

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 109

(6 May 2017)

Perrin, *et al.*

v.

Asian Development Bank

Lakshmi Swaminathan¹, President

Gillian Triggs, Vice-President

Shin-ichi Ago

Anne Trebilcock

Chris de Cooker

1. This is an application on behalf of 122 international staff members (Perrin *et al.*) seeking relief from the effect of changes to the Asian Development Bank's ("ADB" or "the Bank") education assistance ("EA") benefits provided to its international staff ("IS"). Those education assistance changes were part of broader revisions of ADB's compensation and benefits package that were applicable to international staff, national staff, and administrative staff at all duty stations including Headquarters. These changes were conducted in the context of the Respondent's 2020 Strategy. After a year-long consultation period, these final changes were notified to staff on 16 December 2015 and introduced effective 1 January 2016 via Administrative Order ("AO") No. 3.06.

I. THE FACTS

Consultation Process for Changes to the Education Assistance Benefits

2. On 4 February 2015 a Town Hall meeting was held where ADB's Budget, Personnel, and Management Systems Department ("BPMSD") and its salaries and benefits consultant (specialists in providing advice to international organizations on expatriate salaries and benefits) described to ADB staff the scope and processes of a proposed comprehensive review of the ADB's compensation and benefits policies. This presentation and details of the forthcoming consultation process for the review were also shared with staff through email. The consultation process was to include one-on-one interviews with senior staff, focus group discussions, internal surveys and confidential email mailboxes for staff members to submit feedback directly to the Bank's salaries and benefits consultant until 16 March 2015.

¹ Through Video Conference

3. On 19 June 2015 “ADB’s Comprehensive Review of its Compensation and Benefits Policies”, with details of the proposed changes to staff benefits, was distributed to staff along with an invitation to attend a second Town Hall meeting on 22 June 2015.

4. At the 22 June 2015 Town Hall meeting, the ADB President explained in his speech the reason for the changes:

We must strike the right balance between competing factors. This is not an easy equation when everyone has their own interests and needs. So consultations with active staff, former staff, Board and other stakeholders are critical.... On the other side of the equation, we should examine our remuneration to make sure that it is not regarded as inconsistent with our objective of using our shareholders’ resources to eradicate poverty. We cannot continue to enjoy benefits, which are difficult to explain reasonably to tax payers of our member countries just because we have enjoyed them for many years. Indeed, we can no longer just take things for granted.

5. Employees and retirees were invited to provide feedback to the salaries and benefits consultant through a confidential mailbox until 17 July 2015.

6. The Staff Council, by a 9 July 2015 memo, requested an extension to that consultation period, and an extension until 24 July 2015 was granted.

7. On 27 July 2015, the Chairperson of the Staff Council submitted to the DG, BPMSD a copy of a 22 July 2015 legal opinion from a law firm which had been engaged by the Staff Council and the Association of Former ADB Employees (AFE) on the legality of the June proposals. The legal opinion was that the ADB did not have the right under international administrative law and public international law to change the existing benefits in the manner in which it was proposing. A summary of this legal opinion was circulated by the Staff Council to all staff by email on 28 July 2015.

8. Following consultation and feedback from staff, retirees and Board members, a revised “Comprehensive Review of ADB’s Compensation and Benefits Policies – Proposed Modification to Benefits (Revised)” was presented to staff on 12 August 2015. The revisions to the earlier June proposals contained in the August proposals relevant to the education benefits were substantial. The June proposal included the elimination of the flat rate allowance (“FRA”) for non-tuition expenses for eligible dependents of IS attending primary/secondary/tertiary studies outside the duty station starting September 2018. The revised August proposals retained the FRA for dependents attending primary/secondary/tertiary studies outside the duty station and now calculated the FRA by reference to the World Bank Group subsistence grant for room and

board. In addition, the previously proposed elimination of assistance for post-graduate tertiary education was revised to include assistance with a limitation of 4 years up until age 24.

9. On 21 August 2015, the Bank's Office of the General Counsel ("OGC") provided its legal considerations on the proposed modifications to staff benefits (revised) and concluded that the proposed changes to the education allowance "do not change any 'fundamental and essential' term of employment, and therefore ADB has discretion to determine – without staff's consent – to revise the manner in which the education allowance is implemented, so long as those revisions are undertaken in a manner which is: (A) not retroactive; (B) made in good-faith; (C) reasonably related to the underlying objective for the change; (D) does not discriminate; and (E) made in a reasonable manner to avoid unnecessary harm. OGC believes the proposed modifications are being implemented in a manner that respects those criteria, and, as such, are consistent with the relevant legal framework."

10. On 21 August 2015 the Chairperson of the Staff Council requested further consultations. Management agreed and on 21 August 2015 sent an email to all staff inviting them to further information sessions on the comprehensive review and thematic sessions on the proposed changes to the Staff Retirement Plan and education assistance. At these sessions staff were given an in-depth explanation of the proposed changes to benefits, including the rationale for the changes and the context, circumstances and alternatives considered.

11. On 7 September 2015, the Staff Council circulated a second opinion from its legal advisors, dated 4 September 2015. The second opinion continued to regard the proposed changes as unlawful. The opinion concluded that the benefits that Management was attempting to eliminate were fundamental and essential terms of the employees' contracts of employment which could not be unilaterally altered to their detriment.

12. Following a 7 September 2015 invitation to all staff, on 9 September 2015 the President gave a speech (also shared with staff by email) at a Town Hall meeting about the review and also listened to feedback from staff including a response from the Staff Council. The President announced that after the first version of proposals, feedback, two months of further careful review and consideration, and presentation of the second version of proposals on 12 August, the Bank would proceed with modifications to education assistance as proposed and noted:

Regarding this third part, I firmly believe that the present version of the proposals we have shared with you is reasonable. It is consistent with ADB's mandate, changes in economic circumstances worldwide, our fiduciary responsibilities, and the need to be accountable to our stakeholders.

13. The President also explained that:

- (a) “our compensation and benefits should be consistent with our mission of eradicating poverty in the region”;
- (b) “we need to pay attention to greater equity between different personal circumstances of our individual staff members” [noting an overemphasis on benefits for international staff with children in higher education]; and
- (c) “we compared our system carefully with other international financial institutions, and found some benefits go beyond what our comparators offer [and] there is room for improving some other benefits.”

14. The Chairperson of the Staff Council noted during the same Town Hall meeting that the Staff Council considered the proposals to be unlawful as they sought to change the “fundamental and essential terms of our employment contracts, without staff consent...”. The Chairperson also urged that any proposals should reflect respect for international administrative law and good governance. The Staff Council also proposed that Management conduct a review “that is truly holistic... with staff fully engaged and meaningfully consulted.”

15. Management then agreed to the Staff Council’s request that its legal advisors be permitted to address staff directly at the Bank’s Headquarters. This occurred on 26 October 2015. The presentation was recorded and made available to staff. In the same month, the salaries and benefits consultant provided its “2015 Comprehensive Review of ADB’s Compensation and Benefits Policies” to the Bank.

16. On 25 November 2015, ADB’s “2015 Comprehensive Review for IS, NS [National Staff] and AS [Administrative Staff]” was circulated to the Board of Directors (“Board”) for consideration. For IS, this paper recommended, amongst other benefits proposals, an average salary increase of 4.7%; an increase in the dependency allowance from USD\$600 to USD\$1000 annually per eligible dependent child; the introduction of a pre-school allowance of up to USD\$1,350 per calendar year; and lower education assistance benefits for new hires, with a 4-year transition for existing international staff.

Changes to Education Assistance (EA) Benefits Effective 1 January 2016

17. On 16 December 2015 the Board approved the recommendations of the President relating to the revisions to the compensation of staff and endorsed the benefit changes effective on 1 January 2016. On the same day, DG, BPMSD advised IS, NS and AS of the changes to the salary structure approved by the Board and separately circulated a memo to IS, NS and AS entitled “Changes to Staff Benefits Effective 1 January 2016” that included an attached “Guidelines on Education Assistance Changes starting 1 January 2016”.

18. On 17 December 2015, the final report of the salaries and benefits consultant, dated October 2015, entitled “2015 Comprehensive Review of ADB’s Compensation and Benefits Policies”, was circulated through the ADB email newsletter for all staff, *ADB Today*.

19. On 5 January 2016, DG, BPMSD circulated a memo to all staff announcing that management had approved, effective 1 January 2016, consequential amendments to several AOs, including AO 3.06 (education assistance).

Original Intent, Objective of Review, Review Findings, and Effect of Changes

20. The Bank’s provision of education grants is based on the underlying premise of cost-sharing, so that the assistance provides a grant of a percentage (not the full amount) of the costs, with a cap on the grant. A 1968 Policy Paper on the review of dependency allowances and education grants considered by the Bank’s Board of Directors stated that: “It is intended that Education Grants will offset, to a reasonable extent, the additional educational costs which a professional staff member incurs as a result of his assuming duty away from the home country and not being in a position to continue educating his child in his homeland or in the same household.”

21. The objectives of the 2015 Comprehensive Review were explained to staff to include, amongst others: (i) assessment of the competitiveness of the Bank’s compensation and benefits policies with reference to global or local employment markets from which the Bank recruits its staff; (ii) assessment of sustainability and cost efficiency of ADB’s compensation and benefits policies and its effectiveness in supporting talent acquisition, staff development and retention; and (iii) identification of areas where changes in the staffing, compensation and benefits policies are required to support the Bank’s business needs and changing workforce demographics.

22. The main findings of the 2015 Comprehensive Review in relation to IS were that (i) the compensation was “on par or above comparators” and (ii) the benefits (including the Bank’s education assistance policy) were “above the median and average of the comparators”.

23. The 12 August 2015 presentation on revised proposed modifications to benefits policies, noted that considerations for EA included “comparability, competitiveness, alignment with ADB’s key agendas, and accountability to all the stakeholders”, “comparator market practice at the other international financial institutions”, “equity across different personal circumstances of individual staff”, and “modifications designed to cushion financial impact on staff and to be implemented gradually.”

24. The final changes to the EA to international staff (IS) members towards costs of educating their dependent children are found in AO 3.06 effective on 1 January 2016. AO 3.06 stipulates, amongst other things:

- a dependent child of an eligible IS (with a regular or fixed-term appointment) must be 3-23 years of age on the date of commencement of school classes during the EA year;
- the ADB will under certain conditions provide EA for pre-school, primary, secondary, and post-secondary education;
- regarding post-secondary education the ADB will provide a maximum of 4 years of assistance to any eligible dependent child with a transition period such that EA beyond four years of post-secondary would be discontinued starting 2020;
- the FRA benchmark reference changes to the World Bank Group Subsistence Grant for Room and Board; and
- a number of changes to the calculation of the amount of tuition allowance.

II. PROCEEDINGS

25. From late January to early February 2016, Applicants' counsel and the Bank discussed the most efficient way to permit a group of staff to pursue a grievance in connection with the EA changes. Respondent agreed that the Applicants could apply directly to the ADB Administrative Tribunal ("Tribunal" or "ADBAT") pursuant to Article II(3)(a) of the Statute and Rule 6(8) of the ADBAT Rules and that it would not object to IS joining the Application (instead of submitting individual grievances). The Bank informed the Tribunal of its position on 8 February 2016.

26. On 15 February 2016, the Tribunal acknowledged the Notice of Direct Submission and indicated an expectation of receiving the Application within 90 days. The ADB did not object to IS joining the Application by way of intervention under the ADBAT rules before the close of the pleadings. On 27 April 2016, the Applicants requested an extension of the deadline to file, and the revised deadline was set at 23 May 2016. An Application was filed on 23 May 2016 but was revoked on 24 May 2016 for corrections. A later Application was filed on 16 June 2016.

27. The Application puts forward the names of 122 Applicants but no details regarding their children of eligible age (3-23 years of age [born 2013-1993]). The Bank notes in its Answer that nine of the Applicants did not have children at the moment of lodging the Application.

28. On 9 January 2017 the Tribunal directed Applicants to submit within seven days additional documents and data in support of the Application. The following day Applicants' counsel replied that it would be able to compile these documents and submit them, but that it might take a number of months. It added that if the Tribunal wished to acquire this information as soon as possible, the Bank should be able to provide the information requested. It would, however,

submit, as quickly as possible, a document listing all the Applicants' names with the names and dates of birth of their children.

29. On 23 January, 31 January, and 16 February 2017, the Tribunal received indications for 105 of the 122 Applicants, as to whether or not they have children, and, if so, the names and birthdates of those children.

30. The Tribunal informed the parties on 9 February 2017 that the present case was listed for decision under Rule 11(1) of the ADBAT Rules of Procedure. On 15 February 2017 Applicants' counsel queried the Tribunal's decision concerning his 10 January 2017 requests. On 16 February 2017 Respondent's Office of the General Counsel informed the Tribunal that Respondent stood ready to provide further information should that be of assistance at that time.

31. On 28 February 2017 the Tribunal informed the parties that it had decided that considering the terms of the Notice to Applicants to Submit Further Documentation, dated 9 January 2017, and the fact that the case had been listed for consideration and decision, no further communication was considered necessary or appropriate.

III. SUMMARY OF PARTIES' CONTENTIONS, LEGAL ARGUMENTS AND RELIEF SOUGHT

Summary of Positions Regarding Admissibility

Respondent

32. The Respondent requests the Tribunal "to remove the names of the nine Applicants with no eligible dependents, and declare that the Tribunal has no jurisdiction over them since those Applicants have no legal standing to challenge the EA changes". The Respondent argues that, having no eligible dependents, those Applicants have no basis to allege nonobservance of their contracts of employment or terms of appointment as a result of the EA changes. It notes that AO 2.06, para. 2.2 provides:

"[t]he mere disagreement with a decision will not give a right of review or appeal unless there has been an error in the making of the decision covered by this Administrative Order. It is the prerogative of management to direct the operations of the Bank. A staff member can seek administrative review only of decisions that contravene a staff member's contract of employment or terms of appointment."

And Article II(1) of the Tribunal Statute provides that:

“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.”

Applicants

33. Applicants, in their Reply, argue that the Respondent’s argument *vis-à-vis* admissibility is fallacious, since all Applicants are, at the very least, potentially affected: they could have children in due course, or they could adopt. They also argue that the EA changes contravene all the Applicants’ contracts of employment. The Applicants contend that the Respondent is confusing the issue of liability with remedy.

34. In its Rejoinder, the Respondent again argues that the nine Applicants with no children cannot be considered as potentially affected within the relevant framework of Respondent’s AOs and the Tribunal’s Statute. It also submits that in “finding a pragmatic solution to allow several staff to jointly file a direct claim with this Tribunal, it was Respondent’s expectation that staff who were directly affected by the EA changes would be allowed to file a joint claim.”

Summary of Substantive Positions

Applicants

35. The Applicants argue that the right to receive the education assistance (“EA”) is a fundamental and essential term of their employment contract and, as such, cannot be unilaterally altered by the Bank. The Applicants contend that this is the case because the EA was included as a well-defined undertaking when the Applicants accepted their posts with the ADB. They argue therefore that the EA changes made on 1 January 2016 without the Applicants’ consent abolished “a substantial portion of the Applicants’ fundamental and essential rights” and is contrary to international administrative law.

36. The Applicants argue that even if the Tribunal finds that the EA does not amount to an essential and fundamental right, the ADB did not amend it in a manner consistent with its legal obligations which are that the changes should 1) not be retroactive; 2) be based on a proper consideration of the relevant facts; 3) be reasonably related to the underlying objective for the change; 4) be proposed in good faith and not prompted by improper motive; 5) not discriminate in an unjustifiable manner; and 6) be proposed in a reasonable manner. Finally, they maintain that ADB did not carry out meaningful consultations with its employees and instead the process was “artificial and feigned”.

Respondent

37. The Bank argues that the provision of education grants to IS is fundamental and essential in principle but not in the implementation of grants. The Bank contends that it has legal authority and discretion to revise benefits from time to time without the Applicants' consent. It observes that the Application invites the Tribunal to depart from well-established jurisprudence regarding the judicial deference to the authority of an international organization to amend the terms and conditions of employment. The Bank maintains that it is not legally obligated to "grandfather" or "lock in" benefits at the level prevailing when a relevant staff member commenced employment and that some of the changes will not become effective until 2020. The Bank submits that after the EA changes were introduced, it continued to provide a reasonable level of education grants to its eligible IS, consistent with their fundamental and essential terms of employment. It concludes that the changes are not retroactive, are based on the proper consideration of the relevant facts, are reasonably related to the objective they were intended to achieve, were determined in good faith and not prompted by improper motives, do not discriminate, and were proposed in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff.

Relief Prayed for

38. The Applicants seek:

- an order pursuant to Rule 6(3)(b) of the Tribunal's Rules and Article X(1) of the Tribunal's Statute rescinding the 16 December 2015 EA changes made; and
- reasonable legal costs incurred by the Applicants in the case, taking into account the nature and complexity of the case and the nature and quality of the work performed, pursuant to Article X(2) of the Tribunal's Statute.

39. The Respondent requests the Tribunal to dismiss all the Applicants' claims.

IV. FINDINGS*Preliminary Matters – Admissibility*

40. The present Application challenges changes that came into effect on 1 January 2016 and introduced to AO No. 3.06 concerning Education Assistance (EA). Some of these changes are being phased in over a number of years.

41. This Application raises a number of important admissibility questions. The key issues are whether the Applicants have standing and whether their Application is admissible. The Tribunal must deal with them as a preliminary matter before it may consider substantive legal arguments.

Has Respondent Waived its Rights to Preliminary Objections?

42. The Tribunal, first of all, notes that Respondent had agreed that the Applicants could apply directly to the Tribunal pursuant to Article II(3)(a) of the Statute and Rule 6(8) of the ADBAT Rules and that it would not object to IS joining the Application (instead of submitting individual grievances). Respondent has indeed not raised preliminary objections to the admissibility of the cases or to the jurisdiction of the Tribunal, other than regarding the *locus standi* of those Applicants who did not have children at the moment the Application was lodged. It is true that both parties have agreed to submit the cases directly to the Tribunal. It may thus be argued that Respondent has waived its rights to raise preliminary objections.

43. The Tribunal underscores, however, that this does not diminish its powers to make its own assessment. The Tribunal has its own responsibility in admissibility matters and may and, when necessary, must deal with them *sua sponte*, i.e. on its own motion. The United Nations Appeals Tribunal (UNAT) held in this respect:

... this competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law. (See Judgment No. 2015-UNAT-526, citing Judgments Nos. 2013-UNAT-335 and 2014-UNAT-406).

Can the Tribunal Properly Join the Applications? And do the Applications Raise the Same or Similar Legal Issues?

44. Counsel for the Applicants has submitted an Application “on behalf of 122 International Staff”, *de facto* joining these cases. Both parties refer to Case “Perrin *et al.*”. This Tribunal has in a number of cases dealt with joined cases or cases with multiple applicants. Examples are the four *Mesch and Siy* cases (ADBAT Decisions Nos. 2, 6, 18, and 35), and the *Canlas et al.* case (ADBAT Decision No. 56), which included 55 other members of the Bank’s support staff. In Decision No. 56, the Tribunal invited all Applicants, along with the Respondent, to comment upon the possibility of consolidating the 56 cases, after which the Tribunal issued an order to consolidate. Other examples are the *Soerakoesoemah et al.* case (ADBAT Decision No. 68) with 216 Joiners, and the two *De Armas et al.* cases (ADBAT Decision Nos. 39 and 45). Decision No. 39 was lodged by a group consisting of 36 staff members; an additional staff member filed an Intervention seeking to be included in the proceedings, which was allowed by the Tribunal. ADBAT Decision No. 82 (*Suzuki et al.*) had 30 pensioners joined to Suzuki’s application after their applications for intervention were granted.

45. The general practice of international administrative tribunals is that the power to join cases is reserved to the tribunal concerned (see *Samuel (No. 2)*, Decision No. 15 [1996] ADBAT Reports II, para. 47) and that a tribunal joins cases when these are “identical” (*cf.* Administrative

Tribunal of the International Labour Organization (“ILOAT”), Case No. 1001) or “raise the same issues.” (*cf.* ILOAT, Judgment No. 1203). At this stage this Tribunal is unable to join the present cases because essential elements that could assist it in establishing whether the cases are basically identical have not been provided. A first glance at the list that was provided of the Applicants and their children indicates that their situations are not identical. For example, some Applicants do have children who are not (yet) of school-going age, others are no longer entitled since their children have exceeded the age limit for EA, and again others have no children at all. Applicants have also failed to indicate which of the several changes in the new rules have adversely affected which individual Applicant. It is the responsibility of the Applicants to submit adequate and convincing facts in support of their claims.

Do the Applications Concern Individual Administrative Decisions that Directly and Adversely Affect Each and every Applicant?

46. The Statute of the Tribunal provides in Article II (1):

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... .

Article X of the Statute of the Tribunal then stipulates that the Tribunal has the power to rescind the decision that is being contested. The Tribunal’s Rules of Procedure explicitly provide that an Applicant’s plea must specify the decision which he/she is contesting and whose rescission is requested.

47. Of particular relevance here is the following excerpt of this Tribunal’s ruling in the *Canlas* Decision No. 56 [2003] ADBAT Reports VI, 41, para. 20:

...The Tribunal has held before that it has the power to rule only upon a staff member’s claim that the Bank has rendered a decision that violates that staff member’s employment contract and that has adversely affected him or her. [*Carolina Chan*, Decision No. 21 [1996], II ADBAT Reports 160, para. 12]. Staff members are not empowered to come to the Tribunal for the purpose of challenging violations of contracts of other staff members.

48. International administrative tribunals have consistently held that under their statutes their competence is limited to hearing challenges to individual administrative decisions that directly and adversely affect a staff member and that they cannot hear appeals against legislative texts or amendments thereto (*cf. Kalyanaraman (No. 2)*, Decision No. 98 [2012] ADBAT Reports IX, para. 33). They have thus ruled that a direct appeal against the latter texts is inadmissible. On the other hand, an individual decision implementing such a text may be challenged on the ground

that the underlying legislative provision was illegal. As the ILOAT formulated it in Judgment No. 622:

The Tribunal is not on that account precluded from ruling on the validity of any general and abstract rule; but it will do so only by way of exception, viz. when hearing a complaint which challenges an actual decision.

(See also 2014-UNAT-481, para. 51)

It would, moreover, be unreasonable and unrealistic to require every staff member to assess the impact of every new rule or policy on his or her situation at the time the new rule or policy is promulgated, but before it is applied to the staff member (*cf.* ILOAT, Judgment No. 3291, consideration 8). An exception to this general practice can be found in the Statutes of the European Bank for Reconstruction and Development Administrative Tribunal and the International Monetary Fund Administrative Tribunal, which allow for appeals against regulatory decisions. If the ADBAT were to have such jurisdiction this would require an amendment to its own Statute.

49. The World Bank Administrative Tribunal, for example, has held that it is without jurisdiction to adjudicate the validity of a general rule rather than the application of that rule in a particular case so as adversely to affect the applicant. It held in detail in *Briscoe*, Decision No. 118 [1992], para 30:

Article II, para. 1, of the Statute of the Tribunal empowers the Tribunal to pass judgment “upon any application by which a member of the staff of the Bank Group alleges nonobservance of the contract of employment or terms of appointment of such staff member.” The Tribunal, along with other international administrative tribunals, has consistently held that a claim of non-observance of a staff member’s contract or terms of appointment must be directed not against the organization’s promulgation of some general rule or policy but rather against an application of that rule or policy – be it reflected in an action or an omission – that directly affects the employment rights of a staff member in an adverse manner. ...

(See *inter alia* *Agodo*, Decision No. 41 [1987]; *Berg*, Decision No. 51 [10987]; *Vandenheede*, Decision No. 52 [1987]; *Knox*, Decision No. 54 [1987]; *Canada*, Decision No. 119 [1992]; *Tuluy*, Decision No. 126 [1992]).

50. The ILOAT has confirmed the same approach in numerous judgments (see ILOAT Judgments No. 622, 1712 and 2822). For example, it ruled in Judgment No. 3291:

The Tribunal notes that allowing a complaint against a general decision which does not directly and immediately affect the complainant but which may have a direct negative effect on her/him in the future, would cause an unreasonable restriction of the right of defence, as staff members would then have to impugn immediately all general decisions which may have any connection with their future interests, on the basis that a general decision which is not challenged within the established time becomes immune from challenge. On this approach, once a general decision is considered immune, any complaint impugning the subsequent decision implementing it could not challenge the lawfulness of the underlying general decision. Considering this, the Tribunal is of the opinion that the approach illustrated by the recent case law (Judgments 2822 and 3146) is to be followed. According to that case law, a complainant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him, but she/he is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action.

51. In conclusion, tribunals thus cannot hear cases where applicants are potentially affected by a decision, as Applicants have submitted. Also the ILOAT made this clear in its Judgment No. 1463:

The Tribunal will not entertain the plea, which relates, not to any actual dispute, but to potential and hypothetical cases. It may not make general rulings in anticipation of a dispute.

52. The ILOAT is, however, prepared to consider appeals against general decisions if these take the form of individual implementing decisions. In the latter case a challenge to a general decision may be receivable (*cf.* ILOAT Judgment No. 3427 concerning a challenge made by a staff representative).

53. The first requirement is thus that there must be a specific administrative decision that directly and adversely affects an applicant in order to trigger jurisdiction, and that an application challenging a general rule is inadmissible. In other words, promulgation of a rule does not automatically affect the personal interests of staff. This is only the case when the new provision has been applied in a concrete manner. The United Nations Administrative Tribunal defined an administrative decision in *Andronov*, Judgement No. 1157 as follows:

... It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal

order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

54. The ILOAT has in this respect also consistently held that it can decide in a case only when sufficient data are available on the exact adverse impact of the challenged decision. It held in Judgment No. 1081 that:

The impugned decisions do not put figures on the entitlements of each of the complainants it applies to. The figures will be known only when individual decisions have been taken, and the competent administrative authority or a subordinate will presumably take them on the strength of the general decision. In the circumstances the complainants may not now challenge the validity of the general decision they are objecting to. Before they come to the Tribunal they must be able to cite individual decisions.

(See also, ILOAT Judgments Nos. 624 and 961).

Conclusions

55. At this stage the Tribunal cannot but conclude that the Application is lodged against potential effects of a general rule, which clearly requires implementation before an adverse effect in each individual case can be identified and considered. The Tribunal holds that an Applicant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him. However, she/he is not prevented from challenging the lawfulness of the general decision provided that all other conditions under the Tribunal's Statute and Rules of Procedure are met.

56. The Applicants have failed to substantiate to what extent the new rules have adversely affected them when implemented and applied to them. They have not established which part of the several changes in the new rules has adversely affected each individual Applicant, and to what extent. The Tribunal recalls that it is the responsibility of Applicants, at the moment of lodging an Application, to substantiate their claims and to provide complete, adequate and convincing evidence in support of such claims. They have in the present cases failed to do so, including after a request was made by the Tribunal in this respect.

57. For all of these reasons, the Tribunal concludes that the Application as submitted is inadmissible.

58. The Tribunal understands the need for a determination in law regarding the question whether the EA changes adopted by the Bank violate the fundamental and essential rights of its employees under their employment contracts. The Tribunal also acknowledges that the Bank has cooperated with the Applicants in agreeing that they could make their Application directly to the Tribunal without exhausting internal remedies.

59. The Tribunal cannot review the alleged violation in accordance with the law in the absence of detailed facts and evidence as to the impact of the EA changes in relation to each Applicant under his or her employment contract.

60. It is now open to the Applicants, if they choose, to make a further Application to the Tribunal that meets the requirements for admissibility as set out in this judgment and the Statute and Rules of the Tribunal. The Bank and the Applicants may choose to continue to cooperate by agreeing upon relevant facts and evidence. It would be helpful to the Tribunal in its deliberations if the parties could provide representative examples that demonstrate the impact of the respective EA changes on individual employment contracts. For example, it might be helpful to set out facts and evidence that apply to particular categories affected by the EA changes.

61. The Tribunal notes that the EA changes have been in force since 1 January 2016 and the Applicants should therefore be able to substantiate their claims and clearly identify the injury sustained and relief sought, if any. Only then can the Tribunal make a determination in law on the requests before it.

62. In view of the above, it is now not necessary to consider the question of a joinder of the Applicants.

DECISION

For these reasons the Tribunal unanimously declares the Application inadmissible.

The requests for reimbursement of legal and other expenses are denied.

Lakshmi Swaminathan

/s/
President

Gillian Triggs

/s/
Vice President

Shin-ichi Ago

/s/
Member

Anne Trebilcock

/s/
Member

Chris De Cooker

/s/
Member

Attest:

Cesar L. Villanueva

/s/
Executive Secretary

At Yokohama, Japan, 6 May 2017