

Decision No. 252

Hongyu Yang,
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 24, 2000, by Hongyu Yang against the International Bank for Reconstruction and Development. In *Yang*, Decision No. 233 [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, but such proceedings were later cancelled at the Applicant's request. The case, therefore, proceeded on the basis of the written proceedings supplemented by written affidavits, and was listed on October 9, 2001.

2. This case concerns a claim for pension credits and related benefits during the period the Applicant held a Non-Regular Staff (NRS) Consultant position 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 in October 1989 as a Long-Term Consultant. At the time of her appointment, the Applicant expressly accepted the applicable terms and conditions of employment, including the fact made known to her, as was specified in the Notes for Consultants and the Additional Notes for Long-Term Consultants attached to her letter of appointment, that such an appointment did not entail participation in the Staff Retirement Plan (SRP). The benefits available to the Applicant, such as medical insurance and annual and sick leave, were also expressly indicated.

4. The Applicant's initial appointment was mainly related to the undertaking of research in the Education Section of the Latin America and Caribbean Technical Department, Human Resources Division (LATHR). The Applicant's appointments were renewed regularly for six months or one year until September 1, 1999, at which time she was appointed to a four-year Term position, which included the benefits of a Regular staff appointment. This last position was that of Operations Officer for the Education Team of the Human Development Network (HDNED). The Applicant's overall performance was consistently praised by her supervisors.

5. Commencing in 1992, the Applicant, in addition to her research activity, began to provide operational support for various projects in the Latin America and Caribbean, Country Department 1, Human Resources Division (LA1HR). The Applicant was transferred to LA1HR in July 1993 when the Education Section of LATHR was abolished. Following successive reorganizations, the Applicant's functions were as from 1994 carried out for Country Department 2 in the same division, and as from 1996 for the Latin America and Caribbean Region Human and Social Development Group (LASHD), which was later renamed the Latin America and Caribbean Human Development Sector (LCSHD).

6. As the Applicant's career progressed, she was assigned additional responsibilities in the professional management of certain projects. In this context, the Applicant provided technical support and supervision to one

particular project that had been rated as unsatisfactory in 1996, succeeding in having it upgraded to satisfactory.

7. At the time a five-year staffing strategy for LCSHD was discussed in May 1998, it was noted that new types of skills would be needed, particularly those of senior educators. In this context, the Applicant's position was one of three staff in NRS positions identified for transfer or termination, while the positions of other staff in this category were to be extended or converted to different types of appointments. The Applicant was encouraged to search for positions outside LCSHD. Ultimately, the Applicant's appointment was extended until December 31, 1999. However, as noted above, the Applicant was regularized effective September 1, 1999, in one of the positions for which she had applied elsewhere in the Bank.

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 be received also 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.

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. She 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. She 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. She 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. In any event, it is argued by the Bank that the Applicant had access to the grievance system but chose not to challenge her classification before 1999.

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.)

13. This same reasoning applies to the present case. Nor does the Applicant make out a case for redress by alleging that she was treated differently than other staff members. For, as discussed by the Tribunal in *Crevier* (Decision No. 205 [1999]), also in the context of the Human Resources Policy Reform, different treatment in and of itself does not prove unjustified differentiation, because staff members "in different situations will normally be governed by different rules or provisions." (*Id.* at para. 25.) 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. When the Applicant joined the Bank in October 1989, the version of Staff Rule 4.01 that was in effect (September 1986) 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

The amended Rule was consistent with an August 1991 memorandum, issued by the then-President of the Bank, stating 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.)

15. In the present case, neither party relies on the September 1986 version of Staff Rule 4.01 for the proposition that the Applicant should or should not have been regularized. However, both the Applicant and the Respondent refer to the later version of Staff Rule 4.01 with respect to the question whether the Applicant was entitled to be considered for a Regular appointment. It is in this context that Staff Rule 4.01 will be examined.

16. 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.

17. Notwithstanding this broad interpretation of the term "same job," it cannot be said that the Applicant in fact performed the "same job" for four years or more between the date on which she was hired (October 16, 1989) and the last date on which regularization was permitted under paragraph 7.02(b), that is to say September 29, 1995.

18. The Applicant's career during the relevant period was not linear. From October 1989 until the date on which she was transferred to LA1HR in July 1993, the nature, scope and complexity of her work gradually changed. The main emphasis of her work was on research – the specific function for which she had been hired – consistently with the Applicant's *curriculum vitae* and with an affidavit provided by her supervisor for the period 1989-1993. This affidavit further states that as her supervisor was moving to a position that "did not require a researcher," he was unable to invite the Applicant to move with him. In 1992, the Applicant began to participate in some operational work. These functions were noted in a letter of recommendation that her supervisor wrote for the Applicant on December 4, 1992, where he stated that she "is very flexible and could fit in either research or operations." When the Education Section to which the Applicant had initially been assigned was abolished in 1993, her new position entailed quite different tasks, clearly related more to substantive

operational work than to research.

19. After her transfer in July 1993, the balance of her work changed from mainly research to mainly operational. However, she had not completed four years in that kind of work before Staff Rule 4.01, paragraph 7.02(b), ceased to apply. As a result, she did not meet the requirement of that Rule.

20. The Tribunal, therefore, concludes that as the Applicant did not meet the requirements of Staff Rule 4.01, the Respondent did not have an obligation to consider her for regularization under the Rule.

Regularization as part of LCSHD's staffing strategy

21. In the Tribunal's view, the Bank's decision not to regularize the Applicant during LCSHD's staffing strategy exercise in 1998 was a valid exercise of discretion. It was reasonable in the light of the documented concerns about the Applicant's need to improve certain critical skills in relation to her operational work. Her performance record for the period 1995-1996, for example, while overall positive, refers to the need to "take a more strategic view of her projects and to carry out substantive discussions with the Borrower institutions." Similarly, in 1998, the Applicant's supervisor noted, with respect to the Applicant's medium-term career prospects at the Bank, that

a careful review of her substantive skills and development potential for additional operational or research responsibilities needs to be conducted. We are not sure to what extent she has the breadth of knowledge and experience to carry out the type of substantial policy dialogue which would be involved in taking over full task management for implementing a complex operation Hongyu has demonstrated the capacity to work very effectively as a deputy task manager in operations, but her ability to assume leadership assignments in operations involving policy discussions remains to be proven.

22. Further recommendations to improve task management competencies appeared in her performance record for 1996-1997, finalized in 1998. As she was expected to take on increased project management responsibilities, the 1997-1998 performance record also recommended an additional task management course and improvement of communication skills. The performance record for the period 1998-1999, while underlining the contributions made and awards received by the Applicant, again emphasized the need to "improve her effectiveness still further by developing a better grasp of the larger policy issues." Doubts about whether the Applicant had acquired the necessary skills in operational work remained at least until 1998. In fact, it was even considered whether the Applicant's employment should be ended in the light of LCSHD's staffing needs.

The claim of misclassification

23. Irrespective of whether the Bank should have regularized the Applicant between October 1989 and September 1995 under Staff Rule 4.01, or in 1998 during LCSHD's staffing strategy exercise, the question still remains whether the Bank abused its discretion in appointing the Applicant as an NRS, and in maintaining her in that status until 1999.

24. In the jurisdictional phase of the present case, the Tribunal held that the burden of proof remained on the Applicant to establish her claim of misclassification. (*Yang*, Decision No. 233 [2000], paras. 24-25.)

25. The Applicant's main contention in respect of "misclassification" is that from 1989 to 1999 she performed the same operational work in the same position, working alongside Regular staff "who had similar qualifications and performed similar work as she." She further maintains that the need for such functions and duties was of indefinite duration. It follows, the Applicant argues, that she should not have been classified as a Consultant.

26. The Applicant believes that the Bank artificially defined her appointment types so as to suggest functions of a specific, limited duration, or for specific tasks. This led, in the Applicant's opinion, to a situation identical to that considered by the Asian Development Bank Administrative Tribunal in *Amora* (Decision No. 24 [1997]), where it was decided that benefits may not be neutralized by contracts which do not reflect the true relationship between the individual and the organization.

27. The Applicant herself acknowledges that lower-level management did not select types of appointments in a malicious manner. There is indeed no indication whatsoever that the Respondent acted deceitfully in its contractual relationship with the Applicant nor is there evidence that high-level managers applied themselves to harming the Applicant's interests. It follows that there is no connection in this respect with *Amora*, where the problem was precisely one of intentional deprivation of the Applicant's benefits.

28. The Tribunal has carefully examined the progress of the Applicant's career in the Bank so as to determine whether she was performing "equivalent functions and duties, under equivalent conditions of work ... as regular staff who worked along side her," as she claims. There is no question as to the Applicant's overall competence and hard work. The relevant preliminary issue is rather whether the Applicant in fact performed the functions of Regular staff.

29. The key differences between the work of a Regular staff member and that of a Consultant related both to the nature of the functions and their expected duration. By 1994, a Consultant appointment was defined as a "periodic appointment for a maximum of two years for full-time or part-time work to carry out specific assignments which require specialized professional experience, or to satisfy a work program need of limited duration." (October 1994 version of Staff Rule 4.01, para. 2.01(g).) The Applicant, however, was not affected by the two-year limit as she was grandfathered under Staff Rule 4.01, paragraph 6.01(c). This provision allowed for an exception to the two-year limit if the Consultant had been in full-time continuous service since or before September 30, 1990, the performance of the Consultant was satisfactory, there was a continuing need for the Consultant, and the Management Review Group concurred with the extension. (October 1994 version of Staff Rule 4.01, para. 6.01(c).)

30. The Applicant argues, principally, that she performed functions equivalent to those of full-fledged task managers holding Regular appointments. However, as discussed earlier, the functions and responsibilities undertaken by the Applicant between October 1989 (when she joined the Bank) and July 1993 (when she was transferred to LA1HR) progressed from mainly research-oriented tasks to more substantive operational work. Her progression to operational work did not give her immediate expertise in the field or skills necessary to be a full-fledged task manager. This is evidenced by the concerns expressed by management, discussed above, regarding aspects of the Applicant's skills and by the statements of supervisors discussed further below. She did not have the expertise of a task manager in the early part of her career.

31. The Applicant further argues that the functions she now performs as a Term employee are similar to the functions she performed when she was an NRS. This issue is not really relevant since the Applicant was selected for a Term position pursuant to a change in Bank policy. But even if the functions are compared, the Tribunal notes that there are significant differences since the new position entailed aspects of quality promotion, strategic planning, external partnerships and other responsibilities not evident in the Applicant's prior jobs. The Applicant's record of employment and related documents do not support the Applicant's contentions.

32. The Tribunal has also examined in detail the affidavits submitted in this case. The affidavit from the Applicant's supervisor mentioned earlier emphasizes an aspect that, as stated above, is not in doubt, namely that of the Applicant's overall performance "at a level equal to that of many, if not most, regular staff members performing similar functions." Performance is also emphasized in an affidavit dated September 19, 2001 from a staff member who supervised the Applicant when the Applicant began her progression to operational work in 1992-1993. Other affidavits and documents in the record corroborate this point.

33. Opinions are divided on the question whether the functions performed by the Applicant were similar or identical to those performed by Regular staff members. The affidavits just mentioned, as those of three other staff members, two of which were requested by the Tribunal, express the view that the Applicant's functions, skills and capabilities were not different from those of Regular staff.

34. Other affidavits, however, express a different view. Those of two managers who worked closely with the Applicant in the operational work phase of her career, and that of a senior staff member in LA1HR, conclude

that the Applicant did not demonstrate the skills needed to become an independent task manager, and that indeed she was never given such responsibilities. It is argued by the Bank that the task management functions the Applicant performed were related only to an advanced stage of the projects, mainly concerning implementation, not to their inception and early development, phases requiring greater skills; nor did her work relate to difficult projects. The Applicant's principal role, in the Bank's view, was to support the work of task managers who had primary responsibility for projects; her role thus differed from the roles of colleagues whom she considers performed functions similar to hers.

35. In view of the conflicting statements noted, arising from evidence requested specifically in the context of this application either by the parties or the Tribunal, the Tribunal assigns more weight to documents contemporaneous with relevant phases of the Applicant's career. The documents referred to in paragraphs 21 and 22 point towards the conclusion that the Applicant's contentions have not been proved. In fact, both her managerial skills and the likely continued need for her work remained a matter of doubt at the time relevant for the discussion of regularization in 1998.

36. The Tribunal concludes that the Applicant has not met the burden of proving that she performed the same operational work as Regular staff nor that her functions and duties were of indefinite duration.

Interpretation of the SRP

37. The Applicant has also made the argument that under the SRP the definition of "service," "participant" and "days of service" entitles her to have the entire period of NRS service considered for determination of pension benefits and retiree medical benefits. The argument is ingenious in that it seeks to interpret the phrase that "all periods of time for which a participant ... would have been required to contribute if that participant were not precluded from contributing" (Section 1.1(u) of the Staff Retirement Plan of the International Bank for Reconstruction and Development, as amended effective April 15, 1998 with amendments through November 1, 1999 incorporated) as allowing for time credit during the period of NRS service. The argument, however, cannot prosper in view of the fact that these provisions expressly apply to participants in the SRP, a situation not present in the Applicant's case, notwithstanding her interpretation of "participant." Moreover, the relevant rules have been expressly written to allow for NRS participation only on or after April 15, 1998 while they were not required to contribute until January 1999 due to transitional arrangements; therefore, it is simply a futile exercise to try to read them differently.

38. Practice of the Bank and the International Monetary Fund has also been invoked in support of the Applicant's contentions. The Respondent, however, has convincingly explained that the practices referred to have been either discontinued or responded to different situations and conditions that are not extant in the present case. The Tribunal accepts the Respondent's explanations.

39. As the Applicant's contention of misclassification has not been upheld, there is no need to discuss the alternative argument introduced by the Respondent to the extent that there would be a three-year statute of limitations applicable to a finding in favor of the Applicant's claim.

Honoring contracts of employment

40. Every staff member knows in joining the Bank the conditions that apply to his or her particular type of appointment. Sometimes too those conditions include higher pay arrangements in order to compensate for the unavailability of Regular staff benefits. The Bank has provided terms for regularization, either under a specific Rule or as a matter of general policy after 1998. The Applicant has not met the conditions under the former, but has benefited from the latter.

41. The Tribunal is also mindful of the fact that if contracts were to be altered, absent a question of misapplication of a rule or arbitrariness, or some other form of abuse of discretion, the result would be that many competent persons applying for positions with the Bank would simply not be hired. In the experience of many, Consultant appointments offer a first opportunity to join the Bank, which later might become a Regular

appointment if competence, skills and continuing needs of the Bank are met. Sometimes even the budgets of Departments or Divisions do not allow for permanent positions, although they might become available later. If the conditions of recruitment or of Consultant contracts were to become rigid because of the application of lax standards of regularization, not only would the Bank suffer unforeseen administrative and economic consequences, but potential capable staff members would be deprived of a legitimate opportunity to join or continue in the service of the institution.

Decision

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

/S/ Francisco Orrego Vicuña

Francisco Orrego Vicuña

President

/S/ Nassib G. Ziadé

Nassib G. Ziadé

Executive Secretary

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