

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 12
(8 January 1996)**

**Narayanaswami Viswanathan
v.
Asian Development Bank**

**Mark Fernando, President
R. Gorman, Vice-President
T. Sawada
L. M. Singhvi
B. Stern**

I. Basic Facts and Contentions

1. In this case, Mr. Narayanaswami Viswanathan ("the Applicant") filed an Application against the Asian Development Bank ("the Bank" or "the Respondent") on 19 April 1995, claiming remedies in respect of the wrong that he asserts was committed by the Bank in deciding to retire him before his 65th birthday and in refusing to give him a severance payment for the years he worked with the Bank before 1 May 1982.

2. The Applicant began his employment with the Bank on 22 January 1969. On 15 December 1994, he was advised formally of the Bank's decision that his retirement from the service of the Bank would take effect on 19 June 1995, the date of his 60th birthday, in accordance with Section 10 of the Staff Regulations. At that time, he was Chief, Office of Administrative Services. On 3 March 1995, he sent his resignation from the service of the Bank, with effect from 3 April 1995. On 29 March 1995, he received his Advice of Personal Action ("APA") which provided no termination payment and some severance payment. This severance payment was computed according to a severance payment scheme adopted by the Bank on 24 August 1982 (effective 1 May 1982), and confirmed in Administrative Order No. 2.08 of 20 April 1987.

3. The Applicant asks the Tribunal to decide two issues:

- a. that his age of retirement is 65 years;
- b. that he was entitled to severance pay for service prior to 1 May 1982.

4. As remedies, the Applicant requests the Tribunal to grant him compensation equal to five years' salary (being salary due up to the age of 65), severance pay equal to one year's salary (less the amount of severance pay already received by him), moral damages and costs.

5. The Bank asserts that the question of the supposed illegal retirement is moot, as the Applicant has himself terminated his employment by resignation. As for the severance pay claim, the Respondent objects to the jurisdiction of the Tribunal, but maintains that even if the Tribunal has jurisdiction, the Applicant must fail on the merits, as the Bank has discretionary power to design such a severance payment scheme as it deems fit.

II. Jurisdictional Issue

6. The Tribunal must first address the jurisdictional issue raised by the Bank. With respect to the Applicant's severance pay claim, the Respondent objects to the jurisdiction of the Tribunal on the following grounds:

"The Bank's severance pay scheme was adopted in its present form in 1982, and if, as the Applicant claims, the adoption of the scheme disadvantaged the Applicant and therefore constituted action by the Bank adverse to the Applicant, the Applicant should have challenged such action then. The Applicant's delay in objection renders this portion of the Application inadmissible by the Tribunal, under Article II, paragraph 3(b) of the Statute of the Administrative Tribunal of the Asian Development Bank (the 'Statute')."

7. The Tribunal cannot accept this jurisdictional defence of the Bank. It is a well established principle that a member of the staff can properly claim before the Tribunal that there has been an infringement of his own rights. This is clear from the wording of Article II, paragraph 1, of the Statute of the Tribunal:

"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 including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff."

8. Whether or not the Applicant could have contested the severance pay scheme in 1982, there is no doubt that he can contest the specific decision by which it was applied to his personal situation. Such a decision, if it infringes his rights or denies his benefits, gives him a cause of action. The Tribunal therefore rejects the objection to jurisdiction raised by the Bank, as far as the severance pay claim is concerned.

III. The Question of Age of Retirement

9. The Applicant submitted on 3 March 1995 to the President of the Bank his resignation from the service of the Bank with effect from 3 April 1995. In his letter of resignation, the Applicant asserted that he was forced to seek alternative employment because of the improper and illegal action on the part of the Bank and stated:

"My resignation is thus without prejudice to my pensionary, severance pay and other terminal benefits and further without prejudice to my rights for legitimate compensation for the tangible and intangible injuries arising out of the Bank's illegal action."

10. The Respondent asserts that the resignation of the Applicant bars the Tribunal from entertaining his claim with respect to the Bank's decision to retire him from service before the retirement at the age of 65. It contends:

"The Applicant's service in the Bank was terminated as a result of his resignation from the Bank, effective 3 April 1995. While the Bank had notified the Applicant of its decision to exercise its option under Section 10 of the Staff Regulations to terminate his service in the Bank with effect on the date of his 60th birthday (16 June 1995), prior to that date the Applicant resigned. The Bank therefore had no occasion to exercise its Section 10

option in respect of the Applicant, and there is thus no action, illegal or otherwise, completed by the Bank in respect of the termination of the Applicant's service in the Bank under Section 10. The Applicant's objections to the Bank's practices under Section 10 of the Staff Regulations are thus abstract and without reference to his individual situation."

11. The exercise of the Bank's option was to be effective only on 16 June 1995. A contract of employment between the Bank and the Applicant would have continued to subsist until that date. Although his resignation, effective on 3 April 1995, may well have been emotionally motivated by the notification of the Bank's decision to exercise its option under Section 10, this was nonetheless a voluntary decision by the Applicant which brought his employment to an end. When the Applicant applied to the Tribunal on 14 August 1995, his employment had already been terminated on 3 April 1995 by his own act prior to the date when the exercise of the option became operative. The Tribunal therefore does not need to address the question of the age of retirement, and the purported illegal action of the Bank in that context.

IV. The Question of Severance Pay

12. Severance payments were introduced by a decision of 24 August 1982, and confirmed in para. 5.3 of Administrative Order No. 2.08 of 20 April 1987:

"A staff member with five or more years of continuous service will be entitled to severance pay on the following basis:

- a. A sum equivalent to two weeks' final net salary for each year of eligible service after 1 May 1982 up to a maximum of one year's net salary for 26 years of service after that date, if the staff member resettles outside the duty station country upon separation.
- b. Two-thirds of the amount in (a) above if the staff member remains within the duty station country upon separation.

Uninterrupted service prior to 1 May 1982 counts towards meeting the five years' service eligibility, but does not count towards the accrual of the amount of severance pay.

As a transitional arrangement, a staff member who satisfies the five-year eligibility requirement and who, on the implementation date of 1 May 1982, was within 10 years of retirement age (i.e., 50 years of age or older) would, in lieu of normal severance pay benefits, receive credit for each year of service between age 50 and the date of termination. This would allow a staff member who retires at age 60 after having been employed by the Bank since age 50 or earlier to credit 10 years of service. If he resettles outside the duty station country upon separation, he would receive 20 weeks' salary in severance pay; or two-thirds of this amount if he remains within the duty station country."

13. In the Tribunal's opinion, the Bank enjoys discretionary power in determining benefits such as severance pay. It is nevertheless the duty of the Tribunal to ensure that this discretionary power is not abused, and that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated, or adopted without due process (see Lindsey, Decision No. 1 [1992]). If there is an unjustifiable inequality of treatment, it would be violative of the principle of non-discrimination enunciated by the World Bank Administrative Tribunal in *de Merode* (WBAT Reports 1981, Decision No. 1, para. 47), in which it stated that

administrative action "must not discriminate in an unjustifiable manner between individuals or groups within the staff."

14. The Applicant submits that such an unjustifiable discrimination has been made by the severance pay scheme in two respects. He first asserts that "(e)quality in conditions of service would not be achieved if the severance pay is not based on the entire period of service rendered", as was true of staff members first employed after 1 May 1982. He also asserts that the severance pay system is discriminatory, as it creates three categories of employees:

"Employees recruited after 1 May, 1982 get severance pay for all the years of service subject to a maximum payment for 26 years of service. Those who were over 50 years age on 1st May, 1982 were allowed to credit past service up to 10 years for receiving up to 20 weeks salary in severance pay. Those who were below 50 years of age on 1st May, 1982 did not get any benefit for past service rendered prior to 1st May, 1982 and were only allowed to count service thereafter for purpose of severance pay. When the Bank is willing to pay severance up to 10 months' salary, it is arbitrary and discriminatory not to consider the service rendered prior to 1st May, 1982."

15. In other words, the Applicant considers that he has been twice discriminated against: because as a matter of principle, the years before 1982 were not taken into account for the calculation of his severance payment and because, by way of exception, the transitional arrangement permitted those years to be counted only for certain staff members.

16. The Tribunal will first consider whether the fact that the Bank did not count the years before 1 May 1982, which amounts to failure to make the retirement scheme retroactive, is discriminatory.

17. When a new regulation is introduced by the Bank, the new provisions apply for the future unless the Bank provides otherwise.

18. In this case, the Bank granted new benefits to the staff members. The system of severance pay linked the new benefits with the number of years of service. However, in counting these years, the Bank differentiated between staff members first employed after 1 May 1982, who were to be credited for all of their years of service in calculating severance pay, and staff members already in the Bank's service before that date, whose previous years of service were in principle to be disregarded in this calculation. The Applicant contests this differentiation as discriminatory, as he was in the service of the Bank before 1 May 1982.

19. The Tribunal accepts the contention of the Bank that it is not obliged to make any newly introduced benefit retroactive, in order to cover service rendered by staff members prior to the introduction of such benefit. The Bank is under no duty to take into account periods of service rendered when the scheme was not even in existence. In other words, the Tribunal considers that it is within the discretion of the Bank to choose not to make a new rule retroactive.

20. Moreover, contrary to the Applicant's assertions, the action of the Bank does not deprive staff members of accrued rights; before the decision to set up a severance pay scheme, no such acquired or even potential right existed. As the new system does not impair any rights, but on the contrary grants new benefits, there is no question of a denial of acquired rights.

21. Therefore, it is the conclusion of the Tribunal that the operation of the new rule did not deprive the Applicant of any acquired right and is not discriminatory.

22. It remains for the Tribunal to review the transitional arrangement provided for by the Bank, which did introduce some degree of retroactivity in the severance pay scheme. In so doing, the Bank had to act without discrimination or arbitrariness.

23. The Tribunal underlines the fact that the transitional arrangement was intended precisely to alleviate the difference in treatment resulting from the non-retroactive character of the new rule. Although this difference in treatment was acceptable, the transitional arrangement gave to the staff members concerned more than what was needed in strict legality.

24. In order to ascertain whether the transitional arrangement, which ameliorated the position of certain staff members recruited prior to 1 May 1982, is discriminatory or arbitrary, it is important to understand the criteria that were used to shape it. Although the Applicant asserts that three different categories were created, a close scrutiny shows that there were only two categories of employees:

- a. those who will be recruited after 1 May 1982, who would benefit fully from the new severance pay system: in other words, if they were to serve long enough with the Bank, they would receive as severance payment a maximum of one year's salary, that is 52 weeks.
- b. those who were previously recruited by the Bank, who would benefit only for service rendered after 1 May 1982. However, in order to minimize the difference between those who were recruited before and after that date, the Bank introduced a system in which all staff members recruited before 1 May 1982 who remain with the Bank until 60 years of age will be entitled to a minimum of 20 weeks' or five months' salary. Therefore, although it was not obliged to do so, the Bank chose to give to all staff members recruited before 1 May 1982, the same guarantee of a minimum of severance pay, if they were to serve the Bank until the age of 60. In order to achieve this guaranteed minimum, the Bank had to take into account, for staff members who were already 50 years or older, some years of service prior to 1 May 1982; but for those staff members who could receive this guaranteed minimum through service after 1 May 1982, the Bank did not see fit to take into account years of service before that date.

25. The Tribunal notes therefore that the number of years taken into account for the calculation of severance pay for staff members in the service of the Bank before 1 May 1982 was variable: it could range from one to ten years for staff members between the ages of fifty to sixty, but none for staff members below the age of fifty. However, this differentiation in the computation of severance pay was not discriminatory, as its purpose was precisely to reach a uniform result: a certain guaranteed minimum amount of severance pay, for all the staff members recruited before 1 May 1982.

26. The Applicant in fact having served the Bank for 13 years after 1 May 1982 was entitled to - and did receive - 26 weeks' salary as severance pay; he thus received more than the guaranteed minimum provided for all staff members recruited before 1 May 1982 and has therefore not been discriminated against.

27. The Tribunal concludes that the manner in which the Bank designed and applied the new severance pay system does not lend itself to criticism. First, the Bank is not under an obligation to create a new system on a retroactive basis, which means that a non-retroactive scheme of benefits, as such, is not discriminatory. Secondly, the transitional arrangement is not

discriminatory; the application of the scheme to the Applicant resulted in his receiving the guaranteed minimum -- and more.

Decision:

For these reasons the Tribunal unanimously decides to dismiss the Application.