

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 98
(8 February 2012)**

**Srinivasan Kalyanaraman
v.
Asian Development Bank**

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

I. THE FACTS

Background

1. We refer to the facts as set out in *Kalyanaraman v. Asian Development Bank*, Decision No. 96 (8 September 2011), in which the Tribunal decided that the pending claim would be heard *en banc*; that the application was admissible; and therefore that the parties were to submit their Reply and Rejoinder on the merits of the claim.

The Claim

2. In his Application filed on 31 March 2011, the Applicant challenges the decision taken on 24 February 2011 by the Staff Retirement Plan (SRP) Administration Committee not to restore his pension to the amount that it would have been, had he not commuted 50% thereof into a lump sum. The Applicant contends that he is entitled to the restoration of his full pension (by restoring that 50% of the commuted portion of the pension) effective 14 June 2010 when he had completed 15 years of retirement and had reached 70 years of age.

3. In his Reply, the Applicant re-asserts his claim “together with interest to compensate the Applicant for the delay in restoration of full pension”.

II. FINDINGS

Preliminary Measures

A. Request to be heard *En Banc*

4. In his Reply, the Applicant requests “that the application be subject to oral hearing before the full bench of the tribunal”.

5. This decision is being rendered *en banc* pursuant to Decision No. 96, although one member has not been able to attend this plenary session of the Tribunal, and accordingly the case is determined by the four members present.

B. Request for an oral hearing

6. According to Rule 14, paragraph 1 of the Rules of Procedure of the Tribunal, “[o]ral proceedings, including the presentation and examination of witnesses or experts may be held only if the Tribunal so decides”.

7. In the present case, the facts are not disputed; the issue is one of interpretation of the rules and arguments of both parties on the issue are sufficiently explained in their pleadings. The Applicant’s request for an oral hearing is not founded on any claim of evidentiary conflict.

8. Accordingly, we deny the request to hold an oral hearing in accordance with the power granted to us by the rule quoted above.

9. We note that, in his Reply, the Applicant seeks in case of the denial of his request for an oral hearing, permission to “pursue the application under international law ... through alternative processes of adjudication of the application”. It is not the function of the Tribunal to grant or deny such permission.

The Merits

10. The Applicant has the burden of proving his right to secure a full restoration of the pension to which he claims he was entitled as of June 2010.

11. Furthermore, it is up to him to establish, not only that the Bank improperly used a “commutation period” of 15 years, but also that in a case where the retiree has “outlived” (or completed) this period, he had the right to recover the full pension.

12. For the reasons given below, the Applicant fails to discharge his burden of proof; we are unable to find the evidence to support his assertions, either on the provisions of the SRP of 1994 in force at the time of his retirement or in his other arguments.

A. The Provisions of the SRP

13. Under the provisions of the SRP in force in 1994:

- a) the normal retirement age was 60 (Section 1.1 (h));
- b) early retirement was possible depending on the age (50-55 years) and “Eligible Service in months”;
- c) the amounts of the “normal” or of the “early retirement” pensions were set in accordance with the provisions of the First Schedule (normal pension) of the Third Schedule (early retirement pension) (Sections 3.1 and 3.2);
- d) a portion, a maximum of 50%, of either the normal pension or the early retirement pension may be commuted (at the request of the Participant of the retired Participant) into a lump sum of which the amount is fixed “in accordance with ... the provisions set out in the Thirteenth Schedule”. That lump sum is a percentage “according to the age on the date of such commutation” of the immediate pension which the participant would have received, “multiplied by the proportion of the Pension to be commuted.”

14. According to Section 8.1 of the SRP, “No person shall have any interest in or right to any part of the Retirement Fund or of the earnings thereof or any rights in, or to, or under the Plan, or any part of the assets thereof, except as and to the extent expressly provided in the Plan”.

15. There is no provision in the SRP which provides *expressly* or even by implication, the restoration of the full pension after a certain age or period of time, let alone after the completion of a period of 15 years in retirement and at the age of 70.

16. On the contrary, paragraph 5 of the Thirteenth Schedule specifically warns that “[t]he Pension to which the Participant would otherwise be entitled shall be reduced by the amount of the Pension which he is commuting”. The amount remaining after the selection of the commutation is thus a “pension”. The term pension is defined in Section 1.1 (k) of the SRP in force at the time of retirement as “annual payments for life payable under the Plan, except as may be otherwise expressly provided herein.”

17. Therefore, the reduced pension is set for life without any possibility of restoration, except for cost of living increases as foreseen by Section 15.1 of the SRP in force at the time of the Applicant’s retirement.

18. The Applicant argues that in the commutation table “the commuted value of the retired participant [is] 1000% [i.e. 10 times the commuted portion of the pension] at the age 60. ... This simply mean[s] that life expectancy [is] age 70”.

19. This argument might be persuasive if we found the same calculation was imposed at the other ages: for example, 15 times multiplication factor at age 55 or 20 times at age 50. However, such is not the case: the percentage is 11.5927 times when the retirement Participant’s age is 55 and 13.3492 at the age of 50. Thus, there is no apparent link with the age of 70 or with the completion of a period of 15 years in retirement.

20. The Applicant justifies this discrepancy by “discounting factors ... for the value of money ... and actuarial table computations”, but he does not give any explanation concerning the discounting factors. Moreover, while the first SRP of October 1968 referred to “actuarial”

notions, this reference was deleted in the SRP applicable in 1983 and in 1994 (i.e. the SRP applicable in this case).

21. The system of commutation, when applicable and invoked, is balanced. The SRP bears the risk that the pensioner will receive a large pay-out even though he or she may pass away shortly after the commutation, while the pensioner bears the risk that he will long outlive the alleged exhaustion of the lump sum. The system is with risks to both and thus not inequitable as asserted by the Applicant.

22. Additionally, we draw the attention of the Applicant to the fact that he voluntarily opted to commute a part of his pension and that he was not compelled to do so. At the time of his retirement, he was Assistant Controller with seniority of 17 years. He presumably would have had the skill to anticipate the consequences of his choice.

B. The other arguments of the Applicant

1) The deferred wage

23. In his Reply the Applicant asserts that the pension “is a deferred wage”. We are unable to find such term in the “definitions” of SRP, where “pension” is defined as “annual payments for life payable under the Plan” (Section 1.1(k)).

24. Even if the pension were considered as a “deferred wage”, it would not change our interpretation of the rule; that term does not prevent a participant from choosing – freely and in accordance with the regulation – to commute a part of such wage into a lump sum with the advantages (immediate payment) and the possible disadvantages (no restoration of the full pension after a “certain” period) of that choice.

2) The situation in the “Bank’s Member Countries”

25. The Applicant asserts that the Bank should adhere to the regulations of “the Bank’s member countries (e.g. India under direction from a decision of the Supreme Court of India)” which restore “the commuted portion of the pension into the full pension payments after 15 years”.

26. This argument is not in accordance with the well-established jurisprudence of this and other international administrative tribunals, to which we agree.

Haider (No. 2), Decision No. 48 [2000], ADBAT Reports, V, 45, para. 6:

“[T]he Applicant bases his argument in part on the Rules of Civil Procedure and the relevant court cases in a Member State of the Asian Development Bank. Being an international institution, the Administrative Tribunal is normally regulated by the internal law of the Bank and by international law, independent of domestic laws of member countries. A reference to domestic laws may not be inappropriate in certain exceptional situations if it is made in the form of written law or unwritten law. However, the present issue is not such that warrants reference to a domestic law in order to fill the lacunae in law, since the applicable law in this case is clearly established”.

Yamagishi, Decision No. 65 [2004], ADBAT Reports, VI 123-124, para. 53;

“Whatever national or international law her counsel might have had in mind is not binding upon the Bank, which is an international organization and the law of which, with respect to the employment rights of staff members, is internal to the Bank and determined ultimately by the Tribunal”.

De Armas, Decision No. 39 [1998], ADBAT Reports, IV, 21, paras. 39 and 40:

“39. Both parties referred to the practice of other international and regional organisations in regard to the disputed benefits, citing the staff rules and regulations of several organisations, as well as memoranda from some. In the absence of a completely uniform practice, in regard to any particular benefit, by all organisations, it is inevitable that one organization will be the most generous, and another the least generous. But that by itself is no proof of unreasonableness, perversity or discrimination on the part of either. Further, the benefits reasonably necessary to attract staff with the highest standards of efficiency and technical competence, may differ from place to place.

40. ... While the practice of other organisations might well have become relevant if the contending considerations had been evenly balanced, that was not the case here.

Accordingly, in setting out its reasons, the Tribunal has made no reference to the practice of other organisations.”

27. Rather than citing any prevailing international standard, the Applicant invokes just one decision of a court in one member State involving a case where there were differences of treatment in the rules of commutation of pension between members of civilian and defense personnel. We find that the decision of the Supreme Court of India relied upon by the Applicant is not applicable to this case. First, there is no evidence whatsoever that the Indian Supreme Court ruling relied on constitutes a general practice in any other member State. Secondly, unlike the issue settled by the Supreme Court of India, *all* the members of the Bank’s staff benefit from the *same* retirement regulation.

3) The “Noblemaire Principle”

28. The Applicant cites two decisions in reference to the Noblemaire Principle:

In Judgment 831 [1987], Consideration 1, the ILOAT noted that:

“The Noblemaire principle ... embodies two rules. One is that, to keep the international civil service as one, its employees shall get equal pay for work of equal value, whatever their nationality or their salaries earned in their own country. The other rule is that in recruiting staff from their full membership international organisations shall offer pay that will draw and keep citizens of countries where salaries are highest”. (Judgment 831, Consideration 1 of ILOAT, 1987, FAO of the UN)

The same Tribunal noted in Judgment 986 [1989], Consideration 7:

“The relations of staff with an international organization do not end when they leave its employ. The pension scheme forms part of the administrative arrangements they may look forward to and, like pay, pensions are governed by basic rules that are binding on the organisation. Foremost, among them is Noblemaire, the purpose of which is not to bestow privilege on international civil servants but to draw some of the best people from every country into service”. (Judgment 986, Consideration 7 of ILOAT, 1989, ILO)

29. The Tribunal observes in addition that the ILOAT noted in Judgment 2423 [2005]:

“[T]he ultimate goal of the [the Noblemaire principle], according to the complainants, is set forth in Article 101, paragraph 3, of the Charter of the United Nations in the following terms:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible”. (Judgment 2423, Para. D, ILOAT, 2005, W.M.O.)

30. There is no need to deal with the question of whether the Noblemaire Principle applies in this case. Even if it were applicable, the Applicant fails to provide persuasive evidence of violation of that principle or even evidence that his pension was lower than pensions paid to domestic and/or international civil servants with equivalent duties. After 17 years of seniority and at the age of 55, his annual pension amounted in 1995 to \$51,604 and he received that year a lump sum payment of \$243,000.

4) The amendment of the rules

31. In his Application the Applicant requests the Tribunal “to direct SRP of ADB to amend the commutation rules to render a fair and equitable treatment of ADB pensioners who exercise commutation option”, arguing that “[t]he amendment should provide for restoration of the commuted value of pension after 15 years’ expiry from the date of retirement or the attainment of 70 years of age”. He maintains this request implicitly in his Reply.

32. The first conclusion we draw from this request is that the Applicant recognizes that the existing rules do not require the conclusion he advocates.

33. Secondly, it is clear that this Tribunal lacks the authority to change the existing regulation which he challenges. His request is outside the jurisdiction of this Tribunal. Our authority is to determine the meaning and application of the SRP in force at the time of the Applicant’s retirement. We are unable to alter or amend such provisions.

34. Thus, as noted in Decision No. 68 of this Tribunal, quoting a decision of ILOAT (No. 2097 of 2001):

“If the contracts are valid and enforceable and not in breach of any applicable staff rule or principle or international civil law, the Tribunal has no power to reform them or to remake the bargain which the parties have chosen to make” (*Soerakoesoemah*, Decision No. 68 [2005] ADBAT Reports VII, 22, para. 14).

DECISION

For these reasons, the Tribunal unanimously decides to dismiss the claim.

Arnold Zack

/s/
President

Yuji Iwasawa

/s/
Vice President

Claude Wantiez

/s/
Member

Lakshmi Swaminathan

/s/
Member

Attest:

Cesar L. Villanueva

/s/