

Decision No. 86

Ann Hammond, David G.T. d'Adhemar, Susan Struthers,
Sheila A. Geraghty and Jamil Sopher,
Applicants

v.

International Bank for Reconstruction and Development and
International Finance Corporation,
Respondents

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. Onyeama and Tun Suffian, Judges, has been seized of applications, received September 23, 1988 by Ann Hammond, Susan Struthers and Jamil Sopher against the International Bank for Reconstruction and Development and by David G. T. d'Adhemar and Sheila A. Geraghty against the International Finance Corporation. The Tribunal decided that the Staff Association could participate in the proceedings as an amicus curiae. The usual exchange of pleadings took place. The cases were listed on August 11, 1989. The Tribunal decided to consolidate the cases.

The relevant facts:

2. In 1979 on the basis of a Report of the Joint Bank/IMF Committee on Staff Compensation Issues (the Kafka Committee) a system of setting compensation for staff (the Kafka system) was established by the Executive Directors of the World Bank. The essence of the method of setting compensation proposed by the Kafka Committee was recourse to comparators, consisting of a mixture of public and private sectors in the United States, with the international competitiveness of the market to be kept under scrutiny. In regard to review of compensation rates the Committee proposed that:

[A]fter an initial period of three years, there would be a comprehensive review, when the competitiveness of the selected comparators would be tested nationally and internationally. Job matches would be reexamined, the organizations to be included in the sample reviewed, and there would be a full-scale survey of levels of compensation in the United States private sector and the United States Civil Service measured against comparable positions in several other countries. These comprehensive reviews would continue to be held every three years unless, after the first review, the Boards decided that a longer period between reviews would be justified though the period should never exceed five years.

The management of the Bank modified this proposal slightly and recommended that:

[T]here should in principle be a comprehensive review of staff compensation every third year and in the intervening years pay should, in normal circumstances, be adjusted in the light of movements in the pay levels of comparator organizations in the chosen market...

3. The system established by the Executive Directors in 1979 accepted with slight modifications the proposals of the Kafka Committee with regard to the method of setting compensation and provided that, while in principle the market should be international, for pragmatic reasons the U.S. market should be used, provided that its international competitiveness was kept under constant review; that the mix of public and private sector comparators should be 50/50; and that there should be a 10% quality premium in compensation. With respect to periodic review, the Executive Directors accepted in its entirety the recommendation of the Bank's management.

4. Pursuant to these decisions of the Executive Directors a comprehensive review of compensation was carried

out in 1980 jointly with the IMF. Intervening year reviews were conducted in 1981 and 1982, providing the basis for the general salary adjustments for those years. In 1981 an announcement was made to staff which included the statement by management that:

[E]very three years we will undertake a major review based on a comprehensive survey of comparator compensation levels. The March 1980 review based on the findings of the Hay Survey was the first such major review.

Compensation adjustments for 1983 were also based on an intervening year review.

5. In 1984 a second major review was conducted, again with the IMF, based on comprehensive surveys of the compensation levels of comparator organizations in the public and private sectors in France, Germany and U.S.A. In the course of that review, certain aspects of the comparator system were called into question, and it was agreed that these should be considered by a Joint Bank/IMF Committee of Executive Directors on Staff Compensation (the Joint Committee). The Joint Committee's terms of reference, approved by the Executive Directors of the Bank on October 30, 1984 (and by the Executive Board of the IMF on October 26, 1984) stated the objectives of the study to be, *inter alia*, "To consider whether changes in such aspects of the compensation system are desirable and to recommend the changes that appear appropriate in order that they may be taken into account to the maximum extent possible in the 1985 compensation review". The Joint Committee was instructed to review a number of specific issues. In the case of higher level staff, these were (a) the practice of adjusting U.S. civil service pay data to take account of deviations from the rest of the U.S. market; (b) the practice of setting Bank/IMF compensation at a 10% quality premium above the chosen market; (c) the extent to which and the adequacy with which the value of benefits in comparison with the market was being taken into account; and (d) the sample of countries and the criteria to be used to test the international competitiveness of the U.S. market. All these issues except the last were likewise to be considered with respect to support staff, together with the appropriateness of the market, that is, whether it should be expanded to include international organizations and comparators outside the Washington area. The Joint Committee was also instructed to review several issues of general application: (a) the compatibility of the system of merit increases with the comparator principle; (b) the operation of the mechanism for netting down comparator gross compensation in the light of post-1980 changes in the U.S. tax code; (c) the mechanism for Bank/IMF coordination on compensation matters at Board level; and (d) other issues identified by the Joint Committee as relevant to the operation of the comparability system.

6. Intervening year reviews were conducted both in 1985 and 1986. When the Executive Directors considered the proposals for staff compensation in May of 1986, they were informed that recommendations of the Joint Committee had been further delayed and were not expected before July. But in September 1986 the Chairman of the Joint Committee formally notified the two institutions that it had been found necessary to collect additional comparator data, and that, allowing time required for collection and analysis, the Joint Committee would not be able to recommend changes in the compensation system before October 1987 at best. A further delay was subsequently reported. It was said that conclusions would not be reached before December 1987/January 1988, after which the Committee's report would be finalized.

7. As a result of the delays in the work of the Joint Committee, though three years had elapsed since the previous major review, in 1987 only an intervening year review was conducted.

8. The report of the Joint Committee was not finalized in time for the 1988 compensation review. In December 1987 the Staff Association was informed that an intervening year review would be the basis of the 1988 salary proposals. In his memorandum on the 1988 compensation review, dated April 29, 1988, to the Executive Directors the President of the Bank stated:

The planning and commissioning of a major survey for 1988 would have had to begin in 1987. However, since it was earlier expected that the report of the Joint Bank/Fund Committee of Executive Directors on Staff Compensation (JCC) would be available in time for the 1988 salary review, it was not considered appropriate to conduct a major survey based on the "Kafka I" comparators. Moreover, such a survey would

have conflicted with the major survey which Hay Associates were already carrying out for the JCC. In December 1987, the Board Committee on Staff Compensation Issues agreed, therefore, with management's recommendation that an "intervening year" survey be conducted this year, with the caveat that this agreement did not imply any commitment in terms of approving actual staff compensation increases in 1988.

9. In a statement, dated May 16, 1988, to the Executive Directors the Chairman of the Staff Association pointed out, apropos of the absence of a major compensation review:

Had the required review been undertaken, the salary adjustment indicated would have been significantly higher than Bank management has proposed, as those proposals do not account adequately for:

- expanded job content relative to comparators, owing to Reorganization;
- public sector comparator erosion, owing to failure to apply the PATC adjustment to correct for politically-imposed constraints and the US Government's salary cap;
- international comparator erosion, due to depreciation of the US dollar against other currencies;
- biases in salary adjustments against outstanding performers at all levels and all support staff, due to changes in the system of awarding merit as a proportion of total salary increases; and
- erosion in real purchasing power, due to the cumulative effect of structural increases lagging behind consumer price increases.

10. In August 1988 in regard to the next compensation review in 1989 the President of the Bank stated in a memorandum to the Executive Directors:

It is technically feasible to conduct a survey on the basis of the JCC's proposed market definition; but it will also be possible to analyze the results in several different ways if it becomes necessary to reflect final decisions which may be different from the Committee's recommendations. Specifically, it would be possible to extract from the data base information on a limited number of comparators and functions, various percentile levels, and in any combination needed for Board and Management decision-making. It would even be possible to analyze the survey results under Kafka I principles, should the decision process on a new system not be completed by the time the 1989 pay adjustment must be decided. This would also be useful for purposes of comparing the implications of both systems.

11. At the time at which the applications were filed the Respondent agreed that in the cases of Ann Hammond, David G. T. d'Adhemar, Susan Struthers and Sheila A. Geraghty the requirement that internal remedies should be exhausted had been waived.

The Applicants' main contentions:

12. Until a different compensation system is properly adopted, the Respondents have a legal obligation, mandated by the Kafka system and past Tribunal decisions, to conduct every third year a comprehensive comparator review. The Kafka system had not been amended or abrogated. A comprehensive review had not been carried out in 1987 or 1988. This was a violation of the Respondents' obligations.

13. In no event may the Respondents implement a new compensation system before first conducting a final comprehensive comparator review under the existing Kafka system.

14. A comprehensive comparator review conducted in accordance with the existing Kafka compensation system is a necessary prerequisite for two fundamental elements of staff terms of employment: the right to periodic salary adjustments and the right to internal review of Bank management decisions affecting staff conditions of employment. Thus, failure to conduct a comprehensive comparator review is an impermissible unilateral change of an essential element of employment.

15. Even if, arguendo, the right to a comprehensive comparator review is not an essential element of employment, the Bank has abused its discretion by failing to conduct a comprehensive comparator review since 1984, especially when confronted with a prima facie case that a comprehensive comparator review would correct serious inadequacies in the assumptions being used by management in making salary adjustments, i.e., (i) changing economic conditions that suggest that the U.S. comparators may no longer be competitive, (ii) significant internal changes in job categories and job gradings within the Bank following the 1985 job grading exercise and the 1987 reorganization, and (iii) serious recruitment problems at the Bank.

16. The abuse of discretion involved in the Bank's failure to conduct a comprehensive comparator review under the above circumstances has resulted from (a) the introduction of retroactive changes to conditions of employment, (b) ignoring the Respondents' duty to secure staff with high technical competence, and (c) failure adequately to consult with the Staff Association, and has caused excessive harm to staff and a lowering of staff morale.

17. Each applicant requested the following relief:

- (i) compensation in an amount equal to the difference between the salary adjustments he or she has actually received and the salary adjustments he or she would have received had Respondent fulfilled its obligation to conduct a comprehensive comparator review plus interest on that amount at the rate of ten percent per annum, which amount cannot be quantified prior to the specific performance requested herein;
- (ii) in the event that the Respondent makes the election under Article XII, paragraph 1 of the Statute of the Tribunal, compensation in the amount of one year's net salary; and
- (iii) reimbursement of all costs and attorney's fees in the prosecution and support of his or her application.

The Respondents' main contentions:

18. Postponement of a comprehensive compensation review did not constitute an impermissible change in essential conditions of employment. The requirement that a comprehensive compensation review be done every third year was not an essential condition of employment as spelled out in de Merode. As was pointed out in von Stauffenberg, a minor change in periodicity related to a non-essential element in the conditions of employment which did not affect the principle of periodic comprehensive review. Nor was the same requirement an essential element of the Kafka system. The Kafka Committee had recommended that, while comprehensive reviews should be done every three years, the period between such reviews should never exceed five years.

19. Since the postponement of a comprehensive compensation review affected only a non-essential element of employment, it was permissible unless there was an abuse of discretion. There was no abuse of discretion because the postponement was made in good faith and for appropriate reasons and was well within the 5-year limit contemplated by the Kafka Committee. Particularly, there was no evidence that a comprehensive survey would have found a need for increases higher than those that were granted.

20. There is no requirement that a cycle under the Kafka system be completed prior to the adoption of a new compensation system. The cycle under the Kafka system begins, rather than ends, with a comprehensive review.

21. There has been no impairment of the right to judicial review by the postponement of the comprehensive compensation review. The Tribunal does not conduct an independent analysis of the survey data and reach its own conclusions respecting the appropriate level for an adjustment of staff compensation. The implementation of periodic salary reviews involves a discretionary power the exercise of which the Tribunal will review only if it is shown that there has been an abuse of discretion.

22. There has been no impairment of the staff consultation process. Staff was consulted adequately in regard to the 1988 staff compensation review.

23. The requests for specific performance and compensation should be denied. Specific performance is not only inappropriate because no obligation had been violated by the Respondents but it is impracticable. Compensation is not required because in any event no injury has been shown.

24. The claim for costs and attorney's fees should be dismissed. In any event no costs or attorney's fees should be awarded for the support by the Staff Association.

Considerations:

25. The central issue in this case is whether failure of the Respondents to carry out a comprehensive review of staff compensation in 1987 and 1988 as prescribed by the Kafka Committee, and laid down by the management of the Respondents, constituted a non-observance of the conditions of employment or terms of appointment of the Applicants.

26. The Applicants consider such deviation from the triennial comprehensive review rule to be a unilateral change by the Respondents of an essential element of the contract of employment, violating the rights of the staff as defined by the Tribunal in its decisions in de Merode (Decision No. 1 [1981]), von Stauffenberg (Decision No. 38 [1987]) and Pinto (Decision No. 56 [1988]).

27. The Respondents, on the other hand, view their postponement of the comprehensive review for two consecutive years, and their reliance, instead, on intervening years review, to be a valid exercise of their discretion in implementing the rule of periodicity of salary adjustment, prescribed by the Kafka System, and sanctioned by the Tribunal in a consistent line of decisions.

28. In order to dispose of the applications, the Tribunal will have to answer several interrelated questions concerning the proper application of the Kafka System: particularly, whether by postponing the Comprehensive Review the Respondents meant to amend that system, and whether such postponement constituted a reasonable exercise of the discretionary powers of the Respondents.

29. The Kafka System as adopted by the Executive Directors of the Respondents on May 24, 1979 stipulated that staff compensation should be reviewed in accordance with the following principles:

(i) there should be a comprehensive review of staff compensation every third year and in the intervening years pay should, in normal circumstances, be adjusted in the light of movements in the pay levels of comparator organizations in the chosen markets;

(ii) in abnormal situations pay adjustments in the intervening years should also take account of pay movements in real terms among comparator organizations in other countries and, in the case of the U.S. market, should not be subject to sharp deviations from market forces as a result of changing U.S. Government practices towards the pay of its civil service; and

(iii) there should be full Staff Association participation in the review process.

30. There is no disagreement between the Applicants and the Respondents as to the legal nature of the principles governing staff compensation laid down by the Kafka System. This legal nature was affirmed by the Tribunal which concluded in von Stauffenberg that:

There can, therefore, be no doubt that a violation of the rules laid down in 1979 would amount to non-observance of the conditions of employment of the Applicants under Article II of the Statute of the Tribunal. (Decision No. 38 [1987], para. 73)

The Tribunal therefore does not need further to examine this issue in the present case.

31. The record of this case does not substantiate the contention by the Applicants that the Respondents had in

fact unilaterally amended the rule requiring a comprehensive review every three years. The postponement in 1987, and again in 1988, does not amount to an amendment of this rule. What is under consideration is not an attempt by the Respondents unilaterally to change a rule affecting the conditions of employment, but rather a departure from strict adherence to such rule.

32. The real disagreement between the Applicants and the Respondents lies in the way each of them reads the requirements of the Kafka System relating to a comprehensive review to be carried out every three years. Whereas the Applicants read the requirement in a literal and strict manner, the Respondents, on the other hand, refer to the recognition in the Kafka Committee report of 1979 that comprehensive reviews be held every three years “unless, after the first review, the Board decided that a longer period between reviews would be justified though the period should never exceed five years.” Although the President of the Bank did not make a similar qualifying statement in recommending to the Executive Directors that comprehensive reviews be held every third year, there is no reason to suppose that he meant to reject the flexibility proposed by the Kafka Committee.

33. It may be added that in von Stauffenberg, where the Bank had maintained that the three year requirement “was changed by the Executive Directors to a period of four years until the second comprehensive review”, the Tribunal was of the view that

This minor change in periodicity related to a non-essential element in the conditions of employment and the principle of periodic comprehensive review was not affected. (Decision No. 38 [1987], para. 84)

The Tribunal, in this case, does not find the postponement of the comprehensive review for two years to be, in itself, a violation of an essential element of the conditions of employment of the Applicants.

34. The Tribunal finds, however, that the discretion enjoyed by the Respondents in implementing the principle of periodicity of salary adjustments is not without limitations. Under the Kafka System, the Respondents are undoubtedly required, as a general rule, to carry out comprehensive reviews every three years. If for valid reasons and in good faith they decide to postpone the conducting of such comprehensive review, the postponement should meet two conditions:

- (i) It should rest on a reasonable basis justifying the departure from the strict observance of the three year rule.
- (ii) It should not lead to exceeding the five year limit prescribed by the Kafka Committee in 1979.

35. In 1984 a Joint Bank/Fund Committee was constituted “to consider whether changes in such aspects of the compensation system are desirable and to recommend the changes that appear appropriate in order that they may be taken into account to the maximum extent possible in the 1985 compensation review.” However, it became clear that the joint committee needed much more time to accomplish its mission than was initially anticipated by the Respondents. The Respondents’ decision to postpone carrying out a comprehensive review in 1987 and again in 1988 was in fact caused by the delay in the work of the joint committee and not by a deliberate decision to depart from the norm stipulated by the Kafka System. In the minutes of the Executive Directors meeting on November 20, 1986 “many directors expressed their concern for, and disappointment at that delay and urged the committee to complete its work as expeditiously as possible, while a few stressed that the quality of the final outcome was of greater importance than speed.” In a memorandum to the Executive Directors, dated April 29, 1988, the President of the Respondents explained the reasons for the second postponement of the due comprehensive review as follows:

The planning and commissioning of a major survey for 1988 would have had to begin in 1987. However, since it was earlier expected that the report of the Joint Bank/Fund Committee of Executive Directors on Staff Compensation (JCC) would be available in time for the 1988 salary review, it was not considered appropriate to conduct a major survey based on the “Kafka I” comparators. Moreover, such a survey would have conflicted with the major survey which Hay Associates were already carrying out for the JCC. In December 1987, the Board Committee on Staff Compensation Issues agreed, therefore, with management’s

recommendations that an “intervening year” survey be conducted this year...

36. In both 1987 and 1988 the Executive Directors of the Respondents found that the circumstances justified recourse to intervening year reviews rather than engaging in the process of a comprehensive review when the Joint Committee was fully absorbed in its mission and the consultants were busy preparing the survey for the Joint Committee.

37. The Tribunal finds the explanation given by the Respondents for their decisions to postpone the comprehensive review for two consecutive years to be reasonable enough to bring those decisions within the margin of discretion left to them.

38. The Applicants also maintain that the postponement of the comprehensive review for two consecutive years deprived them of the right to participate, through consultation of the Staff Association with the management, in the process of periodic salary adjustments.

39. In their meeting of May 24, 1979 in which the Executive Directors approved the management’s Staff Compensation Review, the Executive Directors decided that:

[T]here should be full Staff Association participation in the review process.

The record shows that the Staff Association was consulted by management before the salary adjustment recommendations were put forward. On December 21, 1987, the Staff Association was informed of the management’s decision to conduct an intervening year survey as a basis for the 1988 Compensation Review. On March 31, 1988 the Staff Association was provided with the Preliminary Hay Survey Data, and a meeting was scheduled for April 1, 1988 to discuss the further consultation process. On April 7, 1988 the management solicited the Staff Association’s views on certain aspects of the 1988 structure adjustment and salary increase. In that letter of April 7 the management went on to state that:

It is understood that this step does not complete the consultation process and that the Staff Association will have the usual opportunity to present their views for inclusion in the Board Paper and to make an oral presentation to the Executive Directors

Again on April 4, 1988 the Staff Association was informed of a meeting with the Board Committee on Staff Compensation issues, to take place on April 25, and the Staff Association was offered the opportunity to present their views on the 1988 compensation review. The Tribunal, therefore, cannot share the Applicants’ view that their right to consult with the management in the review process was impaired by the Respondents’ postponement of the Comprehensive Review.

Decision:

For the above reasons, the Tribunal unanimously decides to dismiss the applications.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, England, September 22, 1989