

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 25
(6 January 1997)**

**Edward Breckner
v.
Asian Development Bank**

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

Facts

1. The Applicant joined the Bank in 1977 as an Agronomist. In 1994 he was 49 years old and was holding the post of Senior Agronomist (Level 6), Agriculture and Social Sectors Department (West), having been promoted to that post in 1988. He complains that he was wrongfully denied the right to early retirement under the Special Separation Program ("SSP"), a voluntary early retirement program, which had been notified to the Bank's staff on 24 October 1994. He alleges, first, that the eligibility criteria for the SSP were flawed, and, second, that in any event his exclusion was the result of a mis-interpretation of one criterion.

The Context of the Special Separation Program

2. It is necessary to appreciate the context (in 1994) in which, the Bank says, it introduced the SSP. The following summary is based mainly on several documents which the Bank had - such as the Report of the Task Force on Improving Project Quality ("TFIPQ") (January 1994), The Human Resources Development ("HRD") Operational Strategy for The Medium Term (July 1994), and The Bank's Medium-Term Strategic Framework (1994- 1997) ("MTSF") (March 1994) - as well as the Board Paper dated 15 July 1994 by which Board approval was sought for funding the SSP.

3. The Asian and Pacific region is currently the most dynamic region within the global economy. Over the last five years it has averaged an annual growth of over 7 per cent, which is twice the average of other parts of the world. However, there is asymmetry in economic growth among the Bank's developing member countries ("DMCs") within the region: while some have robust growth ranging from 7 to 10 per cent, others lag behind with rates of about 5 per cent, and some are even further behind. Further, a number of governments perceive themselves less and less as the major providers of development finance or as primary investors in the productive sectors, and are evolving into catalysts, promoters and regulators of development - leaving the private sector to play an increasing and constructive part in economic growth. In fact, in 1993 foreign direct investment in the DMCs was estimated at over \$27 billion - about five times the Bank's lending in that year.

4. The Bank considered that it was at a cross-roads as a development institution in a region experiencing high economic growth along with rising social demands, continuing poverty and extensive environmental degradation; and it saw an opportunity to enlarge its role beyond that of a project-financing institution to one with a broader mandate for catalyzing more efficient, effective, and sustainable development in the region.

5. The Bank's human resources policies and practices for staff recruitment, retention, motivation, development and separation were therefore critical for its future success. Its HRD strategy was formulated on the premise that the major challenges faced by the Bank would have to be met in an environment of severe resource constraints, with little or no increase in Bank staff or administrative budgets. It had several aims: (i) first of all, the Bank had to ensure that its staff would have an adequate and appropriate mix of the required skills and expertise for its immediate needs: but it also needed to recruit multi-skilled and versatile staff able to serve in more than one area of the Bank's operations, so that as job requirements changed with time, they could be re-deployed to areas in which the Bank needed them; (ii) at the same time, the Bank also wanted both to improve its gender balance and to recruit more staff from under-represented member countries; (iii) in addition, the Bank wished to have a more appropriate balance between less experienced but more versatile younger professional staff and older but more experienced staff, as well as between career staff and staff consultants; and (iv) finally, taking advantage of continuing rapid advances in office automation and information technology, the Bank hoped also to utilize supporting staff more efficiently, by their taking over from professional staff work that could effectively be undertaken by supporting staff.

6. The Bank planned to improve quality and increase efficiency primarily through: "(i) redeployment, to the extent practicable, from the lower to higher priority areas; (ii) Bank-wide increases in staff productivity; (iii) retraining of existing staff and the introduction of a special staff separation scheme; and (iv) recruitment to fill vacancies." In regard to recruitment the Bank hoped to increase its staff flexibility by: "(i) recruiting, within limits, staff that can be relatively easily re-deployed because they had several skills and flexible career structures; and (ii) judiciously utilizing short- and long-term staff consultants in specialized areas of work that do not have permanent staffing requirements."

7. The Bank estimated that at the prevailing rates of staff turnover (including mandatory retirement), 365 professional staff, out of its (1994) total of 654, would have left the Bank by the end of 1999. While recognizing that this high turnover did pose a threat of potential instability to the Bank's institutional capacity, yet the Bank also saw this as an opportunity to gain staffing flexibility by shifting its actual skill-mix swiftly to meet new and priority demands, and by improving upward mobility and career advancement for staff. The Bank hoped to complete by the end of 1994 a study which would identify the Bank's actual skill-mix requirements.

The Special Separation Program

8. It was in that background that the Bank's management approved the SSP, and sought Board approval. The Board paper of 15 July 1994 stated the objectives of the program:

4. The underlying rationale for the SSP stems from the MTSF, the TFIPQ Report and, more importantly and directly, from the HRD strategy. The Bank's current strategic agenda necessitates a strategic shift in the management of its human resources. The needed re-orientation of the HRD strategy, however, cannot be accomplished under conditions of normal staff turnover and retirement. Its effective implementation requires a special separation program to be put in place with special objectives and procedures for the voluntary separation of staff in order to enable the Bank to operate with increased efficiency and economy to better serve the needs of its DMCs.

5. The SSP would provide staff who feel that their contribution to the Bank has become of limited or diminishing value or who are experiencing career stagnation problems the opportunity to leave the Bank earlier than their normal retirement ages and be suitably

compensated with a fair and reasonable separation package. These staff tend to be relatively senior in age and in Bank service. They are not likely to progress further in their respective job streams nor are they likely to make a transition into other job streams. Although still performing satisfactorily, the prospect of continued stagnation in their current jobs would make them lose motivation to continue service in their present jobs. In such cases, the SSP would facilitate their voluntary separation from the service of the Bank.

6. In essence, therefore, the SSP is an exceptional measure to enable the Bank to create new staffing and career growth opportunities in a short-time table in order to meet the HRD strategy objectives without jeopardizing the institutional effectiveness and operational requirements of the organization. Since the SSP is an exceptional measure, it has to be limited in the scope and period of its application. Given the foregoing considerations, it can only be offered to a particular segment of the Bank staff, i.e., those who are experiencing career stagnation despite their long service and age as explained in paragraph 5 above, on a voluntary basis. In order to qualify under the program, such staff would need to meet certain Bank-specified eligibility criteria within the short duration of the program and to wish to be separated from the service of the Bank under the program. Owing to the special nature of the program, it is not covered by any of the existing separation schemes provided in Administrative Order 2.05.

9. The Board paper set out the eligibility criteria for Professional Staff (Levels 1 to 10) which, as later notified to staff, were:

The staff member:

- a. must not have been promoted during the last 3 years prior to his/her effective date of termination from the service of the Bank;
- b. must not have received exceptional/outstanding, above average or marginal/unsatisfactory performance evaluations during the three rating periods including and immediately prior to the 1992/1993 PER exercise;
- c. must be at least 50 years of age as of the end of the eligibility period; and
- d. must have not less than 15 years of continuous Bank service as of the end of the eligibility period.

10. That Board paper sought to explain and justify these criteria. "Performance has been specified as one of the eligibility criteria . . . as this is in keeping with the specific objectives of the SSP", thus excluding "more dynamic, versatile and solid performers who would constitute the base of technical know-how and expertise for enhancing organizational capabilities". The criterion relating to recent promotions was similarly justified: "This criterion acknowledges the potential significant contribution of recent promotees" And finally:

13. The minimum age has been set at 50 years and the minimum service requirement at 15 years' continuous service for professional staff to qualify under the program because it is at about this age and with this length of service that staff would be in a very good position to be able to know with certainty that they have reached their career plateau and that transferring to another job stream may no longer be worthwhile or feasible. On average, professional staff join the Bank at age 35 and after 15 years of service (at age

50) would have better indications of whether they have further career growth or they have levelled off in their career progression. For a number of professional staff, it is the combination of age 50 or higher and 15 or more years of service that best fits the career stagnation scenario of prospective separatees whose contribution to the Bank's organizational goals have become limited or have diminished in value and whose separation would be in the best interests of the Bank.

After dealing with the different criteria specified for supporting staff, the Board paper further clarified that:

16. Staff with performance problems defined as those who have been rated "marginal" or "unsatisfactory" in the annual performance review will not be eligible under the program. The performance of such staff will have to be closely monitored and their separation, if required, would have to be expedited under other existing Management prerogatives such as Separation due to Unsatisfactory Service as provided for in Administrative Order 2.05. The program is also not designed to separate staff for reasons of redundancy.

11. The Director, Budget, Personnel and Management Systems Department ("BPMSD"), by a memorandum dated 24 October 1994, informed the entire staff that the Board of Directors had approved the SSP, and set out the eligibility criteria, the benefits and the implementation procedures.

12. Neither the Board paper dated 15 July 1994 nor the memorandum dated 24 October 1994 issued by the Director, BPMSD, stated that eligibility for the SSP would be affected by the "skill-mix" of staff members. However, in a memorandum dated 18 March 1995, the Director, BPMSD, informed the Applicant that:

The SSP is designed to set into motion some of the Bank's Human Resources Development (HRD) strategy. The strategy emphasizes the need for the Bank to retain experienced, mature and knowledgeable staff with the relevant skill mix and at the same time allow staff whose skills and performance levels are not aligned with the Bank's strategic objectives to leave.

The Internal Proceedings

13. The Applicant and four other members of the Bank's professional staff (Ms. Evelyn Go, Mr. Ang Swee Tai, Mr. Felipe Fajardo and Mr. Alex Knudsen) were among those who applied for retirement under the SSP. They were told that they were not eligible because they had received high PERs during the relevant period: the Applicant and Ms. Go having received one each, and the others two each.

14. Ms. Go had received a promotion in 1992, while Mr. Ang and Mr. Fajardo had been promoted in 1993. Mr. Ang and Mr. Fajardo were also told that their "recent promotions" disqualified them under criterion (a); however, by opting to delay their effective dates of termination, they were able to avoid that disqualification.

15. Accordingly, as the Applicant and his colleagues said in their memorandum dated 28 February 1995 to the Director, BPMSD, they met all the criteria for the SSP but were denied participation therein only because during the period 1990 to 1992/93 their PERs were above average or higher. They accordingly requested reconsideration of the appropriateness of using

the PER as a basis for eligibility for the SSP. This was refused by the Director, BPMSD, by his memorandum dated 18 March 1995.

16. They then filed a formal grievance on 6 July 1995. That was dismissed on 11 August 1995. Dissatisfied with that, they wrote to the Director, BPMSD, on 14 August 1995 seeking his confirmation that they had exhausted all remedies available within the Bank and could have recourse to the Tribunal:

According to Section 6.1 of Administrative Order No. 2.06, we may now submit our appeal to the Appeals Committee. However, according to you our appeal is against a decision adopted by the Board of Directors and Section 6.2(a) ... states that the Appeals Committee shall not be competent to hear appeals against decisions or policies adopted by the Board of Directors, as opposed to appeals against the interpretation or administrative application of such decisions or policies. There is therefore no further remedy available to us within the Bank.

17. The reply they received was that:

Your grievance, contrary to your understanding, is not against a decision adopted by the Board of Directors. We therefore do not agree that you have exhausted all remedies available within the Bank[.]

although previously, on 28 April 1995, the Director, BPMSD, had informed them that:

[t]he Special Separation Program was decided by Management and approved by the Board of Directors with a number of clearly defined eligibility criteria

18. Accordingly, the Applicant (and his four colleagues) filed appeals to the Appeals Committee, whereupon the Bank challenged its jurisdiction under Administrative Order No. 2.06, paragraph 6.2 (a), on the ground that:

this is an appeal against a policy adopted by the Board pursuant to its powers under the Charter ..., and not the interpretation, or administrative application, of a Board policy.

19. On 29 November 1995, the Appeals Committee held against the Applicant (and his colleagues). He applied to the Tribunal on 7 February 1996, in due time. As he has exhausted his internal remedies within the Bank his application is receivable. His four colleagues also applied to the Tribunal, but one of them (Mr. Knudsen) subsequently withdrew his application (ADBAT Decision No. 29 [1997]).

The Applicant's Case

20. As set out in his application, the Applicant contests, and claims rescission of, the following decisions:

- a. the decision to use exceptional/outstanding and above average performance evaluations during the three [specified] rating periods as a criterion to exclude potential applicants from the SSP;
- b. [his] own exclusion from the program on that basis;

- c. the refusal of the Bank. ..to recognize and accept that [PERs] within the Bank are essentially flawed and that the use of high [PERs] to exclude otherwise qualified staff from the SSP was arbitrary, served no good purpose, and was contrary to the best interests of the Bank and its staff; and
- d. the consequent refusal of the Director, BPMSD, to use his authority and discretion to waive or alter (or have waived or altered) this criterion to allow otherwise qualified staff to participate in the program.

21. The Applicant contends that the imposition by the Bank of criterion (b) to exclude potential applicants for the SSP violated their terms and conditions of employment, which may generally and reasonably be considered to include the following obligations of the Bank:

- a. First, its obligations under its Personnel Policy Statement, contained in Administrative Order No. 2.02 and Chapter 2 of the Personnel Handbook for Professional Staff:
 - i. [to meet the Bank's requirements of] a highly qualified, dedicated and motivated complement of staff with various skills, [from member countries,] [by providing] competitive terms and conditions of employment, and [being] guided in the management of [its] staff by fair, impartial and transparent personnel policies and practices...
 - ii. [to] systematically evaluate the relative level of jobs, the equitable remuneration for similar responsibilities, internally and externally, and to reward staff according to performance, length of service and other relevant factors...
 - iii. [to] review periodically and objectively the work of staff in order to obtain the most effective use of their services and expertise, recognize their achievements, and identify their training and development needs. .
 - iv. [to] work at all times in close cooperation with staff representatives in order to safeguard staff's interests....
- b. Second, its obligation to observe the principle of equal remuneration for comparable work, recognized by the Tribunal in Mesch and Siy (ADBAT Decision No. 2 [1994]), which also held that any ambiguity or uncertainty, wherever appearing in documents emanating from the Bank, must be resolved contra proferentem and in favour of the staff.
- c. Third, its obligation to ensure that performance evaluation accurately reflects the staff member's level of contribution and achievement, recognized by the Tribunal in Tay Sin Yan (ADBAT Decision No. 3 [1994]).

22. The Applicant's legal grounds of challenge are that he was denied the benefits of the SSP upon a mis-interpretation of criterion (b), and in the alternative, that criterion (b) as interpreted by the Bank was "(i) a serious abuse of discretion, (ii) violative of [his] right to equal remuneration for comparable work, and (iii) violative of the generally accepted principles of personnel management in the international civil service...." Under the last head the Applicant (citing de Merode, WBAT Reports 1981, Decision No. 1) relies on the principle that an amendment of terms and conditions of employment cannot retroactively deprive a staff member of accrued rights for services already rendered, as well as other principles relating to "abuse of

discretion", under which head the Tribunal will consider all those submissions. Yet another ground of challenge, in regard to the implementation of the SSP, surfaced mid-way through the proceedings, and is dealt with in paragraphs 60 to 66 below.

23. The relief which the Applicant seeks is that he be granted the benefits of the SSP, computed as if his last working day was 31 December 1995 (without prejudice to the salary earned thereafter); compensation for the uncertainty caused by his exclusion from the SSP, as well as for the stress, fatigue and frustration suffered as a result of the Bank's obstructive attitude towards his case, and its efforts to delay him from pursuing his case; and costs and expenses.

Preliminary Matters

Full Panel

24. The Applicant and his colleagues requested that their cases be heard by a full panel of the Tribunal in terms of Rule 5A, paragraph 2 of the Rules of Procedure. Despite the Bank's objections, having regard to the novelty and the complexity of the issues involved, the Tribunal determined that the cases warranted consideration by a panel consisting of all its members.

Production of Documents

25. The Applicant requested production of certain documents, which he contended were "germane to full consideration [of the merits]" of his Application. In its Answer, the Bank objected, contending that the Applicant had failed to make a prima facie case as to the relevance of the documents. To enable the Tribunal to decide the request, the Tribunal, in its Order of 2 May 1996, directed the Applicant to provide the aspects of his arguments to which he considered each of those documents was likely to be relevant.

26. The documents requested included copies of all written comments/ statements made by members of the Board of Directors on the SSP and the Management's response thereto, and the record of the discussions and the minutes of the Board meeting at which the SSP was approved, which he said would show that the Board had not been provided with sufficient information and that the SSP had been implemented with undue haste. The Bank objected, claiming that these documents were confidential. The Tribunal did not require the production of those documents, as the relevant Board paper which the Board considered was available, and so there was no sufficient reason to override the plea of confidentiality.

27. The other documents requested were a detailed list of persons who had been, or would be separated from the Bank under the SSP, and any studies or surveys undertaken by the Bank in relation to the design and criteria for the SSP. By Order of 20 June 1996, the Bank was directed to produce these documents for perusal by the Tribunal.

28. Having considered the documents produced, the Tribunal, by its Order of 22 August 1996, directed the Bank to produce a list of the staff members eligible for the SSP for consideration by the Tribunal only, and to produce a similar list, omitting personal information concerning the staff members, to be furnished to the Applicant. As for studies and surveys undertaken in connection with the SSP, the Bank was ordered to produce its "Three-Year Rolling Work Program and Budget Framework (1995-1997)" for transmittal to the Applicant. The Tribunal granted the Applicant 21 days within which to file a supplement to his Reply with his comments on those documents.

29. Pursuant to Rule 10 of the Tribunal's Rules of Procedure, by Order of 25 November 1996, the President of the Tribunal also directed the Bank to produce the "Medium-Term Strategic Framework (1994 -1997)."

Considerations

I. Preliminary Observations

30. The Tribunal considers it necessary to make some preliminary observations, regarding the establishment of the SSP, which have a significant bearing on the issues for decision in this case.

31. It is not the function of the Tribunal - and indeed the Applicant does not suggest that it is - to attempt to review the Bank's assessment of either the future environment in which it expected to function or the policies and strategies which it needed to meet the new challenges, unless they involved changes in the terms and conditions of employment of its staff. The Bank considered that improvements were needed in the quality, the efficiency, and the adaptability or versatility, of its professional staff; that while it needed to retain those who were likely to be "high" performers, it required many new recruits with the appropriate "skill-mix"; and that normal staff turnover would not create enough vacancies to ensure such recruitment. It therefore required a special separation program as "an exceptional measure to enable the Bank to create new staffing and career growth opportunities in a short timetable." The Applicant does not dispute that.

32. From the Bank's assessment of the situation, three conclusions are inevitable. First, in introducing the SSP, the Bank's primary objective was not the improvement of benefits to staff, upon voluntary separation. On the contrary, the SSP was principally a policy measure - and just one part of a many-pronged approach -designed to improve the quality and impact of the Bank's services to its DMCs. And it was also the Bank's policy, in that process, to improve the balance among its staff in regard to gender and country-representation. It is true that the implementation of the SSP required payments to staff, and so when it was announced the SSP did affect the terms and conditions of employment of staff members concerned; but that was only indirect and incidental. It is in the perspective of those policies that the Tribunal must consider the SSP.

33. Second, the successful implementation of the SSP depended upon a classification of the Bank's staff into two categories - "high" performers whom it wished to retain because of their potential contribution to the Bank in its changing environment, and the others whom it did not wish to retain. There was obviously no formula to determine with mathematical certainty what each staff member's future contribution would be. Some relevant general criteria had to be adopted, but whatever basis was adopted for assessing future performance, inevitably some of those assessed as likely "high" performers would turn out to be average or poor, and vice versa. Subject to that, there may well be several different methods of identifying those likely to be "high" performers. One reasonable approach was that those who had performed very well in the past were likely to continue to do so, and that those who had been average or poor performers were not likely (or were less likely) to be "high" performers in the future. Clearly, therefore, past performance, including promotions, was one reasonable factor for identifying those whom the Bank should retain. The Bank has given acceptable reasons (see paragraph 10 above) why, in determining whether staff members had reached their "career plateau" (or whether "they [would] have further career growth or they [had] levelled off in their career progression"), it included only staff members who had reached the age of fifty and had fifteen years of service with the Bank. Indeed, the Applicant did not question those criteria. Forecasts of future performance may well

have been even more difficult with staff members who were younger or had less service. The Bank had then to prescribe general criteria to assess career stagnation. If a staff member was not currently stagnating, the fact that he had been stagnating in the distant past would have been of no relevance. Hence it was neither arbitrary nor unreasonable for the Bank to take stagnation in the recent past as the relevant criterion

34. Finally, it follows that the payments made under the SSP were not in any sense rewards or remuneration for service. It was not at all a case of substantial payments being offered to those who were average performers as a reward for their services, while nothing was being offered to "high" performers. The Bank wished to retain "high" performers; it was not necessary to pay them something extra for that, and indeed it would have undermined the rationale of the SSP to have offered them enhanced separation payments. In regard to the other category - those whom it did not wish to retain - the Bank faced a practical difficulty: those who were marginal or unsatisfactory performers might have been separated under the existing staff rules and regulations without additional payments, but that would have been more difficult in the case of those who were satisfactory. For the latter, therefore, a special inducement was necessary, and that was what the SSP provided - an inducement to leave, and not a reward for service.

35. The Tribunal must deal at this stage with one other matter. In support of his contentions as to the meaning and effect of the SSP, the Applicant has relied on views expressed by some Directors of the Bank while the Board of Directors was discussing the SSP. Recourse to those discussions is not justified because the Tribunal finds that the terms of the SSP, as notified to staff on 24 October 1994, are clear, except for one ambiguity (referred to in paragraph 38-41 below) on which, however, those discussions shed no light.

II. Interpretation of Criterion (b)

36. The terms used in the Bank's performance appraisal system varied during each of the relevant three periods. The disqualifying ratings were as follows:

| 1990 | 1991-1992 | 1992-1993 |
|-------------------------|-------------------------|--------------------------|
| Distinguished | Exceptional | S1 (Satisfactory Zone 1) |
| | Above Average | S2 (Satisfactory Zone 2) |
| Marginal/Unsatisfactory | Marginal/Unsatisfactory | Marginal/Unsatisfactory |

37. The Applicant received only one disqualifying rating, namely "above average" in 1991/92; so also Ms. Go, "exceptional" in 1991/92. His other colleagues received two disqualifying ratings each: Mr. Ang "above average" and "S2" in 1991/92 and 1992/93; and Mr. Fajardo "exceptional" and "S1" in 1991/92 and 1992/93.

38. The Applicant contends that criterion (b) refers to "evaluations" and "periods", in the plural, and therefore excludes only staff members who had received more than one disqualifying PER during the relevant period; and in the alternative, that criterion (b) is ambiguous, and should be read contra proferentem and in favour of the staff

39. Certainly, there might have been no argument about the matter if criterion (b) had read:

The staff member must not have received any exceptional ... [etc.] evaluations during the last three rating periods...;

or if it had been framed positively:

The staff member must have received a fully satisfactory or satisfactory evaluation in 1990, a fully satisfactory evaluation in 1991/92 and an S3 or S4 evaluation in 1992/93.

40. However, the Tribunal is satisfied that criterion (b) excluded even a staff member who had received only one disqualifying PER (whether "high" or "low"). In general, not only does the singular include the plural, but the plural includes the singular, unless the context otherwise requires. Where as here, the plural is used to define a class -whether in order to include or to exclude persons or things - the singular is included. Thus a provision that "a staff member must not have received promotions (or increments, or bonuses, or invalidity payments, or education grants) during the last three years" would clearly exclude even those who had received only one promotion (or increment, etc.) during those three years. Likewise, a staff member who has only one child, is covered by the phrase "a staff member who has children", and is excluded by the phrase "a staff member who has no children," because the plural includes the singular. So, too, a regulation that "upon the death of a staff member his pension entitlement shall devolve upon his heirs" applies not only where he leaves more than one heir, but even if there is only one heir.

41. A consideration of the purpose for which criterion (b) was adopted confirms that view. It was intended to apply only to those who had consistently been "average" performers during the entire period, because what the Board was dealing with was a problem of "stagnation", or "career plateau" or "levelling off" in career progression: a single "high" performance evaluation (and for that matter, a single "marginal/unsatisfactory" evaluation) was inconsistent with that.

42. The Tribunal holds that criterion (b) applied to those who had received only "average" PERs throughout the specified three-year period, and that the Applicant did not satisfy criterion (b).

III. Right to Equal Remuneration for Comparable Work

43. The essence of the Applicant's contention is that the SSP provided "benefits" for staff members; that those benefits should have been given to staff in accordance with the principle of equal compensation for comparable work; and that the principle of equality was infringed because the benefits which were allowed to consistently "average" performers were denied to those who had performed somewhat better.

44. As explained in paragraph 32, the SSP was neither intended to provide, nor provided, "benefits" for work or services. Consequently, the classification which the Bank made - of "high" performers whom it wished to retain, and others whom it did not - was not in order to reward past service but to improve the quality of its staff. In relation to the object which the Bank sought to achieve, that classification was proper and reasonable. As explained in paragraph 34, the provision of "benefits", which were in essence payments in the nature of inducements to separate to those whom it did not wish to retain was, again, a proper and reasonable way of achieving the Bank's objectives; and the refusal to offer similar payments to those whom it wished to retain was in no way discriminatory.

45. The Tribunal holds that in this respect the SSP did not infringe the principle of equal treatment.

IV. Abuse of Discretion

46. The Applicant contends that the denial of benefits under the SSP to those with "high" PERs during the period 1990 to 1992/93 was wrong for several reasons. First, he claims that the Tribunal had held in *Tay Sin Yan* (ADBAT Decision No.3 [1994]), delivered on 8 January 1994, that the Bank's PER system, as a whole, was fundamentally flawed, arbitrary and discriminatory; and that despite knowledge of that flaw the Bank founded the SSP on PERs. Second, he contends that a "high" PER is a reward for past efforts and past contributions, and by using criterion (b) to exclude staff members, the Bank had retroactively diminished that reward, and, indeed, made it a disability. Third, he argues that it was wrong to exclude him on the basis of one single "high" PER that he had received during his entire eighteen years of service. Fourth, he points out that promotions during the period to which criterion (b) related (1990 to 1992/93) did not disentitle a staff member to the SSP benefits, and that criterion (a) was thus inconsistent with criterion (b) and anomalous. Finally, he urges that none of the criteria tended to ensure that the "skill-mix" which the Bank desired would be achieved, and that in fact staff members were entitled to the SSP benefits regardless of their skills.

47. In *Tay Sin Yan* (ADBAT Decision No. 3 [1994]), the Tribunal did not hold that the entire PER system was flawed, but struck down the use of quotas to withhold "distinguished" ratings from staff members who would otherwise have received them. Because of that practice, Mr. *Tay Sin Yan* had been denied the PER that he deserved, and received instead a lower PER. The Tribunal was not called upon to decide whether there was any flaw in the PER system in relation to other evaluations, and did not suggest that there was any flaw in the way in which "average" or "low" PERs were awarded. But even if it were now assumed that a similar defect affected the entire PER system, that would only mean that other staff members too received lower PERs than they deserved - in which event a staff member who received an "average" PER might well have complained that he should have received a "high" PER, but not vice versa. Thus more staff members might have been rated "average" than their performance warranted, and accordingly, a greater number than actually deserved it, might have become eligible for the SSP - but not the converse. Thus even by some strained implication *Tay Sin Yan* cannot support the Applicant's complaint. And, having taken without demur the benefits of the ("high") PER which he had earlier received, the Applicant cannot now be heard to claim that it was inaccurate and that he deserved only a lower PER.

48. Amplifying his contention that the use of criterion (b) in order to deprive staff members of the benefits of the SSP was a retroactive alteration of their terms and conditions of employment, the Applicant claims that at the time staff members received "high" PERs they should have been warned of the possibility of adverse consequences. The Tribunal agrees with the Bank's submission that the use of past performance as a criterion for a program which operates prospectively does not offend the principle of non-retroactivity. A PER is the result of a contemporaneous and participatory process of evaluation, and must accurately reflect the staff member's level of contribution and achievement. If a staff member does not accept its accuracy - whether "high", "average" or "low" - he must contest it promptly. If he does not, he cannot but know that whenever for some legitimate purpose the quality of his past performance needs to be ascertained, the Bank would be entitled - and, indeed, obliged - to refer to his PERs as being the proper and the best evidence of such performance. To a staff member's service, or to the PER awarded in respect of such service, there attaches no accrued right of participation in a future, as yet unannounced, separation program.

49. The Applicant complains further that the Bank denied him the benefits of the SSP "using one single ["high" PER] in an 18-year career as the sole basis of distinguishing" between him

and his colleagues, some of whom had joined the Bank at about the same time, but who had progressed much faster and further in their careers. As explained in paragraph 33, it was reasonable for the Bank to have taken into account the recent performance of staff members (who had reached the age of fifty years and completed fifteen years of service) in attempting to assess whether they had reached a "career plateau." As the Bank stated in its Answer, it hoped "to identify those staff members with average performance over approximately the last five years", or those "who[se] performance over the last five years had diminished in quality or plateaued". The issue, therefore, was not how a staff member had performed or progressed prior to 1990, but whether he was experiencing "career stagnation" subsequently. The Bank cannot therefore be faulted for deciding not to take into account performance before 1990. However, that still leaves the question why performance in 1993/94 was excluded. It is true that the PERs for that period would not have been completed at the time the SSP was being considered, but they would have been available before the closing date (18 January 1995) for application for SSP benefits. The Bank explains that the SSP was first mooted during the latter half of 1993, and it was decided to exclude the 1993/94 PER "to ensure that there would be no suggestion that a staff member was given a certain performance rating simply to comply with the SSP." That this is not fanciful speculation is confirmed by the Applicant's submission (see paragraph 48) that a "high" PER might have been contested if it was known that it would affect eligibility for the SSP. The Tribunal accepts that it was not arbitrary or unreasonable to exclude the 1993/94 PERs.

50. The Bank had "to identify those staff members with average performance over approximately the last five years." A one-year period might have been unreasonably short and therefore arbitrary, while five rating periods, going back from 1992/93 to 1988, might have been too long. As stated in its Rejoinder, the Bank "chose to use three PER periods because two PER periods was too brief a period of review and more than three PER periods would go to earlier periods too far removed from staffs' current situation." The Tribunal accepts that this was a legitimate and reasonable exercise of the Bank's discretion.

51. The Applicant complains of "the sloppiness with which the SSP criteria were chosen" because criterion (b) was inconsistent with criterion (a):

Since the last possible date of termination is mid-1996, this effectively means that the individual can have had no promotion in the years from mid-1993 to mid-1996, exactly the period not covered by criterion (b). It would thus be quite possible for an individual who had been promoted in 1992 to receive an outstanding rating in 1993 and still qualify for the program whereas another individual who received an outstanding rating in 1992 and was promoted in 1993 would be disqualified on two counts. Yet it would be impossible to determine in which way the latter individual was more essential to the Bank than the former. They would both have received a high performance evaluation rating and been promoted in the 1992/1993 period yet one would be able to participate in the SSP as suffering from career stagnation and the other would be...unable to participate.

52. As already noted, it was not unreasonable for the Bank to exclude PERs for 1993/94. However, the Tribunal finds that the Applicant's complaint that promotions during the period 1990 to 1992/93 were ignored is justified. Recourse to past performance in formulating the criteria for the SSP was justified because its object was to identify the staff members who were experiencing career stagnation during "approximately the last five years." The receipt of a promotion is necessarily a far stronger indication than a "high" PER, that a staff member is not experiencing career stagnation - and accordingly a promotion, during the corresponding period,

was necessarily a more potent disqualification for SSP benefits than a "high" PER. It was thus inconsistent with the object of the SSP to have extended its benefits to staff members who had received promotions during those five years, i.e. (approximately) 1990-1995, and criterion (a) should not have been restricted to the period (approximately) 1992-1995. It was a reasonably foreseeable consequence of that restriction that staff members who were not experiencing career stagnation after 1990 - as evidenced by promotions in 1990 to 1993 - would become eligible for SSP benefits. In fact such staff members did apply for and obtain SSP benefits. The particulars furnished by the Bank show that of the 34 staff members who obtained SSP benefits, two had received promotions in 1990, eight in 1991/92 to 1992/93, and two others on 1 April 1993. It was arbitrary to deny those same benefits to staff members who only received a "high" PER, during the corresponding periods.

53. However, even if criterion (a) was amended in that way, neither the Applicant nor his colleagues who have applied to the Tribunal would have become eligible for the SSP. Indeed, his three colleagues had received promotions after 1990, and would thus have been ineligible for an additional reason. The Applicant would have continued to be ineligible because of his "high" PER. The Tribunal, therefore, cannot order that any of them be allowed the benefits of the SSP. The fact that staff members, who would have been rendered ineligible on account of their promotions, obtained the benefits of the SSP, does not justify an order by the Tribunal to allow other ineligible staff members those benefits.

54. The Applicant questions the criteria for the SSP saying that according to the Director, BPMSD, in his memorandum of 18 March 1995 "the use of high [PERs] was designed to identify persons the Bank would wish to retain because of their particular skill, knowledge or expertise." He rightly says that PERs "have no link to skill or expertise, and a high [PER] would not in any way indicate which particular skill a particular individual was possessed of", and argues that "[a]s a means for identifying persons of a particular skill, knowledge or expertise a high [PER] is not only arbitrary but meaningless."

55. There is an ambiguity in that memorandum, in so far as it does state that the Bank's HRD strategy would "allow staff whose skills and performance levels are not aligned with the Bank's strategic objectives to leave" (emphasis supplied). However, upon closer scrutiny of the whole document it appears that what it meant was that the SSP "would set into motion" a process which would allow the implementation of the Bank's HRD strategy; in other words, the SSP would create the vacancies which would enable the Bank to recruit staff with the required "skill-mix" in the future.

56. Further, it is quite clear from the Board paper that the Bank had not yet determined precisely what skills, and combination of skills, it required: that was expected to be known only later - "before end-1994" - when an ongoing Bank-wide exercise was completed. Thus though it was the Bank's strategy, in the long-term, to achieve a better "skill-mix", the Bank did not intend to do that through the SSP. The fact that the SSP would allow even a staff member with a desirable skill to leave was in any event of no relevance: for even if it did, such a staff member was, ex Eypothesz, one whom the Bank did not wish to retain, because he was not a "high" performer.

V. Implementation of the SSP

57. Consequent upon an order by the Tribunal, the Bank produced a list of 73 professional staff members who, according to the Bank were eligible for the SSP; of these, 34 had applied for and

received the SSP benefits. The Applicant made several criticisms, based on this list, of the implementation of the SSP, and, in particular, of the refusal to waive or alter criterion (b).

58. The Applicant pointed out that during the relevant rating periods two staff members included in this list had received "marginal" and "above average" PERs, respectively, but the Bank nevertheless considered them eligible - indicating either that the Bank's interpretation of criterion (b) was wrong or that it had a discretion to waive or alter the criteria. In its Rejoinder the Bank pleaded that they were not eligible, and had inadvertently been included in the list. These staff members did not apply for the SSP benefits.

59. The Applicant submitted that another staff member had been omitted from the list, although the Bank had considered him eligible. Indeed, his application for the SSP benefits had been accepted, and his departure from the Bank had been announced to staff. Thereafter, in April 1995, he had received a promotion - effective retroactively from 19 December 1994. The Applicant complained that this staff member was allowed to continue in service although the rules of the SSP forbade the retraction of an application. The Bank explained that when the staff member accepted his promotion - which was in the interests of the good administration of the Bank - he became ineligible for the SSP; it was not that he was given the privilege of withdrawing his application. Had he declined the promotion he would have continued to be eligible for the SSP benefits; not having done so, he became ineligible, because criterion (a) made promotion during the three years preceding termination a disqualification, and it was unnecessary to withdraw his application.

60. However, the Applicant was able to point out an extremely serious deficiency, which came to light only from that list. Out of the 71 eligible staff members on that list, 25 had no PERs for 1990; and in fact, 24 had no PERs for 1989 and 1990. What is more, 13 staff members, out of these 25, had been granted the SSP benefits.

61. The Applicant argued that the lack of a regular system of performance evaluation for senior staff was known to the Bank particularly as it had been commented upon by the Tribunal in Lindsey, (ADBAT Decision No 1 [1992]), delivered on 18 December 1992; that to determine the eligibility of senior staff for the SSP on the basis of two PERs, while requiring three for other staff, was discriminatory; that the management undoubtedly knew this when criterion (b) was being formulated; that nevertheless the Board of Directors and the Appeals Committee were misled into believing that the criteria were applicable, and applied, uniformly to all applicants; and that, as a result, the Bank's administrative discretion was not exercised in a fair and equitable manner.

62. An aggravating feature is that of these 13 staff members, five had also received a promotion either in 1991/92 or in 1992/93. Yet another cause for serious disquiet is that one of them held the Level 9 post of Deputy Director, BPMSD, while the SSP was being formulated; and although his performance had not been evaluated in 1990, he received one promotion on 1 April 1990 and a second on 1 January 1992, and an "outstanding" PER in 1994; and, the Applicant says, this shows that - after 18 years of service and at the age of 52 - that staff member was not suffering any career stagnation during the relevant period.

63. Although the Bank admitted in its Rejoinder that "two PER periods were too brief a period for review", it nevertheless tried to maintain that criterion (b) was correctly applied to senior staff (i.e. manager level and above) who had PERs for only two rating periods, arguing that they were properly "treated as having no marginal or outstanding ratings" because before that it was not the practice of the Bank to rate their performance. The Tribunal must observe that if it was

right to interpret criterion (b) in that way, then it would follow that even a staff member who had not been rated at all during any of the three specified rating periods would also be eligible, on the ground that he too had received no marginal or outstanding PERs. But that would defeat the objective of the SSP (which was "to identify those staff members with average performance over approximately the last five years") because it would allow those not identifiable as experiencing career stagnation to separate. To interpret criterion (b) in that way would make it discriminatory and arbitrary. If two rating periods were too brief for review, that had to be true for every staff member.

64. The Tribunal holds that criterion (b) properly construed and applied required three "average" PERs to make a staff member eligible. More than one third of those considered eligible by the Bank could not satisfy this criterion simply because the Bank did not have a PER system for them in 1990. While it might have been desirable that the SSP should have been so formulated as to permit strict implementation - without the need for the exercise of any discretion - the criteria failed to make specific provision for those who were not rated in 1990. Since this was not due to any lapse on the part of the staff members concerned, it would have been unfair to have excluded them on that ground. The resulting situation should properly have been treated as an anomaly, in respect of which the management had a residual discretion in order to find an equitable remedy, although it may not have had a general discretion to waive or vary the criteria. But any such discretion could only have been exercised in favour of these 25 staff members if they could have been regarded as having had "average performance over approximately the last five years." That could not be said of those (over 15 in number) who had received promotions during that five-year period: indeed, if criterion (a) had been properly formulated, they would have been ineligible.

65. However, neither the Applicant nor his colleagues would have become eligible if their PERs for 1990 were excluded from consideration as happened in the case of the senior staff. The Applicant received one "high" PER (in 1991/92) but no promotion; Ms Go received one "high" PER (in 1991/92) and a promotion in 1992; and Mr. Ang and Mr. Fajardo each received two "high" PERs (in 1991/92 and 1992/93), and a promotion (in 1993).

66. How that management discretion might have been exercised, in relation to staff members who had no promotions, in order to differentiate between those who had one "high" PER during a five-year period on the one hand, and those who had no "high" PERs over a four-year period, on the other hand, is open to question. However, since about five staff members who had received one promotion during the relevant five-year period were considered eligible, obviously staff members (such as the Applicant) who had only one "high" PER, were suffering greater career stagnation. Further, a single promotion does not necessarily suggest greater career stagnation than a "high" PER in one year and a promotion in the next (as in the case of Ms. Go), for the latter may merely confirm the preceding "high" PER. And as for Mr. Ang and Mr. Fajardo it can hardly be said that they were undergoing less career stagnation than the Deputy Director, BPMSD, who had two promotions in three years.

Conclusion

67. As a result of the defects in formulating criterion (a) and in implementing criterion (b), out of 34 staff members who obtained SSP benefits, 16 who could not reasonably have been considered as suffering career stagnation in terms of the objectives of the SSP were nevertheless allowed its benefits. Likewise, it is clear that of the 73 staff members on the list furnished by the Bank, as many as 36 were not suffering career stagnation. However, that does

not justify an order by the Tribunal that the Applicant and his colleagues should also be allowed those benefits, as they too were ineligible.

68. But that does not conclude the matter. The criteria for the SSP were not determined on the basis of some inflexible or immutable principles, but pragmatically to create a sufficient number of vacancies in order to recruit new staff with the desired "skill-mix." The Board acted upon the representation by the management that about 70 staff would be eligible, of whom 60% to 70% were likely to separate. Had the Board then realized that in fact only about 37 would be eligible, if it wished to proceed with the SSP it would have directed that the criteria be relaxed to achieve that target of 70 eligible staff members. In that event, there would have been a likelihood that the Applicant (and his colleagues) would qualify. Because of the defects in formulating and implementing the criteria, they have been wrongfully deprived of that opportunity. For that they must be compensated, upon an equitable assessment of their chances of coming within that class - which, of course, would vary according to the extent of the career stagnation of each, as revealed by high PERs and promotions.

69. In assessing that amount of compensation at US\$40,000, the Tribunal has also taken into account, on the one hand, the fact that the Applicant has continued to be in employment, and, on the other hand, the unnecessary delay and inconvenience caused to the Applicant during the internal proceedings (see paragraphs 16 to 18).

70. Although the Tribunal had determined that this case warranted consideration by a full panel, 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 constitute 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 US\$40,000 as compensation;
- b. directs the Bank to pay the Applicant the sum of US\$3,000 as costs; and
- c. dismisses all his other claims.