ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 24
(6 January 1997)

Jorge O. Amora
v.
Asian Development Bank

Mark Fernando, President
Robert Gorman, Vice-President
Toshio Sawada
Brigitte Stern

1. The Applicant commenced his service with the Bank in its Office of Administrative Services (Printing Unit) on 24 August 1979, pursuant to a Memorandum of Agreement ("MOA"), which was periodically extended until 21 April 1993, when it was replaced by a regular appointment. He was retired with effect from 20 February 1995, upon reaching the age of 60 years. His complaint is that he should have been permitted to continue to work until the age of 65; and, alternatively, that he should have been granted dependency allowances, severance pay and pension or retirement benefits on the basis that he had been in regular employment from 1979.

Facts and Reliefs Claimed

2. Under the first MOA dated 24 August 1979, the Applicant was engaged as a Copy Center Operator in the Bank's Office of Administrative Services (Printing Unit) until 31 December 1979, upon the following, among other, terms:

> [He] shall be under the direction of such officer or officers as the Bank may in its absolute discretion nominate from time to time....
>
> In consideration of his services, the Bank shall pay [him] a monthly remuneration of Pesos Seven Hundred Fifty (P750.00) Only payable semi-monthly....
>
> During the term of [his] engagement [he] shall be engaged full-time in performing his work according to the working hours of the Bank....
>
> At all times, he shall act with appropriate propriety and discretion and in particular, shall refrain from making any public statement concerning his work without prior approval of the Bank, and from engaging in any political activity.

3. The MOA also contained the following clauses, which the Tribunal will refer to as the interpretation clause and exemption clause respectively:

> Nothing contained in the terms and conditions herein ... shall be construed as establishing or creating any relationship other than that of independent contractor between the Bank and [him].
>
> [He] shall not be entitled to any compensation, allowances, benefits or rights from or against the Bank other than expressly provided therein ....

4. By another MOA, dated 2 January 1980, the Bank extend[ed] the engagement of the Applicant, upon basically identical terms and conditions for one year from 1 January 1980. While that extension was in force, by letter dated 12 August 1980, that is about one year after starting to work with the Bank, the Bank offered him the vacant contractual position of Total Copy Systems Operator in the General Services Division/Printing Unit with a basic remuneration of P1,210.00 per month effective 16 May 1980 upon the same terms (emphasis supplied). The Applicant accepted.

5. As the Bank required his services, by letters dated 17 December 1980 and 4 January 1982, his engagement was further extended for a year at a time, with increased remuneration. While the latter extension was in force, by letter dated 2 April 1982, the Bank having referred to his Agreement of Employment dated 24 August 1979, and the subsequent extensions, offered him the vacant contractual position of Heidelberg Machine Operator in the General Services Division/Printing Unit with a basic remuneration of Pesos 1,750.00 per month effective 15 April 1982 upon the same terms (emphasis supplied). The Applicant accepted.

6. Thereafter, for 1983 and 1984, the Bank again granted annual extensions, by letters. For each of the years 1985 to 1993, however, the Bank issued nine MOAs, basically identical to the first; these did not refer to extensions, but recited that the Bank wishes to engage the services of [the Applicant]. Although each MOA set out the agreed remuneration for the ensuing calendar year, the Bank increased that amount in mid-year.

7. Several letters which the Bank wrote to the Applicant during this period referred to the extension of his employment contract.

8. While the Applicant was working in the Bank's Office of Administrative Services under the last annual MOA, dated 4 January 1993, by letter dated 19 April 1993 the Bank offered him a regular appointment as a staff member, as Technician/Operator (Heidelberg Operation) in the same Office; after much deliberation, the Applicant accepted this offer on 23 November 1993.

9. By letter dated 2 February 1994, the Manager, Human Resources Division of the Budget, Personnel and Management Systems Department (HRD-BPMSD), informed the Applicant of the Bank's decision to retire him from service, effective 20 February 1995, the date of his 60th birthday, in accordance with Section 10 of the Staff Regulations. By his letter dated 26 August 1994, the Applicant appealed for reconsideration of that decision, seeking to be allowed to continue until the age of 65; he pointed out that after 15 years as contractual staff, his regular appointment took effect on 21 April 1993, just 22 months before his 60th birthday and hence his expected retirement benefits would be very "small and inadequate" to support him and his family. BPMSD refused to reverse its decision on 30 September 1994, and on 24 January 1995 the Applicant asked the Director, BPMSD, for reconsideration.

10. Shortly before that, on 13 January 1995, the Applicant submitted an appeal for reconsideration to the Chairman of the Bank's Grievance Committee. He pleaded that, if his request to continue until the age of 65 was not allowed, he be granted:

a. Dependency allowances for the period 24 August 1979 to 20 April 1993;

b. Severance pay for the same period;

c. Separation pay from 24 August 1979 up to the actual date of his retirement; and

d. Other benefits to which, in the premises, he may be entitled.

11. By letter dated 2 February 1995, the Officer-in-Charge ("OIC'), BPMSD, declined to reverse the decision in regard to retirement and added:

> Concerning the other matters related to your term of employment as a contractual staff from 24 August 1979 to 20 April 1993: the matter is currently under review within BPMSD in consultation with OGC [Office of the General Counsel] and as soon as a decision is made in this regard you will be informed accordingly.

12. The Applicant then submitted an undated appeal to the Appeals Committee, on the same lines as his appeal of 13 January 1995, but also asking specifically for retirement benefits or pension in respect of the period from 24 August 1979 to 20 April 1993.

13. While that appeal was pending, the Manager, Compensation and Benefits Division (BPCB), by a memorandum dated 24 July 1995, offered the Applicant an ex gratia payment of Pesos 158,811.27, saying:

> In response to claims for employee benefits filed by some former contractual staff . . . relating to their contractual service, the President approved the payment of an ex gratia amount to all regularized contractual staff, including yourself, based solely on humanitarian considerations.
>
> The ex gratia payment is equal to P200 multiplied by the age as of the end of the contractual appointment and the years of contractual service.

This was probably the decision foreshadowed in OIC, BPMSDs letter dated 2 February 1995.

14. Although the Bank asserts that these ex gratia payments were made in recognition of the modest pension benefits to which such individuals were entitled and the fact that most such individuals would not have other sources of financial support during retirement other than from family members, there is no evidence that this was the Applicants understanding.

15. The Applicant did not accept that offer before the stipulated deadline of 31 August 1995. However, he wrote to the President of the Bank on 12 March 1996 saying that he wished to accept that payment simply because he had no other source of income besides a grossly inadequate pension of Pesos 143.49 per month, but stating that he did not in any way waive any right, action, prerogative, claims and causes of action [he had] pursuant to this Application to the Tribunal. In its pleadings, the Bank stated that it remains prepared to grant the Applicant that ex gratia payment even though the time limit has expired.

16. On 2 October 1995, the Appeals Committee declined jurisdiction, with one member dissenting.

17. The Applicant filed this Application on 21 December 1995, alleging that (a) the Bank's exercise of its option to retire him at the age of 60 was arbitrary, unjust, unfair and inequitable; (b) the ex gratia payment offered was unfair and unjust; (c) the several MOAs between the Bank and himself should be struck down or disregarded as they had been imposed to preclude him from acquiring security of tenure; and (d) a quitclaim he signed when his employment was regularized does not stop him from pursuing his claims.

18. The relief which the Applicant seeks is reinstatement until the age of 65 years, as well as the other reliefs which he asked for in his appeal to the Grievance Committee.

19. This case was initially considered by a panel of three members of the Tribunal at its seventh session. That panel was of the opinion that the case warranted consideration by a full panel, and the Tribunal so determined. The Tribunal further directed the parties to file additional statements, and the President, acting under Rule 10 of the Tribunal's Rules of Procedure, directed the Bank to produce inter alia copies of the MOAs, the letter giving the Applicant a regular appointment, and the quitclaim.

20. The Bank had averred, in its Challenge to Jurisdiction of the Appeals Committee, that at the time of his regularization [the Applicant] executed an acknowledgment that he had received all amounts due to him from the Bank in respect of his contractual status. When responding to the Order for production of documents, the Bank stated that it had not required him to sign a quitclaim. It produced the documents relating to the regularization of his appointment, and these did not include any signed acknowledgment of that sort. Therefore the Tribunal does not need to consider this plea.

21. In order to deal with the Applicants several claims, the Tribunal must first determine his employment status from 24 August 1979 to 20 April 1993, through an analysis and evaluation of his contractual relations with the Bank during that period.

The Limits to the Binding Nature of Contracts of Employment

22. Usually, a contract signed by the parties is binding upon them. There are, however, some circumstances in which a contract may be set aside or varied by a competent tribunal. This happens, for example, when the contract fundamentally disregards reality.

23. It is the Tribunal's conclusion that in the present case, the MOAs did not reflect the true relationship between the Bank and the Applicant.

24. There are several decisions by international administrative tribunals which define the power of a tribunal to set aside or vary a contract when it does not correspond to the true relationship of the parties. Thus, in In re Bustos, ILOAT Judgment No. 701 (1985), the ILOAT stated:

> The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties - or at any rate the party which is in a position to formulate the document - do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties - or at any rate the stronger of them - do not wish to face. [T]he situation might be that the parties - or one or other of them - do not wish the contracts to be governed by the Staff Regulations: the easiest way of achieving that is for the parties to exhibit in the document a relationship which does not make the employee a staff member.

For the purpose of determining the period of notice due upon termination, the ILOAT treated a series of consecutive short-term contracts as a single long-term appointment.

25. Similarly, in In re Burt, ILOAT Judgment No. 1385 (1995), the ILOAT looked behind the mere wording of the written contract, which sought to give a particular label to the contract, because that was merely a device to deny the employee the protection of the Staff Rules, and gave effect to the real intention of the parties.

26. The cases cited by the Bank, in which a succession of contracts was not deemed to constitute a single contract, are clearly distinguishable. In two cases, the contracts were completely different, the claimant functioning first as an employee of the Congolese government, then as an employee of the United Nations (Fayad, UNAT Judgment No. 176 and Badr, UNAT Judgment No. 276). In another, (Teixeira, UNAT Judgments Nos. 230 and 233), recourse to a series of special service agreements instead of a permanent appointment was considered irregular, but the claim was dismissed, as the Applicant could not show any resulting damage; however, considering the length of service, the UNAT granted him a termination indemnity of US$3000.

27. The Tribunal holds that recourse to successive short-term or temporary contractual appointments to jobs which are essentially of a permanent nature is not a fair employment practice, particularly if such appointments can be shown to have been made only to deny employees security of tenure or other conditions and benefits of service. Such appointments are permissible only if they have a clear functional justification and rationale in the exigencies of management and the nature of the job in question, and are subject to limitations based on norms of good administration.

28. The Bank itself admits that the MOAs do not correctly reflect the true relationship between the Bank and the Applicant. Although in its Challenge to Jurisdiction of the Appeals Committee, the Bank stated that the MOA by its terms specifically provided that the status of the person retained was not that of an employee of the Bank and that the legal relationship of such person to the Bank was that of an independent contractor, in most other statements the Bank referred to the Applicant as a contractual staff or a contract staff.

29. It is the duty of the Tribunal to ascertain what the true relationship was, whatever the characterization given to it by the parties: it follows from the analysis of all the facts of the case that the Applicant was neither an independent contractor nor a contractual staff.

30. There are several tests which traditionally are applied in order to determine whether a person is an independent contractor, engaged under a contract for services, or an employee, working under a contract of service.

31. Although every MOA under which the Applicant worked contained references to his services, it is quite clear that he was not engaged under a contract for services to perform a specified piece of work, for a stipulated fee or price, under his own responsibility and according to his own methods, without being subject to the control of the Bank (except as to the results of his work), and investing his own resources, in regard to tools, equipment, materials and the like.

32. The MOAs did not describe the work which the Applicant was required to do; he was to work, in the Bank's premises, under the direction of the Bank's officers and in accordance with their instructions; he was not to be paid for the job or the result, but was to receive a regular, stated monthly remuneration; indeed, he even received increments mid-way through several contracts, just like an ordinary employee; he had to work full-time in accordance with the Bank's working hours, and could even be required to work overtime or on shifts; and he was entitled to annual, medical and casual leave. One of his obligations was at all times [to] refrain from

actively engaging in any political activity (emphasis supplied). All along, the Applicant was neither carrying on an independent business nor could he assign the performance of the work to anyone else. On the contrary, his work was part of, or ancillary to, the Bank's business.

33. The Tribunal finds that all the relevant tests applicable to the situation under consideration indicate that the Applicant was not an independent contractor. On the contrary, all these features, being totally inconsistent with the Applicants status as an independent contractor, are consistent only with his being an employee of the Bank.

34. This finding is confirmed by the several references which the Bank made in the course of the correspondence to the Applicants employment contract, as well as its own pleadings:

> Since the early 1980s, the Bank found it expedient to supplement its authorized strength of supporting staff positions under the Internal Administrative Expense (IAE) budget with contractual services. In doing so, the Bank used a mix of manpower procured through agencies for its building maintenance [and other] services. However, for management considerations a number of persons, such as the Applicant, were engaged to provide services to the Bank on a contractual basis, rather than through agencies.... Such form of employment was chosen in the interest of the efficient functioning of the Bank as considerable difficulties were experienced in obtaining suitable personnel through agencies....
>
> The requirements for a regular appointment mentioned above were dispensed with in the case of the Applicant in view of the fact that he was recruited on a contractual basis. (emphasis supplied)

35. Moreover, it follows from the Enrollment Form for Group Medical Insurance Plan dated 14 December 1993, with effective date 21 April 1993, that, on that date, the status of the Applicant changed from contractual to regular, and that as a result there was no break in coverage. The manner in which the Bank dealt with the Applicants medical coverage confirms therefore that it had considered the Applicant as previously having been a contractual staff eligible for coverage under Paragraph 2.1 of Administrative Order No. 3.11 (as revised 1 November 1993).

36. Thus the intention of the parties as manifested in the terms and conditions of each MOA was that the Applicant was to be an employee. However, every MOA had an interpretation clause, that nothing contained in [those] terms and conditions...shall be construed as establishing or creating any relationship other than that of independent contractor. That is irreconcilably contrary to reality, and must be disregarded.

37. From the foregoing, the Tribunal concludes that for nearly 15 years, notwithstanding the interpretation clause in each MOA, the relationship between the Bank and the Applicant under every MOA was that of employer and employee.

38. The next step is to determine in which category of staff members the Applicant belonged. This determination is of utmost importance, as it is only in relation to contractual staff that the President has the power to exclude the Staff Regulations acting under Section 26 thereof:

> The President may, in individual cases, establish particular exemption from the provisions of the Staff Regulations for staff members appointed on contractual basis....

39. From that Section, it follows that staff members of the Bank include not only employees holding regular appointments but also those appointed on contractual basis. The former category, i.e. staff members in regular employment, are those staff members whose appointment is of indefinite duration. However, the duration of the employment of those appointed on contractual basis is limited by the contract itself; and it is only in respect of these employees that the President could establish particular exemption from the Staff Regulations.

40. The distinction between a post of limited duration and one of unlimited duration has been explained in the following manner:

> A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. Where a post is attached to a project and the length is not specifically prescribed, its length will be the length of the project; if the project is of limited duration, the post likewise will be of limited duration. (In re Vargas, ILOAT Judgment No. 515 (1982))

The decision in In re Morris, (ILOAT Judgment No. 891 (1988)), shows that a post which began as a post of limited duration could become one of indefinite duration if it was prolonged, or extended, after the period for which it had been created.

41. The Bank's pleadings do not suggest that when the post to which the Applicant was first appointed was created, it was intended to be either of short or of fixed duration. It is significant that for five years after the first MOA, i.e. from 1980 to 1984, the Bank did not issue separate MOAs, but simply extended the original contract. In the light of the successive extensions and renewals of the Applicants service with the Bank for an unbroken term of almost 14 years, the Tribunal, in the absence of any convincing explanation by the Bank, holds that the Applicants employment was intended to be of indefinite duration.

42. In the present case, the Tribunal finds no functional reason whatsoever, justifying the recourse to short-term contracts, in the face of a continuing relationship. It is clear that the work done by the Applicant for the Bank was a continuous whole, even though he had held different positions during his career in the Bank, just as regular staff members do. Thus the separation of his work with the Bank into individual yearly contracts was a pure fiction.

43. The use of successive MOAs is an abuse of power, more precisely a détournement de procedure which is a specific category of the more general détournement de pouvoir. According to precedents of international administrative tribunals summarized by Dr. C.F. Amerasinghe:

> Where it emerges from the facts that there was a positive purpose different from the purpose underlying the power that was exercised, the exercise of the power is vitiated. This improper purpose demonstrates that the proper purpose had been supplanted. This is the usual situation in which abuse of purpose occurs.
>
> There is, however, another legal possibility. The proper purpose may be absent even when no positive irregular purpose is proved to be present . The ILOAT [In re Gale, ILOAT Judgment No. 474 (1982)] found that no good reason had been given for the action taken and therefore the decision was invalid .... No positive reason had been given. The tribunal, therefore, inferred the absence of a lawful motive. It was not found to be necessary to point to a positive irregular purpose, it being sufficient in law that a

> permitted objective was absent. (1 C.F. Amerasinghe, The Law of The International Civil Service 293) (2nd ed. 1994) (emphasis supplied)

Here, as no reason exists objectively, and no good reason was provided by the Bank, for the use of annual contracts for what was in reality a long-term employment, the Tribunal concludes that the use of annual contracts without any functional justification is an abuse of power. Thus, the true legal relationship of the Applicant to the Bank was that of a staff member holding a regular appointment.

44. The President therefore had no power to deny the Applicant the benefits of the Staff Regulations and, accordingly, the exemption clauses in the MOAs were inoperative.

Jurisdiction and Admissibility of the Claims

45. The Tribunal holds that it has jurisdiction ratione personae, as the Applicant was a member of the Bank's staff holding a regular appointment within the meaning of Article II of the Statute of the Tribunal.

46. As far as jurisdiction ratione temporis is concerned, in regard to his claim for dependency allowances from 24 August 1979 to 20 April 1993, the Applicant had a continuing cause of action, arising upon each non-payment. Article XIV of the Statute confines the jurisdiction of the Tribunal to causes of complaint which arose after 1 January 1991, and hence the Tribunal has no jurisdiction to entertain claims in respect of dependency allowances for the preceding period. In respect of the allowances payable between 1 January 1991 and 20 April 1993, while the Tribunal has jurisdiction, the Applicant did not seek administrative review in due time, and he has thus failed to exhaust his internal remedies within the Bank as required by Article II, paragraph 3(a) of the Statute.

47. The Applicants claims for severance pay, separation pay and other retirement benefits and pension, however, stand on a different footing; if he was entitled to them, that entitlement arose upon retirement, and not earlier.

48. As far as these other claims are concerned, the Bank has submitted that the Applicant had pursued the grievance procedure set forth in Administrative Order No. 2.06, only with respect to his claim for continuation of employment until the age of 65. However, the Applicant had expressly claimed severance pay, separation pay from 1979 up to the actual date of his retirement and other benefits. The Tribunal holds therefore that the claims arising upon retirement are admissible.

Retirement at the Age of 60

49. Section 10 of the Staff Regulations provides:

> a. At any time after any staff member attains the age of sixty, the Bank, and such staff member, shall have the option of terminating his service in the Bank on the payment of such appropriate pension or other retirement benefit as shall be provided in the staff retirement benefit scheme; when such option is not exercised by either the Bank or the staff member, the age of retirement will be sixty-five years.

b. Without prejudice to the foregoing, the President, in exceptional circumstances and in the interest of the Bank, may extend, for specific periods, the employment of a staff member beyond the age of sixty-five years.

50. In Samuel (No. 2) (ADBAT Decision No. 15 [1996]), the Tribunal held that Section 10 gives the Bank the option to retire a staff member at the age of sixty, and that the Bank was entitled to adopt a coherent policy of exercising that option uniformly, and without discrimination.

51. Applying those principles, the Tribunal holds that the exercise by the Bank of its option to retire the Applicant was not flawed.

Retirement Benefits

Pension Benefits

52. The Staff Retirement Plan ("SRP") of the Bank stipulated in Section 2.1 (a), that every employee shall as a condition of service become a participant as of the first day of his service. Section 1.1 (d) defined an employee as any person employed by the Bank not holding a temporary, part-time or consultant appointment who receives a regular stated Remuneration from the Bank. At all times the Applicant fell within this definition.

53. Although the exemption clause in the MOAs purported to deny the Applicant any compensation, allowances, benefits and rights except as expressly provided therein, the Tribunal holds that the Applicant was in fact in regular employment and that Section 26 of the Staff Regulations did not authorize exemptions from the Staff Regulations which would have the effect of denying him benefits under the SRP.

54. The Tribunal therefore holds that the Bank was obliged to make deductions from the Applicants remuneration in terms of Section 5.1 (a) of the SRP to be credited to the Retirement Fund and to make appropriate contributions in terms of Section 5.2 (a). This the Bank failed to do.

55. In consequence of that failure, upon the Applicants retirement, his pension was computed on the basis of deductions, contributions and service only from 20 April 1993, and he received significantly lower pension benefits than he would otherwise have been entitled to. His right to separation pay, i.e. a lump sum payment, in lieu of a pension - in terms of Section 3.5 of the SRP and paragraph 6.1(c) of Administrative Order No. 3.02 - was also adversely affected. Although the Applicants immediate cause of complaint is the non-payment of a higher pension or separation pay in lieu, which occurred after February 1995, the effective cause of his complaint arose from the Bank's failure to make deductions and contributions from the commencement of his employment.

56. In so far as the Applicants claim relates to such failures prior to 1 April 1991, the Tribunal has no jurisdiction in view of Article XIV of the Statute. In so far as failures after that date are concerned, the question arises whether any claim is time-barred.

57. It appears that, although the Applicant was offered a formal regular appointment on 21 April 1993, he did not accept that appointment until 23 November 1993, one reason being that he was awaiting the outcome of possible further superannuation benefits, since his pension on retirement would be minimal. This indicates that the matter of retirement benefits in respect of his service prior to 21 April 1993 was yet under discussion. Even from the Bank's letter of 2

February 1995, it appeared that other matters related to [his] term of employment as a contractual staff from 24 August 1979 to 20 April 1993 were yet under review by BPMSD. This shows that at or about the time of the regularization of the Applicants appointment, there was an ongoing process of administrative review in regard to his superannuation benefits for the preceding period and this had not been concluded even when he appealed to the Appeals Committee nearly two years after regularization. In these circumstances, the Tribunal rejects the Bank's objection that the Applicants claim is barred for failure to exhaust internal remedies.

58. The Tribunal holds that the Bank's failure to make deductions and contributions as required by the Rules of the SRP, caused material and moral injury to the Applicant, on account of the unfair employment practice resorted to by the Bank, and the reduction of his superannuation benefits. The Tribunal considers it impracticable to order retroactive contributions, by the Bank and the Applicant, to the Retirement Fund, and instead directs the Bank to pay the Applicant compensation which it equitably assesses in the sum of Pesos 150,000.

Severance Pay

59. The Bank contends that the Applicant is not entitled to severance pay either under the MOAs, because they purported to exclude that benefit, or under paragraph 5.3 of Administrative Order No. 2.05 which provides:

A staff member with five or more years of continuous service will be entitled to severance pay on the following basis:

a. A sum equivalent to two weeks final net salary for each year of eligible service after 1 May 1982 up to a maximum of one years net salary for 26 years of service after that date, if the staff member resettles outside the duty station country upon separation.

b. Two-thirds of the amount in (a) if the staff member remains within the duty station country upon separation....

Uninterrupted service prior to 1 May 1982 counts towards meeting the five years service eligibility, but does not count towards the accrual of the amount of severance pay.

60. The Tribunal rejects the Bank's contention on the two counts. First of all, there is no dispute that at the date of separation, the Applicant was a staff member. He had continuous service from August 1979, and for the reasons stated above, he was a regular staff member, entitled to severance pay. In any event, even if he had not been in regular employment, under the applicable rule the entitlement to severance pay is not restricted to service as a staff member holding a regular appointment; on the contrary, it extends to eligible service, and that includes all service after 1 May 1982, which means that even if he had been a contractual staff, he would have been entitled to severance pay. The Tribunal holds that the Bank must pay him severance pay with interest.

Ex Gratia Payment

61. The last question with which the Tribunal is concerned in this case relates to the ex gratia payment which the Applicant has characterized as an attempt to legitimize [the Bank's] acts and to mollify the injustice perpetrated upon him. The Applicant contends that out of the 463 contractual staff who were regularized and were offered ex gratia payments in 1995, only he was terminated by the Bank. It must, however, be pointed out that he was retired only, and

lawfully, because he attained the age of sixty years. The Bank points out that, despite the absence of a legal obligation to do so, it offered the Applicant an ex gratia payment in the amount of Pesos 158,811.27 for humanitarian reasons.

62. Although the Applicant argues that the ex gratia payment is unfair and unjust, the Tribunal is not in a position to revise the offer made by the Bank to the Applicant. The offer is in its very nature ex gratia. The Tribunal also notes that the Bank has kept its offer open and remains prepared to make that payment despite the expiry of the deadline which was a part of the offer. The Tribunal has no doubt that this assurance will be honored.

63. The fact that the Bank offered this ex gratia payment to the Applicant, purely for humanitarian reasons connected with regularization - and not for reasons related to retirement - does not discharge or reduce the Bank's obligation to pay the entitlement and compensation ordered by the Tribunal on account of the breach of the Applicants terms and conditions of employment.

64. Although the Tribunal had determined that this case warranted consideration by a panel consisting of all its members, on account of illness one member was unable to attend this plenary session of the Tribunal. In the exercise of its powers under Rule 23, and considering that Rule 5, paragraph 4, provides that three members of the Tribunal shall consititute a quorum for plenary sessions, the Tribunal decided that this case should be determined by the four members present at this plenary session.

Decision:

For the above reasons, the Tribunal

a. directs the Bank to pay the Applicant the sum of Pesos 55,000 on account of the failure to pay severance pay and interest;

b. directs the Bank to pay the Applicant compensation in the sum of Pesos 150,000 on account of the failure to pay retirement benefits;

c. directs the Bank to pay the Applicant costs in the sum of Pesos 25,000; and

d. dismisses all the Applicants other claims.