

**ADMINISTRATIVE TRIBUNAL
OF THE AFRICAN DEVELOPMENT BANK**

QUORUM:	Professor Yadh BEN ACHOUR	Vice President
	Justice Salihu Modibbo Alfa BELGORE	Member
	Justice Anne L. MACTAVISH	Member
	Justice Benjamin J. ODOKI	Member

APPLICATION No. 2008/01

Mr. S. S. M. D., Applicant
African Development Bank, Respondent

Judgment No. 68 of the Tribunal rendered on 13 November, 2009

I. THE FACTS

1. The Applicant, Mr. S. S. M. D., a Guinean national, was recruited by the African Development Bank on 03 August 1993 first as a Short Term Staff, then on 03/04/2000 as a regular staff member. In this capacity, he held the position of Principal Maintenance Engineer, Section Chief, Technical Equipment and Maintenance Division (CGSP.1). At the time of his dismissal from the Bank's employ, the Applicant had been Acting Division Manager, CGSP.1, for two years.
2. This case arises from an allegation of solicitation of a commission from one of the Bank's suppliers on a contract for the supply of photocopiers. After investigation, the Respondent summarily dismissed the Applicant for serious misconduct, without notice or benefits, by letter from the President of the Bank, dated 25 March 2008.

Investigation by Bank's Security Team and Anti-corruption and Fraud Investigation Division

3. In December 2006, the Bank's Security Team was informed by a whistleblower that the Applicant was involved in possible corruption regarding the procurement of photocopiers. With this information, the Security Team informed the Bank's Office of the Auditor General, OAGL, and undertook a preliminary inquiry into the allegations. Information obtained from this preliminary inquiry was shared with the Office of the Auditor General, OAGL, which found the allegations serious enough to warrant further investigation. Additional investigation was conducted by OAGL's Anti-corruption and Fraud Investigation Division (OAGL.2). Following this investigation, OAGL produced a report in which it concluded that the Applicant had solicited a commission from a supplier in violation of the Staff Regulations, Code of Conduct and Presidential Instruction.¹ The Executive Summary of that report stated that OAGL.2 had established that the Applicant had solicited a commission from M-D in violation of Bank rules and Presidential Instruction. In support of this conclusion, the report

¹ The Executive Summary of OAGL's Report No. IR/2007/08 states that the Applicant's actions violated Staff Regulation 3.5, Chapter 6.2(d) of the Staff Code of Conduct and Presidential Instruction No. PI 005/2000.

pointed to telephone calls made by the Applicant to the managers of M-D for no objective reasons; that the Applicant met with the Sales Manager and General Manager of M-D on 7 December 2006, during which he solicited a commission on the contract; that the Applicant again met with the managers of M-D on 18 December 2006, during which he was recorded as he asked for a commission; and that the Applicant denied ever meeting with the Sales Manager and General Manager of M-D at their office, although both had executed signed statements confirming that such a meeting took place. The report further indicated that the Applicant's actions exhibited a failure in his duties and obligations to the Bank and that the evidence showed that the Applicant had solicited a commission from a supplier. The report recommended that the President render an appropriate sanction pursuant to the Staff Regulations.

4. The investigation conducted by OAGL.2 included interviews with the Applicant², testimony from M-D managers and interviews with the Applicant's Bank colleagues. Evidence collected from this investigation included signed statements from the Sales Manager and General Manager of M-D, itemized telephone statements of the Applicant's mobile telephone as well as the telephones of the Sales Manager and General Manager of M-D and an audio recording prepared in concert with the staff of M-D.

Notification of Allegation of Serious Misconduct

5. On 7 March 2008, the Bank's Human Resources Management Department, CHRM, addressed a letter to the Applicant titled: "Allegation of Serious Misconduct," informing the Applicant that the Bank's investigation had established that the Applicant solicited a commission from a supplier and that such conduct was considered "punishable serious misconduct" as defined in Staff Rule 101.00.³ The letter further informed the Applicant that failure to provide satisfactory explanation within 10 days of receipt of the letter would result in appropriate disciplinary actions.

The Applicant's Reply to the Allegations

6. On 12 March 2008, the Applicant addressed an internal memorandum to the Director, CHRM, in response to the 7 March 2008 letter. In his memorandum, the Applicant reiterated that as he told the OAGL investigators, he had never solicited a commission from M-D neither before nor after the award of the photocopier supply contract. The Applicant further stated in the memorandum that all his calls to M-D were in response to M-D's calls in his absence; that all his calls were made from his office telephone at the Bank; that the calls stopped immediately after the problems with the supply of photocopiers were resolved; that he never had any secret meeting with M-D on 7 December 2006 or any other day; and that he did not go to M-D offices on 18 December 2006, hence he could not have been recorded. The Applicant added that he had not violated any Bank rules, directives or procedures and that he had always acted in the best interests of the institution. The Applicant concluded in his memorandum that the allegations by the managers of M-D against him had been made expressly to take him out of the contract award process, particularly as a more lucrative bid by M-D was pending and M-D was afraid that the Applicant would cause them problems.

² The Applicant was interviewed by OAGL.2 on five occasions: 16/10/07; 19/10/07; 21/11/07 and 23/11/07.

³ Staff Rule 101.00 states:

"Failure by a staff member to comply with his/her obligations under the Agreement, or the Regulations and Rules of the Bank, shall constitute misconduct under these rules and may result in the imposition of disciplinary measures in accordance with Staff Regulation 10.1."

II. ARGUMENTS OF THE PARTIES

THE APPLICANT

7. The Applicant challenges the summary dismissal on grounds of lack of due process, procedural and substantive irregularities in the investigative process and abuse of discretion, which include inappropriate sanction, mischaracterization of the conduct, lack of sufficient evidence, errors of law and fact. He contends that these irregularities resulted in erroneous conclusions drawn from the circumstances surrounding the case, causing him moral injury to his professional reputation and emotional distress.

Procedural Irregularities – Denial of Due Process

8. The Applicant asserts that the Respondent denied the Applicant due process and abused its discretion because: (1) The preliminary inquiry conducted by the Bank's Security Team was improper as it was not within the authority of the Security Team to carry out such an inquiry; (2) OAGL failed to notify the Applicant in a timely manner that he was the subject of an investigation concerning the procurement of photocopiers; (3) OAGL failed to provide the Applicant a draft of its Report for review and comment before making it final; and (4) the Applicant was only given 10 days to respond, whereas the Staff Rules mandate 14 days⁴.
9. The Applicant further points to the fact that the Respondent claims that the Security Team conducted a preliminary inquiry into allegations of corruption involving the Applicant in an effort to "gather more information" and that information obtained was shared with the Bank's Anti Corruption and Fraud Investigations Division (OAGL). First, the Applicant notes that Deputy Chief of Security at the time, who was involved with the "preliminary inquiry," had a close "personal relationship" with a woman who is a relative of M-D's Sales Manager. The Applicant believes that the "tip" was given to the Deputy Chief of Security, who also arranged for the tape recording.
10. Second, the responsibilities of the Bank's Security officer do not include carrying out investigations related to misconduct, fraud or corruption.⁵ Therefore the Security Team had no authority to conduct a preliminary inquiry on the tip it received. Rather, it should have informed OAGL from the outset. Furthermore, given the nature of the relationship between the Deputy Chief of Security and the relative of M-D's Sales Manager, the Deputy Chief of Security should have recused himself from the process. The Respondent did not consider these circumstances in its investigation of the case.
11. In addition, OAGL failed to notify the Applicant in a timely manner that he was the subject of the investigation. The Applicant was interviewed by OAGL on five different occasions. In an e-mail to the Applicant, Mr. M. O. (OAGL.2) invited the Applicant to an interview with OAGL.2 about an investigation into the purchases of certain equipment for the Bank. In this letter, OAGL failed to inform the Applicant that he was the subject of the investigation. During the first interview of 16 October 2007, OAGL only informed the Applicant that the investigation concerned an acquisition made by CGSP, still not informing the Applicant that he was the subject of the

⁴ Staff Rule 101.03 (b), *Disciplinary Proceedings*, provides: "The charges shall be communicated in writing to the staff member concerned, with a request for a formal written response within fourteen (14) days of the date of the letter of notification."

⁵ See ADB Management of Security Manual ("Security Manual") (2005), Sections 1 and 4.

investigation. In his third interview on 21 November 2007, the Applicant specifically asked what the purpose of these interviews was; however, OAGL failed to inform the Applicant of the true nature of the investigation. During this interview, the Respondent informed the Applicant for the first time of statements written by the managers of M-D and read only portions to him of an e-mail by M-D's Sales Manager indicating they had never discussed the change of machines with the Applicant and of a recording purporting to be of a conversation between the Applicant and the General Manager of M-D in which the Applicant solicits a commission. In his 23 November 2007 interview, the Applicant informed OAGL that documents that had been requested of him during the previous interview had disappeared from the file, and this, in his opinion, was confirmation of a conspiracy against him. Throughout the interview process no charges were levelled against the Applicant. On 7 March 2008 CHRМ formally notified the Applicant of the charges against him. By failing to notify the Applicant in a timely manner of the charges or allegations against him, the Respondent violated the Applicant's due process. The Applicant further contends that all these procedural irregularities and the entire process violated his due process rights.

12. The Applicant posits that the Respondent's investigative process shows that the Respondent proceeded under no specific rules and operated in an ad hoc and irregular manner. The Respondent claims that the investigation was conducted under the guidelines of the Uniform Framework and that the Uniform Framework permits each organization to determine the response time to be given the subject of an investigation, based on its own internal rules and policies. However, the Respondent has provided no rules, policies or procedures in force at the time of the investigation. Under international administrative law, the timing of when a staff member is informed that he is the subject of an investigation is crucial⁶, however, in the present case, the Respondent did not notify the Applicant that he was the subject of the investigation despite having all the pieces of evidence in its possession since December 2006.
13. Following the interviews with the Applicant, OAGL prepared its Report No. IR/2007/08 in which it described its interactions with the Applicant and concluded that the Applicant had violated Staff Regulation 3.5, Chapter 6.2(d) of the Staff Code of Conduct and Presidential Instruction No. PI 005/2000. The Respondent never provided this report to the Applicant for review and comments. The applicant met with the office of the Auditor General and was informed that the report had been finalized and sent to Management for a decision. On 5 March 2008, the Applicant was given an Executive Summary of the said report, almost five months after his last interview with OAGL.2. The Applicant contends that in failing to provide him with the draft investigative report for his review and comment before finalizing it, the Respondent violated his procedural due process rights. The Applicant notes that the World Bank and the Asian American Bank, both parties to the Uniform Framework as is the Respondent, have incorporated into their internal rules the due process right of an Applicant to comment on an investigative report before it is finalized and signed by the President of the organization.⁷

⁶ In support of this argument, the Applicant cites. *Sokoloff v. Secretary General of the United Nations* , UNAT Judgment No. 1246 (2005)

⁷ See World Bank Staff Rule 8, Section 4.09, which provides in relevant part that:

At the End of the Investigation. A staff member will be provided with a copy of the investigative report at the conclusion of an investigation in order to afford the staff member an opportunity to comment on the findings...The report, along with the staff member's comments and a response from the person conducting the investigation will be submitted to the Vice President, Human Resources for the Bank for a decision.

14. The Applicant further reproaches the Respondent for failing to abide by its internal rules regarding responding to charges. Specifically, the Applicant argues that the Respondent only gave him 10 days to respond to the charges described in the Director, CHRM's 7 March 2008 letter, even though Staff Rule 101.03 (b) requires that the staff member be given 14 days to respond to charges. The Applicant argues that Staff Rule 101.02 and 101.03 must be read in conjunction with each other and as such are applicable in the present case. The Applicant contends that as long as the charge against a staff member is deemed to be serious misconduct warranting dismissal, Rule 101.02 applies and requires that the staff member be given a 14 day period to respond to the charges.
15. The Applicant finds that the Respondent's argument that the amount of time afforded to a staff member to respond in cases of summary dismissal is at the discretion of the President is dangerous and discriminatory. First because it means that the Respondent could decide to give staff members facing summary dismissal a very short period for response; and second, staff members who are referred to a Disciplinary Panel will have more time to respond. If such an exercise of discretion by the President results in discrimination, then the action is arbitrary under international administrative law.

Substantive Irregularities

16. The Applicant argues that: (1) the Respondent violated its internal law regarding processing complaints by whistleblowers and the standard of proof required; (2) the charges against the Applicant were not sufficiently corroborated or supported by the evidence to warrant a summary dismissal; (3) the decision was arbitrary because it was based on errors of fact and law and erroneous conclusions were drawn from these facts; and (4) the sanction imposed was inappropriate to the claimed misconduct.
17. The Applicant posits that under the general principles of international administrative law, this Tribunal is required to apply both international administrative law and jurisprudence of other international administrative tribunals as well as the Bank's own internal laws, when reviewing an application. In some instances, even national law can be applied.⁸
18. The Applicant notes that in this case, the Respondent failed to comply with its Whistle Blowing and Complaints Handling Policy, which requires that before an investigation is commenced, the Respondent must determine the "credibility, materiality and verifiability" of the information received.⁹ The Respondent did not take adequate steps to investigate the case and ensure that the requirements of its Whistle blowing policy were followed. The statements made by the M-D officers, the Applicant's colleagues and the unauthenticated tape recording were the only information that the Respondent had. This did not constitute sufficient evidence on which to base a charge of serious misconduct. The Applicant further contends that the tape recording was not authenticated; the Respondent did not establish that the voice on the recording was the Applicant's voice; other than the written statements by M-D officers, there was no other evidence proving that the Applicant had initiated contact with M-D or visited its premises to solicit a commission; and the testimony of the Applicant's colleagues were

⁸ The Applicant cites *Cisse v. IBRD*, WBAT Decision No. 242 (2001) as reference for the position that under certain circumstances, national legislation can be referred to "shed light" on a question of fact.

⁹ Section 9.4 of the Whistle Blowing and Complaints Handling Policy states in relevant part:

Once registered, the allegation will be evaluated by the Division to determine its credibility, materiality and verifiability. To this end, the compliant will be evaluated to determine whether there is a legitimate basis to warrant an investigation.

uncorroborated hearsay and not credible. By relying on this uncorroborated and insufficient evidence, the Respondent therefore committed an error of law and fact by drawing erroneous conclusions from the facts.

Abuse of Discretion

19. The Applicant maintains that the decision to summarily dismiss him was arbitrary and an abuse of discretion because it was not in accordance with the Bank's laws. This Tribunal and the World Bank Administrative Tribunal (WBAT) have similar criteria in determining if there has been an abuse of discretion in the Respondent's exercise of its power. These criteria are spelled out in sections 101.04 (a) and (b) of the Staff Rules, which mirror the requirements on international administrative law and jurisprudence from the WBAT and the International Labour Organization Administrative Tribunal (ILOAT). Staff Rules 101.04 (a) and (b) provide:

(a) Where misconduct is established, the severity of disciplinary measures imposed shall reflect the gravity of the misconduct. In determining the seriousness of the misconduct and in deciding upon the disciplinary measure to be imposed, the following may be taken into account:

- (i) the nature of the misconduct and the circumstances in which it occurred;*
- (ii) the extent to which the misconduct adversely reflects on upon the integrity, reputation or interests of the Bank;*
- (iii) the extent to which the misconduct involves intentional actions or negligence;*
- (iv) whether the misconduct involves repeated actions or behaviour;*
- (v) the prior conduct of the staff member; and*
- (vi) any extenuating circumstances.*

(b) Disciplinary measures resulting from disciplinary proceedings for misconduct may, depending on the gravity of the misconduct, take one or more of the following forms:

- (i) written warning;*
- (ii) removal of benefits and allowances, whether permanently; or for a specified period of time;*
- (iii) reduction in pay, including withholding pay increases;*
- (iv) reassignment from one department to another, and/or demotion; and*
- (v) dismissal.*

20. The requirements mandated in these sections of the Staff Rules confirm that the Institution is required to exercise discretion in imposing sanctions for misconduct, particularly where, as in this case, the institution's own internal laws provide guidance on the issue. To support this argument, the Applicant cites *In re Sharma*¹⁰, *In re Couton*¹¹, *In re Kalla*¹², *D. v. IFC*¹³ and *Carew v. IBRD*¹⁴. The Applicant notes that these cases stand for the proposition that in reviewing a disciplinary decision by the

¹⁰ ILOAT Judgment No. 999 (1990).

¹¹ ILOAT Judgment No. 1070 (1991).

¹² ILOAT Judgment No. 1828 (1999).

¹³ WBAT Decision No. 304 (2003).

¹⁴ WBAT Decision No. 142 (1995).

institution, the Tribunal examines the decision *de novo*, based on a list of criteria cited in *Ms. J. v. IMF*, IMFAT Judgment No. 2003-1¹⁵.

21. The Applicant asserts that the facts upon which his dismissal was based were not properly established and that the established facts did not amount to serious misconduct for which summary dismissal imposed. Therefore, the summary dismissal was not legal and was disproportionate to the offence, if any was committed. The Applicant concludes that the decision of summary dismissal was an abuse of discretion as it was arbitrary and not taken in accordance of the Bank's laws.
22. In his Reply to the Respondent's Answer, the Applicant reiterates his arguments in his Application as stated above, emphasizing that the President of the Bank abused his discretion in summarily dismissing the Applicant without taking into consideration the issues raised by the Applicant during his interviews with OAGL and failing to conduct further investigation on the questions raised.

Lack of Proportionality in the Sanction

23. The Applicant argues that since the Respondent has not been able to prove he solicited a commission, the sanction imposed was not appropriate to the alleged misconduct and the Respondent erred in not taking the provisions of Rule 101.04 (a) and (b) of the Staff Rules into consideration. Had the Bank considered the Applicant's unblemished career during his length of excellent service to the Bank and other positive factors, the decision to summarily dismiss the Applicant would not have been taken. The Applicant therefore asserts that he did not commit any misconduct which warranted dismissal and that his termination of service constitutes an abuse of discretion.

THE RESPONDENT

24. The Respondent affirms that despite the Applicant's attempt to complicate the matter, the case is a simple matter about an Applicant who was an Acting Division Manager charged with soliciting a bribe and who, despite being presented with the evidence and given ample opportunity to respond to the charges and explain himself, was unable to refute the allegation of serious misconduct. The Respondent's decision to summarily dismiss the Applicant was therefore warranted, did not violate the Applicant's due process and was not an abuse of discretion.

On the Applicant's Claim of Violation of Due Process

25. The Respondent contends that the Applicant's claims that OAGL failed to notify him in a timely manner are false. In this regard, not only does the Applicant fail to state the rules on which he relies, but he was indeed notified of the investigation by OAGL in a timely manner and in accordance to OAGL guidelines. According to the Respondent,

¹⁵ In *Ms. J. v. IMF*, the Tribunal referred to the criteria established in *Kiwanuka v. Secretary General of the United Nations*, UNAT Judgment No. 941 (1999) which state:

(i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness.

the Uniform Framework¹⁶, which OAGL follows, provides only that the subject of the investigation be given an opportunity to explain his or her conduct, and no specific timeframe is given. The Respondent affirms that its actions were in keeping with the Uniform Framework.

26. The Respondent further deems baseless the Applicant's complaint of not being provided the draft OAGL report for his review and comment before finalization. The Respondent affirms that there is no rule or regulation within the Bank that gives the Applicant right to review the report before it is finalized and the Applicant's reliance on *Mustafa v. IBRD*¹⁷ is erroneous. According to the Respondent, *Mustafa* does not stand for the proposition, as claimed by the Applicant, that an Applicant has a right to draft and edit OAGL investigation reports. Rather, the WBAT in *Mustafa* made it clear that the nature of investigation in a disciplinary proceeding is administrative and not adjudicatory hence it is not necessary to comply with all the requisites of judicial proceedings. Nonetheless, even if the Applicant could argue that he has such a right, this irregularity would not undermine the proven fact of the Applicant's misconduct and his inability to effectively challenge the findings.
27. In response to the Applicant's claim that he was given only 10 days to respond to the notice, whereas the Bank's own rules require 14 days notice, the Respondent criticizes the Applicant for confusing the Bank's disciplinary procedures. The Respondent first points to Staff Regulation 10.2, which gives the President power to summarily dismiss a member of staff without notice for serious misconduct, as opposed to Staff Rule 101.03(b), which follows the normal disciplinary process and on which the Applicant relies. Citing *C. G. S. v. the African Development Bank*¹⁸, the Respondent then distinguishes Staff Rule 101.02 and 101.03(b), which apply in the administrative disciplinary process from Staff Regulation 10.02, which applies only to summary dismissals, underlining that in the latter case, no specific time period is prescribed by the Staff Rules and Regulations. The Respondent concludes that where the staff member is "unequivocally" put on notice of the charges against him and given "unrestricted opportunity" to exonerate himself, due process is observed.
28. With respect to the Applicant's claims that the Respondent failed to comply with its internal laws, particularly the Whistle Blowing and Complaints Handling Policy, the Respondent notes that in his submissions, the Applicant's reference is rather to the Uniform Framework and not the Whistle Blowing policy. The Respondent notes further that even if the applicant referred to the correct document, the Whistle Blowing policy is inapplicable in this case as it was not in force when the events occurred. The investigation was well under way when the policy came into force, hence the Applicant's arguments and authorities he relies upon are inapplicable. Notwithstanding, if the charges against the Applicant were subjected to the rules of the Whistle Blowing policy or the Uniform Framework, the Respondent's action would still be in compliance.
29. The Respondent concludes that the Applicant's claims of procedural irregularities are therefore unwarranted and only display a misunderstanding of the notion of due

¹⁶ To support its argument the Respondent cites the following from Paragraph 17 of the Uniform Framework:

As part of the investigative process, the subject of an investigation shall be given an opportunity to explain his or her conduct and present information on his or her behalf. The determination of when such an opportunity is provided to the subject is regulated by the rules, policies and procedures of the Organization.

¹⁷ WBAT Decision No. 207 (1999).

¹⁸ Application No. 2004/01, ADB-AT Judgment No. 37 (2005), para. 38.

process. The Applicant was fully notified of the charges against him and given ample opportunity to be heard. Due process was therefore respected.

On the Applicant's Claims of Substantive Irregularities

30. Responding to the Applicant's claim of abuse of discretion, the Respondent notes that the Applicant ignores the exceptional character of an administrative tribunal's review of administrative decisions by a responsible administrative authority. Citing *Liu v. the Secretary General*,¹⁹ *C. G. S.*, and *Jenkins-Johnston v. the African Development Bank*,²⁰ the Respondent points to the well-established principle of international administrative law that the Tribunal's role is not to substitute its judgment for that of the competent administrative authority regarding whether or not misconduct has occurred or the discipline was appropriate. The Respondent contends that the President properly exercised his authority in the present case, and that the conclusion reached by the Respondent in light of all the facts, does not constitute an abuse of discretion.
31. The Respondent further reiterates that there was no violation of due process in this case because a full investigation was conducted following the allegations against the Applicant, the Applicant was notified of all the charges against him in a timely manner, he was given 10 days to explain the alleged conduct, he was given transcripts of his interviews with OAGL and after submitting his response, his response was found to be lacking. Having determined that the Applicant had failed to provide any evidence to rebut the charges against him, the Respondent summarily dismissed the Applicant. The Respondent therefore complied with the requirements of due process in reaching its decision to summarily dismiss the Applicant. The Applicant's claims are therefore without basis.
32. Furthermore, there was no error of law or fact or erroneous conclusions drawn by the Respondent in its decision to summarily dismiss the Applicant. The decision was taken based on the totality of the evidence and the Applicant's inability to refute said evidence.
33. Concerning the Applicant's claims that the statements made by the M-D officers, the Applicant's colleagues and the unauthenticated tape recording did not constitute sufficient evidence on which to base a charge of serious misconduct, the Respondent notes that OAGL analyzed the phone records of the Applicant and M-D officers during its investigation. While the Applicant's mobile phone statement showed calls from the Applicant to the Sales and General Manager of M-D, the mobile phone statements of M-D officers did not show any calls to the Applicant's work or mobile phone numbers.
34. The Respondent further affirms that the tape recording of the Applicant's visit to M-D offices, is admissible and does not need to be subject to the technicalities of a judicial proceeding. The Applicant's reliance on articles discussing the admissibility of tape recordings in court proceedings is misleading. This Tribunal in *T. B. B. v. the African Development Bank*²¹, recognized that in international administrative law, even a secretly obtained recording can be admitted, analyzed and its contents considered by the Tribunal. The Respondent equally cites *Abdul Halim v. the Commission General*

¹⁹ UNAT Judgment No. 490 (1990).

²⁰ Application No. 2004/02, ADB-AT Judgment No. 38 (2005).

²¹ Application No. 2000/09, ADB-AT Judgment No. 24 (2002).

of the U.N. Relief and Works Agency for the Palestine Refugees in the Near East,²² in which the UN Administrative Tribunal, faced with a similar case, held that though a tape recording is subject to manipulation and interference, this fact is not a basis for invalidating such evidence, particularly where the investigators made a reasonable inference that the tape was authentic and there was other evidence that the investigators considered.

35. The Respondent contends that the Applicant failed to rebut the *prima facie* case of corruption established by the Respondent. In support of this assertion, the Respondent cites the well established principle of international administrative law that when a *prima facie* case of misconduct is established, it is up to the staff member to provide satisfactory evidence justifying the conduct. In the present case, the Applicant was unable to meet this burden in light of all the evidence and charges against him.

Proportionality of the Sanction

36. Responding to the Applicant's claim that the sanction was disproportional to the alleged misconduct, the Respondent asserts that its discretionary power under Staff Rules 101.04 (a) and (b) clearly allow the Respondent to determine the disciplinary sanction depending on the gravity of the offence. The Respondent affirms that the President considered all of the evidence in this case and took the appropriate decision. In support of this argument, the Respondent makes reference to this Tribunal's jurisprudence in *M. A. B. v. the African Development Bank*, *C. A. B. O. v. the African Development Bank* and *N. O. v. the African Development Bank*.²³ The Respondent contends that these cases support the argument that the nature of the misconduct in this case justified recourse to Staff Regulation 10.2 and the sanction was appropriate. The Applicant clearly abused his position and used his knowledge of the contract to solicit a commission from the supplier, and like the Applicants in *C. A. B. O.* and *N. O.*, betrayed the trust placed on him by the Bank and soiled the Bank's reputation. The Respondent concludes that based on the overwhelming evidence against the Applicant, the Respondent's decision to summarily dismiss the Applicant was appropriate.
37. In its Rejoinder, the Respondent reaffirms the arguments in its Answer and concludes that the Applicant's claims are without merit and should be dismissed. The Respondent asserts that based on the totality of the evidence in this case, the sanction imposed is justified and reasonable, the Applicant failed to rebut the evidence against him, he was given adequate notice of the charges and the opportunity to explain his conduct and the Respondent acted lawfully in considering the facts and imposing the sanction of summary dismissal for serious misconduct.

III. THE PROCEDURE

Investigation by the Anti-Corruption and Fraud Investigation Unit of the Office of the Auditor General (OAGL)

38. In December 2006, the Bank's Security Team received information of possible corruption involving the procurement of photocopiers for the Bank. The Security Team referred the matter to OAGL, following a preliminary inquiry. The Anti-Corruption and Fraud Investigation Unit (OAGL.2) conducted an investigation to

²² UNAT Judgment No. 927 (1999).

²³ *M. A. B.*, Application No. 2000/10, ADB-AT Judgment No. 20 (2001); *C. A. B. O.*, Application No. 2007/01, ADB-AT Judgment No. 60 (2008); *N. O.*, Application No. 2007/04, ADB-AT Judgment No. 62 (2008).

determine the veracity of the allegations. In the course of the investigation the OAGL investigators interviewed the Applicant on 16 October 2007, 17 October 2007, 19 October 2007, 21 November 2007 and 23 November 2007. The investigators also interviewed the Sales and General Managers of M-D and some of the Applicant's colleagues.

39. Following the investigation, OAGL produced a report which it forwarded to the President for a decision.
40. On 7 March 2008, CHRM notified the Applicant of charges of punishable serious misconduct against him and gave him 10 days to respond. The Applicant responded on 12 March 2008.

Notification of the Summary Dismissal

41. By letter dated 25 March 2008, recalling the conclusions of the OAGL investigation report, the Respondent summarily dismissed the Applicant for serious misconduct.

Application to the Administrative Tribunal

42. On 26 May 2008, the Applicant filed an application with the Administrative Tribunal of the Bank.

IV. REQUESTS BY THE PARTIES

The Applicant

43. The Applicant requests the Tribunal to:
 - a. Rescind the decision taken by the Bank to summarily dismiss him for serious misconduct;
 - b. Reinstate the Applicant or in lieu thereof, pay him three years of salary for compensation for wrongful dismissal;
 - c. Pay the Applicant's salary and benefits retroactively, from the date of dismissal up to the date of the Tribunal's judgment;
 - d. Pay the Applicant USD 25 000 for humiliation, emotional distress and injury to his personal and professional reputation;
 - e. Expunge from his records all references to his dismissal and issue him with an attestation to the effect that his separation from the Bank was voluntary;
 - f. Award all the legal costs, attorney's fees costs and expenses.

The Respondent

44. The Respondent affirms that the decision to summarily dismiss the Applicant was not flawed by a mistake of fact, error of law or violation of due process or vitiated by

extraneous or prejudicial fact. The Tribunal should therefore uphold the summary dismissal and dismiss the Application as lacking in merit.

V. THE LAW

45. The Applicant, Mr. S. S. M. D. was, at the time of his dismissal from the Bank, a Principal Maintenance Engineer and was acting as the Division Manager Technical Equipment and Maintenance Division.
46. The Bank's Office of the Auditor General (OAGL) was alerted by the Bank's Security Team that the Applicant might be involved in possible corruption in relation to procurement of photocopiers for the Bank from a supplier called M-D. OAGL ordered a preliminary investigation. The allegation that the applicant was soliciting a kickback from M-D was found to be serious enough to justify further investigation which was duly carried out. Following this investigation, he was dismissed summarily for serious misconduct without notice or benefits.
47. Mr. D. has raised a number of arguments in support of his contention that he was denied due process in the course of events leading up to the termination of his employment with the Bank.
48. Mr. D. first argument is that he was treated unfairly as the OAGL failed to advise him in a timely fashion that he was being investigated for serious misconduct. It is true that the Bank's investigation appears to have taken a very long time, and that Mr. D. was not informed of the allegations against him for a number of months after the events in issue. That said, the investigation was carried out in accordance with the Uniform Framework for Preventing and Combating Fraud and Corruption, which has been endorsed by a number of international financial institutions, including the African Development Bank. The Principles and Guidelines governing the conduct of investigations contained in this Framework mandate that "the subject of an investigation shall be given an opportunity to explain his or her conduct and present information on his or her behalf". When this is to occur is to be governed by the internal rules of the organization in question. The Bank evidently did not have any specific rules in place governing when the subject of an investigation had to be informed of the allegations against him or her. Nevertheless, Mr. D. was fully apprised of the allegations against him, and was afforded a full opportunity to respond to those allegations prior to a decision having been taken in relation to the termination of his employment with the Bank. In the circumstances, the Tribunal is satisfied that the requirements of due process have been met.
49. Mr. D. also says that he was denied due process as he was not provided with a draft of the OAGL's investigation report for his review and comment prior to the report being sent to the President of the Bank for a decision. In this regard, Mr. D. relies on the decision of the World Bank Administrative Tribunal in *Mustafa v. IBRD*, Decision No. 207, 1999, as authority for the proposition that he was entitled to such input. However, a review of that decision reveals that the case does not stand for the proposition for which it is cited. Moreover, the facts of the case are also readily distinguishable from those of the case at hand. In *Mustafa*, the applicant was both charged with and dismissed for having sexually harassed a co-worker without ever having been provided with the details of the allegations against him. It was in this context that the Tribunal found that "without the detailed analysis of the investigation provided in the investigator's report, the Applicant was not afforded the opportunity to

defend his rights properly, prior to a decision being taken in this case...”: at para. 34. In contrast, in this case, Mr. D. was fully apprised of the nature of the allegations against him, and of the evidence supporting those allegations. He was also afforded a full and fair opportunity to respond to those allegations. There has therefore been no denial of due process in this regard.

- 50.** Finally, Mr. D. submits that he was denied due process in this case as he was only given 10 days to respond to the charges against him, whereas Staff Rule 101.03(b) requires that a staff member be given 14 days in which to respond. However, it is clear from a review of the Staff Rules that the 14 day requirement in Rule 101.03(b) relates to proceedings before Disciplinary Committees. Summary dismissal is governed by Rule 101.02, which does not mandate that a specific amount of time be given to an employee for response. The Tribunal notes that cases of summary dismissal ordinarily involve allegations of very serious misconduct on the part of an employee. Given the gravity of the allegations and the summary nature of the proceedings, the period provided to an employee for response in cases of summary dismissal should ordinarily be at least that provided for in Disciplinary Committee proceedings, namely 14 days. That said, in the particular circumstances of this case, the Tribunal is not persuaded that the brevity of the period provided to Mr. D. to respond to the charges against him compromised the fairness of these proceedings. Not only did he not request any additional time to respond or suggest that the time provided was inadequate, his response was actually provided five days before the expiry of the time provided to him. Obviously, in this case, no additional time was necessary.
- 51.** The key element of the case against Mr. D. rests on the testimony of two officers of M-D, Ms. H. (Sales Manager) and Mr. B. (General Manager). The Applicant, in denying this testimony, asserts that there was a conspiracy against him, due primarily to a relationship between a member of the Bank’s Security Services and a member of the family of one of M-D’s officials. However, the Applicant has brought forward absolutely no evidence to support this allegation. As a consequence, in light of the totality of the evidence presented, the Tribunal finds no serious reason to reject the evidence of the two M-D witnesses.
- 52.** Moreover, the Bank produced a further element of direct evidence in form of a recording of a discussion between the General Manager of M-D and the Applicant. For the Respondent, this recording represents incontrovertible evidence against the Applicant, inasmuch as it clearly records a dialogue regarding a commission. However, having listened to the recording in a public hearing on 5 November 2009, the Tribunal is not persuaded by this element of proof. In fact, the recording is of very poor quality and was inaudible in many places. Thus, the Tribunal does not consider the recording to be reliable evidence of the Applicant’s culpability.
- 53.** In support of its allegation, the Bank also relies on the numerous telephone calls from the Applicant to representatives of M-D during December 2006. According to the Applicant, these calls related exclusively to the technical execution of the contract. The Applicant claims that these technical matters were very complex and required his frequent calls. However, the Bank points out that the longest of these calls lasted just under three minutes. As a consequence, they could not be purely technical calls, which, logically, should have required more time. Moreover, the Bank points out that Mr. K. K., the person principally responsible for the technical execution of the contract, knew nothing of these calls. This anomaly proves the falsity of the claims of the Applicant. The Tribunal accepts the Bank’s arguments. It considers that this

evidence is of a nature and extent that the Tribunal should, as a result, take into consideration.

- 54.** Mr. B. has stated that he met with Mr. D at the M-D premises on the evening of December 18, 2006. It was in the course of this meeting that Mr. D. repeated his request for a commission on the photocopier contract. Mr. D. denies attending at the offices of M-D on that date. However, members of the Bank's Security team observed Mr. D. entering and leaving the M-D offices on the evening in question. Having found there to be no evidence whatsoever before the Tribunal to support Mr. D. allegations of a conspiracy against him on the part of members of the Bank's Security service, it follows that there is no reason to reject the evidence establishing his presence at M-D's offices on the evening of December 18, 2006. Not only does Mr. D. presence there tends to corroborate the evidence of Mr. B., Mr. D. lack of candour on this point also has the effect of undermining his overall credibility.
- 55.** All the circumstances of this case lead the Tribunal to conclude that the allegations of corruption, which led the Bank to summarily terminate the Applicant's employment without notice or benefits, were justified.

VI. THE DECISION

Based on the foregoing, the Application is dismissed.

Professor Yadh BEN ACHOUR

Vice President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

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