

Decision No. 196

Hung Nguyen,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on August 4, 1997, by Hung Nguyen against the International Bank for Reconstruction and Development. The Tribunal granted the Respondent's request to separate jurisdictional issues from the merits, and pleadings were filed with respect to those issues. In *Nguyen*, Decision No. 190 [1998], the Tribunal concluded that it was without jurisdiction to decide all of the Applicant's claims with one exception: the claim "that the Respondent denied him consideration for the vacant position of Financial Sector Specialist in MN1PI that was advertised in May 1996." The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of Robert A. Gorman (President of the Tribunal) as President, A. Kamal Abul-Magd, Bola A. Ajibola and Elizabeth Evatt, Judges. The usual exchange of pleadings took place with respect to the merits, and the Respondent, pursuant to an order of the Tribunal, produced certain documents that were requested by the Applicant. The case was listed on September 21, 1998.

2. The Applicant contests the decision of the Bank not to award him a position that became vacant in his Division after he was informed that he was redundant and after the date on which his period of special leave was to commence. He asserts that the position was essentially the same as that which he had previously occupied at the time of the declaration of redundancy, and that the Bank's failure to place him in that position was improperly motivated and an abuse of discretion, and thus violated his contract of employment. The Applicant seeks reinstatement and two years' salary or, alternatively, compensation in the amount of \$700,000 "for lost economic opportunity and damage to career," along with costs. The Respondent claims that the Applicant was not entitled to be considered for the vacancy because he was already on special leave after the termination of his active employment, that the vacancy was in fact for a more demanding position than that held by the Applicant in the past and that he was not qualified for it, and that the Bank thus did not abuse its discretion in not awarding him the position.

3. The Applicant was first employed by the Bank in 1987. By 1995, he was serving as Financial Sector Specialist, level 23, in the Private Sector Development, Finance and Infrastructure Division of the Middle East and North Africa Country Department (MN1PI), a position in which it appears that he was placed in 1992.

4. On July 21, 1995, he was informed by the Vice President of the Middle East and North Africa Regional Office that, pursuant to Staff Rule 7.01, paragraph 8.02(d), his position would be redundant with effect from August 1, 1995. The Applicant was also informed that the Bank would attempt to place him in a suitable position among existing or known vacancies in his type of employment but that, should the job search prove unsuccessful within six months of the abolition of his position (*i.e.*, by January 31, 1996), it would be necessary to give him a sixty-day notice of termination of employment.

5. In September 1995, the Applicant was informed by a Manager in the Human Resources Service Center of the terms of his redundancy: (i) he would remain on regular pay status through March 31, 1996 (including the job-search and notice periods); (ii) he would be on special leave beginning April 1, 1996 and ending January 31, 1997, during which period he would not be eligible "to apply for vacancies through the Vacancy Information Service or otherwise"; and (iii) the Bank Group was prepared to provide specific career and outplacement counseling. After his job search, assisted by the Bank, proved unsuccessful, the Respondent informed the

Applicant at the end of January 1996 that he had sixty calendar days' notice of termination, and that termination would become effective March 31, 1996.

6. Although the Applicant began his special leave, technically, on April 1, 1996, it appears that he in fact continued to work until July 24, 1996, with the knowledge of management. (This was later disputed by the Respondent in a proceeding that reached the Appeals Committee, but that body so found, and the Bank then took action that in effect confirmed that finding.) In the meantime, effective April 15, 1996, the only other Financial Sector Specialist in MN1PI, Ms. X -- whose post had been preserved at the time the Applicant's was declared redundant -- was reassigned from MN1PI to the Private Sector Development and Infrastructure Division of the Middle East and North Africa Country Department II (MN2PI), so that her Financial Sector Specialist position became vacant.

7. On May 24, 1996, a vacancy announcement for the position of Financial Sector Specialist in MN1PI, graded at level 23-24, was "updated" and posted. The announcement described the position and its duties and specified certain selection criteria. This posting was during the Applicant's period of special leave, when it had been assumed that his active work would have ended but at a time when he was in fact continuing to work.

8. In a memorandum dated June 7, 1996 to the Director of the Applicant's Department (MN1), the Applicant pointed out that he had recently seen the vacancy announcement and that, among other things, "the description of the position advertised (duties and selection criteria) fits exactly my work experience and the tasks I have been carrying out" and that "since [Ms. X] has left MN1PI Division, the reasons invoked to justify my redundancy should no longer exist and therefore I should fairly be allowed to fill the vacancy arising from [her] departure." The Director in June 1996 responded that he would keep the position open until he could check on the Applicant's eligibility to be considered for, and his qualifications for, the position, and that he would contact the Applicant again.

9. The Director ultimately did so in a memorandum dated August 12, 1996. He informed the Applicant that he had consulted with the Division Chief of MN1PI and had concluded that the "new" position required very different skills and leadership qualities, and was "a very different job," from the position that the Applicant had previously held. The Director identified the pertinent skills and tasks with some specificity. Ultimately, the Bank hired a person then serving as a Consultant in MN1PI to serve with a regular fixed-term appointment in the position advertised in May 1996; and, in light of his high qualifications, he was given the title "Senior Financial Sector Specialist." A vacancy in a yet higher-level position, Financial Sector Adviser, level 26, was also advertised, in November 1996, but it was ultimately left unfilled.

10. The Applicant unsuccessfully sought administrative review of several decisions of the Bank relating principally to the declaration of redundancy and to the failure to appoint him to the level 23-24 Financial Sector Specialist vacancy announced in May 1996. He then filed an appeal with the Appeals Committee in December 1996, and later, when his special leave ended on January 31, 1997, the Applicant separated from the Bank.

11. Although sustaining challenges to its jurisdiction on certain issues, the Appeals Committee concluded that the work assigned to the Applicant following the commencement of his special leave on April 1, 1996 had been beyond the scope of what the Bank might reasonably ask a staff member on special leave to undertake. The Appeals Committee recommended that the Applicant's termination date be revised to June 30, 1996, that his special leave be deemed to have commenced on July 1, 1996, and that he be compensated with appropriate pay, salary increase and pension payments. The Bank subsequently agreed to these recommendations.

12. The Applicant took to the Tribunal his claims as to which the Appeals Committee had denied jurisdiction and, in Nguyen, Decision No. 190 [1998], the Tribunal held that it had jurisdiction solely over the Applicant's claim that "the Respondent denied him consideration for the vacant position of Financial Sector Specialist in MN1PI that was advertised in May 1996." The merits of that claim are now before the Tribunal for decision.

13. The Applicant contends that, because he performed work beyond the beginning of his special leave on April 1, 1996 and because in any event Ms. X should be presumed to have made known before then her intention to

leave her position as Financial Sector Specialist, the Applicant should have been offered that position because the sole reason for his redundancy was to reduce the number of Financial Sector Specialist positions from two to one. He asserts that the position posted in May 1996 was the very same position in which he had been serving at the time of his declared redundancy, and that he had fully demonstrated all of the skills that were necessary for that post. The Applicant places particular weight upon Principle 2.1 of the Principles of Staff Employment which provides, among other things, that the Bank "shall at all times act with fairness and impartiality ... in [its] relations with staff members," and that the Bank shall "provide staff members security in their employment." Moreover, the Applicant claims that the Director's explanations on August 12, 1996 for not appointing the Applicant were unfounded and fabricated, and that the Director announced requirements that in fact exceeded those in the May 1996 posting (and reflect the level 26 job description later announced in November 1996). To the Applicant, the Director's conduct and that of other supervisors -- including the delay in posting the May 1996 vacancy and in communicating with the Applicant -- evidence the Respondent's improper motive in attempting to exclude him from the post.

14. In assessing these contentions, the Tribunal notes as an initial matter that the Respondent has argued that the Applicant was not eligible to be considered for the vacancy posted in mid-May 1996 because his special leave had begun well before, on April 1. It was indeed the case that when the Applicant was informed of his redundancy, he was also informed that he would not be eligible during his period of special leave, to begin on April 1, 1996, "to apply for vacancies through the Vacancy Information Service or otherwise." But the Applicant responds that he was automatically entitled to, and should thus have been notified of and awarded, the position vacated by Ms. X, so that no "application" for the position was necessary. More significantly, he points out that at the time of the May 1996 posting, he was actively at work to the knowledge of management, so that he should not have been treated as if he were on special leave and ineligible to apply for the post.

15. There is weight to the Applicant's contentions, especially the latter. The Appeals Committee recommended that his period of special leave should be viewed as not beginning until July 1, 1996, and that he be given enhanced economic benefits based on that assumption; the Bank accepted the recommendation. Surely eligibility to apply for a vacancy that was posted in May 1996 can reasonably be said to fall within those benefits to which the Bank apparently concedes the Applicant was entitled.

16. But there is no need to resolve the issue of the Applicant's eligibility to be considered for the post, for he in fact was so considered. In response to his statement to his Director in June 1996 that he was qualified for the post, the Director responded that he would look into the Applicant's eligibility and qualifications, and his response on August 12, 1996 raised no objection to the Applicant's eligibility to apply but spoke only to what he viewed as "very different" and more demanding qualifications than those of the Applicant's level 23 position. In sum, the Applicant was indeed treated as eligible, but as not having demonstrated the skills needed for the "new" post.

17. The central issue before the Tribunal is therefore whether the Applicant was entitled to the vacant position, so that the Bank's decision challenged here is an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure. This issue turns upon whether the content of the position posted in May 1996 was materially different from, or essentially the same as, the content of the Financial Sector Specialist position he was already holding. (Compare *Brannigan*, Decision No. 165 [1997].) If it was essentially the same, then there is much force in the Applicant's contention that -- when Ms. X left the position on April 15, 1996 -- he should have automatically been given her position, in view of the fact that the reason given for his redundancy, under Staff Rule 7.01, paragraph 8.02(d), was the need to reduce the number of Financial Sector Specialists from two to one.

18. The Tribunal, however, concludes that the Respondent has satisfactorily demonstrated that the "new" position was different from, and more demanding than, the "old" one occupied by the Applicant. Although the Bank retained the job title "Financial Sector Specialist" for the position that was opened by Ms. X's departure, it altered the pertinent job description as it clearly had the discretion to do in light of the changing needs of the Bank and its clients.

19. To test the force of the Applicant's contention that the new and old positions were essentially the same, it would have been most useful to compare the two job descriptions. But the Bank asserts that there is no longer a record of the Financial Sector Specialist job description as it existed at the time the Applicant assumed and occupied that position. It is therefore necessary to examine the tasks actually performed by the Applicant as he has himself summarized them in his performance reviews (PPRs) from July 1990 to December 1994, and which the Respondent does not dispute as an accurate description of the content of his "old" position.

20. The tasks described in the Applicant's PPRs (particularly the later ones dating from April 1, 1993 through December 31, 1994, before he was informed of his redundancy) can be summarized as falling into a number of categories: serving as "task manager" for a number of sector studies (including preparing terms of reference and recruiting and monitoring consultants), monitoring the activities of governments and banking institutions for compliance with Bank-promulgated conditions, supervising the processing of loans and utilization of lines of credit, preparing papers based on interviews and surveys, and preparing a document that included recommending "a Bank strategy for sector work and lending operations." These tasks were undertaken particularly in Morocco and Tunisia.

21. The May 24, 1996 vacancy announcement for the position of Financial Sector Specialist, level 23-24, pointed out that MN1PI was responsible for serving the needs of Algeria, Morocco, Tunisia and Iran "in the restructuring and development of their Infrastructure, Finance and Private Sector Development," including the supervision of over 40 operations then under implementation. The announcement continued:

In support of its operational program in the financial sector, the division is seeking to recruit an experienced financial sector specialist. This person will be expected to play a key role in the following areas:

- providing advice to client countries in the design and implementation of financial sector reform and bank restructuring programs;
- participating in and leading the preparation of Bank lending operations in the financial sector of these countries (the division's existing and planned operations include a mix of adjustment and financial intermediation operations); and
- preparing formal sector reports and informal papers on various aspects of the financial sector, in particular for the emergence of capital markets.

The announcement further specified the following selection criteria:

- preferably hands-on experience in the design and implementation of similar work in the Bank Group;
- experience in financial sector issues and banking institutions in developing markets;
- demonstrated client orientation and ability to work effectively with clients;
- fluency in French is essential.

22. It seems clear to the Tribunal that, to the extent the tasks undertaken by the Applicant as reflected in his PPRs can be viewed as equivalent to a description of the "old" job, there is some overlap with the "new" job as posted in May 1996. Examples are the preparation of sector reports and informal papers, experience in financial sector issues and banking institutions in developing markets, and his fluency in French. But it seems equally clear that there are certain significant elements of the new job description that go beyond those of the old.

23. Certainly, the Applicant's Director, in his August 12, 1996 memorandum, took issue with the view of the Applicant that the positions were essentially the same. He asserted that the new position required different skills and different leadership qualities. With specific reference to skills, he explained:

Given the changing nature of our borrower needs, we are looking for a financial sector specialist with

demonstrated expertise in:

- financial sector reform and bank restructuring;
- [m]onetary policy and domestic public debt financing;
- [c]apital markets development including (i) market infrastructure (stock exchange; securities commission; trade settlement, etc;) and (ii) contractual savings reform (insurance companies, pension plans) and its macroeconomic impact;

The selected individual will have to lead our dialogue with government and institutional investors, and manage policy-based operations in a relatively new area for the Bank. This requires excellent communication and persuasion skills as well as strong professional expertise.

24. The Respondent, in its pleadings, compares the Applicant's PPRs with the May 1996 vacancy announcement and the August 1996 Director's memorandum, and asserts that the Applicant lacked, among other things, experience in leading tasks for new bank lending operations, in independently advising client countries, in preparing reports for capital markets, and in project development. The Respondent also identifies the needs of the three main clients of MN1PI – Morocco, Algeria and Tunisia – as the modernization and privatization of banks, and the rationalizing of banking procedures; these are said to be on a "macro-sector level" in contrast to the Applicant's experience on a "micro-institutional level."

25. The Tribunal is not in a position to draw conclusions with respect to such matters as the mix of microeconomic and macroeconomic analysis in the new and old positions. Nor is it prepared to conclude that each and every element of the new job description as recapitulated in the Director's August 1996 memorandum is contained in the May 1996 job posting. It is understandable that the Applicant might well subjectively have perceived that the positions were equivalent. However, the Tribunal finds that the May 1996 posting, as fairly elaborated in the August 1996 memorandum from the Director, does appear to reflect an expanded and more challenging and responsible set of job duties than those previously undertaken by the Applicant.

26. The Applicant's former activities were largely focused upon implementation of plans and projects devised by others, rather than upon the creation and design of new projects. His written reports appear to have been for the most part descriptive, based on interviews of third parties, rather than analytic and suggestive. His supervisory experience consisted principally of monitoring, on a small number of projects, the performance by others of pre-identified tasks. He appears not to have played a role in helping to shape Bank lending operations or in representing the Bank in dialogue with governments or with institutional investors. The Tribunal regards it as pertinent that, in the Applicant's final PPR prepared in March 1995 just shortly before he was informed of his redundancy, it was stated on behalf of the Management Review Group that: "Given the diminishing work program of the Division for traditional bank lines of credit, we do not envisage fully utilizing his services in the near future [He] should explore reassignment possibilities with other departments where his expertise could be fully deployed."

27. The Tribunal concludes that there was a material difference between the new and old positions of Financial Sector Specialist so that the Applicant was not automatically entitled to be placed in the new position and so that the Bank was entitled to consider all applications competitively submitted for that position.

28. A related but different question is whether, assuming the new position to be different enough to warrant a new consideration of competing applications, the Bank abused its discretion in not appointing the Applicant. The Applicant asserted to his supervisors on a number of occasions that he was fully qualified immediately to perform the tasks of the newly advertised position, and that other staff members lacked comparable skills.

29. The Tribunal concludes that there is no proof that the Bank's decision to deny the position to the Applicant was arbitrary, improperly motivated or otherwise an abuse of discretion. As already explained, the tasks performed by the Applicant in the old position, despite some overlap, were materially less responsible and demanding than those of the new; it could not be assumed that he would immediately be competent to perform

the latter tasks. Indeed, in his earlier PPRs, the Applicant was cited for certain performance weaknesses that the Bank could reasonably later conclude would be a liability in the new position; these related to such matters as leadership, teamwork, presentation skills, management of multiple tasks, and “initiative and drive.”

30. The Bank determined that another person, who had previously served in MN1PI as a Consultant, was more qualified and should be given the position on a regular fixed-term appointment. There is no proof that this constituted an abuse of discretion. The individual who was selected had sufficient qualifications that the Bank concluded he should be appointed as a *Senior* Financial Sector Specialist; and he was not long after promoted to the position of *Principal* Financial Sector Specialist.

31. The Applicant, however, asserts his prior entitlement to the position when in competition with a Consultant, by referring to a Board Paper (R95-9/1) dated February 10, 1995, which states that “to ensure fairness in administering the redundancies, Personnel has advised Managers that the staff reduction exercise is not to be seen as an opportunity to hire consultants in exchange for career staff or to significantly change the staff/consultant ratio.” It is clear from the language of the Board Paper that it is meant to discourage the use of Consultants, acting in that short-term capacity, to displace individuals who would otherwise serve as regular staff members. That policy is not meant to embrace the situation here, where the Financial Sector Specialist position was given to a person who indeed assumed it as a regular staff member, albeit on a fixed-term appointment, rather than continuing in the status of Consultant.

32. Finally, although the Applicant considers his treatment by the Bank to evidence bad faith and illicit motivation by his superiors, the Tribunal finds that there is no evidence to support such a speculative conclusion. The principal basis for the Applicant’s assertion is that he was unfairly denied an appointment to a position to which he was entitled; but the Tribunal has concluded otherwise. Any alleged shortcomings in timeliness and communications on the part of the Applicant’s superiors do not rise to the level of proof of illicit motivation or any failure of due process.

DECISION

For the above reasons, the Tribunal unanimously decides:

(i) to dismiss the application; and

(ii) to order the Respondent to pay costs in the amount of \$2,000 to cover the jurisdictional phase of the case (*Nguyen*, Decision No. 190).

Robert A. Gorman

/S/ Robert A. Gorman
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé

Executive Secretary

At Washington, D.C., October 19, 1998