

JUDGMENT CASE NO. 27

FRANÇOIS DE BACKER vs. IDB

The Administrative Tribunal of the Inter-American Development Bank,

Composed of Judge Kenneth G. Smith, President, Judge Alfredo Martínez-Moreno, Vice President, Judge Ildélio Martins, Judge Baltasar Cavazos-Flores, Judge Thomas Buergenthal, Judge Luzius Wildhaber and Judge Guillermo López-Guerra examined the case under Articles 20, 21, 22, and 23 of the Tribunal's Rules of Procedure.

Complainant presented his own case. The Bank was represented by the attorney Mr. John S. Scott, Esq. Aside from the briefs, the Tribunal commissioned the Executive Secretary to take the testimony of witnesses.

WHEREAS:

1. On 8 November 1991, Mr. François De Backer, a French national and former staff member of the Bank stationed in the IDB field office in Port-Au-Prince, Haiti, filed with this Administrative Tribunal a complaint requesting the following:

- A. Production of the data and computations used in fixing the coefficients for "cost of housing" and "cost of goods and services" for Haiti.
- B. The auditing of those computations, particularly the exchange rates employed.
- C. Payment, based on the audit, of the difference in remuneration to which Complainant was entitled.
- D. As an alternative to the ascertainment of that difference, payment of US\$ 74,074.00 (seventy four thousand and seventy four dollars) on the same account.
- E. Compensation for the distress and psychological injury suffered by Complainant because of the insufficient remuneration he received and the uncaring and dilatory treatment he was given by the Bank.

2. In support of his petitions, Complainant argues as follows:

- A. He was the victim of deceit practiced by Bank management in reporting to him (and publishing a sheet showing) a cost of housing in Port-Au-Prince that has nothing to do with the real cost that an employee must incur in order to secure decent housing. The Bank also tried to persuade Complainant that such data are only for information purposes, whereas in truth management uses these figures also to determine who is entitled to the financial allowances established by Bank rules.
- B. The comparison of housing costs made by the Bank to determine whether or not the housing allowance is payable to Complainant is incomplete because it refers only to Complainant's rental, whereas those costs include other factors that are covered by the

cost of housing in the sheet published by the Bank. The additional costs specified by Complainant reflect necessary expenses that must be taken into account as an integral part of the cost of housing, even if they are not identical to those incurred in Washington, D.C., because life in Port-Au-Prince is completely different from life in Washington, D.C..

C. Complainant was deceived when he signed his contract, since he was told, and it was published, that the cost of housing was US\$ 8,121.00 a year, which is less than half the real cost of US\$ 22,389.00 a year.

D. The data supplied by the Bank are incomplete and make it impossible to explain the discrepancy between the constant value of the coefficient of goods and services and the considerable increase in all costs in Port-Au-Prince. There is no legal reason for the Bank to conceal from Complainant the information on the computations that were used in determining the cost of goods and services in Haiti.

E. The exchange rate used by the Bank for the computations should be the one specifically stipulated in Complainant's contract, because using a different exchange rate is contrary to the letter and the spirit of the contract.

3. The Bank answered the complaint and asked for its total dismissal, based on the following:

A. Complainant does not identify any clause of his contract or any policy, rule or regulation of the Bank allegedly infringed. However, the Bank believes that Personnel Policy No. 363 "Post Adjustment" and the "Brochure on the Post Adjustment System" are applicable to this case.

B. The Bank correctly applied the organization's rules and policies in the area of adjustments and allowances. The Bank also used objective criteria and data for the relevant computations.

C. Post adjustment is paid to those international staff members stationed in IDB field offices who are faced with a cost of living higher than that of the Washington, D.C. area. The Bank watches over the application of these allowances and is able to introduce additional adjustments when necessary.

D. The Bank bases its "cost of goods and services" allowances on indices supplied by the US State Department, which are among the most reliable and accurate available. In this case the index published by the State Department for Haiti when Complainant took up his duties was adjusted by the Bank in line with its normal procedures. The computations were made in each quarter while Complainant was employed, based on updated reports provided by the State Department.

E. As with the adjustment component that reflects cost of housing, Personnel Policy 363 provides that when both the average cost of housing in the duty station and the real cost to the employee exceed the average cost of housing at headquarters for the same salary level, the Bank will pay an allowance. The figures used by the Bank, obtained from the firm of Organizational Resources Counselors, Inc. (O.R.C.) indicate that at no time during Complainant's employment was the average cost of housing in Haiti higher than the limits set for Bank headquarters. Accordingly, there was no reason to pay any allowance whatever.

The cost of domestic services is excluded under the Bank's policies, because those services are taken into account in determining the US State Department index of goods and services.

F. Using the IDB official exchange rate for Haiti in all matters connected with computation of the adjustment is not a requirement found in Complainant's contract or in the rules of the Bank. Nevertheless, whenever it was appropriate to consider an exchange rate, only the official exchange rate was applied.

G. The data requested by Complainant are supplied throughout the Bank's answer. However, any documents regarded as background to the reports provided by the US State Department or by ORC are not in the possession of the Bank and could not be provided either to Complainant or to the Tribunal.

H. Changing the procedure now used by the Bank to establish post adjustment so as to make it possible for Complainant to receive a payment is a matter that lies beyond the jurisdiction of the Tribunal.

I. There is no evidence that he suffered a serious injury because of the remuneration he received under the terms of his employment contract which he accepted when he was hired, or because of the correct computation of his post adjustment made by the Bank in line with its uniform policy. Nor has it been shown that there are exceptional circumstances justifying compensation.

J. Throughout all proceedings before the Committee and prior to those proceedings, the Bank answered each and every request for information made in writing by Complainant. Mr. Michael D.V. Davies, as Chief of Compensation and Benefits Division, met with Complainant in January 1990 in the Field Office in Haiti to personally review his claims.

4. The parties produced documentary evidence in the form of memoranda, documents from the US State Department, internal correspondence, rules, policies, and case law of this and other administrative tribunals. On instructions from the President of the Tribunal, the Executive Secretary heard the testimony of the witnesses for Complainant: Mr. Philippe Dewez, Georges Landau, and Fadrique Otero. The Bank called no witnesses.

5. The Tribunal finds that the following facts are established by the evidence:

A. Complainant negotiated his contract with the Bank in January 1989. At that time he inquired about housing costs in Port-Au-Prince. The oral information given to him was that housing costs would be in the order of US\$ 800.00 a month (US\$ 9,600.00 a year).

B. On 3 May 1989 Complainant signed a fixed term employment contract for two years, from 16 May 1989 to 15 May 1991. Complainant's contract included a post adjustment provision that read "Post Adjustment according to current policy."

C. On arriving in Port-Au-Prince Complainant looked for housing. Rentals of unfurnished housing were all in excess of US\$ 1,250.00. Complainant then decided to continue the lease of a Field Office Financial Specialist who was leaving Haiti in June 1989. He managed to keep the amount of rental of the previous contract, namely US\$ 1,250.00 a month (US\$ 15,000.00 a year).

D. Having just arrived in Haiti Complainant saw a document, periodically published by Bank Management dated 1 July 1989, stating that, in Haiti, an employee with a basic salary such as his own would pay for housing US\$ 8,121.00 a year, that is to say US\$ 676.75 a month. These amounts included not only the rental but also charges for services directly connected with housing.

E. The index of the cost of goods and services for Port-Au-Prince was changed by the Bank only once during Complainant's stay.

F. Complainant asked Management to provide him with the calculations used in fixing the "goods and services" coefficient for purposes of salary adjustment. It was only during the proceedings before this Tribunal that the Bank supplied the tables of indices without providing additional documents and data, which are considered confidential because they originated in the US State Department.

G. On 14 February 1991 Complainant filed a formal claim with the Conciliation Committee.

H. Conciliation having failed, on 8 November 1991 Complainant filed this action with the Administrative Tribunal.

AND WHEREAS:

The first issue that needs to be addressed in this case has to do with the question, raised by the Bank as a preliminary objection, whether the Tribunal has jurisdiction to hear this Complaint. Here it is clear that the contract concluded by the parties was not violated or terminated. However, some of the elements that went into its formation were based on an erroneous factual assumption having its source in an unintentional misrepresentation of the Bank concerning the cost of housing in the country where the services of Complainant were to be rendered. This mistake of fact affects the legal significance to be attached to the contractual provision dealing with this subject, which brings the matter within the jurisdiction of the Tribunal.

The Tribunal has considered the weight to be given to information provided by the Bank to those who are about to enter into contractual relations with it and, in particular, whether these individuals may rely on information concerning the cost of living in places where the Bank has offices. The Bank does not deny that the figures provided Complainant are those asserted by him concerning costs of housing in Port-Au-Prince.

The Tribunal concluded, based on the evidence before it, that these figures were unrealistically low in light of the conditions prevailing in the country. Here the Tribunal hastens to add that there is no evidence whatsoever in the record for assuming that the Bank intentionally misrepresented these costs or that it wanted to mislead the Complainant. The record does show however, that review of post adjustments were delayed for several years and that with regard to Complainant the first post adjustment review was undertaken eight months after he assumed his position. The record also contains many complaints by the staff of the IDB Field Office in Haiti, addressed to the Bank, relating to its failure to undertake timely post adjustment reviews, and the Bank's replies thereto.

This background has convinced the Tribunal that had the information given to Mr. De Backer reflected the true conditions prevailing when the parties signed the contract, specifically that approximately US\$ 800.00 a month was insufficient to secure housing adequate to his professional and social standing, Mr. De Backer would have declined to join the Bank. The Tribunal notes that Complainant raised his objections with the Bank three months after arriving

in his duty station and that, in the light of the erroneous information he was given he could have terminated the contract or resigned; however, the financial consequences would have been too costly and precluded this course of action. He would have had to meet the expenses of returning to his country of origin, which were guaranteed to be paid by the Bank only after one year of service but not before, under any circumstance.

The Tribunal has also considered the fact that the Bank did not carry out the mandated quarterly cost reviews. These would have shown in a timely fashion how changes in the cost of housing affected the Complainant's personal actual income.

The evidence the Complainant introduced concerning the cost of housing was never contradicted by the Bank, which confined itself to the production of tables and studies from third-party entities that supplied the data on cost of living in Haiti. Even when questioning Complainant's witnesses, Bank counsel confined himself to trying to establish their personal interest in the outcome of Mr. De Backer's claim, without seeking to establish that their statements were inaccurate.

The Tribunal concludes consequently that the Bank did supply the Complainant with inaccurate information, and that this information affected the Complainant adversely as of the moment the contract began to be performed. This injury translates into a monetary loss for Complainant over the length of his service in Haiti, for which he must be compensated even though no provision for it is made under the formal terms of his contract.

The misrepresentation made by the Bank during the negotiations was in respect of housing related costs only and is the basis for the award of compensation being made to the Complainant. He is not entitled, therefore, to succeed in his claim based on the loss he sustained for goods and services. The Bank may, in this respect, validly rely on the postadjustment clause in the Complainant's contract.

The other claims made by the Complainant did not merit consideration and are formally denied.

ACCORDINGLY:

For the above reasons, the Tribunal decides unanimously that Mr. François De Backer is entitled to a compensation amount of US\$ 13,000.00 (thirteen thousand dollars).

Washington, D.C., 13 November 1992.

Kenneth G. Smith
President.

Alfredo Martínez-Moreno.

Ildélio Martins.

Baltasar Cavazos-Flores.

Thomas Buergenthal.

Luzius Wildhaber.

Guillermo López-Guerra.

Judge Cavazos-Flores wants the record to make it perfectly clear that the Bank never acted in bad faith or tried to deceive the Complainant, who, for his part, was also negligent in failing to obtain from another source, information about the housing conditions that prevailed in Port-Au-Prince.

Baltasar Cavazos-Flores.

Hernán Sáenz-Jiménez
Executive Secretary.