclusions in no way contradict the performance evaluations or the need for the Applicant to improve such performance.

37. The Tribunal must now examine the question of the administrative review undertaken by the Vice President and Controller. This issue touches upon questions of both procedure and substance since the administrative review resulted in a decision more unfavorable to the Applicant – termination – than the initial decision – abstention from confirmation and extended probation. The purpose of the administrative review is to provide for the possibility of reconsideration by a higher authority of decisions which a staff member considers adversely to affect his or her interest and rights. Therefore, it can only be conceived in the sense of allowing for a remedy, total or partial, in the event of the reconsideration being accepted by such authority. This is the very reason why the administrative review is open only to the aggrieved or affected staff member. The management has other means to have initial recommendations reviewed, such as the procedure initiated in this instance by the CPO. The possibility that the supervisor carrying out an administrative review could reach a more unfavorable decision is not within the spirit of the Staff Rules and would constitute a serious deterrent to seeking relief under the administrative review process. The consequences of this conclusion will be dealt with below.

38. The fact that the management was not satisfied with the Applicant's performance is well established and the pertinent evaluations do not depart from applicable Staff Rules. The record does not provide any evidence that discretion might have been abused in this regard. Unsatisfactory performance was not, therefore, an arbitrary conclusion and this was the basis on which confirmation was withheld and probation was extended.

The subsequent performance of the Applicant elsewhere in the Bank is not relevant since evaluations and assessments are related to specific positions in a given Department and its needs, IAD being the only unit relevant to the contentions made in this case.

39. The financial treatment given to the Applicant was not unfair because an ex-gratia payment covering the balance of his fixed-term appointment was offered and later combined with Special Leave. The Bank also paid the Applicant for the time worked on Special Leave. It follows that the Applicant did not suffer undue financial hardship in terms of what he could have reasonably expected under a three-year fixed-term contract.

40. The issue concerning the Applicant's visa status needs to be examined in the proper perspective. The entitlement to a given visa follows the contract of employment and not the other way round; that is, the contract of employment does not follow the need for a visa, a situation which would be utterly disruptive of any employment policy. While the concern expressed by the Applicant regarding his situation at home might be understandable, it cannot alter the standards of performance required by the Bank. To meet these concerns full resettlement benefits were made available and Special Leave was granted by the Respondent amounting as a whole to fair treatment.

41. The Tribunal must now consider the consequences of the administrative review which resulted in the termination of the Applicant's employment. As decided by the Tribunal on various occasions (Skandera, Decision No. 2 [1981], paragraph 29; Buranavanichkit, Decision No. 7 [1982], paragraph 30; Broemser, Decision No. 27 [1985], paragraph 40; K. Berg (No. 2), Decision No. 99 [1990] paragraph 39), it has a choice between ordering the rescission of the decision contested and ordering performance of an obligation – in this instance to carry out a proper administrative review – or fixing an amount of compensation to be paid to the Applicant.

42. The Respondent's decision here under consideration is in essence a negative decision, that is not to confirm the Applicant in level 21 which was the specific request made by him in the administrative review. Neither was confirmation possible at levels 20 or 19, an alternative which was furthermore unacceptable to the Applicant. Termination followed as a consequence. In this context, as stated by the Tribunal in an earlier case, "in the circumstances rescission of the decisions contested or specific performance of the obligation invoked is not a remedy appropriate to the injury done" (Buranavanichkit, Decision No. 7 [1982], para. 30). This kind of remedy would be impracticable in light of the circumstances of this case. Rescission of the contested decisions would not result in any form of confirmation. As to specific performance, even if a new administrative review was ordered this would not change the refusal of confirmation which was based on the Applicant's unsatisfactory performance. It follows that payment of compensation is the only appropriate alternative.

43. In assessing the compensation due to the Applicant the Tribunal must take into account the fact that no material injury has been caused to him since payments covering the balance of the fixed-term appointment were made and special leave granted in conjunction therewith. However, since due process and the appropriate standards of justice were not fully observed in the administrative review, this in itself caused an intangible injury to the Applicant.

Decision:

For these reasons, the Tribunal unanimously decides that:

- (i) the Respondent pay the Applicant compensation in the amount of \$10,000; and
- (ii) all other pleas are dismissed.

A. K. Abul-Magd

/S/ A. K. Abul-Magd
President

C. F. Amerasinghe

/S/ C.F. Amerasinghe
Executive Secretary

At Washington, D.C., December 10, 1993