World Bank Administrative Tribunal

2022

Decision No. 681

Rafael P. Rofman (No. 2),
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

(Preliminary Objection)

World Bank Administrative Tribunal
Office of the Executive Secretary

Rafael P. Rofman (No. 2),
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Mahnoush H. Arsanjani (President), Marielle Cohen-Branche (Vice-President), Janice Bellace (Vice-President), Andrew Burgess, Seward Cooper, Lynne Charbonneau, and Ann Power-Forde.

2. The Application was received on 27 August 2022. The Applicant was represented by Ryan E. Griffin of James & Hoffman, P.C. The Bank was represented by David Sullivan, Deputy General Counsel (Institutional Affairs), Legal Vice Presidency.

3. The Applicant seeks reconsideration of *Rofman*, Decision No. 669 [2022] pursuant to Article XIII of the Tribunal's Statute on the question of "whether the manner in which [the Depreciation Special Compensation Measures (SCM)] policy was effectuated and communicated breached the Bank's fundamental obligations concerning transparency with respect to compensation."

4. On 20 September 2022, the Bank objected to the Applicant's request. This judgment addresses the Bank's objections.

FACTUAL BACKGROUND

5. The historical context of this case is contained in *Rofman* [2022]. A brief background of the facts relating to the Applicant's present claim is as follows.

6. The Applicant joined the Bank in 2002 and from 2015 until his retirement in September 2020 held a locally recruited Grade Level GH position in the Argentina Country Office. In *Rofman*

[2022], the Applicant challenged the failure of the Pension Administration (PENAD) to fully account for the Depreciation SCM pay the Applicant had received during his final three years of Bank service when calculating his Defined Benefit Pension amount.

7. From 2016 to 2020, the Bank's SCM policy provided for Depreciation SCM which would involve the temporary indexation of compensation to a hard currency, allowing for pensionability in the Staff Retirement Plan (the Plan). Pursuant to this policy, the Plan was amended in November 2016 to make Depreciation SCM pensionable. The definition of net salary was updated, with retroactive effect to 1 January 2016, to state, "[N]et salary does include certain depreciation special compensation measures provided in accordance with the World Bank Group Directive of Staff Rule 6.27 Special Compensation Measures." This amendment would allow Depreciation SCM pay to be incorporated into the Highest Average Net Salary (HANS) for the Defined Benefit Pension calculation.

8. Neither the Plan nor the SCM policy documents provided details regarding the implementation of Depreciation SCM with regard to pensionability. According to the Bank, "the responsibility for implementing the SCM at a granular level was appropriately entrusted to specialized HR [Human Resources] and Treasury officers, consistent with many similar pension and compensation computations" and, as such, "the respective methodology [for incorporating Depreciation SCM into the HANS calculation] was determined in late 2015 by HR and Treasury officers, in consultation with legal counsel to the [Plan]."

9. Beginning in 2016, Argentina experienced an economic crisis causing inflation and rapid depreciation of the Argentinian peso relative to the U.S. dollar. These events triggered the commencement of Depreciation SCM, and the Applicant's salary was temporarily indexed to the U.S. dollar from April 2016 to March 2017 and from July 2018 to September 2020 pursuant to the SCM Framework.

10. Throughout 2019 and 2020, prior to his retirement, the Applicant discussed the calculation of his Defined Benefit Pension in respect of Depreciation SCM with PENAD on multiple

occasions. During these discussions, the Applicant expressed that he believed PENAD was making a mistake when incorporating the Depreciation SCM pay into the HANS amount.

11. The Applicant retired from the Bank in September 2020 and, upon receiving his Termination Completion Packet, contacted PENAD to challenge the calculation of his benefits, reiterating that he believed the current methodology to incorporate Depreciation SCM into benefits calculations was inconsistent with Bank policy. The Benefits Administrator and, subsequently, the Pension Benefits Administration Committee (PBAC) considered the Applicant's challenge and denied it, upholding the calculation of the Applicant's Defined Benefit Pension in respect of Depreciation SCM.

12. On 22 October 2021, the Applicant filed his first application with the Tribunal, challenging the PBAC decision and contending that the HANS methodology undervalued Depreciation SCM payments relative to base salary and thus failed to treat the former as fully pensionable in violation of applicable Bank policy.

13. On 8 July 2022, the Tribunal transmitted its judgment to the parties in *Rofman* [2022] in which it dismissed the application. In *Rofman* [2022], the Tribunal first considered what the SCM policy required with respect to pensionability and, second, whether the HANS methodology violated that policy, noting that there was nothing in the SCM policy – whether in the Staff Rule, Procedure, or the Plan – which stated that Depreciation SCM must be fully pensionable. The Tribunal thus considered that, while the SCM policy required that Depreciation SCM be incorporated into net salary for pension calculations, it was silent as to the method of implementation.

14. The Tribunal further determined that the HANS methodology was not arbitrary, discriminatory, improperly motivated, reached without fair procedure, or in violation of the contract of employment or the terms of appointment of the staff member and therefore found that the Bank did not abuse its discretion in the methodology's development. The Tribunal finally concluded that the PBAC properly interpreted the Plan when it denied the Applicant's challenge to the HANS methodology.

15. On 27 August 2022, the Applicant submitted his present request in which he "moves pursuant to Article XIII of the Statute of the Tribunal for partial reconsideration of Decision No. 669." In his Application, the Applicant states that his first application "was premised on his understanding that from 2015 to 2020, the Bank had a policy of treating Depreciation [SCM] pay as fully pensionable on par with base salary." The Applicant further states that he "learned of the true Depreciation SCM pension policy only through Decision No. 669" and that he now seeks reconsideration on the question that arises from the Tribunal's judgment: "whether the manner in which this policy was effectuated and communicated breached the Bank's fundamental obligations concerning transparency with respect to compensation."

16. The Applicant claims legal fees and costs in the amount of $4,165.00.

17. On 20 September 2022, the Bank objected to the Applicant's request for reconsideration.

18. The Bank claims legal fees and costs in the amount of $1,000.00.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The Bank's Contentions

19. The Bank contends that the Applicant fails to meet several of the conditions required for revision under Article XIII of the Tribunal's Statute. First, the Bank submits that the Applicant must demonstrate the discovery of a new fact that was unknown to both the Applicant and to the Tribunal at the time the judgment was delivered and which, had it been known at the time of the judgment, would have had a decisive influence on the judgment of the Tribunal. It contends that the Applicant's "alleged new fact" is that it was only through *Rofman* [2022] that he became aware that the Depreciation SCM policy provided partial pensionability. The Bank submits that this is not a new fact as it was not only known to the Tribunal at the time of the judgment but also specifically considered and discussed by the Tribunal in its judgment.

20. The Bank also submits that the Applicant's claim that he became aware of the Bank's policy concerning partial pensionability of Depreciation SCM only by reading the Tribunal's judgment is "disingenuous." In this regard, it refers the Tribunal to several instances in the record of his first application that show "multiple communications between [the] Applicant and the Benefits Administrator" whereby the HANS methodology and the treatment of SCM payments were explained. The Bank's position is that there was no separate "fractional pensionability policy" revealed by the Tribunal's judgment in *Rofman* [2022] and that the Applicant's "feigned ignorance of the policy is not supported by the record." To the Bank, "[e]xtensive contemporaneous documentation was produced in this case that show[s] [the] Applicant was acutely aware of the methodology of calculating the Depreciation SCM. He just did not agree with it."

21. The Bank contends that the Applicant "relies on the Tribunal's references to documents that were produced to the Tribunal for *in camera* review as the origin of the discovery of the new fact and uses this discovery as the basis for the request for reconsideration." It recalls that the Applicant requested the Tribunal to make available to him a copy of the *in camera* documents and that the Tribunal denied his request. It submits that, "as explained in Decision No. 669, the *in camera* materials were in reference to the development of the methodology – not a separate, standalone policy." The Bank adds that "[t]he *in camera* documents were deliberative – not legislative – in nature, and once management settled on the methodology, it was clearly communicated to affected staff." The Bank avers:

> The Tribunal has already found that the documents at the heart of [the] Applicant's Motion are privileged. [The] Applicant cannot use the non-disclosure as the basis for his request for reconsideration nor as the basis of his claim that the Bank breached its obligation of transparency. Moreover, the record shows that the Tribunal was not only aware of the alleged new fact, but carefully reviewed, considered it, and ultimately dismissed [the] Applicant's claims.

22. The Bank notes the Tribunal's jurisprudence that the "new fact must 'shake the very foundations of the Tribunal's persuasion' that if the Tribunal had known the new fact, they 'might have reached the opposite result,'" citing *Kwakwa (No. 2)*, Decision No. 350 [2006], para. 19. However, the Bank contends that, as the alleged new fact in this case was not new to the Tribunal,

"there is no need to hypothesize its decisive influence." The Bank submits that the Tribunal "was intimately aware of all of [the] Applicant's claims and arguments in [the] Applicant's submission before the Tribunal, including [the Bank's] alleged breach of transparency," and that the Tribunal, "after careful consideration, dismissed [the] Applicant's [a]pplication in its entirety." The Bank notes that the Tribunal "not only determined that the methodology adopted had a reasonable basis, was not arbitrary, discriminatory, improperly motivated, but was also reached following fair procedure."

23. The Bank requests that the Tribunal order the Applicant to pay the Bank's associated legal fees and costs, in an amount to be determined by the Tribunal pursuant to Rule 29 of the Tribunal's Rules. The Bank submits that "[n]either the Tribunal's Rules, Statute[], nor the Tribunal's case law precludes [the Bank] from requesting the costs associated with defending cases before the Tribunal."

24. The Bank acknowledges that it has always taken an approach of deference with regard to the legal fees and costs of defending cases before the Tribunal as it understands that it is a staff member's right to challenge management's decision whenever the staff member believes a breach of their contract of employment or terms of appointment has occurred. It encourages such challenges as they force the Bank to "do better." However, to the Bank, the Applicant's motion for revision is not such a case.

25. In support of its request for legal fees and costs, the Bank contends that the Applicant's motion is based on a misreading of the Tribunal's Rules, that his claims are implausible, and that his procedural requests are gratuitous. The Bank further submits that "[the] Applicant's counsel is an experienced litigator who has appeared before this Tribunal on many occasions. It is therefore reasonable to expect that [the] Applicant's counsel has read the Tribunal's Rules, Statute[], and is aware of its case law."

The Applicant's Response

26. The Applicant contends that the Bank's "opposition to reconsideration lacks merits" because, while he was aware of the methodology used to incorporate Depreciation SCM pay into the Defined Benefit Pension calculations, it "was only through Decision No. 669 that [he] discovered the true nature of the underlying Bank policy." The Applicant submits that this policy "was never memorialized in any staff-accessible document, but was instead apparently only reflected in certain late 2015 or early 2016 emails between HR, Treasury, and Pension Administration officials and counsel to which [he] was denied access during this litigation."

27. The Applicant further contends that, "while the Tribunal was of course aware of the documents it reviewed *in camera*, that alone does not resolve the 'decisive influence' question because it ignores the context in which the Tribunal considered them." The Applicant submits that he did not "raise any transparency and due process claims in his [a]pplication with respect to how the Bank's Depreciation SCM pensionability policy was promulgated or communicated" because "he did not believe the Bank's policy to be the problem." The Applicant avers that,

> at the time of his [a]pplication, and up until Decision No. 669 was issued, he understood the Bank's policy to be one of full pensionability (on account of the Bank never qualifying its various statements about Depreciation SCM pay being "pensionable") and believed that the problem lie [*sic*] in the methodology through which PENAD implemented that policy.

28. The Applicant submits that "[t]his is precisely the type of situation in which Article XIII should apply. The Tribunal did not have the opportunity to fully consider these issues in its Judgment because [the Applicant] did not have the ability to adequately raise them before the Judgment was issued."

29. The Applicant contends that the Bank's request for legal fees and costs should be denied. He submits that his request is brought in good faith and deserves proper consideration. He further contends that an award of legal fees and costs against him would likely have a chilling effect on other applicants' exercise of their right to seek review before the Tribunal.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

30. Article XI of the Tribunal's Statute provides that "[j]udgments shall be final and without appeal." In *van Gent (No. 2)*, Decision No. 13 [1983], para. 21, the Tribunal held:

> Article XI lays down the general principle of the finality of all judgments of the Tribunal. It explicitly stipulates that judgments shall be "final and without appeal." No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff.

31. The Tribunal has also stated, "Once the Tribunal has spoken, that must end the matter; no one must be allowed to look back to search for grounds for further litigation." *Mpoy-Kamulayi (No. 7)*, Decision No. 477 [2013], para. 27.

32. The sole exception to the principle of finality is found in Article XIII(1) of the Tribunal's Statute which provides that

> [a] party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

33. In *DC (No. 3)*, Decision No. 565 [2017], para. 32, the Tribunal observed:

> Article XIII(2) provides that a request for revision must "contain the information necessary to show that the conditions laid down in paragraph 1 of this Article have been complied with." The requisite conditions are:
>
> a. Discovery of a fact which was unknown to both the Tribunal and the party seeking revision at the time the judgment was delivered;
>
> b. The fact must be such that it "might have had a decisive influence on the judgment of the Tribunal"; and

c. The request for revision must be submitted within a period of six months after discovery of said fact.

34. In other words, the Tribunal considers that there are four strands to the test that must be met by a party who requests a revision of a Tribunal judgment, namely, (i) the discovery of a new fact; (ii) which said new fact was unknown both to the Tribunal and to the requesting party at the time the judgment was delivered; (iii) which said new fact, had it been known at the time of the judgment, might have had a decisive influence on the judgment; and (iv) the submission of the request for revision must be made within six months of the newly discovered fact.

35. The Tribunal has stated in a number of its judgments that "the powers of revision of a judgment are strictly limited and may be exercised only upon compliance with the conditions set forth in Article XIII." *Skandera*, Decision No. 9 [1982], para. 7. In *Kwakwa (No. 2)* [2006], paras. 18–19, the Tribunal further held:

> In this light, the character of Article XIII as a very limited exception should be obvious. Its requirements are not fulfilled unless the Tribunal is satisfied that newly discovered facts are potentially decisive.
>
> It is difficult to define in a phrase the nature of factual revelations which might justify the disruption of a *res judicata*; it is a matter to be determined in the particular circumstances of each case. If it were left to any disappointed litigant to assess the relevance and decisiveness of subsequently discovered facts, the ingenuity of pleaders would ensure that few, if any, judgments would ever be final. Unless some restrictive principle fulfills a rigorous screening function, the availability of revision would subvert a fundamental rule of tribunals such as this one: namely that its judgments are definitive. To ensure that Article XIII does not wreak havoc with the rule of finality, enshrined in Article XI, the former must be recognized as available only in exceptional circumstances. The "new fact" must shake the very foundations of the [T]ribunal's persuasion; "if we had known that," the judges must say, "we might have reached the opposite result."

36. Accordingly, the Tribunal will now assess whether the Applicant has satisfied the criteria for revision set forth in Article XIII of the Tribunal's Statute.

37. To satisfy the first two conditions of Article XIII, the Applicant contends that it "was only through Decision No. 669 that [he] discovered the true nature of the underlying Bank policy." In

other words, the essence of the Applicant's contention is that, by reading the Tribunal's judgment in *Rofman* [2022], he learned for the first time that the Bank's policy permitted treating Depreciation SCM pay "as only fractionally pensionable relative to base salary." In the Applicant's view, this is the discovery of a fact which was unknown to him at the time of the Tribunal's judgment.

38. The Tribunal considers that it is not sustainable for the Applicant to contend that his first application was based on a misunderstanding of the Bank's policy. In *Rofman* [2022], the Tribunal observed the extensive educational efforts that had been made by HR and PENAD to educate staff, including the Applicant, on pension benefits. The Tribunal recalls that there were several instances on the record which demonstrated that the HANS methodology and the treatment of Depreciation SCM payments had been explained to the Applicant. Accordingly, his claim to have discovered a new fact concerning the pensionability of SCM payments only as a result of the Tribunal's judgment in *Rofman* [2022] is untenable.

39. Incidental to this finding of untenability, the Tribunal observes that the Applicant has characterized the Tribunal's judgment in *Rofman* [2022] as a confirmation of the Bank's discretion under the Board-approved 2015 SCM Framework to give Depreciation SCM pay only a fraction of the weight afforded to base salary when computing net salary for pension purposes. This is an inaccurate characterization of the Tribunal's judgment. The Tribunal held that, while the SCM policy required that Depreciation SCM be incorporated into net salary for pension calculations, it was silent as to the method of implementation. Thereafter, the Tribunal found that the HANS methodology satisfied the requirements of the SCM policy with respect to pensionability. The Bank's choice of this methodology instead of the methodology advocated by the Applicant is not synonymous with fractional treatment.

40. Moreover, even if the Tribunal were to assume that the Applicant's purported discovery constituted the discovery of a fact that was unknown to him, that, in itself, is not sufficient to satisfy the second condition of Article XIII. Article XIII also requires that there must be a "[d]iscovery of a fact which was unknown to both the Tribunal and the party seeking revision at the time the judgment was delivered." The purported discovery of a fact, described by the

Applicant as the "true nature" of the Bank's policy, was not unknown to the Tribunal at the time the judgment was delivered as it was considered and discussed by the Tribunal in its judgment. Thus, the Tribunal finds that the second condition of Article XIII has not been satisfied.

41. The Tribunal next notes the Applicant's statement that he did not "raise any transparency and due process claims in his [a]pplication with respect to how the Bank's Depreciation SCM pensionability policy was promulgated or communicated" because "he did not believe the Bank's policy to be the problem." For three reasons, the Tribunal is not persuaded.

42. First, the Tribunal observes that the issue of transparency was considered by the Tribunal in *Rofman* [2022]. In this respect, the Tribunal notes the Applicant's contention that any claims of a lack of transparency were in relation to PENAD's alleged lack of transparency in explaining its methodology. However, in its consideration of the Applicant's claims in *Rofman* [2022], the Tribunal did consider whether the HANS methodology was an abuse of discretion. In doing so, the Tribunal found no want of fair procedure and, thus, no lack of transparency was found.

43. Second, even if the Applicant's claim in the present Application concerns a lack of transparency *vis-à-vis* the documentation reviewed by the Tribunal *in camera*, the Tribunal considers that documents in respect of which privilege is asserted, challenged, but upheld, and which are then reviewed as part of the deliberative process, remain privileged and that there is no disclosure or transparency obligation attaching thereto. Further, the Tribunal's review of the *in camera* materials was limited to determining whether the process in question constituted a violation of fair procedure.

44. Third, to the extent that there is any new aspect to the Applicant's complaint in respect of transparency, the Tribunal considers that the statement by the Administrative Tribunal of the International Labour Organization in its Judgment No. 3058 (2012), at paragraph 5, is apposite wherein it held: "It is a fundamental principle that a person cannot, in separate proceedings, challenge a judgment to which he was a party by raising issues that could have been raised in the earlier proceedings." The Tribunal considers that it was open to the Applicant in his first

application to have pleaded, as an alternative claim, that the SCM policy was not sufficiently or transparently communicated to staff. The Applicant did not do so.

45. As the Applicant has failed to establish the discovery of a fact which was unknown to him and to the Tribunal at the time it delivered its judgment, it is unnecessary to consider whether the purported new fact asserted by the Applicant might have had a decisive influence on the Tribunal's judgment.

46. The Tribunal is satisfied that the Applicant has failed to meet the requirements for revision under Article XIII. The Tribunal reiterates that the revision of a judgment is an exceptional procedure and not an additional opportunity for a party to relitigate issues that were addressed in an earlier judgment. The Tribunal denies the Applicant's request for reconsideration invoking Article XIII.

The Bank's request for legal fees and costs

47. The Bank has requested the Tribunal to order the Applicant to pay the Bank's legal fees and costs associated with defending the present case. The Bank recognizes that its request for legal fees and costs is "unprecedented." However, it explains that it "is simply asking to be awarded a nominal fee in the amount of $1,000.00 as an indication to [the] Applicant that the Tribunal will not accept frivolous motions simply because [the] Applicant is dissatisfied with the result and refuses to accept the Tribunal's decision."

48. Neither the Statute of the Tribunal nor its Rules provide for such an order. Whilst the Tribunal accepts that, as a matter of common sense, wholly frivolous or entirely unreasonable claims ought not to be made as this would constitute both an abuse of judicial process and an unnecessary expenditure of resources, it considers that there are already procedural mechanisms in place to address such applications.

49. Accordingly, the Tribunal denies the Bank's request.

DECISION

The Application is dismissed.

/S/ Mahnoush H. Arsanjani
Mahnoush H. Arsanjani
President

/S/ Zakir Hafez
Zakir Hafez
Executive Secretary

At Washington, D.C., 18 November 2022[*]

[*] Judge Burgess attended deliberations in these proceedings remotely, by way of audio-video conferencing coordinated by the Office of the Executive Secretary.