

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 1
(18 December 1992)

Carl Gene Lindsey
v.
Asian Development Bank

E. Lauterpacht, Chairman
F.P. Feliciano, Member
M.D.H. Fernando, Member

A. Preliminary matters

1. In this case Mr. Carl Gene Lindsey ("the Applicant") has filed an application against the Asian Development Bank ("the Bank" or "the Respondent") claiming remedies in respect of the wrong that he asserts was committed by the Bank in not converting his fixed-term appointment into an indefinite contract of employment.

2. The jurisdiction of the Tribunal is established by the terms of its Statute. This provides in Article II, paragraph 1, as follows:

"The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member. The expressions 'contract of employment' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged nonobservance ..."

3. Subject to such exceptional circumstances as may be decided by the Tribunal (see Statute, Article II, paragraph 3), an application, to be admissible, must be filed within 90 days after the occurrence of the event giving rise to it. This rule could not be applied in the present case because the Tribunal, although established within 90 days after the relevant event, had not become fully operational and was therefore not able to adopt its Rules of Procedure within that period. The Bank therefore agreed to raise no objection to the Application if it was filed within 90 days after the adoption of the Rules of Procedure. The Application was posted on 7 April 1992 and was received on 6 May 1992, that is to say, after the expiry of this agreed 90-day period. However, the Tribunal, after receiving the comments of the Bank, determined that the facts before it constituted exceptional circumstances and decided that the Application should be treated as validly filed.

B. General legal considerations

4. As the outcome of this case depends in large part on the view that the Tribunal takes of the facts, it will be convenient, before analyzing these, to indicate the principal rules of law within the framework of which the facts must be considered. In addition to the constituent instruments of the Bank and of the Tribunal, as well as general principles of law, these rules are to be derived from the contract between the Bank and the staff member, the Staff Rules and Regulations of the Bank, the Personnel Handbooks for professional and support staff, and Administrative Orders and Circulars, as promulgated and applied from time to time, subject to the recognition and protection of any acquired right of the staff, and, by analogy, from the staff practices of international organizations generally, including the decisions of international

administrative tribunals dealing with comparable situations. There is, in this sphere, a large measure of "common" law of international organizations to which, according to the circumstances, the Tribunal will give due weight.

5. In general, a staff member serving on a fixed-term appointment is entitled to employment only for the agreed term. Exceptionally, circumstances may exist which create in the staff member a legitimate expectancy either that his employment will be extended for a further fixed period or that it will be converted into a position of indefinite duration. Although it is possible that such circumstances may give rise to an unconditional expectancy, in which case the conversion or extension must of course take place unconditionally, the greater likelihood is that the expectancy will be subject to a condition, in terms related to the performance of the staff member or to the needs of the Bank at the time.

6. Where a legitimate expectancy exists the Bank must honour it and give due consideration to each case. Such consideration involves examination of the facts and this examination itself must be carried out in accordance with due process. Indeed, the Bank has promised this to all staff in paragraph (xiii) of its Personnel Policy Statement, approved in December 1990: "The Bank will observe due process in all areas of personnel administration ..." The scope of this undertaking is not reduced by the footnote to Section 5.1 ("the Performance Review Process") of the Personnel Handbook for Professional Staff which states:

"The process described in Section 5.1 generally applies to Professional Staff in Levels 1-6. Senior Staff in Levels 7-9 have a modified process."

The "modified process" mentioned in the footnote does not appear to be elaborated elsewhere, but the basic concepts laid down for Levels 1-6 are capable of being applied in all major respects to Levels 7-9 and in principle, therefore, must apply to these higher Levels also.

7. The application of such due process must involve a fair and balanced scrutiny of the staff member's qualifications, as well as of his performance during the period he has already served. It is now a very common feature of the employment practices of international organizations that periodic written assessments or evaluation reports are prepared on the performance of staff members. These reports detail both the satisfactory and the unsatisfactory features of the employee's performance and, if criticisms of performance are made, they are required to be accompanied by a clear indication of the steps which the staff member should take to improve the situation. Experience has shown that this practice is an important element in the avoidance of administrative arbitrariness or discrimination. (See, for example, the decisions of the World Bank Administrative Tribunal in Saberi, WBAT Reports 1981, Decision No. 5, para. 23; Buranavanichkit, WBAT Reports 1982, Decision No. 7, para. 28; and Thompson, WBAT Reports 1986, Decision No. 30, para. 28.)

8. So widespread is this practice within international organizations that it may now be said to qualify, in this sphere, as a general practice accepted as law. Since April 1991 it has been incorporated in the Bank's Administrative Order No. 2.11 ("Performance Review and Promotion Processes") and in greater detail in Chapters 5 and 8 of the Bank's Personnel Handbook for Professional Staff. Thus Chapter 5 elaborates ten steps in the performance review process. It is hardly necessary for present purposes to do more than quote from the introductory paragraph describing the nature and consequences of an "unsatisfactory" rating:

" - [means] substantially not meeting the significant requirements of the job. The ranking triggers a process of counselling about the performance deficit and the improvement

required, to avoid ultimate separation. Your Department/Office Head will submit a separate memorandum on the reasons for, and the extent of the performance problems, means of overcoming these through training or counselling, your suitability for redeployment if found necessary, and recommended action." (Emphasis supplied).

But it may be added that the dominant feature of the procedures thereafter outlined is the elaborate series of exchanges of written memoranda that must pass between the staff member and Management. Again, the element of a written notice is an essential feature of the procedure described in Chapter 8, which lists the nine major reasons for separating from service with the Bank. Of these, one is "unsatisfactory performance." As to this, Section 8.1.3 provides:

"This occurs when the Bank decides, after counselling and due warning, both verbal and in writing, your performance remains unsatisfactory and that the employment contract would be best terminated." (Emphasis supplied)

The fact that such provisions were not formally incorporated into the Bank's practice prior to that date is a reflection of the insufficiency of the Bank's expression of pertinent obligation, not of the absence of such obligation.

9. It is also inherent in this system that those who exercise a discretion in respect of staff employment should have reliable first-hand evidence of any deficiencies alleged; that when evidence is gathered it should be related to the whole of the period and range of activity under consideration and that hearsay and indirect evidence should be carefully weighed for reliability and cogency. Individual complaints or adverse comments by one staff member of the conduct of another should not be taken into account unless first brought to the attention of the latter, to whom an opportunity of replying should have been given including, where appropriate, the opportunity of meeting and questioning the complainant or witness.

10. Any enquiry into the performance or conduct of a staff member must be carried out in accordance with the requirements of due process of law, in such a way that the establishment of the truth or falsehood of allegations is not itself a subject of discretion but is the consequence of an objectively verifiable and rationally explicable examination of the facts. Where the continuance or not of a staff member's livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections.

11. However, this statement of some elements of the right of staff members to the enjoyment of due process must be balanced by recollection of the possession by management of a broad discretion to determine the policy of the Bank and its operational needs. In some respects this discretion is absolute; in others it is not. In case of dispute, the determination of the reviewability of the discretion falls within the jurisdiction of the Administrative Tribunal. Like any other judicial body, it possesses the competence to determine its own competence. In general, reviewable discretions are those the exercise of which can have an effect upon the position of staff members in their individual relationships with the Bank. For example, on the one hand, decisions as to whether a particular post should be established, or on the number and levels of staff to be employed in a given division or on the choice of equipment are not reviewable. On the other hand, determinations relating to the performance of a staff member or to changes in levels of staff salary are reviewable.

12. However, the fact that the Tribunal may review the exercise of a discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the

decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed. In relation to the treatment of members of the staff, as has repeatedly been said by the World Bank Administrative Tribunal,

"[t]he Respondent's [Bank's] appraisal is final unless, as a result of a review of the exercise of the Bank's discretion, the Tribunal finds that there has been an abuse by the Bank in that its actions have been arbitrary, discriminatory or improperly motivated, or have been carried out in violation of a fair and reasonable procedure. (See, Suntharalingam, WBAT Reports 1982, Decision No. 6, para. 27.)" (Mr. X, WBAT Reports 1984, Decision No. 16, para. 39.)

In particular, in the case of evaluation of an employee's performance, these facts may relate

"not only to the technical competence of the employee but also to his or her character, personality and conduct generally, insofar as they bear on ability to work harmoniously and to good effect with supervisors and other staff members." (See World Bank Administrative Tribunal decision in Matt, WBAT Reports 1982, Decision No. 12, para 47.)

C. The basic facts and contentions

13. The Applicant entered the Bank's employment on 6 May 1987 as the Chief of the Office of Computer Services, Level 9. As such he was head of one of the Bank's 26 departments or offices, reported directly to one of the Bank's Vice-Presidents and had responsibility for all the Bank's computer programmes. He managed 130 professional, supporting and temporary staff and was responsible for a combined administrative and capital budget of about \$6 million per year. He was, in accordance with the then prevailing practice of the Bank, initially appointed under a three-year fixed-term appointment which expired on 5 May 1990. Some time prior to the expiry of that appointment, he was given a one-year extension. Thereafter, the Applicant's appointment was neither renewed for a fixed period nor converted into one for an indefinite period.

14. It is out of that non-renewal and non-conversion that the present claim arises. The Claimant seeks reinstatement as Chief of Computer Services and a regular appointment effective from the expiry of his one-year extension or, if the Bank opts to pay compensation, an amount equal to the salary that he would have earned to the retirement age and the amount of retirement and severance pay that he would have received if he had remained with the Bank until age 60. The Applicant also seeks his legal costs.

15. The Applicant asserts that he was entitled to be offered a permanent appointment upon the expiry of his one-year extension and that the decision not to offer him such an appointment was based upon, first, "a biased and improper investigation of his performance by members of the Bank's Budget, Personnel and Management Systems Department (BPMSD)" which, he claims, had a vested interest in ending the Applicant's employment with the Bank and, second, "the strictest and narrowest interpretation of the contractual documents by BPMSD without credence given to verbal promises and customary procedures." The Applicant contends that the decision process was carried out in violation of the relevant law by reason of "the numerous administrative irregularities and abnormalities consisting of: substantive irregularities, irregular motive or purpose, procedural irregularities, and violations of general principles of law."

16. The Bank denies that there was any understanding to convert the Applicant's fixed-term appointment into a regular appointment. The Bank also maintains that an objective, systematic evaluation of the Applicant's performance was carried out towards the end of the Applicant's one-year probationary period and that a second evaluation was undertaken six months before the end of the expiry of the original three-year fixed term. This evaluation concluded that the condition of satisfactory performance of the duties assigned to the Applicant had not been met in that "it was the Respondent's considered judgment that while the Applicant was technically qualified and competent, he lacked the essential managerial and interpersonal skills demanded of the position of the head of a department." The Bank stated that "further consultation was carried out by the Respondent", that the Applicant was "apprised ... of his shortcomings, verbally and in writing", and that the Applicant was urged "to achieve his departmental objectives with closer cooperation, consensus and support of his staff and user departments." The Applicant's appointment was then extended for one year. However,

"[i]n view of persistent deficiencies in management and lack of visible improvement in the Applicant's relations with his colleagues within and outside his department during the course of this one-year extension, the Respondent decided that it would be in the interest of the institution neither further to extend nor renew the Applicant's fixed-term appointment."

The Respondent submitted in conclusion that the Applicant's terms of appointment had at all times been respected and that there was nothing in the action of the Respondent that constituted an abuse of discretion by the Respondent.

D. The issue of whether the Applicant had a right to the conversion of his fixed-term appointment into a regular appointment

17. The first issue is whether the Applicant had any right to the conversion into a regular appointment of either his original three-year fixed-term contract or of its one-year extension. The general considerations relating to that matter have already been stated in paragraphs 5 and 6 above. Prima facie, the Applicant was not entitled to the conversion of his appointment. Absent other considerations, the only remaining question would be whether there existed any exceptional circumstances that could have given rise in the Applicant to a legitimate expectancy of such a conversion. 18. So far as the Applicant's original appointment was concerned, the Tribunal does not at all exclude the possibility that there may have been an understanding of the kind alleged by the Applicant. It seems unlikely that a person of the Applicant's age, experience and status in the computing field would have taken up an appointment in the Bank had it not been on the understanding that, given satisfactory performance, the position would become a permanent one. The Applicant asserts that he was initially told in New York that "the three-year appointment was a mere formality to be endured before being granted a regular appointment such as that held by the previous incumbent in the Chief, OCS position" and that "he was later told in Manila ... during recruitment interviews that the conversion to a regular appointment would be semi-automatic unless the Applicant failed to do his job." The Respondent has denied these assertions, though without producing statements on the point from the officials directly concerned. As will be seen, however, the question of whether at the time of the Applicant's recruitment an expectancy of conversion was established is not controlling. E. The question of due process

19. The real question in this case relates to the nature of the expectancy created by the use, in connection with the Applicant's extension of appointment for one-year, of the expression

"subject to further review." This term appears in the Bank's own record of the arrangement and is, therefore, not questioned by the Respondent. The Tribunal takes the words to mean that the Bank indicated to the Applicant that there was a prospect of further renewal or even of conversion if it considered that his performance matched what was required of him. By thus opening up or restating this prospect, the Bank established in the Applicant an entitlement to a genuine "further review", an entitlement that could only be satisfied if the review were carried out in accordance with the standards of due process. (See below, paras. 35-36.)

20. It is necessary, in considering whether due process was followed during the period of the Applicant's one-year extension, to go back over the manner in which the Bank dealt with the most pertinent aspects of the whole of its relationship with the Applicant as evidenced by the documents annexed to the pleadings.

21. The Applicant entered the employ of the Bank at Level 9 on 6 May 1987 under a three-year fixed-term contract. His letter of appointment, dated 30 March 1987 indicated that the appointment had a probationary period of one year. In a memorandum dated 19 April 1988, the Director, BPMSD, brought to the relevant Vice-President's attention the fact that Mr. Lindsey would be completing his probationary period on 6 May 1988 and requested the Vice-President's confirmation of the appointment. The memorandum, prepared after the Applicant had been in service for some 11 months, contained no reference whatsoever to the Applicant's performance and no suggestion that it was in any way unsatisfactory. On 29 April 1988 the Applicant was informed, by a letter signed by the President, of the continuation of his appointment. This letter mentioned no conditions and concluded with the words: "We look forward to your continued cooperation and a mutually beneficial relationship." By that date, it may be noted, the Applicant had already been vigorously discharging his duties for some months. He states:

"The Applicant was given the mandate by the former President ... to rapidly improve the efficiency of the Bank by implementing computer technology ... that would reduce the need to continually hire increasing numbers of additional new staff. The Applicant was directed to be an agent of change by the President who expected him to achieve immediate results. The Applicant accepted the challenge and moved at a rate unprecedented in the Bank ..."

These statements have not been denied by the Respondent. It thus appears that, whatever may be said about the Applicant's performance in subsequent years, nothing that he did in his first ten months led the Bank to communicate to him in writing any adverse criticism either as to substance or as to style.

22. Apart from two notices of salary adjustments, the record contains no document bearing upon the Applicant's performance for the next 19 months, that is to say, until about seven months before his original three-year fixed-term appointment was due to end. Then, on 23 November 1989, the Director of BPMSD addressed a memorandum to the President, through the relevant Vice-President, seeking approval to allow the Applicant's fixed-term appointment to lapse at its expiry on 5 May 1990. The memorandum stated, in part, that "while Mr. Lindsey is considered quite competent in his field of responsibility there have been recurring problems with his approach and style of management." The memorandum mentioned the Applicant's "highly centralized approach to decision making" and a "lack of understanding of Bank procedures." The record does not show that Mr. Lindsey had ever, during the preceding two-and-a-half years, been formally notified in writing of the existence or nature of the criticisms noted in the above memorandum. Apparently, the President must have accepted the recommendation in the

memorandum but that decision was not formally conveyed to the Applicant. Instead, he was left to hear about it "informally."

23. A further memorandum from the Director, BPMSD, to the President, dated 17 January 1990, indicates that the Applicant, upon thus hearing of the decision not to extend his service, sought reconsideration of the decision and that "discussions" were held between the Applicant and the Vice-President (Finance and Administration) in the presence of the Director, BPMSD. This memorandum then repeated the words from the memorandum of 23 November 1989 quoted above and added that "it was emphasized to Mr. Lindsey that his aggressive behaviour and, on occasions, abrasive manner" had caused friction which had adversely affected good working relationships. He was told that if he was to continue in service he would have to "change significantly and adopt a less contentious but a more persuasive and cooperative approach in the performance of his functions." Upon Mr. Lindsey expressing a desire to continue longer in the Bank, "it was indicated to him that, at this time, the Bank would be prepared to offer him an extension of one year only, subject to further review." The Tribunal notes in passing that the Applicant was not given any written note of the criticisms made of him nor any indication of exactly what was expected of him. The Memorandum concluded by seeking the President's approval for a one-year extension, which approval was given by an "Advice of Personnel Action" signed by the President, dated 24 January 1990.

24. The Respondent claims that the appointment was extended "to provide a fresh opportunity to improve the Applicant's performance." It is to be observed that in the paragraph of the Respondent's Answer containing this statement of the purpose of the extension no reference appears to any contemporary Bank document conveying to the Applicant, as a matter of record, this statement of the condition affecting his extension. The "Advice of Personnel Action" dated 24 January 1990, though recording the extension of the appointment for a period of one year contains nothing to this effect in the section on "Remarks", where one might reasonably expect such a condition to have been noted. Only in the memorandum dated 17 January 1990 from the Director, BPMSD, to the President is there a statement that "if he [the Applicant] is to continue in service, the Bank needs to be fully assured that [he] would change significantly and adopt a less contentious but a more persuasive and cooperative approach in the performance of his functions"; and this statement appears not to have been passed on in writing to the Applicant. By a further "Advice" dated 28 March 1990, the Applicant was informed that he was to be given a salary increase.

25. According to the documents before the Tribunal, nothing noteworthy occurred until 7 November 1990 - a period of nearly eleven months from the date of the Applicant's previous recorded interview with the Vice-President (Finance and Administration) and the Director, BPMSD. On that day, the Vice-President (Finance and Administration) made a note for the file, copied to the President and the Director, BPMSD, but not sent to the Applicant, recording that, having "heard various complaints about Mr. Lindsey's professional conduct and management style", the Vice-President had interviewed separately eight professional staff from the Computer Services Office. Neither the names or levels of those interviewed nor the dates of the interviews were recorded; nor, it would seem from the absence of such documents from the record, were systematic notes made of the individual interviews. Of the eight staff members interviewed, three "felt that the situation in the Office had improved somewhat during the current year although they also felt that his [the Applicant's] personal style was not always acceptable." The note continued: "The five other professional staff made serious complaints regarding his [the Applicant's] style of management but also in relation to his competence and professionalism." The note concluded:

"Generally, concern was expressed that the management style which had maybe slightly improved during the past probationary year, might definitely turn to the worse and might become quite unbearable if permanent employment status were given to the Chief, OCS."

26. On the following day, by a memorandum dated 8 November 1990, the Director, BPMSD, sought the President's approval to allow the fixed-term appointment of the Applicant to lapse upon expiry on 5 May 1991. The memorandum was received in the President's Office on 13 November 1990. The memorandum used the wording of the memoranda of 23 November 1989 and of 17 January 1990 to describe the general background and then added:

"The Vice-President has reviewed Mr. Lindsey's performance over the last year and, in his opinion, Mr. Lindsey has not significantly altered his behaviour or management style during this period. The morale of staff in OCS has not only not improved but has in fact deteriorated. The Vice-President therefore considers that it would be preferable not to further extend Mr. Lindsey's appointment. Attached is a copy of [the Vice-President's] comments of 7 November 1990. BPMSD supports these views (which it understands are fairly widespread in the Bank) as BPMSD continues to receive a number of complaints about Mr. Lindsey's style."

To this note the Vice-President (Finance and Administration) made a manuscript addition:

"There are some staff who feel there is some improvement since the beginning of this year but even they consider the management style as unsatisfactory."

27. A further note for the file by the same Vice-President, dated 12 November 1990, also appears to have been sent to the President. It records that, at Mr. Lindsey's request, the Vice-President interviewed three more staff that day:

"One of them said he had no personal complaints about Mr. Lindsey. Another staff said he had learned to adjust and could live with Mr. Lindsey. All of them confirmed that his conduct and management style was not very satisfactory, even if there had been some improvement. Users outside OCS seemed to be able to get along better with Chief/OCS now compared with a year ago ..."

28. It is to be noted that these reports of Mr. Lindsey's performance were made after interviews with OCS staff. However, the reports contain no indication that either the Vice-President (Finance and Administration), who was the Applicant's immediate superior in-line officer, or the Director, BPMSD, who under the Bank's Regulations was charged with responsibility for making recommendations to the President upon staff, expressed any opinion derived from their own personal observation of, or contact with, the Applicant. Perhaps the nature of their views is to be derived by implication from the fact that they subscribed to the documents in question. But the fact remains that neither of them formally recorded a view of the matter based upon direct personal judgment.

29. There is no direct evidence of the President's reaction to the memorandum of 8 November 1990 but, on 19 November 1990, the Vice-President (Finance and Administration) sent the Applicant a letter advising him that his fixed-term appointment would expire on 5 May 1991. Thus, no more than six months into the additional probationary period of one year, the responsible officials of the Bank had not only initiated a review process but had also taken a decision that the Applicant would not receive any further extension.

30. Some five months elapsed before the Applicant reacted to this letter, a delay which, he has explained, was due to the impending move of the Bank to the new headquarters and the demands of coordinating the relocation of all the Bank's computer assets. On 2 April 1991 the Applicant addressed a substantial memorandum to the Vice-President (Finance and Administration) requesting administrative review and reversal of the Vice-President's decision communicated in his letter to the Applicant of 19 November 1990. On 10 April, the Applicant filed a second memorandum in which he formally lodged his grievance and reiterated and expanded the exposition and request contained in the first.

31. In the meantime, the Applicant had, on 26 March 1991, requested the Director, BPMSD, to give him access to his "personal personnel record." This elicited a response from the Manager, BPHR, dated 5 April 1991:

"Staff of the Bank who wish to see their personnel files are requested to submit a precise list of documents that they wish to see. BPMSD then provides access to those documents, provided it does not contravene the Bank's ruling on confidentiality of information."

A further memorandum from the Applicant dated 9 April 1991 requested sight of

"each and every document in my personnel or other files maintained by BPMSD concerning my performance, conduct or any other factor bearing on my past, current and possible future employment at the Asian Development Bank."

On 26 April 1991 the Manager BPHR replied to the Applicant, stating that it was not possible to grant him unlimited access to his personal files but

"[i]n general we grant staff access to such documentation as (i) Advice of Personnel Action, (ii) Personal History Form and Curriculum Vitae, (iii) appointment-related travel documents, (iv) appointment-related correspondence and (v) medical records."

The Manager BPHR again asked the Applicant to submit a precise list of the documents that he wished to see but the Applicant appears - not surprisingly - to have carried the matter no further. However, in his Application the Applicant requested the Tribunal to obtain and send him a copy of the Bank's personnel records relating to him. The Tribunal has not done this as it believes that, had any pertinent documentation existed, the Bank would have produced it. Moreover, having regard to the conclusion which the Tribunal reaches on other aspects of due process involved in this case, the production by the Bank of additional documents at this stage would not affect the outcome.

32. On 17 April 1991 the Vice-President (Finance and Administration) replied to the Applicant's memoranda of 2 and 10 April 1991 stating that "the decision not to convert the Applicant's fixed-term contract was taken after a thorough assessment" of the Applicant's tenure "over the past four years", that "it was made in full compliance with due administrative process", that the Applicant "had been counselled on a number of occasions by management and ... [had] been kept fully apprised of our views on [his] shortcomings as Chief OCS." The Memorandum also pointed out that under Administrative Order No. 2.10, paragraph 4.1(b), "any decision not to convert a fixed-term appointment is not subject to review under the Bank's grievance procedures except where the decision has been influenced by administrative irregularities or abnormalities" and continued that "in the present instance the Bank's decision has not been

influenced by any such irregularity or abnormality." The memorandum concluded by informing the Applicant that "we do not find any reason to reverse the Bank's decision."

33. On 26 April 1991 the Applicant filed a Statement of Appeal to the Bank's Appeals Committee seeking, principally, the reversal of the Bank's decision. The Applicant also asked the Bank to extend his contract pending the determination of his application by the Appeals Committee. This request was refused by the Bank on 30 April 1991. On 7 May 1991 the Bank challenged the jurisdiction of the Committee to consider the application on the ground, as stated above, that the decision complained of could only come before the Committee if it had been influenced by "administrative irregularities or abnormalities." After the Applicant had taken the opportunity provided by the Appeals Committee to comment in writing on the Bank's challenge, the Appeals Committee decided on 13 May 1991, without entering into details, that it did not have jurisdiction.

34. The Applicant then gave the Bank notice of his intention to commence proceedings before this Tribunal. As the Tribunal had only just been established, the Bank agreed not to object to its jurisdiction if within 90 days of the publication of the Tribunal's Rules of Procedure the Applicant duly filed his application. The Tribunal subsequently determined that the Application had been duly filed.

35. The Tribunal has entered into this detailed review of the Applicant's relationship with the Bank because of the Tribunal's obligation to ensure that the requirements of due process have been observed. As already stated, it is well-established that

"the evaluation of the performance of staff members is a matter for management as long as its exercise of discretion is not ill-motivated, arbitrary, discriminatory or otherwise vitiated by any other abuse of power." (See, e.g., Gyamfi, WBAT Reports 1986, Decision No. 29, para. 37.)

The Tribunal will not review the substance of the exercise of the Management's discretion in relation to the Applicant unless there is evidence that it was so unreasonable that it could only have been arbitrary. The Tribunal does not find it necessary to go into this aspect of the matter, though it is bound to say that the letters of recommendation of the Applicant signed by the President of the Bank on 26 March 1991, by the Vice-President (Projects) on 2 April 1991 and by the Vice-President (Operations), on the same date, stating inter alia that the Applicant's "performance and achievements have been outstanding" and that the Applicant had been "a highly effective manager", are not documents which the Bank can properly disavow and, being intended as references, must be taken to be candid assessments of the Applicant upon which third parties may safely rely.

36. It is sufficient for the Tribunal to limit its conclusions to the procedures followed in relation to the Applicant. The Tribunal is, in particular, struck by the seeming absence during the relevant period of any system of regular staff evaluation applicable to an officer of the Bank at the Applicant's level. The record reveals not one contemporaneous document communicated by the Bank to the Applicant complying with the basic requirements of due process in the field of staff evaluation. Neither during his probationary period during his first year of employment in the Bank, nor in the remaining period of his initial three-year term, nor especially in the subsequent period of extension, also described by the Bank as "probationary", were the criticisms of the Applicant's personal behaviour spelled out in specific detail. Nor was any specific indication given of the change of conduct that was required of the Applicant if he was to meet the standard of personal performance called for by the Bank. If such documents exist, it was, of course, the

duty of the Bank to produce them to the Tribunal. No order of the Tribunal to this effect is required. Such documents would have been an essential ingredient of the proof of the Bank's contention that there was no irregularity in the process leading to its eventual conclusion not to extend the Applicant's employment. The fact that the Bank has not produced such documents can only be taken to reflect the fact that they do not exist.

37. The Bank has, however, filed one document which purports to provide written evidence of the Applicant's shortcomings. This is a document dated 24 July 1992, prepared by the Vice-President (Finance and Administration) nearly four months after the Application was filed in these proceedings and clearly written for the purposes of the case. Even so, in a manner appropriately frank, the note does not attempt to suggest that any written evaluations or notes of guidance were addressed to the Applicant. The goal posts for his performance, if not actually moving, were certainly obscure. On the important question of the Applicant's treatment of supporting staff, the note is clearly based on hearsay evidence: "... I was told that unacceptable personal treatment has contributed to the high turn-over rate among support staff. It could be checked whether turn-over rate has come down after Mr. Lindsey's departure." Though not inadmissible, such evidence must be treated with caution and the fact that the Bank has had recourse to it is an indication of the absence of hard evidence which in itself indicates a defect in the system of due process.

38. In short, the Tribunal finds that the decision of the Bank not to extend the Applicant's period of employment was invalidated by failure to apply due process. The fault lay in the insufficiency of the system of establishing reports on senior personnel. What was lacking was a procedure that would ensure that senior staff whose performance within the Bank might still be called into question would enjoy proper protection. Even at high levels, if the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. It is this absence of record which makes it so difficult to understand how the quality of the Applicant's performance in his first year of service could be deemed to have so seriously declined thereafter.

39. The consequence of this finding, that the Bank's decision is invalid, is that there has been a failure by the Bank to meet a basic obligation owed by it to the Applicant. The Bank's Separation Policy, contained in Administrative Order No. 2.08, as revised 19 December 1989, provides in paragraph 2.1 that

"[i]t is the Bank's policy to accord staff members security of service in the Bank consistent with their satisfactory job performance and with the efficient functioning of the Bank."

It was presumably in implementation of this general obligation that the specific undertaking was given to the Applicant at the time of his one-year extension that his period of employment would be "subject to further review." This could only have meant that the Bank would carry out a review which, if certain objective criteria were found to be satisfied, would lead to the further extension or conversion of the Applicant's appointment. Interestingly enough, this approach was subsequently spelled out, at a date subsequent to the decision challenged in the present case but still within the period of the Applicant's one-year extension, in Administrative Order No. 2.01, paragraph 7 ("Criteria for Extension or Regularization of a Fixed-Term Appointment"), which provides:

"A fixed-term appointment may be converted to a regular appointment or extended when the following criteria are met:

7.1 the staff member has completed a three-year fixed-term or fixed-term extension;

7.2 the Bank decides that it will continue to require the staff member's particular blend of skills and experience for the foreseeable future; and

7.3 the staff member's performance has been judged at least as consistently fully satisfactory."

40. By failing to carry out the review of the Applicant's performance in a valid manner, the Bank must be treated as having in effect denied the Applicant the possibility of obtaining the extension or conversion which he might otherwise have received. The possibility that, even if everything had been done correctly, the Applicant might still have been found not to have met the Bank's performance requirements is not relevant. To put the point another way, the Bank cannot now say that, if it had acted properly in accordance with due process, it could legitimately have exercised a managerial discretion not to regard the Applicant's performance as satisfactory.

F. Relief

41. It remains to consider the consequences that flow from the above conclusion.

42. Article X of the Statute of the Tribunal provides as follows:

"If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the Bank ... decide ... that the applicant shall be compensated without further action being taken in the case; provided that such compensation may not exceed the equivalent of three years' basic salary of the applicant. ..."

43. This provision appears to be modelled upon Article XII of the Statute of the World Bank Administrative Tribunal which contains identical language. The World Bank Administrative Tribunal has on many occasions interpreted this provision as authorizing it to fix an amount of compensation without ordering the rescission of the decision contested or the specific performance of the obligation invoked. (See, for example, Skandera, WBAT Reports 1981, Decision No. 2, para. 29; Buranavanichkit, WBAT Reports 1982, Decision No. 7, para. 30; Broemser, WBAT Reports 1985, Decision No. 27, para. 40.) The Tribunal accepts the applicability of this interpretation to Article X of its own Statute.

44. The Tribunal thus has a choice in this case between ordering the rescission of the decision or ordering specific performance of the obligation to carry out a proper review of the Applicant's performance or fixing an amount of compensation to be paid to the Applicant. As the decision under consideration is a negative decision, i.e. not to convert or renew the Applicant's fixed-term contract, it appears to the Tribunal that its finding that the decision is invalid renders it unnecessary to order its rescission. As to specific performance, even if a fresh consideration of the Applicant's performance were ordered, it could not be properly carried out because of the

absence of contemporaneous written evaluation reports covering the whole period of the Applicant's employment. Therefore, the only alternative left is that of ordering payment of compensation.

45. Even in the absence of strict proof of loss suffered by the Applicant, the Bank's action has effectively caused him harm. (See Buranavanichkit, WBAT Reports 1982, No. 7, para. 30.) The question is, how much harm? Is it the loss of a one-year extension or the loss of employment over the rest of the period that the Applicant might have served prior to his retirement at the age of 60? These are questions which it is impossible for the Tribunal to answer on the basis of the material before it. In these circumstances, therefore, the Tribunal must use its power equitably to assess the compensation due to the Applicant.

46. In doing so, the Tribunal will take into account, amongst other factors, that the Applicant has been deprived of employment at a high salary, that at his age and in present general economic circumstances he will now have some difficulty in obtaining further steady employment, that he has been denied the possibility of generating further pension entitlement and that he has been occasioned considerable moral injury. Accordingly, the Tribunal will order the payment to the Applicant of compensation in the amount of US\$185,000.

G. Costs

47. The Applicant has requested reimbursement of all legal, secretarial and other expenses connected with the proceedings from the date of his request for administrative review. He has not provided any details of the expenses said to have been incurred. The Respondent has submitted that the Applicant is not entitled to the award of any costs. The Tribunal observes that the Applicant has developed his case very thoroughly, including therein detailed reference to legal authorities. Although it is in principle desirable that claims for costs should be itemized in an applicant's Reply, the Tribunal decides that in the circumstances it is appropriate to award the Applicant costs in the amount of US\$3,000.

Decision:

For these reasons the Tribunal unanimously decides that:

- a. the Respondent shall pay the Applicant US\$185,000;
- b. the Respondent shall also pay the Applicant costs in the amount of US\$3,000; and
- c. all other requests in the Application are dismissed.