

JUDGMENT, CASE NO. 96 - JEAN-MARC D. ABOUSSOUAN V. IDB

The Administrative Tribunal of the Inter-American Development Bank Group, composed of Judge Alberto Wray, President; Judge Edith Brown Weiss, Vice-President; Judge Mónica Pinto; Judge Hugo Lorenzo; Judge Shoschana Zusman Tinman, Judge Graciela Dixon Caton, and Judge Lisa Shoman considered Case 96 following the procedures established in the Tribunal's Rules of Procedure.

PROCEDURAL HISTORY:

1. On June 13, 2016, Mr. Jean- Marc D. Aboussouan (the "Complainant"), a French citizen, assisted by Counsel James R. Hammerschmidt and D. Jack Blum of Paley, Rothman, Goldstein, Rosenberg, Eig & Cooper, Chartered, filed a *Complaint* before the IDB Administrative Tribunal ("the Tribunal") concerning the application of the Tribunal's judgement in Case No. 80 to Mr. Aboussouan, in so permitting him to purchase past years of service in the Staff Retirement Plan ("SRP"), and adopting those past years of service for purposes of calculating pension and retirement benefits.
2. The Complainant is also asking to receive a credit for his three years of service as a consultant in the calculation of the severance payment as a consequence of the Bank's termination of his employment through a collective dismissal. Together with the Complaint, a Certificate of Conclusion of Mediation of February 11, 2016 was also filed.
3. On July 21, 2016, the Inter-American Development Bank (the "IDB," "the Bank," or "the Respondent") represented by Counsel Griffith L. Green, William Hochul III, and Brian P. Morrissey of Sidley Austin LLP, filed its *Answer to the Complaint* together with 34 Annexes.
4. On November 22, 2016, the Complainant filed *Replication of Complainant, Jean-Marc D. Aboussouan and Motion to compel production of documents objected by the Inter-American Development Bank* together with 3 Annexes.
5. On December 21, 2016, the Respondent filed a Rejoinder to the Complaint and 4 Annexes.
6. On February 7, 2017, pursuant to Article 20 of the Rules of Procedure of the Tribunal, the President of the Tribunal presented with a controversy regarding the facts, ordered the opening of the probative phase of the proceedings for the parties to offer evidence.
7. On February 22, 2017, the Respondent filed a Petition for Admission of Evidence, together with 2 Annexes. On the same day, the Complainant filed an *Offer of Evidence of Complainant Jean-Marc D. Aboussouan*.
8. At the invitation of the Tribunal, each Party filed comments on the other Party's offer of evidence on March 17, 2017. Additionally, the Respondent filed a *Response in Opposition to motion to Proceed Under Article 20, Section 1* and a *Notice of Withdrawal of Brian P. Morrissey as Counsel for Respondent*.
9. On March 30, 2017, having decided that the case will be heard by the Tribunal *in plenum*, the Tribunal rejected the *Motion to Proceed Under Article 20, Section 1*. The Tribunal also admitted the evidence proposed by the Parties and notified Parties about the hearing dates. The evidence was received on May 24, 2017 in Washington D.C.

10. On June 1, 2017 the Tribunal, having distributed the transcripts of the witness testimonies, granted 15 calendar days to the parties to file comments on the probative value of the evidence. Both parties commented on the evidence.

11. On June 29, 2017, the President listed the case for decision and ordered Oral Argument. The Tribunal heard oral argument on October 10, 2017.

PARTIES POSITION:

A. Complainant' arguments can be summarized as follows:

a. The Bank is bound by the Tribunal's judgement in Case 80, *Agusti et al. v. IDB (2015)*, through the principles of *res judicata* and collateral estoppel.

12. According to the Complainant, during the consultancy period he performed the same work as a staff member and he continued to perform the same work when he was hired as an employee in January 2002. The Complainant argues that like the Complainants in Case No. 80, he should have been considered staff and treated as staff by the IDB, including receiving all benefits available to staff.

13. The Complainant asserts that like the Complainants in Case No. 80, his consultancy contracts were continuously renewed and that he was converted to staff without interruption in 2002.

14. The Complainant claims that he should therefore be permitted to purchase past years of service in the SRP and to adopt those past years of service for purposes of calculating pension and retirement benefits. He claims that he should also receive credit for his three years of service as a consultant in the calculation of the severance payment as a consequence of the Bank's termination of his employment through a collective dismissal.

15. Citing *ILOAT Judgment No. 3450 (November 2, 2015)*, the Complainant submits that the Tribunal should follow its own precedents and that the latter have authority even as against persons and organizations who are not party thereto unless it is persuaded such precedents were wrong in law or in fact or that for any other compelling reason they should not be applied. Since the Bank has not identified any material factual difference between Mr. Aboussouan and the Complainants in Case No. 80, the Complainant argues that the Tribunal's decision in Case No. 80 controls this case.

16. In rebutting the statute of limitations argument made by the Bank, which was rejected by the Tribunal in Case No. 80, the Complainant states that the dispute over pension credits could not be resolved by either Mr. Aboussouan's supervisor, the Human Resources Manager, or the Staff Retirement Plan.

17. Further, after Mr. Aboussouan learned that the Bank would not follow Case No. 80 in his claim, Mr. Aboussouan promptly brought the matter before the Administration Subcommittee of the SRP within 180 days of the time Mr. Aboussouan learned that the Bank would not include his consultant service in calculating his pension benefit. The Administration Subcommittee denied

Mr. Aboussouan his requested relief on May 18, 2016. Mr. Aboussouan then filed his Complaint on June 10, 2016, well within the 120 days period required by this Tribunal's rules.

b. The Bank's decisions are contrary to its Staff Rules and principles of Human Resources management because they do not treat Mr. Aboussouan equally as other IDB Staff who commenced their service, performing the same staff-like activities as Mr. Aboussouan in 1998.

18. According to the Complainant, the Bank recognized that the long-term consultants were performing staff-like work on a regular basis and, should have been recognized as employees and treated as such.

19. In failing to allow Mr. Aboussouan to purchase past years of service in the SRP and in not accurately calculating Mr. Aboussouan severance payment, the Complainant claims that the Bank has disregarded the principles of equity, reasonableness, transparency, impartiality and rationality.

c. The Bank's refusal to include Mr. Aboussouan's service as long-term consultant is contrary to the language of Staff Rule PE-325.

20. According to the Complainant, the language in Staff Rule PE-325 does not distinguish between service as consultant and service as staff; since Mr. Aboussouan's service has been uninterrupted and full-time since December 1998, he should have been credited with seventeen years of service not fourteen for both his pension rights and his severance payment.

21. Under Section 3.3.3.2 of Staff Rule PE-325, only staff members who are terminated in a collective dismissal are entitled to a severance payment in any amount. In the Complaint's view that at no point prior to his termination in 2015 was Mr. Aboussouan a part of any collective dismissal, therefore no right to a severance payment had been accrued in any amount as of that time. The Complainant argues that the waiver refers only to compensation or benefits that Mr. Aboussouan had been paid or had previously received. Clearly the parties by the January 2, 2002 agreement were intending to refer to payments that could have been paid or received as of that date. The severance payment was not such a payment.

22. The Complainant requests that the Tribunal declare and order that:

- I. Mr. Aboussouan was entitled to the benefits, rights and interests of a staff member during the period of his long-term consultancy from 1998-2001;
- II. Mr. Aboussouan has the right to purchase past years of service in the SRP for the period 1998-2001;
- III. The Bank shall permit Mr. Aboussouan to purchase past years of service in the SRP;
- IV. That if Mr. Aboussouan purchases past years of services in the SRP, the Bank shall contribute to Mr. Aboussouan's retirement account all matching contributions that it would have been required to make had Mr. Aboussouan been previously participating in the SRP;

- V. The Bank shall adjust Mr. Aboussouan's official staff date of each Complaint to December 1, 1998;
- VI. Mr. Aboussouan is entitled to mandatory severance pay in the amount of seventeen (17), not fourteen (14) months of salary, with interest from December 31, 2015;
- VII. In alternative, that Mr. Aboussouan is entitled to monetary damages in an amount equal to the lost SRP benefit, including interest accrued thereon;
- VIII. That Mr. Aboussouan is entitled to damages for all the benefits have received as a Bank member during the period of their classification as a FLTC';
- IX. The IDB shall pay all attorney fees and costs incurred by Mr. Aboussouan in bringing this Complaint; and
- X. Any further relief that it deems appropriate.

B. Respondent's arguments can be summarized as follows:

a. The Complaint is inadmissible because is filed late.

23. In the Respondent's view, Mr. Aboussouan was on notice that he was an "individual consultant," and therefore ineligible for SRP benefits or severance credits, immediately upon executing his first consulting contract in November 1998. There is overwhelming evidence, according to the Respondent, that Mr. Aboussouan repeatedly was notified and affirmatively understood that he was not receiving credit for staff service during the period of his consulting tenure from 1998 to 2002.

24. Citing Case of *Burey*, IDB Administrative Tribunal, Judgment No. 11, 10 (1985), the Respondent claims that Complainant inaction for over 17 years should constitute a waiver of any right. Notwithstanding the above, according to the Respondent, Mr. Aboussouan waited more than 17 years before raising any objections to his classification as a consultant for the first time in 2016. In fact, he remained on the sidelines throughout the entire five-year duration of Case No. 80.

25. In the Respondent's view, it would be exceptionally unreasonable, for the Tribunal to grant Mr. Aboussouan a waiver of the 180-day limitations period when he waited over 17 years to bring his claim, and slept on his rights for more than five years while Case No. 80 was adjudicated. Mr. Aboussouan's severe delay renders his Complaint inadmissible.

26. Furthermore, statutory limitations on time periods for challenging Bank actions assure that the implementation and administration of Bank's policy may be carried out with the expectation that, after a prescribed period of time has passed, Bank actions shall be deemed final and may not be challenged. The Bank has a right to having certainty in its policies and enforceability of its contracts, in order to be able to administer and fund its activities.

b. Mr. Aboussouan's Complaint is unfounded because it asks the Tribunal to overrule longstanding decisions on personnel management adopted by the Board of Executive Directors in the exercise of its plenary legislative authority.

27. According to the Respondent, the SRP's governing documents and Staff Rule PE-325 expressly exclude consultants, respectively, from participating in the SRP or from obtaining severance credits for consulting work. The Tribunal can hold the Bank accountable to the existing policies these documents codify, but it cannot create new policies these documents do not support. Mr. Aboussouan cites no Bank rule, regulation, or policy decision that would entitle him to the benefits he now demands.

c. Mr. Aboussouan's Complaint is unfounded because his contracts with the Bank expressly foreclose such relief.

28. In the Respondent's view, Mr. Aboussouan's consulting contracts unambiguously designated him as an "individual consultant" entitled to a bi-monthly "professional fee," but not staff benefits such as SRP participation or severance credits. In addition, when Mr. Aboussouan accepted a fixed term staff position in 2002, he specifically agreed that he had received all compensation he was owed as a consultant, and he expressly waived all claims to further compensation or benefits arising from his consulting tenure.

29. Additionally, Mr. Aboussouan's 2002 staff contract contains an enforceable waiver of the claims he belatedly seeks to pursue in this action. The Respondent states that it is a fundamental principle of contract law that waivers are enforceable so long as they are knowing and voluntary.

d. Mr. Aboussouan's arguments, the Judgment in Case No. 80 does not have *res judicata* effect, and does not compel an award in his favor.

30. The Judgment in Case No. 80, claims the Respondent, is not *res judicata* because Mr. Aboussouan was not a party to that action, and because he raises a new claim for severance credits that was never considered by the Tribunal in that proceeding. In addition, there is no reason to extend Case No. 80's holding to Mr. Aboussouan under *stare decisis* principles. Mr. Aboussouan had notice that he was ineligible for staff benefits from the moment he signed his first consulting contract in 1998.

31. The Respondent claims that Mr. Aboussouan received all staff compensation and benefits to which he is entitled under the plain terms of the SRP Document, Staff Rule PE-325. No Bank rule, regulation, or policy grants him any additional benefit, and he has provided the Tribunal no equitable reason to ignore these documents and the statute of limitations, as would be necessary to provide him the extraordinary relief he demands.

WHEREAS:

32. The Tribunal has jurisdiction to "hear and pass judgment upon any application by which an Employee of the Bank or of the Corporation alleges non-observance of his or her contract of employment or terms and conditions of appointment." (IADB Administrative Tribunal, Statute, Article II.1).

33. According to the Statute, “When the application concerns policies interpreted by a Plan Administration Committee, such application shall be admissible only from a final decision of the Plan Administration Committee, and such application is presented to the Tribunal within 120 calendar days from notice of such decision to the Applicant. The final decision of the respective Administration Committee shall be filed with the application.” (Article II.2.b).

34. On May 18, 2016, the Administration Subcommittee of the Staff Retirement Plan rejected his request to consider that his years of service as a long-term consultant be considered as years of service as a staff member.

35. Mr. Aboussouan lodged his Complaint with this Tribunal on June 13, 2016 to determine his entitlement to purchase three additional years in his Retirement Plan for the three years he served as a long-term consultant. The Tribunal finds that the Complainant brought his claim to the Tribunal within the time limits provided for in the Statute.

36. One of the grounds on which Mr. Aboussouan based his claim was that the principle of *res judicata* required the application of this Tribunal’s decision in Case 80 to his particular claim. This Tribunal considers that for the principle of *res judicata* to apply, there must be identity of parties, identity of grounds, and identity of relief. Without any one of these elements, this principle cannot be applied. The Tribunal finds in the current case that there is neither identity of parties nor identity of relief.

37. Furthermore, the Statute that governs the Tribunal does not provide for class action claims. Case 80 binds only the parties named therein. The decision in that case cannot, therefore, be extended to any other complainant. This Tribunal, therefore, declines to apply to Mr. Aboussouan’s claim the judgement rendered in Case 80.

38. The claim of Mr. Aboussouan therefore must be determined and decided on its own particular merits.

39. Mr. Aboussouan became a consultant on December 1, 1998 and his one-year contract was extended three times until December 31, 2001. As a consultant, he could not participate in the Staff Retirement Plan. When he became a staff member, by a contract dated January 2, 2002, Mr. Aboussouan was entitled to participate in the Staff Retirement Plan, pursuant to this contract.

40. When Mr. Aboussouan became a staff member in 2002, his contract stated that “you further acknowledge and agree that you have been paid any and all compensation you have earned or accrued, and have previously received any and all benefits which you may have earned or accrued, as a result of the services you provided to the IDB prior to the effective date of this Agreement.” (Vol. I, p. 126).

41. Starting in 2003, Mr. Aboussouan received an annual Statement of Benefits which included the starting date of 2002 for his participation in the Plan. Each such Statement contained a paragraph stating: “Please contact us should you have any questions or find any discrepancies regarding your data.” (Vol. II, p. 399). He did not avail himself of the opportunity to do so.

42. During the entire period of the Complainant’s employment that followed, he did not raise any claim regarding his inability to purchase benefits in his retirement plan corresponding to the years in which he was a long-term consultant, until he was dismissed.

43. In 2002, after the former long-term consultants had become staff members, the Staff Association initiated a dialogue regarding the issue of those former long-term consultants’ pension

benefits and their ability to purchase such benefits corresponding to their past years of service. On May 21, 2010, once the dialogue failed, a group of 123 former long-term consultants filed a grievance with the Bank's Conciliation Committee. Mr. Aboussouan did not join this group, nor did he initiate any claim during this period. The Conciliation Committee's effort failed.

44. On January 17, 2012, most of those in that group of 123 former long-term consultants filed a complaint with this Tribunal. This became Case 80. Mr. Aboussouan was not a party to this claim, nor did he initiate any other claim at that time.

45. On October 23, 2015, Mr. Aboussouan received the notice of termination for collective dismissal. (Vol. I, p. 135). Mr. Aboussouan then first raised his claim to a right to purchase pension benefits in the Staff Retirement Plan corresponding to the years in which he was a long-term consultant.

46. The Complainant did not therefore make any effort prior to October 23, 2015, to raise any claim to the Administration Subcommittee of SRP which he now seeks, even though he was admittedly well aware that those benefits were being denied to him.

47. Furthermore, the Tribunal finds that the Complainant did not provide evidence that he made any effort prior to October 23, 2015 to assert, pursue or present his claim, although other former long-term consultants did.

NOW THEREFORE

48. Mr. Aboussouan urged this Tribunal to apply the principles of equity, transparency, fairness, and reasonableness, as in the judgement of Case 80. The Tribunal reaffirms the importance of these principles but considers that in the instant case their application does not produce the same results because Mr. Aboussouan did not pursue or present his claim in a timely manner.

49. The Tribunal finds that Mr. Aboussouan was aware that he was not able to purchase pension benefits corresponding to his years of service as a long-term consultant and raised no claim about this matter from 2002 until late 2015. He did not, therefore, pursue his claim in a timely manner.

50. For these reasons, the complaint is dismissed.

Washington D.C, October 13, 2017.

(signature)

Alberto Wray
President

(signature)

Edith Brown Weiss
Vice-President

(signature)

Monica Pinto

(signature)

Hugo Lorenzo
Dissenting

(signature)

Shoschana Zusman

(signature)

Graciela Dixon

(signature)

Lisa Shoman

(stamp)

(signature)

Giuliana Canè
Executive Secretary

DISSENTING VOTE OF Judge Lorenzo:

In keeping with Article 26(4) of the Rules of Procedure of this Tribunal, I set out my minority vote with the following statement:

I have voted against the operative part (decision) of the final judgment that puts an end to Case 96 (hereinafter “this judgment”) for the following reasons:

1. I agree with what this judgment establishes when it indicates that the final judgment in Case 80 does not have the effect of *res judicata* in relation to the complainant in Case 96, Mr. Jean-Marc ABOUSSOUAN (hereinafter “the complainant” or “ABOUSSOUAN”), because he was not a party to the proceeding in Case 80. That judgment cannot benefit him, or prejudice him, as *res judicata*.
2. However, this Tribunal may draw on the judgment in Case 80 as case law.
3. In effect, in public international law, including international administrative law, which governs the constitution and operations of an international organization like the IDB, “judicial decisions” constitute a source of law “as subsidiary means for the determination of rules of law” (see Article 38 of the Statute of the International Court of Justice).
4. Accordingly, the grounds for the judgment in Case 80, expressed in the CONSIDERING section of that judgment, could legitimately be taken into account for preparing this judgment in Case 96, among other reasons because the factual situation of the functional relationship (particular to international civil service) between the IDB and Mr. ABOUSSOUAN, from 1998 to 2015, were entirely similar to those between the Bank and the complainants in Case 80.
5. The judgment in the instant case distinguishes those factual situations (those of Case 80 and those of this Case 96) based on the consideration by the clear majority of members of this Tribunal that Mr. ABOUSSOUAN was late in bringing his claim.
6. On this last point – with great respect and in my modest opinion – I do not agree with the majority, for the following reasons.
7. One who considers that his or her right has been violated, breached, or impaired may bring a claim before the courts of justice so long as his or her right to bring an action has not lapsed or prescribed.
8. The legal rules of lapsing or prescription of actions, universally recognized, are based on the passage of time, because they seek to strike a balance between two central values of the law,

justice and security, such that however just a claim may be, it is not allowed to remain pending indefinitely. For this reason, legal provisions establish terms which, like any term, have a beginning, a period during which they transpire, and an end. The limitations period of a right to be claimed, whether sums of money or other interests, begins when the respective right becomes enforceable.

9. The rights that Mr. ABOUSSOUAN invoked, referring to his retirement benefits and his severance pay, both became enforceable when the employment relationship between the IDB and the complainant ended (December 31, 2015). Acting in a timely manner, as per legal requirements, ABOUSSOUAN began to pursue the administrative remedies provided for in the IDB; and once those remedies were exhausted, he filed his judicial complaint with this Administrative Tribunal of the Inter-American Development Bank Group in the time frames provided for by Article II(2) of its Statute.

10. Accordingly, I find that the complainant brought his claims in a timely fashion, and that his complaint could have been ruled upon favorably by this Tribunal.

(signature)

Hugo Lorenzo, Judge

(stamp)

(signature)

Giuliana Canè

Executive Secretary