

Judgment No. 1994-1

Mr. "X", Applicant v. International Monetary Fund, Respondent

(August 31, 1994)

1. The Administrative Tribunal of the International Monetary Fund held its first judicial session in Washington, D.C., August 29-31, 1994.¹ The full membership of the Tribunal, and the Registrar, were in attendance. On August 30-31, 1994, the Tribunal, composed of Judge Stephen M. Schwebel, President, and Judge Michel Gentot and Judge Agustín Gordillo, Associate Judges, met to consider its first case, brought against the Fund by Mr. "X", a former official of the Fund.

The Procedure

2. On March 14, 1994, Mr. "X" filed an Application, elements of which did not meet the requirements set forth in provisions of the Rules of Procedure.² On April 13, 1994, Mr. "X" was so informed, and was advised that a corrected and amplified Application could be filed not later than May 3, 1994. A corrected and amplified Application was filed on that date. Pursuant to Rule VII, paragraph 6,³ the Application was considered filed on March 14, 1994.

¹ The Statute of the Administrative Tribunal of the International Monetary Fund entered into force on October 15, 1992. The members of the Tribunal were appointed on January 1, 1994:

Stephen M. Schwebel, President
Michel Gentot, Associate Judge
Agustín Gordillo, Associate Judge
Georges Abi-Saab, Alternate Judge
Nisuke Ando, Alternate Judge.

On January 13, 1994, the staff of the International Monetary Fund was notified by the Managing Director of the Fund of the appointment of the members of the Tribunal. Pursuant to Article XX of the Statute, the Tribunal was deemed to be established as of the date of this notification, with the effect on its jurisdiction prescribed by Article XX. The members of the Tribunal adopted Rules of Procedure of the Tribunal on February 18, 1994 at an organizational meeting in Paris, and appointed Mrs. Philine R. Lachman as Acting Registrar. Mrs. Lachman was appointed Registrar on August 29, 1994, for a term running until December 31, 1995, coinciding with the date of expiration of the terms of office of the members of the Tribunal.

² Specifically, Rule VII, paragraphs 2(d) and 3, which require applications to state "the channels of administrative review, as applicable, that the applicant has pursued and the results thereof", and to contain as annexes all documents cited in the application.

³ That paragraph provides in part, "If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date."

3. In accordance with the Rules of Procedure, the Application was notified to the Fund and transmitted to the Fund's General Counsel. The Fund, on May 27, 1994, filed a Motion to Dismiss the Application, arguing lack of jurisdiction of the Tribunal.

4. The Motion was transmitted to the Applicant, who was given thirty days to file an Objection to the Motion. The Objection was received on July 5, 1994. The Objection, in turn, was transmitted to the Fund, which filed a Response on July 25, 1994. By virtue of the authority conferred on him by Rule XXI of the Rules of Procedure,⁴ the President ordered that, as both parties had made, in all, an equal number of submissions--having regard to the Application (which contained a jurisdictional plea), the Motion to Dismiss, the Objection and the Response--further pleadings would not be in order.

5. On June 6, 1994, the case was placed on the agenda for the first judicial session of the Tribunal. The Tribunal decided that oral proceedings, which neither party had requested, would not be held.

6. Pursuant to the Rules of Procedure, a Motion to Dismiss suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. In view of the Fund's filing of a Motion to Dismiss, the present consideration of the claim is confined to the jurisdictional issues of the case. Its substantive aspects are referred to only to the extent necessary for disposition of the jurisdictional issues.

The Facts

7. The facts on which the claim is based, which are not in dispute between the parties, may be summarized as follows. In April 1985, the Applicant was advised, for reasons not relevant to these proceedings, that his termination as a member of the staff was justified but that the Fund would be prepared to accept his resignation in lieu of termination. The Applicant agreed to resign and submitted his resignation on June 5, 1985. Subsequently, the Applicant was allowed to withdraw his resignation in order to be able to file a grievance with the Grievance Committee of the Fund, but he was advised that, on the basis of the record, he was in the view of the Fund's Director of Administration culpable of serious misconduct and that he would consequently be terminated, effective September 30, 1985.

8. The Applicant appealed his termination to the Grievance Committee on September 16, 1985. In accordance with the applicable General Administrative Order, he was placed on annual leave beginning October 1, 1985, pending the Committee's recommendations and final decision by the Managing Director of the Fund. It was further agreed that when his annual leave balance expired, he would be allowed to continue on leave without pay.

⁴ "The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules."

9. On February 14, 1986, the Grievance Committee issued a Report and Recommendation to the Managing Director, in which it found that the Applicant's termination was for just cause. It recommended that the Applicant be given another, and final, opportunity to resubmit his earlier resignation, effective September 30, 1985, in lieu of termination. The Managing Director accepted the recommendation of the Committee, and the Applicant was so informed in writing on March 3, 1986. Mr. "X" resigned from the Fund as of September 30, 1985.

10. In response to representations by Mr. "X" about his resultant financial situation, made in a letter to the Managing Director of March 3, 1986, the Director of Administration wrote to Mr. "X" on March 20, 1986, stating that "your earlier resignation has been re-instated, and became effective on September 30, 1985", and offering him an ex gratia payment of \$10,000 under the Fund's Termination Benefits Fund. An attachment to that letter, "To inform you about the amounts payable by you to the Fund, and by the Fund to you, in connection with your resignation, effective September 30, 1985," set forth the final financial settlement between Mr. "X" and the Fund as of the date of his resignation. It included a credit to Mr. "X" for contributions to the Staff Retirement Plan after the effective date of his resignation. On March 31, 1986, Mr. "X", referring particularly to the grant from the Termination Benefits Fund, wrote to the Managing Director expressing his appreciation of the Fund's terms.

11. On April 21, 1986 the Fund's Senior Pensions Officer wrote to the Applicant "Since you terminated your service with the Fund on September 30, 1985, you are credited with 15 years and 3 months of eligible service under the Staff Retirement Plan." Fifteen years and 3 months of eligible service treated that service as terminated as of September 30, 1985. The letter listed the amount of Mr. "X"'s contributions to the Plan, and set forth the options available to him in regard to his pension under the provisions of the Plan.

12. In a letter of May 8, 1986 addressed to the Managing Director of the Fund, the Applicant requested that his resignation take effect on January 8, 1986 to coincide with the expiration of his accrued leave, rather than September 30, 1985. He stated that one of the reasons for this request was that his "position in the pension plan was adversely affected" by treating September 30, 1985 as the date of his resignation, adding, "(and I contend that it is illegal for the Fund to withdraw contributions)."

13. In response, the Director of Administration on June 12, 1986 wrote:

"As to the timing of your resignation, you initially resigned effective September 30, 1985, and when you withdrew your resignation you were terminated with effect on that date. It was necessary to suspend implementation of this termination pending a resolution of your grievance, but the grievance process resulted in a recommendation that you be given a choice between resigning as of September 30, 1985 or being terminated as of that date. You chose to resign as of September 30, 1985. This was a final disposition of the matter, and it will not be reopened."

14. In each of the years 1 88, 1 89, 1 90, 1991 and 1992, the Applicant wrote to the Fund regarding the amount of the pension to which he would in due course become entitled. On each of those occasions, the Senior Pensions Officer gave him the information he requested with respect to amounts of the pension to which he would be entitled under various options from which he could choose under the Staff Retirement Plan ("SRP"). All of the Fund's replies to Mr. "X" treated his pensionable period of service as terminating on September 30, 1985.

15. In anticipation of his 55th birthday on November 19, 1993, the Applicant requested, and the Senior Personnel Assistant on April 26, 1993 supplied, information on the amounts of the pension under the options set forth in the Plan. On April 29, 1993, the Applicant requested the Director of Administration to review the pension calculation set forth in the Fund's letter of April 26, 1993, on the ground that his entitlements were there computed on the basis of his Fund service ending on September 30, 1985, despite contributions to the Staff Retirement Plan having been made in the subsequent period of his accrued leave. On May 12, 1993 the Senior Personnel Assistant replied:

"An examination of our records shows clearly that everything related to your service after September 30, 1985 was reversed, and that your service terminated for all purposes with effect from that date. You were, you will recall, required to repay the Fund your salary from that date and the pension contributions you had made were effectively reversed by crediting them in the calculation of what you owed the Fund. I am enclosing a copy of the attachment to Mr. Rea's letter of March 20, 1986, and you will note the credit item for the reversal of the pension contributions."

The Respondent's contentions in support of the Motion to Dismiss

16. The Respondent maintains that the act complained of--in its view, the reversal in 1986 of certain pension contributions--pre-dates the commencement of the Tribunal's jurisdiction⁵ and, under generally accepted principles of international administrative law, that the Application should be dismissed as untimely. The fact that the act decided upon and taken

⁵ Article XX of the Statute of the Tribunal provides:

"1. The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date.

2. In the case of decisions taken between October 15, 1992 and the establishment of the Tribunal, the application shall be admissible only if it is filed within three months after the establishment of the Tribunal. For purposes of this provision, the Tribunal shall be deemed to be established when the staff has been notified by the Managing Director that all the members of the Tribunal have been appointed."

in 1986 has financial effects within the period of the Tribunal's competence does not confer jurisdiction on the Tribunal. To hold otherwise would allow a claim regarding an administrative act decided upon and implemented long in the past, e.g., a downgrading, to circumvent the time bar, because the effects of the act are continuing. The bases of calculation of the Applicant's pension were determined by the 1986 decision and are not the result of an administrative act taken in 1993. In 1988, 1989, 1990, 1991 and 1992, the Applicant made inquiries of the Fund Pensions Officer regarding the amounts of his pension that would result from the exercise of certain options available to him under the Staff Retirement Plan when he became eligible to receive pension payments, and that information was provided to him. The amounts were always based on a period of service ending September 30, 1985.

17. A distinction must be made between an administrative decision applying the Fund's rules and a payment, the calculation of which flows from that decision. The issuance of the Applicant's pension payments simply reflects the earlier decision to treat Mr. "X"'s pensionable period of service as terminating as of the date of his resignation. Correspondence in 1993 pertaining to the 1986 disposition was merely confirmatory; it does not constitute a new administrative act and does not recommence the running of time for the purposes of a statute of limitation.

18. An individual decision is an administrative act.⁶ Such a decision was made in 1986 and clearly communicated to the Applicant, who understood its effects, as his letter protesting that decision of May 8, 1986 demonstrates. The decision was communicated to him in 1986 as "a final disposition of the matter and it will not be reopened." The amount of the pension was fixed (except for cost-of-living adjustments) at the time of his separation; pension payments beginning at the end of 1993 are ministerial acts, involving no "decision."

19. The Applicant cannot reasonably have believed that the 1986 letters from the Managing Director and Director of Administration contained statements of intention subject to reconsideration rather than a final decision; this is demonstrated by the fact that on May 8, 1986 he requested a review of "this decision," stating among his reasons its effects on his prospective pension. On June 12, 1986, the Fund's Director of Administration described the arrangement as "a final disposition of the matter" and stated that "it will not be reopened".

The Applicant's contentions in opposition to the Motion to Dismiss

20. The gravamen of the Applicant's claim is the contention that the amount of his pension is less than it should be because the pension is calculated on a length of service ending September 30, 1985 instead of January 1986, when his accrued leave expired. The contributions to the pension fund made by him between these two dates were in effect

⁶ Article II(2) of the Statute provides: "For purposes of this Statute:

a. the expression "administrative act" shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;..."

reimbursed to him in the context of a financial settlement with the Fund in March 1986. The Applicant maintains that that treatment of his contributions was unlawful pursuant to a provision in the Staff Retirement Plan which, he asserts, provides that contributions are irrevocable.⁷ The Applicant maintains:

"While the events described... took place sometime ago, the issue is a current one since it affects me now.⁸ Indeed, it was in anticipation of my 55th birthday that I initiated correspondence with the Fund some months ago to determine my status in the SRP...."

21. The Applicant characterizes the Fund's treatment in 1986 of pension contributions from September 25, 1985 until January 1986 as a "threat" rather than a decision. He asserts that he was not on notice of what he views as unlawful treatment of his pension contributions until December 1993, when the first pension payment was made. That was also the date on which the Fund committed its unlawful act. The Applicant maintains:

"Had the Tribunal existed in 1986, it is clear that an application to it then, complaining of the threat, i.e., the apparent intention to withdraw amounts from Applicant's pension account and credit Applicant with an amount less than his legal entitlement, would have been dismissed as premature. The Administration Department of the Fund had several years in which to rectify what could have been regarded as a bookkeeping or clerical error. During none of that time did a "cause of action" arise. It was only when the pension payment was made, at an illegally reduced amount that the misconduct could be discovered. Applicant cannot be held to knowledge of any improper act until the reduced payment check was actually received. Up until that time, no wrongdoing can be said to have occurred. Any bookkeeping error or mistake or incorrect or improper calculation could have been cured before that event.

"The unlawful plan complained of here could only have become known in December 1993 when the first pension check was received and the unlawful act committed. The unlawful act was the payment to Applicant of an amount which did not reflect the contributions made to his Retirement Account."

⁷ The Applicant refers to Article 6, Section 2(c) of the Plan. That provision deals with "Contributions by the Employer" and provides:

"(c) Any and all contributions made to the Plan by the Employer shall be irrevocable and shall be held by the Employer in the Retirement Fund, to be used in accordance with the provisions of the Plan in providing the benefits and paying the expenses of the Plan, and neither such contributions nor any income therefrom shall be used for, or diverted to, purposes other than for the exclusive benefit of participants and retired participants or their beneficiaries or estates under the Plan, prior to the satisfaction of all liabilities with respect thereto."

⁸ Underlining in the original.

Grounds of the Decision

22. Article XX of the Statute of the Tribunal provides that "The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992...." In order to decide upon the Motion to Dismiss, the Tribunal thus must resolve the question of what in this case is the administrative act whose legality is challenged or whose illegality is asserted, and when that administrative act was taken.

23. Despite the Applicant's contention that the challenged administrative act is the 1993 computation of his pension and payment in pursuance of it, in the view of the Tribunal the administrative act whose legality is challenged by Mr. "X", the administrative act which Mr. "X" asserts to be illegal, actually is the decision taken and confirmed by the Fund in 1986 to reverse contributions made for his benefit to the Staff Retirement Plan between September 30, 1985 and the point in January 1986 when Mr. "X"'s accrued leave expired. It is not for the Tribunal at this stage of the proceedings to express itself on that decision. The question is rather, was the dispositive act determinative of the period of the pensionable service of Mr. "X" taken in 1986, or was it taken in 1993?

24. It is clear to the Tribunal that the administrative act at issue was the decision of the Fund to treat Mr. "X"'s period of pensionable service as terminating as of the effective date of his resignation, namely, September 30, 1985, and, consequently, to reverse pension contributions made thereafter. The Fund, in settling financial accounts with Mr. "X", credited him with pension contributions made after September 1985 during the period of his accrued leave. It deducted this credit from the total amount which Mr. "X" owed to the Fund. Mr. "X" not only was aware of this decision to take September 30, 1985 as the date as of which the period of his pensionable service terminated. By a written communication of May 8, 1986, he contested this decision, on the ground, among others, that giving effect to his resignation as of September 30, 1985 rather than January 8, 1986 "adversely affected" his "position in the pension plan". Moreover, the Applicant then contended that this withdrawal of contributions from the Plan by the Fund was "illegal". There could hardly be a plainer assertion of the illegality of an administrative act. That assertion was voiced in 1986, more than five years before the date for the commencement of the Tribunal's jurisdiction, October 15, 1992.

25. The Applicant contends that the administrative act which he challenges is the calculation of his pension in 1993 and the issuance of pension payments beginning in December 1993 which reflect a period of pensionable service which is deemed to have ended September 30, 1985 rather than in January 1986 when his accrued leave expired. He maintains that, if a decision was taken in 1986, it affects him "now"; in the alternative, he maintains that the Fund did no more in 1986 and subsequently than to "threaten" to take a decision which it could always have reconsidered and corrected up to the time when it finally calculated the amount of his pension in 1993 and issued pension payments pursuant to that calculation.

26. The Tribunal is unable to accept these contentions. The calculation of Mr. "X"'s pension in 1993 was a purely arithmetical act governed by the decision of 1986 as to the extent of his pensionable service. As was repeatedly made clear to the Applicant in response to his inquiries about his pension options, the variable that remained to be factored in was the effect of cost-of-living increases. Otherwise his pension had been determined by the 1986 disposition. The fact that that decision of 1986 produces consequences for Mr. "X" now can have no effect upon the extent of the jurisdiction of the Tribunal; if it were otherwise, then the limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts may well be felt for years after the date when the Tribunal's Statute came into force. Equally, the Applicant's claim that the 1986 decision was open to reconsideration does not mean that it was not taken when it was taken. Nor did the Fund give the Applicant reason to believe that the decision at issue was open to reconsideration or adjustment; on the contrary, he was officially informed by the Fund that the decision was "a final disposition of the matter and it will not be reopened." Continued discontent with the results of an administrative act and eventual renewal of a challenge to its legality cannot put in question the fact that the act was taken, and taken when it was taken.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund, unanimously, decides summarily to dismiss the Application.

Stephen M. Schwebel, President

Michel Gentot, Associate Judge

Agustín Gordillo, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
August 31, 1994