

Decision No. 253

Walter Prescott,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of Francisco Orrego Vicuña, President, Thio Su Mien and Bola A. Ajibola, Vice Presidents, and A. Kamal Abul-Magd, Robert A. Gorman, Elizabeth Evatt and Jan Paulsson, Judges, has been seized of an application, received on February 25, 2000, by Walter Prescott against the International Bank for Reconstruction and Development. In *Prescott*, Decision No. 234 [2000], the Tribunal denied the Bank's request to declare the application inadmissible for lack of jurisdiction. The parties thereafter submitted their written pleadings on the merits. A request made by the Applicant to hold oral proceedings was granted by the Tribunal. After a postponement at the request of the Applicant, the hearing took place on November 26, 2001. The case was listed on November 27, 2001.

2. This case concerns a claim for pension credits and related benefits during the period the Applicant held a Non-Regular Staff (NRS) Temporary appointment before April 15, 1998. The claim is based on arguments that the Bank pursued policies in violation of the Principles of Staff Employment and the relevant Staff Rules and that it misclassified the Applicant's position.

The Applicant's career in the Bank

3. The Bank hired the Applicant on December 2, 1985 as a Temporary Messenger to serve in the Administrative Services Department on an initial six-month appointment. The Applicant's Temporary appointment was extended continuously for six-month or one-year periods. Sixteen extensions of his contract were made between 1985 and 1999. Other than a six-month assignment in 1987 as a Telephone Operator, the Applicant performed the same messenger functions through December 1988.

4. In January 1989, the Applicant moved to the Information Technology and Facilities Department (ITF), Internal Documents Unit (ITFIO), as a Records Clerk. ITF later became the Information Solutions Group (ISG). The clerical functions the Applicant performed remained essentially the same and were subject to the changes in priorities and technologies periodically introduced in ITF and later in ISG. Training was provided to enable the Applicant to take on additional duties.

5. In 1999, ISG advertised a two-year Term position for an Information Technician that corresponded to the Applicant's functions. Having applied for this position, the Applicant was selected and appointed to it effective August 1, 1999.

6. When the Applicant joined the Bank, a Temporary appointment was defined as a "full-time appointment to the staff of the World Bank for a specified period of time, less than one year in duration." Although the length of the period specified in the Rule changed over time, it was always short-term. Conversely, a Regular appointment was a "full-time appointment of indefinite duration."

7. The Applicant's initial appointment as a Temporary employee allowed for participation in the Medical Insurance Plan, annual and sick leave and overtime pay, but did not allow for participation in the Staff Retirement Plan (SRP).

The Human Resources Policy Reform

8. As a result of the Human Resources Policy Reform enacted in 1998, the Applicant, like other NRS, commenced participation in the SRP and the corresponding accrual of service credit toward retirement benefits and retiree medical benefits on April 15, 1998. It is important to note in this respect that notwithstanding specific requests by the Staff Association to the effect that credit should also be received for employment prior to April 15, 1998, the Executive Directors expressly decided that no past service credit would be granted.

9. The Human Resources Policy Reform also led to a new policy concerning the phasing out of long-term NRS appointments by December 31, 2000. Staff holding this kind of appointment would be either selected for a Term or Open-Ended appointment or their appointment would expire by that date. It is in this context that the Applicant was appointed to a Term position in 1999.

10. The Applicant's first argument is that the Bank's management, by means of intentional and improper policy decisions, created incentives for an unjustified differentiation against particular NRS. He further argues that while lower-level management did not intentionally engage in *détournement de procédure* and unjustifiable differentiation, such abuses nevertheless resulted from the policy framework in which management had to operate. He mentions dollar budgeting, different comparators to determine pay rates, power inequalities and considerations based on nationality as particular policies that created incentives for managers to hire NRS instead of Regular staff. He maintains that they led to violations of the Principles of Staff Employment requiring proper process, equal treatment and equitable compensation.

11. The Respondent answers that at all times staff employment followed the applicable Staff Rules and Principles of Staff Employment, and that there was no abuse of power or any form of unjustifiable differentiation.

12. The policy questions involved in the Human Resources Policy Reform were discussed and decided by the Tribunal in *Caryk* (Decision No. 214 [1999]) and *Madhusudan* (Decision No. 215 [1999]). After examining various initiatives and decisions taken by the Bank in order to correct the adverse consequences of dollar budgeting, recruitment practices and, generally, the condition of NRS, the Tribunal then concluded:

These examples of policy initiatives or studies ... show that the Respondent, far from being involved in a *détournement de pouvoir* and *détournement de procédure*, was sensitive to a wide range of different, and occasionally conflicting, factors. The task of the Tribunal cannot possibly be to judge whether the Respondent could have been wiser.

(*Caryk* at para. 40; *Madhusudan* at para. 49.) The Respondent, during the Human Resources Policy Reform, was particularly sensitive to the situation in ISG, which had the highest percentage (50.9 percent) of NRS in the Bank.

13. Consistent with this jurisprudence, the Tribunal concludes that to the extent the issue before it involves a question of general policy pertaining to the ambit of managerial discretion, there is no basis for a finding of *détournement de procédure* or *de pouvoir* on the facts of this case. This does not, of course, obviate an examination of whether the implementation of the Bank's policies in fact resulted in a violation of the Applicant's conditions of employment.

Regularization under the Staff Rules

14. Regularization of NRS was governed at the time by Staff Rule 4.01. The 1986 version of this Rule allowed for the regularization of staff members in two situations: (i) if the Director of the Personnel Management Department or a designated official, at his or her discretion, authorized such regularization and the staff member met the eligibility criteria for the Regular position (para. 7.01); or (ii) the staff member was selected on a competitive basis against qualified external candidates for a Regular position (para. 7.02). Staff Rule 4.01 was amended in November 1991 and remained in effect until July 1998. Paragraph 7.02(b) of the amended Rule provided:

Staff holding Consultant or Temporary appointments before September 30, 1990 who have remained in continuous service and in the same job for four years or more, may be appointed ... to a Regular or Fixed-Term position if (i) before September 30, 1995, the vice president responsible for the hiring unit has selected the staff member, after determining that the staff member meets the criteria required for the new appointment, that the Bank Group's requirements for the work are likely to continue, and that the expected needs of the Bank Group indicate the staff member's skills should be secured by converting the existing appointment

15. The policy embodied in the Rule was first set out by the President of the Bank in an August 1, 1991 memorandum. This document stated that a special effort was to be made to regularize NRS who met similar criteria. The Tribunal referred to this memorandum in *Caryk* and *Madhusudan* when discussing the initiatives undertaken by Bank management to improve the conditions of NRS. (*Caryk* at para. 38; *Madhusudan* at para. 47.)

16. In the present case, the situation of the Applicant was addressed in a memorandum directed to him by the Acting Director of ITF on October 9, 1991, and communicated in exactly the same terms to other staff in ITF. This memorandum explicitly referred to the initiative of the President of the Bank to regularize NRS. It concluded, however, that

[a]s you had less than four years in your current assignment as of September 30, 1991, a final decision on your case cannot be taken at this time. You should be aware, however, that it is unlikely that you will be considered for regularization even if you do accumulate the necessary service. ... Arrangements for contract renewal remain unchanged and will continue to be based on the ongoing need for your services.

17. The Bank has argued that the Applicant, who was well aware of the fact that as a Temporary staff member he was not entitled to pension benefits, cannot plausibly complain now before the Tribunal since he could have brought a grievance many years ago. In particular, so the Bank argues, he could have complained on the occasion of one of the numerous renewals of his contract. Having failed to do so, he should not be allowed to rewrite his employment history by alleging that it had been wrong to maintain his NRS status.

18. In this respect, the Tribunal concludes, however, that the Applicant did ask to have his situation addressed. The Applicant's testimony, which the Tribunal views as credible in the circumstances (and which the Bank did not seek to rebut), is that during his early years of employment he had a number of conversations with his managers about his prospects for regularization, and was consistently told that this would not be possible at the moment because of budget constraints but not to be concerned because "[his] job would still be there." As for the October 1991 memorandum, the Applicant testified that it came as "quite a shock," that he "immediately confronted [his] supervisor," and that he was told "this is probably just temporary.... Everything changes in the Bank.... Be patient." When the Applicant's position was regularized in August 1999, he realized, as the Tribunal accepted in its decision on jurisdiction, that this brought into question the propriety of his NRS status over many years. The Applicant then took action without delay and in a timely manner to challenge his prior NRS condition and his exclusion from participation in the SRP prior to April 15, 1998. It is only because the Applicant has satisfied in a timely manner the indispensable jurisdictional requirements imposed by the Tribunal's Statute that the Tribunal is now in a position to consider his claim on the merits.

19. Although regularization under Staff Rule 4.01, paragraph 7.02(b), was not mandatory, as indicated by the expression "may," there was a clear indication in the Rule and the related policies that the matter should be considered if the terms of the Rule and the policies were met. The application of the Rule was conditioned on various cumulative elements. First, there had to be a continuous service for at least four years. Second, service had to be "in the same job." On this point, the Tribunal accepts the Applicant's argument that the term "same job" does not necessarily mean that the staff member performs precisely the same tasks over the relevant period.

20. Between 1985 and 1988, the Applicant held the Temporary messenger position described above. In 1989, he undertook a new job in ITF. Even though there may have been some continuity between the two, the fact is

that the ITF position was a new job. The Applicant himself speaks of having “undergone training in different functions of a new job.”

21. However, from January 1989 the Applicant held one single job, which involved filing reports into archives, duplicating microfiche, making photocopies, coordinating electronic mail, and ordering and stocking office supplies. Over time, some of these functions diminished considerably and new functions were added to this job, such as operating a new imaging system, printing reports, and maintaining the condition and performance of the printers. The Applicant was particularly successful in handling these assignments, as evidenced by the fact that by 1997 manual processing had been largely discontinued and the functions performed formerly by three staff members were now handled by the Applicant alone. This same job is the one currently held by the Applicant as an Information Technician after his regularization.

22. Other requirements of Staff Rule 4.01, paragraph 7.02(b), included that the work envisaged was likely to continue and that the staff member’s skills met the expected needs of the Bank. The Bank has explained, particularly at the oral hearing, that it had expected that the Applicant’s responsibilities would be either discontinued – through the development of the computer network – or absorbed by different departments. The Bank argues that it had anticipated these plans to begin as early as 1989 and finalized within a decade’s time. Because of these plans, the Bank further argues, the Applicant’s contract was appropriately extended for only short periods of time. Any long extensions, in the Bank’s view, would have given the Applicant an expectation of continued employment and would have committed the Bank on a long-term basis.

23. The Bank’s arguments are untenable. There can be no doubt that the work of the Applicant was expected to continue as in fact it did continue and does so presently. It may be true, as the Respondent has argued, that the specific tasks of the Applicant “changed significantly” over time; however, the general nature of his work remained substantially the same. As noted above, the Applicant was particularly successful in handling new assignments, thus evidencing that he also had the skills to meet the expected needs of the Bank. All the elements required under Staff Rule 4.01, paragraph 7.02(b), were thus met. The Respondent’s argument that ITF experienced significant changes over time does not alter the fact that the core functions of the Applicant remained the same over time and that he proved to be capable of adapting to new methods.

24. The question then arises as to why, if the Applicant met all the criteria under Staff Rule 4.01, paragraph 7.02(b), and performed competently, he was not regularized between the date when he achieved four years in the job and the last date on which regularization was permitted under the Rule, that is to say September 29, 1995. Not only did he complete four years in the same job as of January 1993, but he also had the skills that met the expected needs of the Bank and his functions were expected to continue.

25. As a general principle, the Bank did not have an obligation to regularize the Applicant. This was a discretionary decision, which was final unless the decision constituted an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure. But under the applicable policy and rules, and in the context of contemporaneous communications to staff and managers, the Bank had an obligation to consider his regularization after four years in the light of the unique circumstances of the case. The Bank undertook no such consideration and thus failed to comply with this obligation. Moreover, the Bank at the time offered no valid reason for this failure.

26. Reasons now invoked by the Respondent, such as technological advances mentioned above, or the policy relied upon to regularize only staff having critical technological skills, were only raised by the Respondent for the first time in its pleadings, and most certainly not explained to the Applicant. In fact, the Tribunal, as noted, has been persuaded that there was an ongoing need for the Applicant’s services.

27. In light of the above, the Tribunal concludes that the managers responsible for ITF/ISG decisions in this case abused their discretion in not considering and determining the Applicant’s regularization before September 30, 1995 despite the clear terms of Staff Rule 4.01, paragraph 7.02(b), and of the President’s directive of August 1, 1991. This directive should have weighed heavily in favor of regularization as it mandated the managers to make a “special effort” to regularize NRS who met the established criteria. The directive, in effect,

placed the burden on the Respondent to show – when NRS met the criteria, but were not regularized – that there were particular reasons which justified a negative outcome. Here, however, although the Applicant satisfied the criteria, no special effort was made to regularize him and no particular reasons were offered at any material time to justify this failure.

28. This was not the result of a general policy of the Bank, which was leading in the opposite direction, nor of a deceitful purpose aiming at the denial of benefits, but rather of the failure to apply the policy on regularization to the Applicant. If all the legal and policy elements point in one direction and the managers choose to go the opposite way, probably relying on how things had been done in the past, there is an element of arbitrariness amounting to an abuse of discretion. In the light of this finding, the question of misclassification becomes moot.

Interpretation of the SRP

29. Because of the finding of abuse of discretion, there is likewise no need to address the question of interpretation of the SRP in respect of the definition of “service,” “participant,” and “days of service” that the Applicant has raised. Nor is it necessary to discuss questions of practice in the Bank and the International Monetary Fund. (See *Yang*, Decision No. 252 [2001], paras. 37 and 38.)

30. The Respondent has argued that under Staff Rule 11.01, paragraph 2.01, a Statute of Limitations would apply were the Applicant to establish an entitlement to past pension and medical service credits. This Rule provides as follows: “[T]he 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.”

31. The Applicant has argued that this is a jurisdictional provision and not one related to the determination of substantive rights. The Tribunal agrees with this view. (See *Singh*, Decision No. 240 [2001], para. 22; *Thomas*, Decision No. 232 [2000], para. 21; and *Mitra*, Decision No. 230 [2000], para. 14.) The jurisdictional aspect of the case has already been settled. Moreover, as a right to pension and other credits shall be established only as a consequence of this judgment, the three-year statute of limitations would only apply, if at all, as from the date of the decision establishing the right.

Date for commencing participation in the SRP and related benefits

32. The Tribunal must now establish the date from which participation in the SRP and related medical benefits is recognized. The Applicant’s first three years of service in the Bank do not qualify under the terms of Staff Rule 4.01, paragraph 7.02(b), because he had a different kind of job that lasted less than four years. The Applicant began his work with ITF in January 1989. After four years in this last job and having met all the other conditions of the Staff Rule and the Bank’s stated policy, the Applicant was entitled to be given fair consideration for regularization and participation in the SRP and related benefits as from January 1, 1993. He was not given such consideration, and the Bank’s explanations for this failure, as seen above, do not overcome the finding of arbitrariness. This is the date accordingly identified by the Tribunal for commencing SRP participation and entitlement to related medical benefits.

33. Account must be taken of the Applicant’s obligation to make contributions to the SRP as from January 1, 1993 and until the date he began his present participation. However, as the Bank has been found at fault in this matter, it should provide the Applicant with an adequate time frame for completing these contributions and grant the appropriate facilities to this effect, as has been done on other occasions regarding the bridging of benefits.

Decision

For the above reasons, the Tribunal decides to:

- (i) direct the Respondent to allow the Applicant to participate in the Staff Retirement Plan and to receive related benefits beginning on January 1, 1993; and

(ii) award costs to the Applicant in the amount of \$15,000.

/S/ Francisco Orrego Vicuña

Francisco Orrego Vicuña

President

/S/ Nassib G. Ziadé

Nassib G. Ziadé

Executive Secretary

At Washington, D.C., December 4, 2001