

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 37
(7 August 1997)**

**Mohandas K. Samuel
v.
Asian Development Bank
(No. 3)**

**Mark Fernando, President
Robert Gorman, Vice President
L.M. Singhvi
Brigitte Stern
Toshio Sawada**

1. This is an Application for the revision of Samuel (No. 2), ADBAT Decision No. 15 [1996]. Article XI of the Statute of the Tribunal empowers the Tribunal to revise a judgment in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to [the requesting] party.

2. In Samuel (No. 2) the Tribunal had to interpret Section 10 of the Bank's Staff Regulations (SR10), adopted in 1966. Mr. Samuel contended that under SR10 the normal age of retirement was sixty-five, and that accordingly the Bank did not have the right to retire him from the service of the Bank with effect from his sixtieth birthday. The Bank's position was that SR10 gave the Bank an option to retire a staff member at any time after he reached the age of sixty.

3. The majority decision of the Tribunal was that SR10 did not refer to, let alone define, any normal retirement age or date, and that it was plain from SR10 that it made two distinct provisions in regard to the age of retirement: first, for optional retirement, at any time between sixty and sixty-five, the Bank and the staff member each having that option; second, for compulsory retirement at sixty-five, subject to an exception. Accordingly, when the Staff Regulations were first adopted, the power of the Bank to retire a staff member after the age of sixty did not depend on what the Bank considered to be the normal retirement age. The majority also held that a retirement under SR10 could not be deemed to be also a termination under SR11 (which would have entitled the staff member to a termination payment under SR12).

4. The dissenting Member of the Tribunal held that the plain wording of SR10 tended to support Mr. Samuel's contention that the normal retirement age was 65 years, and referred to several matters in support of that conclusion, one being the practice of the Bank prior to 1982.

5. The facts relating to that practice were as follows. Between August 1977 and December 1981, only six staff members had reached the age of sixty; five of them had continued in service for varying periods thereafter (though not up to the age of sixty-five); and each of these five had received a termination payment equivalent to one-half of a month's salary for each year of continuous service. That was the payment due, in terms of paragraph 5.2 of Administrative Order No.17 of 14 December 1967, in respect of termination of appointment in the interest of the good administration of the Bank. (In the Staff Regulations, it was SR11 which provided for termination of appointment in the interest of the good administration of the Bank).

6. The dissenting Member of the Tribunal considered that this practice was both unambiguous and conclusive as to the age of retirement being sixty-five. She found that until 1982 it was the Bank's interpretation that it could only terminate the appointment of a staff member between the age of 60 and 65 upon the payment of termination money in addition to pension benefits, as a matter of obligation; and that in 1982 the Bank had illegally changed the normal age of retirement from sixty-five to sixty. However, although the normal age of retirement was sixty-five, she concluded further that SR10 did give the Bank the option to terminate the employment of a staff member on his reaching the age of sixty, but that it could terminate for retirement in this way only upon the payment of termination money and pension benefits, as it had done before 1982.

7. In view of its conclusion as to the plain meaning of SR10, the majority said that it is strictly unnecessary to consider the Applicant's contention, relying on other subsequent documents and matters, that the normal age of retirement was sixty-five, but that it would deal with them as extensive submissions have been made in that respect. It was only in that context that the majority discussed the practice of the Bank between 1977 and 1982, and concluded that it had been only in respect of five staff members; that it was ambiguous; that it had prevailed only for a period of less than five years, which period had ended fifteen years previously; and that it was quite insufficient to displace the plain meaning of SR10.

8. The first ground on which review is sought is that the submissions made by the Applicant on significant issues have been misrepresented in the Decision, in that although the Applicant made no submissions regarding the aforesaid practice, and made no request for similar treatment or for a termination payment under SR12, the Decision states, in four places, that the Applicant did refer to and rely on that practice.

9. The Tribunal acknowledges, and regrets, that it incorrectly attributed those submissions to the Applicant. However, the fact is that questions did arise as to the existence of that practice, and its relevance to the interpretation of SR10. Indeed, it was one of the circumstances which the dissenting Member relied upon in confirming the conclusion that the normal age of retirement under SR10 was sixty-five as contended by the Applicant. The majority took a different view. But what is crucial is that - even assuming that the mistaken attribution of those submissions to the Applicant might be regarded as a new fact within the meaning of Article XI of the Statute - neither the majority nor the minority view, as to the existence, nature, and effect of that practice, depended in any way on who it was who had made those submissions. The fact that those submissions were attributed to the Applicant did not have any influence, let alone a decisive influence, on the judgment of the Tribunal.

10. The Applicant refers to a number of other matters relevant to the interpretation of SR10, on the basis of which he argues that the Tribunal's decision was wrong. He contends that the legal principle of *res magis valeat quam pereat* that should have governed the interpretation of SR10 ... was unknown to both the Honourable Tribunal and the Applicant; that SR10 should have been interpreted so as to give the fullest weight and effect to its language and to the rest of the text; that since the right of a staff member to resign at any time is an inalienable fundamental human right, it is redundant for SR10 to give him an option of terminating his service in the Bank after he attains the age of sixty, and SR10 is meaningful only if it is taken to refer to mutual agreement between the staff member and the Bank as to termination between sixty and sixty-five years; that if such mutual agreement is not reached, SR10 makes the age of retirement sixty-five; that the Staff Retirement Plan (SRP) provides the option of retirement only to the staff member, and that under the SRP there has always been a vesting period to become a qualifying participant, so that the Bank cannot exercise an option to retire a staff member under

SR10, as a general rule, before that period; that the SRP was not a contemporaneous instrument; that the rule of contemporanea exposita in interpretation ought rarely, if ever, to be applied to modern legislation; that an unwarranted distinction was drawn between appointment and service; and that there has been no public promulgation by the Bank that exceptional circumstances are required for extensions of service at or after the age of sixty. He claims that there has been unawareness of all those facts, which has had a decisive influence on the judgment.

11. Every one of those grounds is in substance a contention that the Tribunal erred in its conclusions, and does not constitute a new fact, let alone one that might have had a decisive influence on the judgment. What the Applicant is really doing is to appeal against the Tribunal's decision because of alleged errors, which neither Article XI nor any other provision of the Statute permits.

12. Finally, the Applicant complains of the procedure adopted by the Tribunal (set out in paragraphs 18 to 20 of the Decision) in directing the production of the verbatim record of the discussions of the Board of Directors of the Bank relating to SR10 (to which the Applicant had already made references). He says that he became aware of such direction only after the judgment, and that if he had known of it, he could have, even without seeking formal access to this confidential document, made relevant submissions. The judgment shows that the Tribunal considered resort to those discussions to be unnecessary. However, the Applicant's grievance in this respect is no more than an alleged error of procedure, not falling within the scope of Article XI.

13. On 4 February 1997, less than a month after the filing of the Application and after the Respondent had been asked to file its Answer, the Applicant died. On 11 April 1997, Ms. Montira Samuel, the daughter of the deceased Applicant, wrote to the Tribunal asking to be substituted in place of the deceased and thereby to be allowed to pursue the case. Attached were letters signed by the widow and other children authorizing her to represent them in these proceedings. The Respondent, on the assumption that the Applicant had not left a will naming a person other than Ms. Samuel as the executor of the Applicant's estate, and that no court had named any person other than Ms. Samuel as the legal representative of the Applicant's estate, did not object. The Tribunal, having ascertained that these conditions have been satisfied, recognized Ms. Samuel as a person who is entitled to claim upon a right of a member of the staff ... by reason of the staff members death under Article II, paragraph 2 of the Statute, and allowed Ms. Samuel to pursue this request for revision of judgment.

Decision:

For the above reasons, the Tribunal decides to reject the Applicant's request for revision of its judgment in Samuel (No. 2).

Mark Fernando
President

R. Gorman
Vice-President

T. Sawada
Member

L.M. Singhvi
Member

B. Stern
Member

R. C. Pangalangan
Executive Secretary

At Manila, 7 August 1997