

Decision No. 295

Randall G. Vick,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on October 15, 2002, by Randall G. Vick 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 Francisco Orrego Vicuña (President of the Tribunal) as President, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges. The usual exchange of pleadings with respect to jurisdiction took place. The case was listed on January 15, 2003, to decide the issue of jurisdiction only.

2. The Applicant began working with the Bank in 1976, and in 1994 was employed as Chief of the Contracts Unit at Grade 24 in the Procurement Division of the General Services Department (GSD). In that year, the Applicant accepted a Mutually Agreed Separation (MAS) from the Bank.

3. According to the terms of the MAS agreement dated November 23, 1994 and signed by the Applicant on November 25, 1994, the Applicant was to remain in working status through December 31, 1994. Beginning January 1, 1995, he would be on Special Leave through July 31, 1995, and would retire from the service of the Bank on August 1, 1995. For the duration of the Special Leave, the Applicant would continue to receive his current salary and dependent's allowance, if applicable, but was not required to report for work, except if called upon. There is nothing in the record to suggest that the Applicant was ever called upon to render any services to the Bank during the Applicant's Special Leave.

4. Once the Applicant's Special Leave ended, he was offered a series of Short-Term Consultant appointments. The Applicant states that at the time he signed his MAS he believed that he would be allowed to work for the Bank on Short-Term Consultant appointments for up to 190 days per year, as a regular retiree. Soon thereafter, however, the Applicant was informed that, under the terms of his MAS, the Bank might want to limit to 120 the number of days he would be allowed to consult per year. In a letter to a staff member in the Personnel Services & Compensation Department, Program Staff (PSCPS) dated March 7, 1995, the Applicant sought clarification on the matter. The following year, the Applicant sought a meeting with the two relevant Personnel Officers to discuss the matter. The Applicant states that he received no answer to his request for clarification on either of those two occasions.

5. The Short-Term Consultant appointments offered to the Applicant (and forming part of the record of this case) routinely referred to provisions of the Staff Rules, as amended from time to time. Thus, in the appointment letter dated October 15, 1999, the Respondent advised the Applicant that, as a former staff member of the World Bank Group, he could be reappointed only as specified in Staff Rule 4.01, concerning appointment. Section 8 of this Rule sets out the terms relating to reappointment of staff after separation from the Bank's service. A subsequent letter offering appointment for a single day as a Short-Term Consultant, dated August 4, 2000, stated, *inter alia*, that

[o]ur records indicate that you left the Bank Group service with severance payments. Therefore, your reappointment is restricted in accordance with Staff Rule 4.01, Section 8, Reappointment. Please ensure that you comply with this restriction.

6. On August 15, 2000, the Applicant was offered another Short-Term Consultant appointment with the Private Sector Development and Infrastructure (PSI) Department. This letter, like the August 4, 2000 letter, stated that

the Bank's "records indicate that you left the Bank Group service with severance payments. Therefore, your reappointment is restricted in accordance with Staff Rule 4.01, Section 8, Reappointment. Please ensure that you comply with this restriction." The letter further provided that under this appointment, the Applicant would be subject to the Staff Rules of the World Bank "in effect at the time you are appointed and as they may be amended during your period of service." The Applicant accepted this letter of appointment on August 17, 2000.

7. Staff Rule 4.01, Section 8, in effect on August 15, 2000, provided that:

Reappointment after Retirement

8.02 A former staff member who is receiving a pension under the Staff Retirement Plan may not be reappointed to an Open-Ended or Term Appointment. Except as provided in paragraphs 8.04, 8.05, 8.06, 8.07, and 8.08, such a staff member may be reappointed to a Short Term Consultant or Short Term Temporary appointment, for periods not to exceed 190 work days in any twelve-month period.

...

Reappointment after Separation by Mutual Agreement

8.07 A former staff member whose employment terminated with payment of severance under mutually agreed separation provisions of Rule 7.01, section 5, may not be reappointed to an Open-Ended or Term appointment. Such a former staff member may be reappointed to a Short Term Consultant or Short Term Temporary appointment for the following periods:

(a) for a maximum of 30 work days in the aggregate in any twelve months during the period with respect to which severance payments were calculated; and

(b) for a maximum of 120 work days in the aggregate in any twelve months thereafter.

8. As the record indicates, the Applicant was offered another letter of appointment with PSI on August 7, 2001, which the Applicant signed on August 20, 2001. The second paragraph of the Applicant's new letter of appointment again indicated that as the Applicant had left the Bank after receiving severance payments, his reappointment would be restricted pursuant to Staff Rule 4.01, Section 8. This time, however, the Applicant placed next to this paragraph a hand-written and initialed objection.

9. Following a discussion between the Applicant and the Ombudsman, the Human Resources (HR) Director of Operations sent an e-mail to the Applicant on January 7, 2002 informing him that HR records indicated that the Applicant had left the service of the Bank Group under an MAS and that he had been on Special Leave from January 1, 1995 through his termination date of July 31, 1995. She further informed the Applicant that during that period he had not been required to report for duty but was still in full-pay status. The Director stated that such Special Leave is considered severance and that the Applicant had accepted this arrangement through his agreement to the MAS. She confirmed that the Bank Group's position on the issue of the Applicant's reappointment remained the same and that there would be no further review of the matter. She concluded that, as a Short-Term Consultant, the Applicant would be restricted to only 120 days of consulting work per fiscal year.

10. Thereafter, on March 27, 2002, the Applicant filed a Statement of Appeal with the Appeals Committee challenging the Respondent's decision to subject the Applicant to a reappointment limit of 120 days per fiscal year. In its Decision on Jurisdiction sent to the Applicant on July 2, 2002, the Appeals Committee ruled that it was without jurisdiction to hear the Applicant's appeal because it was untimely.

11. The Applicant filed an application with the Tribunal on October 15, 2002, contesting the 120-day work restriction confirmed in the HR Director's communication of January 7, 2002. The Respondent filed a Challenge to Jurisdiction on November 6, 2002, alleging that the Applicant had failed to exhaust all available internal remedies as required by Article II, paragraph 2(i), of the Tribunal's Statute.

12. The Applicant claims before the Tribunal that the Bank breached the terms of his MAS agreement by

unfairly denying him the right to consult for up to 190 days per year, just as every other regular retiree is permitted to do. The Applicant further claims that the Special Leave (with concomitant regular pay) in which he was placed under the MAS did not constitute severance pay, and that according to the Staff Rules he is not restricted to working 120 days a year unlike other former staff who were terminated and received severance payments. The merits of this claim do not need to be considered at this time, given the preliminary issue of jurisdiction which the Respondent has raised and which the Tribunal must address in this judgment.

13. Article II(2)(i) of the Statute of the Tribunal sets out the relevant admissibility requirement:

No ... application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

(i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal.

14. The Tribunal has stressed, in several decisions, the importance of the statutory requirement of exhaustion of internal remedies (see, e.g., *Klaus Berg*, Decision No. 51 [1987], para. 30). The Tribunal has also, in numerous decisions, regarded a staff member's failure to observe time limits for submitting an internal complaint or appeal as non-compliance with the statutory requirement of exhaustion of internal remedies (see *de Jong*, Decision No. 89 [1990], para. 33; *Setia*, Decision No. 134 [1993], para. 23; and *Sharpston*, Decision No. 251 [2001], paras. 25-26).

15. Under the earlier version of Staff Rule 9.01 ("Administrative Review"), which would have applied to the Applicant in 1994 (at the time of his MAS), the first step in exhausting internal remedies was a request by the staff member for administrative review of the contested administrative decision no later than 90 calendar days after being notified of the decision. Pursuant to changes in the grievance procedures of the Bank, administrative review was abolished in February 2000 and the new Staff Rules (i.e. 9.01 ("Office of Mediation") and 9.03 ("Appeals Committee")) established that staff members have 90 days after receiving notice of the administrative decision either to seek mediation or to appeal the decision to the Appeals Committee.

16. To determine whether the Applicant has exhausted internal remedies in a timely manner, the Tribunal needs first to establish the date by which the Applicant had notice of an adverse administrative decision, and which activated the running of the time limit for the pursuit of such remedies. The Applicant states that this date was January 7, 2002, since it was then that the Director of HR Operations put in writing HR's final position that the Applicant's placement on Special Leave under his MAS constituted severance and that this circumstance limited the number of days for which he could consult with the Bank. The Applicant asserts on this basis that the filing of his appeal with the Appeals Committee on March 27, 2002 was a timely filing.

17. The Respondent for its part refers to the date of the Applicant's receipt of the letter of appointment as a Short-Term Consultant dated August 15, 2000 as the date which started the running of the 90-day time limit for filing an appeal with the Appeals Committee.

18. A review of the record shows that there were several instances after the Applicant signed his November 1994 MAS agreement when he was or should reasonably have been aware that, under the terms of the MAS, he was restricted to consulting for less than 190 days, unlike other retirees who had not signed an MAS providing for Special Leave with full pay and without need of performing any work.

19. First, the Applicant, by his own admission, was aware soon after signing his MAS agreement of the possibility that he could be subject to the 120-day consulting limitation. As earlier noted in the letter to a PSCPS staff member dated March 7, 1995, the Applicant sought confirmation that his MAS did not preclude him from consulting for the Bank for up to 190 days. There he stated that the "reason I now request this information is because I have recently been informed that the Bank may want to limit me to only 120 consulting days because I agreed to the separation." Secondly, his October 15, 1999 letter of appointment, mentioned above, also alluded to limitations on his reappointment specified in Staff Rule 4.01, Section 8. Later, on August 4, 2000, the Applicant was clearly notified in another letter of appointment that HR records indicated that the

Applicant had left the Bank's service with severance payments, and therefore his reappointment would be restricted in accordance with Staff Rule 4.01, Section 8. The Applicant should thus have been reasonably aware in any of those instances of the 120-day annual limitation on his reappointment.

20. In any event, the Respondent asserts that the determinative date on which the Applicant must have or should have become clearly aware of the applicability of the 120-day limitation is the date on which he received his letter of appointment of August 15, 2000. The Tribunal finds that, indeed, the Applicant was made specifically aware by this letter that the Bank considered that he had left the Bank's service with severance payments and that therefore his reappointment would be restricted in accordance with Staff Rule 4.01, Section 8. The Applicant was asked in the letter to ensure that he complied with that restriction. That letter further stated that the Applicant would be subject to the World Bank Group's Staff Rules in effect at the time he was appointed and as they might be amended during his period of service. The Applicant's awareness and acceptance of these terms was confirmed by the Applicant's signing of this letter on August 17, 2000.

21. The Tribunal finds that even if in the past the Applicant could have had some doubts as to whether full pay during his Special Leave was considered by the Bank as constituting severance payments and as to the maximum number of consulting days he was permitted after receiving such severance payments, his doubts must have or should have been dispelled by this letter of August 15, 2000. If he disagreed with the Bank's decision to subject him to the 120-day limit, he could have challenged that decision before the Appeals Committee within 90 days of his receipt of the letter, pursuant to the terms of Staff Rule 9.03. The Applicant, however, filed his complaint with the Appeals Committee well over one and a half years later, on March 27, 2002. Thus, the Tribunal finds that the Applicant failed to exhaust internal remedies in a timely manner.

22. Although the Applicant does not explicitly invoke exceptional circumstances to justify his delay in challenging the terms of his August 15, 2000 letter of appointment, he does offer several explanations as to why he did not challenge those terms at that time. One is that he believed that the critical language in the letter constituted clerical error, as he had, over a period of more than 5 years, worked several times over the 120-day limit. Indeed, the Applicant claims that HR consistently gave him misleading messages regarding the number of days that he was allowed to work per year. He states that since 1995, an HR representative had advised him that he need not worry, as there were ways to work around the 120-day time limit and that he was allowed to borrow days from future appointments to meet any overflow above the 120-day limit. He states, and the record indicates, that he did receive such conflicting messages regarding extensions of the applicable time limit.

23. The Applicant contends, moreover, that only the HR Officers could resolve his claims, as it was they who used the new language in the August 15, 2000 letter. In this respect, the Applicant explains that more restrictive criteria seemed to have been made applicable to him only in June 2000 when a new Officer joined the HR unit and began to handle his consulting contracts. After her arrival, borrowing future days to meet overflows above the 120-day limit was no longer permitted. The Applicant states that he approached this HR Officer in August 2000 to ask why the Bank's policies regarding borrowing over the 120-day limit had changed. The Applicant also subsequently approached other HR Managers in June 2001.

24. The Tribunal notes several problems with the Applicant's explanations. Firstly, although his written pleadings assert that he approached the HR Officer in August 2000 regarding his claim, the record indicates that his communications with her on the matter actually took place in May 2001.

25. Secondly, notwithstanding the Applicant's claims, the Tribunal has found, as noted above, that any doubts that the Applicant might have had regarding the applicable limit on his consulting days must or should have been dispelled when he received the letter of August 15, 2000. There is no explanation as to why the Applicant did not seek clarification of the provisions of his MAS from the HR Officers within 90 days after his receipt of this letter. If the Applicant had not received such clarification within a reasonable time, he could and should have proceeded to file an appeal with the Appeals Committee. As the Tribunal ruled in *Walden*, Decision No. 167 [1997], para. 20, as a matter of principle, when a staff member is confronted with an adverse decision by the Bank, he or she should invoke internal remedies within the prescribed time limits. The Tribunal there

explained that

[i]f clarification of the Bank's decision is sought by the staff member, it should be done promptly, for the time limits ... would be effectively negated if the ninety-day period could be indefinitely suspended by a staff member's requests for further clarification of a decision whose purport is already quite clear. (*Id.*)

26. The Tribunal finds, accordingly, that the Applicant unreasonably waited more than a year and a half after receiving his August 15, 2000 letter of appointment before formally challenging the Bank's decision, and nearly nine months before even approaching the HR Officer and HR Managers in order to request clarification of what he allegedly believed to be a clerical error.

27. The Applicant's meetings with HR Officers, before going to the Appeals Committee and the Tribunal, did not constitute exhaustion of internal remedies, contrary to what the Applicant seems to believe. As the Tribunal has ruled in the past, "all other remedies available within the Bank Group" means *formal remedies* and includes timely recourse to the Appeals Committee. (See *Dey*, Decision No. 279 [2002], para. 20; *Islam*, Decision No. 280 [2002], para. 19.)

28. The Tribunal also notes that the Applicant not only had been reminded in his letter of appointment that he would be bound by the Staff Rules in effect at the time of his reappointment and as amended from time to time, but had easy access to these Staff Rules, including those addressing grievance procedures. Should he now allege that he did not know of the existence of, or had misinterpreted, such Staff Rules, it suffices to observe that ignorance of the law is no excuse for failing to exhaust internal remedies. (See, e.g., *Bredero*, Decision No. 129 [1993], para. 23; *Guya*, Decision No. 174 [1997], para. 7; and *Dey*, Decision No. 279 [2002], para. 17.)

29. The Tribunal considers the Applicant's treatment of the relevant time limits, and of the resources which the Bank offered him, to have been rather casual and indicative of a relaxed handling of his own case. The Tribunal has held in the past that such an approach cannot constitute an exceptional circumstance. (See *Agerschou*, Decision No. 114 [1992], paras. 45, 48; and *Guya*, Decision No. 174 [1997], para. 11.)

30. At the same time, the Tribunal believes it is desirable for HR Officers who are approached by staff members requesting clarification of possibly adverse administrative decisions to respond to such requests promptly and accurately, particularly because the time limit within which these staff members can contest such administrative decisions is not suspended by their requests. HR Officers should also be careful to apply Staff Rules according to their explicit terms and to avoid making exceptions or *ad hoc* arrangements which may potentially confuse the staff members as to the meaning of such Staff Rules.

31. We turn to the Applicant's contention that he did not file an appeal with the Appeals Committee after receiving the August 15, 2000 letter because the administrative decision which he was required to challenge before the Appeals Committee was the HR Operations Director's e-mail to him of January 7, 2002. The Tribunal is not persuaded by this argument. A careful review of the language of the January 7, 2002 e-mail shows that this was not a new administrative decision which the Applicant could challenge separately. It merely confirmed circumstances and determinations which had been conveyed to the Applicant at various times in the past. The Tribunal finds that the Applicant cannot toll the time limit for the exhaustion of internal remedies by filing an appeal against a communication which is not a new administrative decision but simply a confirmation of the previous administrative decision embodied in the letter to the Applicant dated August 15, 2000. (See *Kehyaian* (No. 3), Decision No. 204 [1998], para. 23.)

32. The Applicant also submits that his initialed objection in his appointment letter dated August 7, 2001 was a counter-offer on his part which the Bank accepted. The Tribunal considers this argument bereft of basis. As the Respondent has noted, if the Bank had considered the Applicant's notation a counter-offer and had accepted it, it would have had to accept it explicitly in a subsequent letter, something that did not happen in this case. Assuming, *arguendo*, that the Applicant's objection was a counter-offer, the Bank simply did not accept it and did not act on it.

33. In sum, the Tribunal finds that the Applicant failed to exhaust internal remedies in a timely manner with

regard to his claim, and that no exceptional circumstances exist to justify the assumption of jurisdiction by the Tribunal.

Decision

For the above reasons, the Tribunal decides to dismiss the application.

/S/ Francisco Orrego Vicuña

Francisco Orrego Vicuña

President

/S/ Nassib G. Ziadé

Nassib G. Ziadé

Executive Secretary

At London, England, May 20, 2003