JUDGMENT CASE NO. 31

STEPHEN L. ABRAHAMS et al. vs. IDB

The Administrative Tribunal of the Inter-American Development Bank (hereinafter "the Tribunal"),

Composed of Judge Alfredo Martínez-Moreno, President, Judge Thomas Buergenthal, Vice President, Judge Ildélio Martins, Judge Baltasar Cavazos-Flores, and Judge Guillermo López-Guerra, examined the case under the procedures of Articles 20, 21, 22 and 23 of the Rules of Procedure of the Tribunal (hereinafter the "Rules of the Tribunal").

Complainants were represented by Mr. Heribert Golsong. The Inter-American Development Bank (hereinafter the "Bank" or the "IDB") was represented by Mr. John S. Scott. On 8 February 1993, the Tribunal heard oral arguments.

WHEREAS:

I. On 16 June 1992 Mr. Stephen L. Abrahams, a Canadian national and staff of the Bank, acting jointly with Euro F. Alves, Romeo S. Arnaboldi, Neville O. Beharie, Gustavo Calderón, Rolando Castañeda, Alberto Castillo, Gustavo Cruz-Varón, Luis F. de Lucio, Carlos H. Delgado, Jorge Liacuris, Branimir Lobo, Héctor J. López-García, Osvaldo T. Luis y Prado, Stephen McGaughey, Humberto Mereles, Roland H. Meyer, Celio A. de Moraes, Abayubá Morey, José M. Pérez, José A. Pinto, María E. Sanjurjo de Sakamoto, José Santaballa, Leonardo A. da Silva, Johann Schmalzle, Abel Sosa, José Soto-Angli, Hugo Souza, Daniel Szabo, Enrique E. Torres, Victor Toth, José A. Viana and Héctor Yáñez also staff members of the Bank, filled a complaint with this Tribunal, petitioning for:

A. To order the Bank to produce the following documents:

1. All documents connected with the deliberations that led to the amendment of Article 1.1(i) of the Staff Retirement Plan.

2. All documents dealing with the decision to allow Mr. Reuben Sternfeld, a former employee of the Bank, to continue in the payroll of the Bank until age 65.

3. Copies of the formal notices by which each complainant was advised that his mandatory retirement age had been reduced from 65 to 62 years.

B. To find that the 1976 Amendment of Article 1.1(i) of the Staff Retirement Plan, which changed the mandatory retirement age from 65 to 62 years, is inapplicable to Complainants.

C. To find that the Bank must recognize that Complainants have the same right granted to pre-1976 employees born before 1 January 1931 to retire at age 65:

D. Alternatively, to order the Bank, under Article 9 of the Statute of the Tribunal, to pay each Complainant compensation equivalent to three year salary, net of taxes, giving each Complainant the option to receive:

1. A lump sum equivalent to three annual salaries (last salary) upon retirement from the Bank.

2. The above lump sum, payable in 36 equal installments, net of all deductions, and subject to the annual percentage of increase applied under the salary structure of the Bank, keeping throughout this period all benefits and conditions applicable to a regular employee.

Payment of the above compensation by the Bank, under any of this options, would not preclude Complainants from working for the Bank as consultants after they retire.

E. To order the Bank to reimburse Complainants the attorney fees and costs incurred in pursuing this grievance before the Human Resources Deputy Manager, the Administrative Manager, the Conciliation Committee and the Tribunal.

II. In support of their petitions Complainants argue as follows:

A. The wording of the Retirement Plan, as well as the letter of appointment of staff members employed by the Bank who participated in the Retirement Plan prior to 1976, indicated that mandatory retirement age was 65 years.

B. On 8 January 1976 the Executive Board approved Resolution DE-2/76 (The 1976 Resolution) amending the Retirement Plan, lowering to 62 years the normal retirement age of participants in the Plan. This change also established a grandfathered category of staff members who will remain subject to the age 65 rule (all persons participating in the Retirement Plan on 31 December 1975 who were born on or before 31 December 1930).

C. The Tribunal has jurisdiction to hear this case because Article II(1) of its Statute, which governs its jurisdiction, provides that it will hear and decide applications from the staff of the Bank or the Inter-American Investment Corporation alleging a breach of their employment contract or their terms and conditions of appointment. The wording of Article II(1) is very similar to the provisions in the Statutes of other Tribunals on the same subject. All of them, including that of the Tribunal of the World Bank, are understood to include the jurisdictional authority to review the legislative acts of executive bodies, provided those acts constitute a breach of the conditions of service or the employment contract. The Statute of the Tribunal of the IDB does not specifically exclude this authority and it would be absurd to find that Article VI(3) bars such review, because if that were the case, the Board of Directors as well as Management could change any term or condition of the employment contract, whether an essential element of employment, a fundamental individual right or a term involving acquired rights.

The normal retirement age defines the maximum term of both the participation of the employee in the retirement fund and of his actual employment in the Bank, so that it is an essential term of employment which may not be unilaterally changed by the Bank. Applying the change of normal retirement age to the staff employed prior to 1976 would be a unilateral change in an essential condition of employment and a violation of the rules of employment observed by international organizations.

D. The right to participate in the Retirement Plan until the normal retirement age agreed upon is an acquired right of Bank employees and a right that each Complainant negotiated when joining the Bank. Applying the change in normal retirement age to staff members employed before 1976 could violate the general legal principle that bars retroactive application of amendments of the law. The Administrative Tribunal of the World Bank, in its Judgment No. 1, de Merode v. World Bank (1981), held that no amendment introduced by the World Bank, may have retroactive effect and that staff members may not be deprived of rights they have acquired on account of past service.

In the case of the IDB, its rules and regulations include the principle of nonretroactivity, and Article 12(1) of the Retirement Plan authorized the Bank to amend or change all or any part of the provisions of the Plan, provided no amendment or change is made that deprives a participant of any benefit to which he or she may be entitled on account of services already rendered.

E. The 1976 Resolution is discriminatory and arbitrary with respect to employees who participated in the Retirement Plan before 1976 and were born after 31 December 1930. The Bank had no objective reason to protect from the change those employees born prior to 31 December 1930 and not the rest. Another way of underlining the discriminatory nature of the 1976 amendment is the way in which the Bank handled the retirement of Mr. Sternfeld. Mr. Sternfeld had no right to benefit from the retirement date at age 65, and yet the Bank allowed him to continue to be employed until age 65 by arguing that he had a legitimate expectation of remaining in the service of the Bank until that age. As a basis for this, the Bank used Mr. Sternfeld's subjective concern over his situation and, consequently, he was given a special treatment that is completely different from the treatment given to Complainants, who were in a similar situation in that the normal retirement age when they signed their employment contracts with the Bank was 65 years.

F. The Complaint was filed on time. First of all, Complainants are not asking for a finding that Resolution DE-2/76 is null and void; they're asking that the amendment to Section 1.1(i) of the Plan lowering the normal retirement age from 65 to 62 years should not apply to them. Secondly, the change in normal retirement age introduced by the Board has not yet been implemented with regard to Complainants. To this day, that change is nothing more that a unilateral policy decision of Management's which could affect the employment contracts of Complainants; nevertheless, the threat of its imminent application to Complainants constitutes an immediate risk warranting the filing of a complaint. The statute of limitations can only begins to run when the Bank seeks to implement the provisions of the 1976 Resolution.

G. The Tribunal should order reimbursement of attorney fees and costs to Complainants; to do otherwise would be a violation of a basic procedural right. Whereas the Bank has available to it large resources and qualified legal personnel and administrative facilities, Complainants are lacking in those same resources and if they did not have outside legal advice they would have no reasonable means to present their case. If reimbursement of attorney fees and expenses were to be denied, Complainants would be denied procedural equality, a fundamental principle that must be observed in any judicial proceedings because it is part of due process.

III. The Bank answered the Complaint, requesting that it be dismissed in its entirety.

IV. The Bank bases its position on the following:

A. The Complaint is inadmissible for lack of jurisdiction over the subject matter. The Board of Executive Directors (the Board) and the President of the Bank are the foremost legislative and executive authorities within the Bank. The agreement establishing the Bank does not envisage a judicial body within the organization to serve as the governing counterpart of those two authorities.

The Tribunal does not have the power to invalidate Bank policies; it cannot do so either directly or indirectly by awarding monetary compensation. These limitations are specifically set out in Article VI(3) of the Statute of the Tribunal. Article VI(3) provides that the Tribunal, in deliberating on a case, is subject not only to the regulations governing the legislative and executive authorities of the organization but to the administrative and personnel policies in force. The legislative history of the Statute supports the Bank's interpretation of Article VI(3) in that annulling resolutions of the Board of Directors of the Bank is not within the jurisdiction of the Tribunal. In addition, the Rules of the Tribunal, drafted and approved by the Tribunal itself, stressed in Article 20(1) its interpretation function in reviewing Bank policies. The Tribunal has also recognized in Cases No. 5, Cook et al. v. IDB (1985), No. 7, Castro v. IDB (1985), and 20, Valderrama v. IDB (1988), its jurisdictional limits with respect to the subject matter of a claim.

In the instant case neither of the Complainant's petitions are options provided for under current Bank regulations. What Complainants are really asking the Tribunal to do is to strike down current policies of the organization and legislate new policies, even though the power to legislate lies beyond the jurisdiction of the Tribunal, as the Tribunal itself has acknowledged in the cases mentioned in the preceding paragraph.

B. The Complaint is inadmissible because the statute of limitations has run out. Nor do circumstances exist in this case which would justify extending the time. The logical consequence of the argument made by Complainants that the action being challenged has not yet occurred and might not occur, and that therefore the term of prescription has not yet begun to run, would be to dismiss the complaint. If Complainants' argument is accepted, there would be as yet no administrative action to challenge and the Tribunal would have no jurisdiction to review the complaint, since the Tribunal is not empowered to review "possible" administrative actions. Actually, the amendment to Subsection 1.1(i) of the Plan applies to Complainants from the date it was approved by the Board. The Tribunal has acknowledged its effectiveness in Case No. 25, Rosselló v. IDB (1991) and in Case No. 2, Schwarzenberg v. IDB (1984). The Plan was amended after long debates over more than two years in which the staff were always represented. Complainants offer no basis for their theories that continuous publications of the Plan by the Bank did not constitute sufficient notice to the staff.

C. Complainants have no basis whatever to deny the Bank's authority to amend Subsection 1.1(i) of the Plan.

1. The employment contracts of the Bank do not refer to the permanence of any rule or benefit, or a commitment on either side to continue the employment until the staff member turns 65 years of age. On the contrary, future amendment of the rules is provided for explicitly in the employment offer and the employee agrees to it by accepting. When the Board established the Plan in March 1961, it specifically reserved the right to amend it. The Plan itself provides for its amendment in Section 12.1 and it may be amended even to the point of terminating it, as stipulated in Section 10 of the Plan.

Furthermore, the Bank has the inherent power, implicit in law, to amend its regulations, as acknowledged by the Administrative Tribunal of the World Bank in its Judgment No. 1, de Merode (1981), and by the Administrative Tribunal of the United Nations in its Judgment No. 82, Purvez v. UN (1961).

Courts such as the Administrative Tribunal of the International Labor Organization (ILO) in its Judgments No. 208, Joshi v. ILO (1973), No. 369, Nuss v. ILO (1979), and No. 372, Guyon v. ILO (1979), have rejected the argument that the mere existence of a rule at the time of employment creates a permanent right to its provisions, unless the employment contract expressly provides that such permanence was the intent of the parties.

2. In establishing the Plan the Board set specific limits to its power of amending its provisions, and it is worthwhile noting that those limits do not bar the amendment of Subsection 1.1(i). Broadly speaking, the rules allow for amendment of the Plan unless the change is to apply "retroactively" or deprives a participants of benefits to which he is entitled. The premise that benefits arising in the future are not "acquired" benefits finds support likewise in the analysis made by International Tribunals such as the European Court of Justice in its Judgment No. 127/80, Grogan v. EC (1979). The US Court of Appeals, for the Eleventh Circuit has also explained that a benefit is acquired if the employee's right to the benefit would survive the termination of employment (Bessit v. Neal 848 F.2nd 1164, 11 Cir. 1988).

The benefits to which an employee has a right are those that have been earned, which would otherwise be immediately payable when the employment ends. Those benefits are not future prospects. In this case, the amendment of Subsection 1.1(i) of the Plan did not go beyond the limits set for amending the Plan; it did not affect benefits accrued on account of past services. When Subsection 1.1 (i) was amended, benefits accruing from services rendered between ages 62 and 65 were as yet not even a prospect. Depending on the situation of each complainant, they might have become acquire rights 17 to 29 years in to the future.

3. None of the other arguments submitted by Complainants supports the conclusion that the Board's amendment of Subsection 1.1(i) should be struck down.

(a) A detailed study of normal retirement ages in international organizations shows that there is no consistent retirement age. The normal retirement age of 62 years selected by the Bank lies within the average of ages when compared with other international organizations. Irrespective of policies in other institutions, the Bank has the authority to set its own personnel rules on the basis of its particular institutional goals.

(b) The domestic legislation of the Bank's member countries is not applicable to the Bank.

D. The Bank has met Complainants' request for documents connected with the legislative background of the amendment of Subsection 1.1(i) of the Plan. All documents requested are attached as annexes to the Bank's Answer. Aside from those documents,

no other records of this matter were found in a comprehensive search of Bank files that included files in the Legal and Administrative departments and in the office of the Executive Secretary of the Staff Retirement Plan. There are no documents by the Pension Committee on this topic. No verbatim minutes of the meetings of the Administration Committee were taken during that period. The verbatim minutes of discussions in the Board of Executive Directors were kept for five years and then destroyed.

Through Circular PER/05/76 of 27 January 1976 from the Personnel Division of the Bank, all staff members were advised of the amendments to the Plan introduced by Board Resolution DE-2/76. Those amendments were likewise reflected in all subsequent editions of the rules of the Staff Retirement Plan, the first of which was the 1976 edition. All amendments took effect immediately upon approval.

E. Complainants may not compare their situation with that or Mr. Sternfeld because there are several differences:

1. Mr. Sternfeld was not a participant in the Staff Retirement Plan when the Board amended Subsection 1.1(i).

2. Mr. Sternfeld was more than 45 years when the Board amended Subsection 1.1(i), so that if he had been a participant in the Plan in 1975 he would have had the option to participate in it and continue working until age 65.

3. The extension of Mr. Sternfeld's employment with the Bank after age 62 was authorized as an exception under Personnel Policy No. 325.

4. The Bank's analysis of Mr. Sternfeld's case has no bearing on Complainants' petitions.

F. Complainants are asking for abrogation of the amendment to Subsection 1.1(i) of the Plan, and the logical consequence of such abrogation would be to apply the previous rule, that is to say, their normal retirement age would be 65 years. In addition, the new formulas that provided expanded benefits for early retirement should not apply to them.

The request for annulment of the amendment of Subsection 1.1(i), thereby allowing them to choose a normal retirement age at any time between ages 62 and 65, means asking the Tribunal to establish a new rule that bears no relation to their petition to quash the legislative measure they challenge.

Likewise, Complainants' request for damages and for assurances about their eligibility to work as consultants for the Bank following their retirement, bears no relation whatever to the annulment of the action challenged. Complainants seek to receive a sum certain as compensation for a mere possibility, since there is no guarantee that, if offered the possibility to do so, any complainant would continue working during the three remaining years. Personal circumstances as well as many factors affecting the administration of the Bank might lead to Complainants' service ending before they reach age 62 or 65. This, along with the fact that it is impossible to compute compensation for loss of a mere employment prospect 17 to 29 years into the future, makes it plain that the amendment of the rule caused no injury to complainants.

G. Complainants' allegations concerning an alleged discrimination against them are completely baseless. For discrimination to exist there must be not only different treatment of similar individuals but that differences in treatment must also be arbitrary. The Administrative Tribunal of the ILO, in its Judgments No. 518, Delhomme v. ILO (1982), No. 580, Tevoedjre v. ILO (1983), No. 452, Foley v. ILO (1981), No. 498, Tarrab v. ILO (1982), as well as the Commission of the European Communities in its decision No. 20/68 Passetti-Bombardella v. EC (1969), held that different circumstances among individuals who are part of the same class of persons allow for different treatment, provided such treatment is not irrational or arbitrary. In addition, when drawing the comparisons needed to prove the existence of discrimination against them, Complainants compare themselves with three groups of individuals who bear no relation whatever to one another.

H. Complainants' request for costs and attorney fees must be rejected. Only persons who are not attorneys may represent others before the Conciliation Committee, and so, there is no justification for attorney fees in connection with the proceedings before the Committee. The inference that the Bank has available to it internal legal support that costs nothing is unreal. The costs incurred by the Bank in litigating these cases are similar to those incur by a complainant in retaining a law firm to present his case. Also to be considered is the expense of the Tribunal itself, since the cost of operating the office of the Executive Secretary and the Tribunal is defrayed entirely by the Bank alone. Complainants present no argument that would justify the Tribunal setting aside the explicit wording of its statute, which provides in Article V(3) that each party must bear its own legal representation costs.

I. Complainants' request for additional compensation on account of material and emotional injury is inadmissible because it was not filed initially with the complaint. The rules of the Tribunal bar the filing of new petitions and applications for additional legal remedies after the complaint has been lodged. Even if it were admissible to make those petitions, Complainants' would not be admissible because no specific and definite material injury has been either alleged or proved. As for the intangible injury mentioned by Complainants in their observations, it needs to be noted that such compensation has been awarded only in exceptional circumstances where the administrative action gives rise to a serious injury affecting the dignity or the reputation of a person or causing that person serious and unnecessary distress. This has been the ruling of various tribunals, including the Administrative Tribunal of the ILO in its Judgments No. 361, Shoefield v. ILO (1978), No. 367, Sita Ram v. ILO (1978), and No. 470, Perrone v. ILO (1982), as well as of the Administrative Tribunal of the United Nations (UN) in its Judgment No. 215, Ogley v. UN (1976), and of the Administrative Tribunal of the World Bank in its Judgment No. 28, Gyamfi v. World Bank (1986).

In the present case there is no evidence whatsoever that the Bank's correct application of its duly approved rules has caused or will cause a serious injury, or that there are other exceptional circumstances justifying such an award. Mere personal disagreement with a Bank rule is not a sufficient basis to claim compensation for emotional injury.

V. Since the issues of fact relative to Messrs. Martín Arocena, Héctor J. López-García, Enrique E. Torres and Alberto Sturla are different from those of the rest of the complainants, the President of the Tribunal decided that their complaints were to be considered withdrawn without prejudice to bring future claims. Likewise, the President of the Tribunal dismissed in the interest of procedural fairness, the applications of Mr. Nöel X. Belt, Ms. Ana O. López, Ms. Amalia A. Rosan, Mr. Gonzalo Biggs and Mr. Norman Miller to intervene in the case as complainants, as

they were filed when the evidentiary phase of the proceedings had run out. Finally, the Tribunal did not admit the untimely motion filed by the representative of the complainants during the oral argument which modified their prayer for relief.

AND WHEREAS:

In 1976 the Bank changed the normal retirement age of its employees from 65 to 62 years. For those employees, among them the Complainants, who had joined the Bank prior to that date, this was an amendment of their employment contracts, which incorporated by reference, expressly or implicitly, all Personnel Policies of the Bank.

There is no evidence in the record to indicate that the decision to lower the retirement age was formally challenged by Complainants prior to 1992. The arguments of the parties reflect two legal theories. The Bank, on the one hand, characterizes the conduct of the Complainants as a tacit acceptance by them of the new retirement age. Complainants, on the other hand, contend that they had no cause of action until the receipt by each of them of their individual notice of retirement and that, as a result, their prior silence can have no legal significance.

Complainants' 16 years of silence compels the Tribunal to address the preliminary objection raised by the Bank, which argues that prescription bars the instant claim. To determine whether the passing of time has extinguished Complainants' right to assert their claim, it is necessary to ascertain the degree to which existing legal procedures enabled Complainants to challenge the change in retirement age or to voice their disagreement with that unilateral decision at the time it was adopted.

Based on the evidence produced the Tribunal finds that all Complainants were in due course made aware of the text of the amendment to the Retirement Plan which took effect in 1976 but which had been discussed prior to that time for two and a half years. The staff received memorandum PER/05/76 of 27 January 1976, from the Personnel Division, reporting the changes in the Retirement Plan, which included express reference to the lowering of retirement age to 62 years. This change was likewise included in 15 annual editions of the Retirement Plan, which were designed to acquaint the staff with the changes made by the Board in the Retirement Plan from 1976 to the present time. The evidence shows, furthermore, that the Staff Association of the Bank took part in the process leading up to the 1976 amendment of the Retirement Plan.

The Tribunal has attached particular importance to determining how an employee affected by the change in the retirement system might have objected thereto.

The Labor Relations Committee was already in existence in 1971. Personnel Policy 326, in force in 1976, provided that it was a Committee which would hear allegations of "non-observance of the conditions set forth in the respective letters of appointment or contracts of employment, the general policies of the Bank concerning personnel, and generally, any complaint against a decision of the Bank regarding employment matters..." (emphasis added).

Thus, employees who felt that the decision to lower the retirement age in 1976 was a breach of the terms of their appointment or employment contracts could have raised their objection with that Committee.

Moreover, the Conciliation Committee was established in 1981, followed in 1982 by the creation of the Administrative Tribunal of the Bank. There is no record in the case file of any

complaint or appeal by the claimants against the amendment that lowered their retirement age to 62 years.

Even though the Tribunal had been established, the Complainants took no action until 1992, when this claim was filed. In other words the Complainants remained silent for 16 years.

The Tribunal finds no valid basis in the contention that the Complainants were justified in waiting for such a long time to challenge the change in the retirement age particularly if this change was regarded as a condition of employment specifically included in their individual employment contracts. For these reasons, the Tribunal considers that the applicable norms and the passage of time compel the conclusion that the right to enforce the original cause of action has lapsed. Thus, consistent, with the universally recognized doctrine of legal certainty, the Tribunal must here give effect to the principle of prescription.

The Tribunal does not wish to overlook Complainants' argument, advanced with much conviction, that the time limit for prescription did not begin to run until the letter or communication indicating to each employee the date of their retirement. The Tribunal considers such a communication to be no more than a reminder of a future date indicating that the requirements for retirement have been met. It is not a document that creates rights as such.

THEREFORE:

The claims are dismissed.

Washington, D.C., 12 February 1993.

Alfredo Martínez-Moreno
President.

Thomas Buergenthal. Ildélio Martins.

Baltasar Cavazos-Flores. Guillermo López-Guerra.

Hernán Sáenz-Jiménez
Executive Secretary.