

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 96
(8 September 2011)**

**Srinivasan Kalyanaraman
v.
Asian Development Bank**

**Arnold Zack, President
Yuji Iwasawa, Vice President
Claude Wantiez
Lakshmi Swaminathan**

I. THE FACTS

1. The Applicant joined the Asian Development Bank (“ADB” or the “Bank”) in May 1978 and became, at that time, a participant in the Staff Retirement Plan (“SRP”). He retired on 14 June 1995 at the age of 55.

2. During the period when the Applicant worked at ADB, three successive SRPs were introduced:

- a) the first: October 1968;
- b) the second: January 1983; and
- c) the third: August 1994.

Each of these plans contained:

- a) the same definition of the word “pension”: “annual payments for life ...”; and

b) the possibility for any participant to elect to commute part of the pension into the form of a lump sum by written notice received by the Administration Committee before the pension became effective.

3. Under the terms of the plan in force at the time of the Applicant's retirement, i.e. the plan of October 1994:

a) the normal retirement age was 60 (section 1.1, H);

b) the Participant could retire with an immediate pension before the age of 60 "from any other date specified by the Participant following the 55th anniversary of his birth";

c) the amount of any such early retirement pension was calculated in accordance with the provisions of "the second schedule" or "the third schedule" of the 1994 SRP, depending on the dates of the payment and retirement (section 3.2(b));

d) "any Participant or Retired Participant ... may, by written notice received by the administration committee before the date on which the pension is due to commence, elect to commute his pension on that date ... in accordance and subject to the provisions set out in the thirteenth schedule";

e) according to the thirteenth schedule of the 1994 SRP:

(i) “The amount of the pension which the Participant or Retired Participant may commute is up to fifty percent (50 %) of that Pension”;

(ii) “The amount of the lump sum shall be equal to the percentage given in the table following, according to the Participant’s age on the date of such commutation, of the immediate Pension payable to the Participant, multiplied by the proportion of the pension to be commuted:

Age	Percentage
65	862.61
...	
60	1,000
...	
55	1,159.27
...	
50	1,343.92
... ”;	

f) “The pension to which the Participant would otherwise be entitled shall be reduced by the amount of the Pension which he is commuting.”

4. In June 1995, at the age of 55, the Applicant:

a) decided to take immediately his early retirement pension, the amount of which was reduced according to the third schedule: the annual amount of the full early retirement pension was set at US\$51,604.47; and

- b) elected to commute 50 % of the total amount of his pension into a lump sum of US\$293,441.03.

The remaining annual pension of the Applicant was $\$51,604.47 \times 50 \% = \$25,802.24$ (which, at the time of the Application, amounted to \$41,384.69 due to cost of living increases).

5. On 2 July 2009, the Applicant brought a claim to the Pension Unit of ADB for restoration of full pension despite the earlier commutation. This claim was rejected by the ADB's Pension Unit on the grounds that restoration of pension following commutation is not provided for in the SRP. On 1 April 2010, the Applicant forwarded his claim to the Pension Committee, and it was considered by the Administration Committee pursuant to the revised provisions of the current SRP regarding the functions of the Pension Committee and the Administration Committee. The Administration Committee denied the Applicant's request on the basis that the SRP at the time of the participant's separation did not provide for restoration of full pension after the pensioner has reached a certain age or has received a reduced pension for a certain period of time. The decision was sent to the Applicant on 24 February 2011.

The Claim

6. On 31 March 2011, the Applicant filed an application before this Tribunal. He challenges the decision taken on 24 February 2011 by the SRP Administrative Committee not to restore his pension to the amount that it would have been had he not commuted 50% of its amount into a lump sum.

The Objections of the Respondent

7. The Respondent objects that “the tribunal lacks jurisdiction *ratione materiae* over the claim and is without authority to issue the remedies sought and on the basis that it is time-barred under the equitable doctrine of laches”. It argues there is no jurisdiction *ratione materiae* as there has been no nonobservance of the SRP and instead the Applicant is asking the Tribunal to rewrite his contract. It also argues that the commutation provisions of the SRP that govern the Applicant’s pension benefits were approved by the ADB’s Board of Directors in the 1983 amendments to the SRP, which was prior to the establishment of the Tribunal. The Respondent argues that the claim predates the Tribunal’s jurisdictional authority.

II. FINDINGS

Preliminary Measures

8. The Applicant requests a hearing and that this Application be considered by the Tribunal *en banc*. We have been provided no persuasive justification to call for a hearing and that request is therefore denied. However, in the circumstances of the case, the Tribunal grants the request for consideration by the Tribunal *en banc*.

9. Although the Tribunal has determined that this case warrants consideration by the Tribunal *en banc*, one member has not been able to attend this plenary session of the Tribunal. In the exercise of its powers under Rule 23, and considering that Rule 5, paragraph 4, provides that three members of the Tribunal shall constitute a quorum for plenary sessions,

the Tribunal decides that this case shall be determined by the four members present at this session.

Issues To Be Resolved: Lack of Jurisdiction

10. According to the Respondent, “the application fails to state a claim over which the tribunal has jurisdiction pursuant to art. II paragraph 1 of the Statute of the Tribunal”. This provision states: “The Tribunal shall hear and pass judgment upon any application by which [an] individual member of the staff ... 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 provision of the staff retirement plan”.

11. The conditions of admissibility of an application before this Tribunal are:

- a) the allegation of nonobservance of the SRP (art. II, para. 1);
- b) being a current or a former member of staff (art. II, para. 2);
- c) having exhausted all the remedies available within the Bank (art. II, para 3(a)); and
- d) having filed the application within ninety days after the latest of the following: (i) the occurrence of the event giving rise to the application, or (ii) receipt of notice, after the Applicant has exhausted all other remedies available

within the Bank, that the relief asked for or recommended will not be granted (art. II, para 3(b)).

12. Three conditions are fulfilled in this case:

- a) the Applicant alleges the nonobservance of the SRP;
- b) he is a former member of the staff; and
- c) he has exhausted the remedies within the Bank: on 1 April 2010 he brought a claim to the Pension Committee, and on 24 February 2011 the Administration Committee rejected the claim.

13. Concerning the time limit of ninety days, we have two relevant dates in this case. The first is 14 June 2010, when, in the perception of the Applicant, he believed he would become entitled, pursuant to principles which he claims to be applicable in this case, to receive the restoration of his full pension after the expiration of a period of 15 years from the date of his retirement and reaching the age of 70. These conditions were not fulfilled until 14 June 2010. As acknowledged by the Respondent in its Answer “under the SRP there is no express time limitation on bringing a claim regarding one’s pension benefits through the internal SRP governance mechanism, a request to the administration committee.” The Applicant brought a claim to the Pension Unit for restoration of his full pension on 2 July 2009, nearly a year before the 15-year period was completed on 14 June 2010, and submitted this Application on 31 March 2011, nine months after that date, subsequent to the exhaustion of the remedies available within the Bank. The action of the Applicant was thus not tardy

under his interpretation, without prejudice to later consideration of the correctness of his interpretation.

14. The second relevant date is 24 February 2011, when the SRP Administration Committee denied the request of the Applicant by writing “it is up to the ADBAT to decide the receivability of your appeal.” The time limit of ninety days set out in Article II (3)(b)(ii) started at the Applicant’s receipt of the Bank’s denial on 24 February 2011 and the Application was filed on 31 March 2011, i.e. within the time limit of ninety days. Thus, the Tribunal finds that the Applicant in this case acted in a timely manner.

15. To support its contention that the Tribunal lacks jurisdiction, the Respondent relies on its judgment in *Soerakoesoemah et al.* (Decision No. 68 [2005] VII ADBAT Reports, 15) in which the Tribunal dismissed the claims of more than 200 pensioners who had commuted pension and claimed their restoration.

16. The case of *Soerakoesoemah et al.* was similar to the case of the Applicant, but the issues at stake were not the same, because in that case, some of the pensioners had retired before the date of the establishment of the Tribunal and/or the other pensioners had filed their application in 2005, i.e. there had been five years of unchanged circumstances after the occurrence of the event which, in their argument, had given rise to their claim without them taking action.

DECISION

For these reasons, the Tribunal unanimously decides that the Application is admissible.

In light of this decision, the Tribunal directs the Applicant to submit a Reply on the merits of the Applicant's claim within thirty days of receipt of this decision, and the Respondent to submit a Rejoinder on the merits within thirty days of receipt of the Applicant's Reply.

Arnold Zack

Yuji Iwasawa

 /s/
President

 /s/
Vice President

Claude Wantiez

Lakshmi Swaminathan

 /s/
Member

 /s/
Member

Attest:

Cesar L. Villanueva

 /s/
Executive Secretary

At Manila, 8 September 2011.