

World Bank Administrative Tribunal

Reports

2004

No. 324

**Pedro N. Taborga (No. 2),
Applicant**

v.

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

**World Bank Administrative Tribunal
Office of the Executive Secretary**

World Bank Administrative Tribunal

**Pedro N. Taborga (No. 2),
Applicant**

v.

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

1. The World Bank Administrative Tribunal has been seized of an application, received on April 15, 2004, by Pedro N. Taborga against the International Bank for Reconstruction and Development. The Bank has raised a jurisdictional objection to be decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Bola A. Ajibola (President of the Tribunal) as President, Jan Paulsson (a Vice President of the Tribunal) and Francisco Orrego Vicuña, Judges. The usual exchange of pleadings with respect to jurisdiction took place and the case was listed on August 6, 2004 to decide the issue of jurisdiction only.

2. This case concerns a claim about the funding and management policies of the Bank's Staff Retirement Plan (SRP or the Plan) and the failure of the Bank to distribute to the Applicant and other staff members or former staff members the excess funds allegedly available, or to lower the amount of their contributions to this pension system. Misuse and misappropriation of funds are also claimed in this case.

3. The Applicant joined the Bank in 1971 as a Transport Economist and was declared redundant in 2000. He retired at Grade G and received the pertinent separation benefits in 2001. The Applicant contested the redundancy decision before this Tribunal, a claim that was dismissed in 2003.

4. On April 28, 2003, the Applicant brought a separate claim to the Tribunal concerning an alleged breach of the Bank's fiduciary duty for failure to distribute funds actuarially determined to be in excess of the Applicant's proportionate share in the SRP fund. The Tribunal dismissed this application on the grounds of failure to exhaust internal remedies and failure to demonstrate that the Respondent had agreed to allow him to proceed directly to the Tribunal instead.

5. On December 11, 2003, the Applicant brought his claim to the attention of the President of the Bank and the Pension Benefits Administration Committee (PBAC). However, as stated in the answer received from Mr. Krishnan Nagarajan, the Pension Benefits Administrator, on March 8, 2004, neither the Bank's President nor the PBAC could consider the claim, as it concerned decisions of the Pension Finance Committee in respect of contributions, and of the Executive Directors in respect of the amendments introduced to the SRP. At the same time, Mr. Nagarajan informed the Applicant that the Bank would allow him to file an application with this Tribunal without first exhausting internal remedies, but would reserve the right to raise other jurisdictional objections, such as the timeliness of the application.

6. In light of this authorization, the Applicant filed the current claim before the Tribunal on April 15, 2004. The Bank, as will be discussed further below, objected to the Tribunal's jurisdiction on the ground that the application was untimely.

7. The Applicant explains in support of his claim that his contributions to the SRP during the period of his employment were significant, amounting in his estimate to \$1,495,667.97. At retirement, the Applicant commuted \$534,878.25 and has received various pension payments in the years that have followed. The Applicant argues that the difference between the amounts staff have contributed and the actual value of pensions is

“astonishing,” and submits that his own contributions show an excess funding of his pension. These excess funds, the Applicant claims, should be distributed to beneficiaries on the basis of their proportionate share in the fund.

8. The Applicant also asserts that at the time he joined the Bank, the Respondent was required to pay, as part of his compensation, a pay-in ratio to the SRP of 2 to 1. The Applicant contends that this ratio has dwindled over the years. Moreover, he asserts that the Bank even suspended its contributions altogether for over five years, and added liabilities to the SRP in excess of 2 billion dollars. The Applicant further claims that when the Bank in 1998 converted the SRP into an account-based defined contribution plan, which shows exactly the amounts contributed by each staff member and the Bank, it discriminated against the Applicant and other staff by treating only new staff in a clear and transparent manner.

9. In the Applicant’s view, the above policies have resulted in the breach of the fiduciary duties of the Bank to all SRP beneficiaries, in addition to weakening the Plan and materially reducing the Applicant’s rights. Although under the Staff Rules the assets of the SRP are the property of the Bank, the Applicant asserts that beneficial ownership is vested in participants, and the assets must be managed solely in the interest of beneficial owners. The Applicant also challenges the fact that new classes of participants, such as Non-Regular Staff (NRS), are brought into the SRP without funding their participation appropriately. The Applicant further argues that the Bank’s contributions should continue as part of staff compensation or, at least, current participants should see their contributions reduced and retired participants should have their pensions increased.

10. In pursuing these policies, the Applicant further argues, the Bank has been able to use staff contributions for other purposes and has thus decreased staff salaries by way of a tax on staff or unlawful appropriation of their monies.

11. The Applicant requests a variety of remedies to attend to his claim. First, he asks that the Tribunal appoint, or that it order the Respondent to appoint, a panel of independent experts to analyze the matter and issue binding recommendations. It is further requested that the Tribunal order the Respondent to offer him and other staff a nominal account reflecting the individual share of the total fund, return all excess funds above the cost of the pension, put a stop to all further actions depleting the resources of the Plan, restore all monies unjustly appropriated, suspend the Pension Benefits Administrator and appoint an interim board of trustees.

12. The Respondent, as noted, objected to the Tribunal's jurisdiction on May 6, 2004. The Respondent first explains that the Applicant's letter of appointment expressly referred to the conditions of employment as then in effect and as they may be amended from time to time, including the SRP. The Respondent notes that while the Applicant's contribution was fixed at 7% of his notional gross salary, the Bank is committed to contributing the funding costs of liabilities in excess of staff contributions, and carrying all investment risks. Further, the Respondent submits that there was never a 2 to 1 ratio obligation in this respect, this being only the reflection of what was considered to be the historical average.

13. As to the SRP 1998 amendment, it is pointed out by the Respondent that this is a new benefit formula long requested by the staff, and the Bank is still obliged to make contributions to the Plan as determined by the Pension Finance Committee based on the overall actuarial evaluation of total Plan liabilities. There is thus no harm to the Applicant's rights, for he has received and continues to receive "huge financial benefits." It is also explained by the Respondent that the total contributions made by the Applicant over his career amounted only to \$416,727, including interest. The Respondent rejects the notion that

the Bank has misused or misdirected Trust assets and explains that these assets are clearly kept separate from other assets and are used exclusively to pay benefits under the Plan.

14. The Respondent's objection to jurisdiction is based on the argument that the Applicant is not alleging that the terms of the Plan have been misapplied to him, but has pleaded instead that an entirely new benefit system should have been in place from the time of his appointment. This alternative benefit system, the Respondent explains, is largely based on the performance of world financial markets over the past two decades. The Respondent observes that the Applicant conveniently ignores the declines of those markets after the Applicant's retirement, the Bank's financial risks in respect of future investment returns, and the fact that the Bank has a continuing obligation to make contributions to the fund so as to cover its liabilities. Moreover, the Respondent argues, an implementation of any such proposal would mean the reduction of benefit entitlements to all participants in the SRP.

15. It follows, the Respondent asserts, that the Tribunal's Statute's 120-day timeline for filing applications, as set out in Article II(2), has been exceeded by some 33 years, which is the period of employment the Applicant alleges should have been governed by an entirely different pension system. To this effect, the Respondent explains that the Applicant cannot "33 years after his appointment ... contest either the benefit scheme to which he is subject or the provisions governing the calculation of the Bank's contributions (which have essentially remained unchanged)." In the Respondent's argument, what the Applicant in fact pretends is to reverse the terms and conditions of his employment established in 1971.

16. The Respondent also argues in this connection that although the Tribunal has ruled that the three-year statute of limitations under Staff Rule 11.01 applies to pension claims, this limitation has also been by far exceeded, given that the Applicant's terms and conditions

of employment were fixed long before December 11, 2000, i.e., three years before the Applicant first notified the Respondent of his claim on December 11, 2003. Even the changes to the Plan approved by the Executive Directors in 1998 were put in place and well publicized more than five years earlier.

17. The Respondent concludes by explaining that the Applicant should not succeed in his attempt to supplant the authority of the Executive Directors by attempting through judicial means to terminate and distribute the assets of the SRP, and that the request to appoint a panel of experts is beyond the scope of the Tribunal's authority.

18. The Applicant has in turn opposed the objections to jurisdiction on the ground that the Tribunal is the only forum available to him, except for the possibility of applying to a United States federal court. Moreover, the Applicant explains that the Respondent itself authorized him to resort directly to the Tribunal, thereby forfeiting the right to make jurisdictional objections on the ground of timeliness. In the Applicant's view, the date of this authorization, March 8, 2004, i.e., the date on which his request for review was denied, is the date from which the statutory 90-day period should be counted under Rule 7(8) of the Tribunal's Rules. In any event, the Applicant further argues, his rights are of a continuing nature, as is the harm done.

19. In connection with the three-year limitation of Staff Rule 11.01, the Applicant believes that this does not apply to this case, as he is claiming funds from the SRP and not from the Bank, the latter in his view being the situation envisaged under that Rule. The Applicant further contends that his claim is timely because it was filed within three years of the date on which he became entitled to receive pension benefits, i.e., monthly payments and/or applicable commutation, upon his retirement on March 1, 2001. The Applicant submits that his right to claim a benefit in accordance with Staff Rule 11.01 would therefore

not lapse until March 1, 2004. Having attempted to claim his right to this benefit in April 2003, the Applicant contends that his claim has been brought within the three-year time frame set forth in Staff Rule 11.01.

20. The first question the Tribunal must examine is whether the Respondent is precluded from raising objections to jurisdiction on the basis of timeliness or other issues once it has allowed a staff member to apply to the Tribunal without first exhausting internal remedies. The Respondent in this case granted that authorization while expressly reserving its right to object on other grounds. The question was clearly resolved in *Thomas*, Decision No. 232 [2000], para. 9, where the Tribunal held that

it was indicated that the staff members could file applications directly with the Tribunal, but that the Bank would argue that such applications were untimely and inadmissible on jurisdictional grounds. It was added, however, that the Bank would not raise jurisdictional objections on account of a failure [to exhaust internal remedies].

The Tribunal accordingly concludes that the Bank did not forfeit its right to raise jurisdictional objections on grounds different from the exhaustion of internal remedies, and that this right was expressly and validly reserved.

21. A second question the Tribunal must examine concerns the scope of Staff Rule 11.01 and the three-year limitation period therein established. In terms of paragraph 2.01 of this Rule, “the right of a staff member to claim any refund, allowance or payment due but unpaid or any benefit not credited shall lapse three years after the date on which a right to the benefit, allowance or payment claimed arose.” After citing this Rule, the Tribunal held in *Mitra*, Decision No. 230 [2000], para. 14:

There is here a time limit of three years that prevents claims, including those brought under the SRP, being made indefinitely into the future. The Staff Rules and the SRP thus offer a standard which attends both to the rights of staff members and to the need to avoid unlimited or undefined claims proceedings.

22. In light of that judgment, the Tribunal can make certain clarifications. The first is that there is no room under the Staff Rules or the SRP to argue that a right is of a continuing nature, or so is the breach and the harm done, as the Applicant has argued in the instant dispute. There is a clearly established statute of limitations precisely so as to prevent claims being made indefinitely into the future.

23. A second clarification the Tribunal must make concerns the nature of the benefits, allowance or payment due or not credited. These are of course rights the staff member is individually and specifically entitled to in accordance with the terms and conditions of employment and the terms of the SRP. They are not abstract or theoretical rights, even less so speculative. This means, in the instant case, that the Applicant must show, at least *prima facie*, that he is entitled to a certain right that has not been paid or credited, and claim it within the three-year time period.

24. This last consideration leads to a third clarification of importance. To the extent the right is specific and identifiable, the counting of the three-year limitation period will begin on the date the right arose, which in the case of the SRP shall normally be the date of retirement, or in any event the date on which the Applicant became aware of the deficiency he is claiming. As observed in *Yang*, Decision No. 233 [2000], para. 23,

the difficulty is that there is no *adverse* decision regarding the classification of the Applicant's appointment to which the Applicant can point. If the Applicant had raised a claim regarding her classification while she was NRS, a decision would have been made by Bank management, which decision the Applicant could have then challenged through administrative review and the Appeals Committee processes, subject to the time limits provided thereunder. However, the absence of any particular adverse decision regarding her classification is not necessarily fatal to the Applicant's claim.

However, to the extent the claim is unrelated to a specific and identifiable right, but rather vaguely to what the terms and conditions of employment should have been or the SRP

should have said, the limitation period shall of course begin at the point where the claimant believes that particular understanding should have been manifest.

25. The Tribunal must then examine the related question concerning the Applicant's claim in this case. The Respondent has made a persuasive argument when stating that the Applicant's request essentially asks the Tribunal to "disregard, rather than interpret, longstanding policies set out in the Plan and approved by the Executive Directors." According to the Respondent, "Applicant does not allege that the terms of the Plan have been misapplied. He just has suddenly decided after 33 years that the Bank should have an entirely different pension system."

26. In fact, the Applicant is not asking for the enforcement or interpretation of a specific right to which he can point under the SRP, but for an overarching policy decision involving the gross benefit formula in force for a long time, the decision to introduce a capital accumulation system as from 1998 for new staff members, the decision to include NRS in the benefits of the Plan, the calculation of the Bank's contribution to the SRP under new criteria, and the decision of the Pension Finance Committee not to contribute to the Plan for certain years in view of its over-funding. None of these questions arise from the terms and conditions of his employment or from the provisions of the SRP, not even *prima facie*.

27. An identical situation was submitted to the Tribunal's consideration in *Briscoe*, Decision No. 118 [1992], where in upholding the objection to jurisdiction it was held in para.

31 that

[t]he application here is in effect directed against a general rule regarding employment benefits, rather than an individualized application of that rule to the Applicant himself. His application has not been directed at any specific decision by the Respondent denying him expatriate benefits. In fact, at no time did the Applicant specifically request such benefits, nor did the Bank specifically deny such a request.

28. The Tribunal accordingly concludes that, assuming that there are indeed any proper claims, part of those claims arose on the date of his contract of employment in 1971, and part of them arose as of certain SRP terms' coming into force in 1998. None of these claims relate to the specific rights the Applicant could claim upon retirement. All such dates are well over any statute of limitation considered under the Staff Rules or the Tribunal's Statute.

29. The Tribunal must also examine a string of accusations made by the Applicant against the Bank, some serious indeed. The Applicant asserts first that the 2 to 1 ratio of contributions to the SRP is "contractually established," but offers no evidence to this effect. In fact, the obligation of the Bank, as noted, is written quite differently and that ratio arises, as it is satisfactorily explained, from historical averages that might be constant or not. At the most, such ratio can be considered a "rule of thumb" that is reflected in non-binding descriptions.

30. Neither does the Tribunal see any connection between the Applicant's claim and an Internal Revenue Service determination that the Plan qualifies in some respects under U. S. tax legislation concerning the distribution of benefits to participants, which has been invoked by the Applicant in support of his argument. No inference can be made from this determination in respect of an eventual obligation to distribute excess funds.

31. More serious are the accusations concerning the Bank's alleged misuse and misappropriation of funds from the SRP. The Applicant goes to the extreme of asserting that he is challenging the "Respondent's unjust enrichment in wrongfully capturing millions upon millions of Plan assets for the Bank's own benefit." No evidence has been produced to support this extraordinary accusation. Moreover, such a gratuitous affirmation is disrespectful of both the Bank and the Tribunal. As held by the Tribunal in *Mahmoudi*, Decision No. 219 [2000], para. 12:

Coming before the Tribunal is an important right of staff members and they are entitled to make all pertinent arguments in defense of their views and claims, which shall be considered with the greatest attention. Such right, however, must not be tainted by trivial or frivolous arguments.

32. As the Tribunal held in *Crevier*, Decision No. 205 [1999], para. 29, even if there is an incidental reduction of budgetary expenses deriving from pension payments, “such incidental reduction of administrative expenses is not, in itself, an abuse of discretion or otherwise an improper use of the Bank’s assets.”

33. Notwithstanding the Applicant’s views to the contrary, the same conclusion applies to the question of decrease or suspension of contributions to the SRP and related matters if these are beyond the Bank’s obligations under the pension scheme. Even if other approaches to the pension scheme might be feasible, these have not been introduced. As the Tribunal held in *Lavelle*, Decision No. 301 [2003], para. 28:

As the Tribunal has held, it cannot judge whether a given policy could have been wiser. In *Crevier*, Decision No. 205 [1999], para. 17, the Tribunal stated:

It is not within the competence of the Tribunal to consider which alternative would have been best or more effective to attain the desired objectives of the reform. This is a matter that is solely within the discretion of the Board of Directors. The Tribunal is empowered only to decide whether the solution ... can be applied lawfully to the Applicant in the light of his rights as a staff member.

The Tribunal has no doubt in concluding that the policy defined did not entail an abuse of power or frustrate a legitimate expectation.

34. Finally, just for the sake of completeness, the Tribunal notes that under Article XII of the Statute, most of the remedies requested by the Applicant are in any event beyond the Tribunal’s powers.

Decision

For the above reasons, the Tribunal decides that the application is inadmissible.

/S/ Bola A. Ajibola
Bola A. Ajibola
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington, DC, November 12, 2004