

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 8
(31 March 1995)**

**Sutanu Behuria
v.
Asian Development Bank**

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

1. The Applicant received a three-year fixed-term contract as a Programs Officer in the Bank effective 31 May 1991. He contends that one of the terms of his contract of employment was that his service with the Bank would be treated as continuous from 22 June 1989, on which date he had joined the Bank as a Director's Assistant.

2. The post of Director's Assistant was created in order to provide assistance for the Executive Directors of the Bank. A Director's Assistant is appointed by the President upon the recommendation of the Executive Director concerned. He is not a member of the Bank's professional staff, but is entitled to salary, allowances and benefits broadly comparable to that of the professional staff. His appointment is co-terminous with that of the Executive Director for whom he works.

3. In or about May 1991 the Applicant appears to have discussed the question of his joining the Bank's professional staff with Mr. Tony Wan, Manager, Human Resources Division ("BPHR"), and Mr. Robin Broadway, Human Resource Specialist. In consequence, by memorandum dated 28 May 1991 addressed to the Director, Budget, Personnel and Management Systems Department ("BPMSD"), the Applicant tendered his resignation using the following words:

"effective 30 May 1991 on the understanding that I will be given a Staff appointment in the Bank effective 31 May 1991 enabling my appointment with the Bank to be treated as continuous service with effect from 22 June 1989 on which day I had joined my present post."

This memorandum was copied to Mr. Tony Wan and Mr. Robin Broadway.

4. By letter dated 29 May 1991 the Director, BPMSD, offered the Applicant a three-year fixed-term appointment as Programs Officer in Programs Department (East) on the following among other terms:

"(2) In order to place you in the same status as other staff members, we would ask you to resign from your present position as Director's Assistant effective the close of business on 30 May 1991 and take up your new appointment as Programs Officer effective start of business on 31 May 1991. If these conditions are met, there will be no break in your service and, consequently, you will carry forward the service credits for the staff benefits to which you are entitled, e.g. Staff Retirement Plan, education grant, home leave, rental subsidy, etc.

.....

(4) At the option of the Bank, the appointment may be extended for a further fixed term, or may be converted to a regular appointment, which shall constitute a continuation of the previous fixed-term and be regarded as such for administrative purposes.

....

(6) Since you are already located in Manila and received appointment benefits as a Director's Assistant, you will not be entitled to receive appointment benefits for the second time." (Emphasis supplied).

5. By a memorandum dated 30 May 1991 to the Director, BPMSD, the Applicant accepted this offer, saying:

"on the understanding that there would be no break in my service and I would carry forward the service credits for the staff benefits to which I am entitled, e.g., Staff Retirement Plan, Education Grant, Home Leave, Rental Subsidy, etc." (Emphasis supplied).

6. The Human Resource Specialist by memorandum dated 31 May 1991 acknowledged the Applicant's memoranda of 28 and 30 May 1991 and stated that:

"We wish to confirm that . . . your service with the Bank as well as all your Bank benefits will be considered uninterrupted." (Emphasis supplied).

7. However, the Bank's Advice of Personnel Action dated 7 June 1991 described the Applicant's appointment as being subject to a probationary period of one year, "effective date: 31 May 1991."

8. There was thus a serious ambiguity in the documents as to whether the Applicant's service with the Bank was to be treated as continuous from 22 June 1989 for all purposes or only in regard to his entitlement to the service credits for staff benefits such as Staff Retirement Plan, Education Grant, Home Leave, and Rental Subsidy.

9. The first opportunity to resolve this ambiguity arose when the Applicant by his memorandum dated 5 July 1991 to the Director, BPMSD, requested a merit increase. A staff member qualifies for a merit increase upon completing one year of service, and thereafter upon every successive anniversary.

10. The Applicant stated:

"As agreed by you, my appointment was to be treated as on continuous service with the Bank with effect from my date of appointment as Director's Assistant which was 22 June, 1989. Accordingly, I have completed 2 years service in the Bank on 21 June, 1991 and would have been due for merit increase effective 22 June, 1991 had I continued as Director's Assistant. However, having joined the Programs East Department on 31 May, 1991, i.e., three weeks prior to the due date of increment, I seem to have been deprived of the due merit increase

I shall be most grateful if you could kindly consider granting me a merit increase prorated for the period 22 June, 1990 - 30 May, 1991."

11. By memorandum dated 25 July 1991 the Officer-In-Charge, BPMSD, refused that request, stating:

"I understand from Mr. Wan and Mr. Broadway that you had raised this question when your salary was under consideration prior to your appointment -and that the matter had been fully discussed at that time. It was explained to you that salaries of new staff were determined, within the framework of the Bank's salary structure, on the basis of academic qualifications and relevant work experience relative to their peers. Previous salary could therefore play only a marginal role in the process.

The salaries of Directors' Assistants are set and adjusted according to a system that is more or less independent of staff remuneration.

If we had followed our usual practice, your salary as a staff member would have been set slightly lower than your pay as a DA at that time - \$57,755. Under the circumstances, we decided not to reduce your salary but to offer you the same salary as you were then receiving. If, however, your entry on the staff had been delayed beyond 22 June 1991, we would not have been able to set your salary to incorporate the merit increase.

You were offered a new appointment as a staff member in order to place you on the same footing as other staff members. It was arranged that there should be no break in service between the two appointments in order that you could carry forward your pension credits, home leave credits and leave balances. However, you are now under the staff salary system and not under the DA system. Thus, like other staff members, your first merit increase will be awarded on your first anniversary. You will, however, be entitled to any general salary increase the staff may receive." (Emphasis supplied).

12. The Applicant did not reply. Thus he failed to deny that the question of his remuneration had been discussed in May 1991 prior to his appointment as Programs Officer; and for over two years he made no further claim for a merit increase or for continuity of service from 22 June 1989.

13. About six months before the expiration of his fixed-term contract, by letter dated 19 November 1993, the Director, BPMSD, informed the Applicant that

"Management has approved the conversion of your appointment from fixed-term to regular status at the same salary and level effective 31 May 1994.

For administrative purposes, 31 May 1991 shall be deemed to be your date of appointment"

14. The Applicant completed and submitted a formal letter of acceptance on 16 March 1994, accepting the regular appointment offered to him subject to the conditions set out in the offer of appointment, but made no reservation or request that his service be treated as continuous from 22 June 1989.

15. However, by a memorandum dated 29 April 1994 the Applicant claimed that it was incorrect to treat 31 May 1991 as his date of appointment because

"[t]his matter has been discussed a number of times with a variety of officers in BPMSD who while agreeing verbally that for administrative purposes my date of joining the Bank

(which was 22 June 1989) would be considered as my date of appointment, do not reflect it as such in written records."

He requested that necessary modifications be made. By memorandum dated 20 May 1994 the Director, BPMSD, declined this request.

16. The Applicant then lodged a formal grievance dated 26 May 1994 to the Director, BPMSD, claiming that the Bank's records should show his date of appointment as 22 June 1989 for two reasons:

"(i) A later date of 31 May 1991 rather than 22 June 1989 has resulted in my being placed at a lower level of seniority and consequently, denial of promotion compared to other staff;

(ii) A lower salary level result[ed] from a denial of merit increase (vide Director, BPMSD's letter of 25 July 1991 . . .)."

His contention was that by his memorandum of 28 May 1991 he expressed willingness to accept the appointment if it was treated as continuous from 22 June 1989; that because the offer of appointment was not specific he sought clarification by his letter of 30 May 1991; and that the Human Resource Specialist confirmed that his service with the Bank as well as all his Bank benefits would be considered uninterrupted. He also asked that his request of 5 July 1991 for a merit increase be reconsidered.

17. The Director, BPMSD, by his memorandum dated 14 June 1994 rejected his grievance, saying:

"2. In the Advice of Personnel Action dated 7 June 1991 you were informed of the Bank's decision to show 31 May 1991 as the date of your appointment [and] the consequences of the Bank's decision were spelled out to you in a memorandum dated 25 July 1991 . . . , namely that you would not qualify for a merit increase until the first anniversary of your appointment as a Programs Officer. As you did not agitate the matter further, it is assumed that you agreed to the same. Consequently, your present purported grievance application is time-barred under paragraph 4.1 of Administrative Order No. 2.06.

3. Even otherwise it was made clear to you that the position of a Director's Assistant is different from that of other professional staff positions and, therefore, you were required to resign from position of Director's Assistant, which you did, on 30 May 1991. However, as a special dispensation, it was arranged that there would no break in service between the two appointments in order that you could carry forward your pension credits, home leave credits and leave balances. This position was reiterated in our memorandum of 25 July 1991 which was accepted by you. Furthermore, the fact that your date of appointment for administrative purposes is 31 May 1991 was also repeated in the offer of regular appointment dated 19 November 1993 which you unconditionally accepted on 16 March 1994."

18. Paragraph 4.1 of Administrative Order No. 2.06 (as revised 27 September 1991) provides:

"A staff member who remains aggrieved after he/she has undergone the administrative review procedures in Section 3 may lodge a formal grievance and seek redress following

the procedures in Section 4.3. A grievance must be formally submitted within six (6) months from the date the staff member is notified of the decision giving rise to the grievance."

Previously, Administrative Order No. 2.10 (as revised 23 September 1987) provided:

"4.1 Following administrative review under Section 3, a staff member may lodge a grievance

5.1 Grievances must be formally submitted within six (6) months from the date the decision giving rise to the grievance is notified to the staff member."

19. The Applicant then submitted an appeal to the Appeals Committee on 16 June 1994. He contended that paragraph 4.1 did not apply for the following reasons:

"the administrative review procedure was on-going till 20 May 1994 when Director, BPMSD, informed me that my request of 29 April 1994 to show my appointment date as 22 June 1989 had been carefully considered and rejected. If in fact, the administrative review procedure had been completed, he would have informed me that my request had been earlier considered on 25 July 1991 and rejected and, therefore, the matter was closed. Accordingly, it was well within 6 months of the 'decision giving rise to the grievance' . . . that the formal grievance was lodged

6. . . . The reason I did not agitate the matter further [in 1991] was that I had already resigned as Director's Assistant and the Bank had decided to put me on probation for [one year] and I was under a 3-year fixed-term contract up to 30 May 1994. Clearly, it would not have been prudent on my part to agitate the matter with the authority which would be crucially involved in deciding on my confirmation and later regularization. Unfortunately, the oral tradition in the Bank does not attach much transparency to personnel decisions, and collegial advice is against any agitation, particularly, at non-regular status. It is for this reason that I took up the administrative review process again after having received advice regarding conversion from fixed-term to regular status and when it was close to the actual date of regularization. Non-agitation of the issue from 25 July 1991 to 29 April 1994 can in no way be considered as acceptance."

20. On 28 July 1994 the Appeals Committee held that the appeal was time-barred and that the rejection of the Applicant's requests for the revision of his date of appointment and for a merit increase was not flawed.

21. The Applicant then applied to the Tribunal on 12 August 1994. He contended that paragraph 4.1 of the Administrative Order was not a clause of limitation; that even if it was, the limitation would apply only after the administrative review procedure had been completed, which occurred on 20 May 1994; and that not taking issue with the decision in 1991 did not imply that he accepted the decision but only that as a prudent person he had decided to wait until he was on regular status.

22. Without prejudice to its case on the merits, the Bank on 27 October 1994 objected to the jurisdiction of the Tribunal, in accordance with Rule 7(6) of the Tribunal's Rules of Procedure, on the grounds that:

- a. the Applicant's memorandum of 26 May 1994 was not a grievance against a decision of the Bank taken on 20 May 1994, but against a decision which, in essence and substance, had been made and conveyed to the Applicant on 29 May 1991, 7 June 1991 and 25 July 1991;
- b. the purported "grievance" of 26 May 1994 was therefore not in compliance with paragraph 4.1 of the Administrative Order because it had not been submitted in due time, namely, within six months of the impugned decision; and
- c. the Applicant had thus failed to exhaust internal remedies, and the Application was inadmissible under Article II, paragraph 3(a), of the Statute of the Tribunal.

23. The essence of the Applicant's grievance is that continuity of service from 22 June 1989 for all purposes was one of the terms of his contract of employment which the Bank did not honour. All his other complaints - lower seniority, reduced salary, and the refusal of a merit increase - stem from that grievance. The request which the Applicant made on 5 July 1991 for a merit increase was founded upon his claim to unconditional continuity of service. This was unequivocally rejected by the Bank on 25 July 1991, on the basis that continuity was only "in order that [he] could carry forward [his] pension credits, home leave credits and leave balances", so that he would receive his first merit increase on his first anniversary. This was a final decision, in respect of which the Applicant, if dissatisfied, should have lodged a grievance within six months, as required by the Administrative Order. The Tribunal holds that the Appeals Committee correctly decided that it had no jurisdiction because the Applicant had not submitted his grievance in time. It is an established principle that in order to fulfill the requirement of exhausting all other remedies available within an organization (imposed by provisions such as Article II, paragraph 3(a)), it is not sufficient merely to submit a grievance or an appeal to the internal appeal bodies. Such grievance or appeal must be submitted also in conformity with prescribed time-limits (In re Schulz, ILOAT Judgment No. 575 (1983); In re Michl, ILOAT Judgment No. 585 (1983); and In re Zahawi (No. 2), ILOAT Judgment No. 634 (1984)).

24. The fact that the Applicant chose to wait until he obtained regular status in order to "[take] up the administrative review process again" does not mean that that process had not already been completed. What he sought, as his memorandum of 26 May 1994 states, was a reconsideration of his July 1991 request for a merit increase and not relief upon a new cause of complaint. Where a complaint is not admissible, because it is time-barred or because internal remedies have not been exhausted, a complainant cannot seek a reconsideration of that complaint and attempt to found the jurisdiction of the Tribunal upon the refusal of such reconsideration.

25. In regard to the Applicant's claim that he delayed to seek internal remedies for reasons of prudence, the Tribunal recalls the provision in the Bank's Personnel Handbook for Professional Staff that "staff will be entitled to invoke administrative review as well as the grievance and appeals procedures, without fear of reprisal, including ultimate recourse to an Administrative Tribunal whose decision shall be binding on the Bank and the staff." In the absence of evidence of an objective basis for a fear of reprisal in this case, the Tribunal concludes that "prudence" was no excuse for delay.

Decision:

Although amendments made to the Statute of the Tribunal on 22 December 1994 (effective 1 January 1995) increased the number of Members of the Tribunal to five and also permit the

Tribunal to adjudicate in panels of three, the Board of Directors of the Bank have not yet appointed the additional Members of the Tribunal foreseen in those amendments. The Tribunal has, therefore, decided that the present case should be considered and determined by reference to the Statute of the Tribunal as it stood prior to the adoption of the above mentioned amendments.

For these reasons the Tribunal unanimously decides that the Application is inadmissible.