

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 68
(20 January 2005)

M.M. Soerakoesoemah, Syed Mahboob
Alam, Ramdass K. Keswani, Akira Tsusaka,
William Webb, Benigno E. Serafica, et al
v.
Asian Development Bank

Flerida Ruth P. Romero, President
Arnold Zack
Yuji Iwasawa

A. Factual Background

1. The above listed 6 Applicants together with 216 Joiners, as retired staff employees, seek to adjust the terms of their retirement to bring it into conformity with the Bank's personnel policy statements to provide and maintain internally equitable and externally competitive compensation and benefits extending as well to the Staff Retirement Plan (SRP). They claim that the Bank failed to review and revise the 1983 based commutation factor which had been part of the contract of employment for those already retired when it increased the commutation by 21% at normal retirement age 60 for only active staff on 1 May 2001 effective 1 October 2000. It asserts that the Bank did not maintain external competitiveness with its comparator organizations in that action or when it failed to provide additional pension protection for those who exceeded the projected life expectancy of 74 years. Additionally it claims that the Bank paid comparatively lower rates than its comparators when it initially hired relatively experienced and senior professionals who failed to retain vested rights at their former employment and were then required to leave the ADB at age 60 with low pensions. It challenges the Bank's lack of good governance and accountability in its internal management vis-a-vis pensioners and asserts that they have been stonewalled since 1998 in their long and tortuous process to achieve pension improvements. It notes that their submissions have not been responded to in timely fashion and that they were required to go through the SRP Administration Committee and the SRP Pension Committee to pursue their claims even though such Committee decisions had been a foregone conclusion after the Budget, Personnel and Management Systems Department (BPMSD) and the President had refused to permit direct submission to the Tribunal. Full disclosure and transparency on matters affecting pensioners was lacking and advice, recommendations, calculations, and cost estimates relied on by the Bank were not disclosed. It asserts that this Application has been filed at the earliest opportune time after delays caused by the Respondent's own actions and omissions to bar recovery *ratione temporis* constituting causes of action for continuing grievances. That abuse of Bank discretion should be addressed and redressed by the Tribunal as within the scope of its review.

B. Claims

Applicants' Claims

2. In their claim, Applicants rely on the Bank's living up to its obligations under its personnel policy statements which are incorporated and implied in the Staff Development Plan including the following:

- a. Personnel policy statements that "provide competitive terms and conditions of employment...impartial and transparent personnel policies and practices for its entire staff";
- b. A.O. No. 2.02. of 28 May 1998: "[T]he Bank seeks to provide competitive terms and conditions and is guided by fair, impartial and transparent personnel policies and practices in the management of its entire staff";
- c. Section 6.4(j) of Article 6 of the SRP: "Every rule, policy, or procedure made, issued, or prescribed by any committee hereunder shall be uniformly applicable to all persons similarly situated"; and
- d. Section 11.1 of Article 11 of the SRP: "[T]he ADB reserves the right at any time and from time to time to modify or amend in whole or in part any and all of the provisions of the Plan, provided that no modification or amendment may be made which would deprive the Participants, Retired Participants, and any other persons receiving or entitled to receive a Pension, annuity or other benefit without their consent, of any benefits vested in them under the Plan at that time by reason of Service theretofore rendered or for which contributions have been made and provided that no such modification or amendment shall make it possible for any part of the funds of the Plan to be used for, or diverted to, purposes other than for the exclusive benefit of the Participants and Retired Participants or other persons entitled to benefit under the Plan, prior to the satisfaction of all liabilities with respect to such persons."

3. To this end Applicants seek from the Bank certain service and retirement data concerning the Applicants and documents reflecting discussions and decisions of the Pension Committee and the Administration Committee. They also seek rescission of certain decisions of the Administration Committee and the Pension Committee. As to relief, they request the following:

- a. A one-time payment equivalent to the recent increase in the commutation factor graduated according to year of retirement between 1 January 1983 and 1 October 2000;
- b. Restoration of Reduced Pensions for pensioners who outlive the projected life expectancy used at the time of retirement;
- c. Supplemental pensions for early staff who retired prior to 1 August 1991 with relatively short years of service; and
- d. Reimbursement of pensioners for reasonable and necessary out-of-pocket costs of pursuing their claims and payment of professional fees of designated representative and counsel.

Respondent's Position

4. The Respondent asserts that the Applicants' claims suffer from lack of jurisdiction for the following reasons:

- a. Many of the Applicants separated or retired prior to the 1 January 1991 establishment date of the Administrative Tribunal, and are thus personally disqualified from appearing

before the Tribunal since its jurisdiction *ratione personae* does not extend to these Applicants.

- b. The Applicants challenge features of the SRP, which predate the establishment of the Tribunal, which thus lacks jurisdiction over the claims *ratione materiae*. Applicants had the right to receive only those benefits provided by the SRP and can not use this Tribunal to amend the SRP or to claim new benefits not contemplated by the SRP or applicable to them at the time of their retirement. Applicants voluntarily opted for commutation of their pensions based on factors applicable at the time, and the Tribunal thus lacks jurisdiction *ratione temporis*.
- c. The claims made many years after separation and/or retirement are time-barred.
- d. Under the Tribunal's Statute, it lacks authority to rescind a decision or to order specific performance of a prior obligation that Respondent has failed to perform. This is so since it lacks the authority to rewrite or amend the SRP, to negotiate the Applicants' contracts of employment, to declare new benefits payable to Applicants or to award their requested relief.

Reply Positions

5. Applicants reply that the Statute of the Administrative Tribunal extends its authority to any current or former member of the Staff including any person entitled to receive a payment under the provision of the SRP. They assert that former staff members are entitled to allege non-observance of the contract of employment due to the administration of the SRP for abuse of discretion in respect of their continuing entitlements under the SRP. On the merits, they reply that the Respondent violated its stated formal policy of competitive compensation by unreasonably maintaining a low commutation factor prior to 1 October 2000. This, they continue, deprived Applicants of a just equivalent of future pensions foregone in exchange for a commuted lump sum. In that exchange, relative to comparators, it abused its discretion with respect to claims for pension improvements and the right to procedural due process in failing to correct the underpayment of those still receiving pensions who have survived past the age 74 computed pension expectation. They deny guilt of laches asserting that they have fully complied with their obligations to utilize the Respondent's administrative appeals procedures, while Respondents have imposed excessive technical and procedural delays to constructively deny the Applicants' claims. Finally, Applicants seek a Special Plenary Session of the Tribunal on the ground of urgency of the case due to the advancing age and failing health of Applicants who have patiently waited for relief since 1998.

6. The Bank in its Answer provides some retirement data for the 46 former employees who retired from the Bank prior to 1 January 1991, out of the 222 Applicants. It also provides responses from the Director, Compensation and Benefits Division (BPCB) to both the SRP Administrative Committee and Pension Committee, as well as minutes, memos and canvassing notes surrounding the Pension Committee meeting of 4 April 2001. It also provides papers relating to the review of the SRP dated 15 July 1988 review of actuarial assumptions dated 20 November 2000, and the proposed amendments to the SRP. It rejects the Applicants' allegations that Respondent sought to delay the proceedings, and submits there is no justification for convening a Special Plenary Session of the Tribunal to consider the case. In its Answer of 24 May 2004, the Bank objected to the Application based on the lack of jurisdiction.

C. The Opinion of the Tribunal

Jurisdictional Issues To Be Resolved

7. The Tribunal suspended further arguments on the merits of the case, including consideration of provisional measures sought, pending resolution of the following jurisdictional objections:

- a. The Tribunal's jurisdiction *ratione personae* does not extend to many of the Applicants who were separated or retired before 1 January 1991 and are thus personally disqualified from appearing before the Tribunal under Article XIV of the Statute of the Administrative Tribunal which bars jurisdiction to entertain an application in respect of grievances arising before that date;
- b. The Tribunal's jurisdiction *ratione materiae* does not extend to entertain the claims as they challenge features of the SRP which predate the establishment of the Tribunal inasmuch as the provisions of the SRP were met; there has been no "nonobservance of the contract of employment or terms of appointment";
- c. The Tribunal has no jurisdiction *ratione temporis* as the Application has been filed outside the acceptable time limits under Article XIV, and is also barred under the equitable principle of laches; and
- d. The Tribunal has no authority to grant the Applicants' claims for lump-sum payment, restoration of pensions to the pre-commuted amounts, and supplementary pensions to ban staff who retired before 1 August 1991. It is empowered to neither amend nor create new provisions to the SRP nor is it authorized to confer entirely new benefits on the Applicants, which were not contemplated by the Respondent's Regulations, nor is it empowered to remake the Applicants' contracts of employment.

Applicants request that Respondent's jurisdictional objections be dismissed and the Application be heard on the merits.

8. The Tribunal Statute establishing the Administrative Tribunal granted it jurisdiction in Article II, paragraph 1, over

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.

That grant identifies "contract of employment" and "terms of appointment" as being governed by

all pertinent regulations and rules in force at the time of the alleged non-observance including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.

Additionally in Article II, paragraph 2, the Statute defines "member of the staff" as being

any current or former member of the Bank Staff....

On their face, the foregoing provisions appear to provide the rationale for acceptance and processing on the merits of the Applicants' claims. However, Article XIV declares that even if the statutory appeal procedure prescribed in Article III, paragraph 3, has been followed to bring the case to the Tribunal

the Tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to 1 January 1991, provided, however, that the application is filed within ninety days after the entry into force of this statute.

Jurisdiction Ratione Personae

9. The assertion by Applicants that as former staff members they are still entitled to raise issues of abuse of discretion in respect of their continuing entitlements under the SRP, is challenged by the Bank. It contends that the Applicants who retired or separated prior to 1 January 1991 are personally disqualified from appearing before the Tribunal to raise issues that arose prior to its establishment and which are barred by Article XIV of the Statute. That is so because they opted for a commuted lump sum payment prior to 1 January 1991 and were separated from the ADB prior to that date. That Article by prescribing the competence of the Tribunal to hear any application arising subsequent to 1 January 1991 has been interpreted in Nelson, Decision No. 7 [1995], I ADBAT Reports, 77, 84, para. 25, to preclude its exercise of jurisdiction over grievances arising prior to that date:

Under Article II, read with Article XIV, of the Statute, the Tribunal has no jurisdiction to entertain an application in respect of grievances arising before 1 January 1991. Since this claim relates to a grievance arising before that date, the Tribunal has no jurisdiction to entertain it.

10. Although the first sentence of Article II, paragraph 3, requiring adherence to specified appeal procedures permits admissibility of applications "upon exceptional circumstances as decided by the Tribunal", that potential exception to the sub-paragraph (a) and (b) compliance with the specified Article II, paragraph 3, appeal procedure, is also covered by the broader Article XIV exclusion of Article II, paragraph 3. While it is true that prior to the Statute and the establishment of this Tribunal there had been no comparable channel for raising complaints over alleged abuse of discretion in respect of continuing entitlements under the SRP, it is beyond the authority of this Tribunal to reopen any such alleged pre-1 January 1991 inequity. The drafters of the Statute when they had the opportunity to extend jurisdiction to an earlier date, opted not to do so, leaving open only a ninety-day window after entry into force of the Statute for filing of applications which in any event was not utilized by the Applicants in this case.

11. Although some 46 of the 222 Applicants appear to have retired or separated before 1 January 1991 and are thus disqualified from eligibility before the Tribunal because their cause of complaint arose prior to its establishment, even for those who had a semblance of claim after 1 January 1991 for events that occurred prior to that date, there appears to have been no utilization of the ninety-day window under Article XIV to file any claims.

12. The 1 January 1991 date does not discriminate between active and former staff members; it merely establishes a threshold for entertaining claims precluding those of former employees who seek to challenge the actions of the Bank which had occurred prior to the creation of the Tribunal's reviewing authority. Although the SRP contained provisions permitting elections to change pensions prior to retirement, once the staff members retired and separated and took the lump sum commutation, their pension then became fixed. They then became bound by the pension terms even though subsequent events including the 1 October 2000 revisions may have caused them to question the wisdom of those earlier choices. The 2000 revisions covered a different group of employees and in no way affected the benefits the claimants had earlier

agreed to. They continued to receive pensions calculated pursuant to the terms of the SRP that were in force at the time of their retirement or separation.

Jurisdiction *ratione materiae*

13. The challenges raised by the Applicants have their bases in the original 1968 structure of the SRP. They seek now to rely on a process created in 1991 to challenge a plan that predated the establishment of the Tribunal, in effect urging an *ex post facto* interpretation, application or even revision of the Statute that is barred by the terms of Article XIV. Whether their claim is based on the original SRP or any amendments, interpretations or pension elections made prior to 1 January 1991 or based upon the pre-1 January 1991 retirement or separation of former employees, the terms of Article XIV preclude such claims based upon events occurring prior to that date from being considered now. The language of Article XIV barring the Tribunal from hearing any application concerning a cause of complaint arising prior to 1 January 1991 also extends to precluding claims of those who retired after 1991 inasmuch as there was no change in the 1968 Plan to which they had agreed at the time of their retirement. That reasoning would also apply to those who are now seeking to revise what they had originally committed to, including actuarial forecasts and commutation plans based on the then comparators at the time of their retirement. To permit such post-1991 claims based on pre-1991 decisions would open the door to complaints over current consequences and disbursements arising from pension election choices made prior to the creation of the Tribunal, election choices that are beyond the reach of the Tribunal under Article XIV. Applicants should not be permitted to recoup through the Tribunal for the consequences of decisions made at a time when they lacked such an appeal opportunity or to reshape their earlier decisions because of having outlived their anticipated survival or for their options made prior to the advent of the Statute and Tribunal.

14. Applicants seek rescission of some decisions of the SRP, particularly to achieve lump-sum benefits for Applicants, restoration of pensions to pre-commutation levels for those who so elected to commute their pensions, as well as supplementary pensions for those who retired in the early years of the Bank's operation. Any one of those requests would constitute more than a rectification of an earlier inequity; it would constitute a rewriting of the SRP, which is beyond the authority of the Tribunal. As the International Labour Organisation Administrative Tribunal (ILOAT) stated in *In re Deville and others*, ILOAT Judgment No. 2097 (2001):

If the contracts are valid and enforceable and not in breach of any applicable staff rule or principle of international civil service law, the Tribunal has no power to reform them or to remake the bargain which the parties themselves have chosen to make.

Even if there were grounds for such rescission, the Administrative Tribunal is not the appropriate venue for instituting changes in the SRP, nor is it empowered to remake the Applicants' contracts of employment.

Jurisdiction *Ratione Temporis*

15. Applicants claim they filed at the earliest opportunity after they became aware that their claims were actionable and for years have gone through the Respondents' administrative mill in the reasonable expectation that their needs would be addressed without having to resort to this Tribunal, and have not sat on their rights. Although the triggering event for their claims may be the 1 October 2000 changes in pension benefits for those not yet retired, the Applicants are bound by events and decisions they made under a plan that was in place prior to 1 January 1991. Under the terms of Article XIV they are time-barred in as much as the claims were not

made within the time provided by the Statute. The Applicants accepted the benefits to which they subscribed. Additionally, beyond the ninety-day window of 1991, the concept of laches is properly invoked to preclude reopening long closed and long accepted conditions merely because later evidence may cast some doubt on the wisdom of the earlier choices. The stability and certainty of a pension scheme can only be assured if those covered are held to their choices, and if the Plan can rely on the permanence of those decisions. The same reasoning applies to those who received pension payments beyond 1 January 1991 based upon decisions made prior thereto. Their payments continued as originally provided and agreed to.

16. That the Bank undertook to provide amended and increased benefits effective 1 October 2000 for those not yet retired, does not alter the fact that for these Applicants their pension commitment had been made at a time excluded by the Statute from our review. Even for those who made their pension commitment between 1991 and the 2000 Plan revisions, there is no evidence that they made a timely filing. Their original retirement, pension and commutation arrangements continued as originally provided. Applicants' effort to secure restoration of benefits or supplemental pensions were not provided for by the SRP, and the belated effort to secure them through this forum constitutes not only an untimely but also an impermissible challenge to the substantive provisions of the SRP. Although the Applicants claim that a prospect of equal treatment justifies extending the improvements to those already retired as well as to active employees, this forum is unable to address that claim because it lacks jurisdiction over pension commitments made prior to the creation of the Tribunal.

17. In the light of the foregoing we find that we lack jurisdiction over this appeal. In the absence of jurisdiction, there is no need to determine the applicability of A.O. No. 3.20. Our ruling on jurisdiction likewise applies to the requests for information sought by the Applicants which are denied, as are the requests for reimbursement of legal and other expenses.

Decision

For the above reasons, the Tribunal unanimously decides that the Application is inadmissible.