

**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. 2008/04

S. Z. M., Applicant
African Development Bank, Respondent

Judgment No 71 of the Tribunal rendered on 13 November 2009

I. THE FACTS

1. The Applicant, Mr. S. Z. M., was recruited by the African Development Bank on 14 July 1993. At the time of the events that led to the filing and registration of this application, he served as Division Manager, Natural Resources and Environmental Management (OSAN.3), grade PL2, in the Agriculture and Agro-industry Department (OSAN).
2. As a result of health problems, the Applicant sent a memorandum to the Bank on 9 May 2007 asking to leave the Institution on health grounds.
3. On 13 August 2007, the Applicant was sent a letter signed by the CHRM¹ Director informing him that his request had been granted, following the recommendations of the Health Committee, pursuant to Rule 611.04 of the Staff Rules, entitled "*Termination for Health Reasons*". In the same letter, Management stated that the termination was to take effect from 16 September 2007. It also spelt out the financial consequences of his decision in accordance with Regulation 6.12.5 of the Staff Rules, pursuant to which termination on account of the employee's health entitled the latter to a notice period of two months and a compensation equivalent to one month's salary for each year of service up to a maximum of 24 months.

II. APPLICANT'S ARGUMENTS

4. In his application, registered by the Secretariat of the Tribunal on 20 November 2008, the applicant explained that the sudden deterioration in his health condition, which was the main reason for his request to leave the Bank, was caused by the climate of hostility in which he lived as a consequence of harassment,

¹ Department of Human Resources Management

intimidation and unwarranted pressure put on him by some officials of the Bank. These actions were particularly manifest in:

- a) The memorandum of 19 April 2007 entitled “Your Conduct in Recent Weeks” addressed to him by the Vice-President, OSVP². The memorandum drew the attention of the Applicant to his conduct in the preceding weeks. He was particularly criticized for discrediting the recruitment process following which his colleague, Mr. Abou Sabaa, was appointed as OSAN Director. He was also accused of verbally and publicly attacking Mr. Abou Sabaa in order to undermine his authority. Other acts of misconduct were listed. The memorandum concluded that these very serious problems could in the long run lead to the initiation of disciplinary action. In his application, the Applicant maintains that the memorandum is based on erroneous and false information provided by the OSAN Director, Mr. Abou Sabaa, to the Vice-President, OSVP.
 - b) The humiliating actions taken by the OSAN Director who repeatedly chose to entrust acting responsibilities to a staff member with less seniority than the Applicant, which, according to the latter, is contrary to Article 3.1 of Presidential Instruction 004/99, Article 4.3 of the Bank’s Code of Conduct, Articles 23 and 24 of the Universal Declaration of Human Rights, and Article 1 of the ILO’s International Code of Conduct.
 - c) Other cases akin to harassment, pressure and unjustified discrimination, such as numerous meetings, excess mail (10 to 12 e-mails a day), requests for feedback “without delay”, systematic negative evaluations, offensive remarks, plagiarism, and marginalization.
5. According to the Applicant, all these factors caused him serious health problems manifested by depression, leading him to apply for sick leave and to be hospitalized following considered medical advice. All of the above ultimately forced him to ask to leave the Bank for health reasons.
 6. The main purpose of the Application is to challenge the memorandum of 19 April 2007 and the appointment of an Officer-in-Charge less senior than the Applicant, and to seek redress for damages suffered by the Applicant as a result of the humiliation of which he was victim. These were the issues submitted by the Applicant to the Staff Appeals Committee on 6 July 2007. The Staff Appeals Committee rendered its decision on 16 September 2008. It dismissed the Applicant’s Appeal with regard to the memorandum on grounds that it was not an administrative decision within the meaning of Rule 103.01 of the Staff Rules, rendering the Staff Appeals Committee incompetent to hear such a matter. It was also of the view that the procedure set out in Presidential Directive No. 04/2006 of September 2006 establishing Rules and Procedures for dealing with Harassment in the Bank was not followed, making the Appeal inadmissible.

² Operational Services Vice Presidency

7. On August 28, 2007, concurrent with his claim before the Staff Appeals Committee, the Applicant appealed to the Staff Retirement Plan requesting a disability pension. That request was reviewed by the Steering Committee of the Staff Retirement Plan and dismissed. On 17 September 2008, the Applicant petitioned the Pensions Appeal Committee.
8. In the last part of the Application, the request was extended to include “disability damages.” (VI (1) (ii) and VI (2) of the Application). In that regard, the Applicant claimed that in 2000 and 2001, he was involved in a plane crash at the Lusaka International Airport, which he miraculously survived, followed by a motor vehicle accident necessitating surgery on his hand in South Africa. These two accidents, especially the first, caused the Applicant lasting stress and psychological difficulties. The Bank’s actions in 2007 significantly worsened the disorders that have now reached the point of disability, as evidenced by medical certificates in due form. Therefore, the Applicant claims disability compensation equivalent, according to the Application, to 12 months’ salary for health damage due to the major depression suffered resulting in 15% disability and equally claimed 16 months’ salary for health damage attributable to the chronic post traumatic stress disorder resulting in 20% disability.
9. The Applicant reiterates and develops the matter in his Reply. In addition to compensation for major depression at a chronic stage, and compensation for damage resulting from chronic post traumatic stress disorder, the Applicant in his Reply requests for a disability pension pursuant to the Rules of the Staff Retirement Plan.

III. RESPONDENT’S ARGUMENTS

10. The Respondent maintains that the Bank simply accepted the Applicant’s request for voluntary departure, terminating his appointment for health reasons, pursuant to Regulation 6.11.1(v), 6.12.5 and Rule 611.04 of the Staff Rules. Accordingly, Bank Management granted him termination benefits pursuant to Rule 612.01 (a) and Regulation 6.12.5 of the Staff Rules.
11. As regards the Applicant’s request for disability benefit which he confuses with termination benefits for health reasons, the Respondent contends that the Steering Committee of the Staff Retirement Plan dismissed the Applicant’s request on grounds that it did not comply with Article 5.4 (1) of the Staff Retirement Plan. This decision by the Steering Committee was the subject of appeal by the Applicant. The Appeals Committee rendered its decision on 9 September 2009. According to the Respondent, this renders that claim moot.
12. The memorandum addressed to the Applicant by the Vice-President OSVP, was a mere warning addressed to the Applicant to improve his behaviour and did not in any way constitute an administrative decision within the meaning of Article II (1)

(i) of the Tribunal's Statute. That act had no legal effect on the conditions of employment or contract between the Applicant and the Bank. Not being an administrative decision, it could not therefore be challenged before the Tribunal.

13. On the issue of appointing a less senior staff member as Acting Director, the Respondent posits that the seniority criterion is not an absolute rule. Reference by the Applicant to Article 3 .1 of Presidential Instruction 004/99³ is a result of misinterpretation thereof by the Applicant, since that provision relates to the appointment of an acting authority in case of vacancy of the position of Director, which is not the situation in the present case. The relevant provision of the Presidential Instruction is found in Article 2.
14. As for humiliation and offensive behaviour from the Director of OSAN constituting harassment, the Respondent contends that the Applicant's action did not follow the procedure prescribed by Presidential Directive No. 04/2006 and that, furthermore, these acts do not constitute administrative decisions within the meaning of Article II (1) (i) of the Tribunal's Statute. The allegations levelled by the Applicant at his manager are not enough grounds for legal proceedings giving rise to compensation.
15. Consequently, the Respondent asks the Tribunal to dismiss the Applicant's claims which have no foundation in law and fact.

IV. THE LAW

16. During the written procedure and the oral hearings, the Bank raised a number of major objections concerning the admissibility of the Application. To begin with, the Bank maintains that the Applicant himself requested the termination of his appointment on health grounds. By implementing the recommendations of the Health Committee, the Bank accepted the Applicant's request pursuant to Articles 6.11.1 (v) and 6.12.5 of the Staff Regulations, and Rule 611.04 of the Staff Rules. Therefore, the Bank cannot be held responsible for the termination of appointment since it only responded to the Applicant's personal request. According to the Respondent, the Applicant is wrong in laying the blame on the Bank for the termination of his appointment on health grounds. In that regard, the Bank maintains that the Applicant received all termination benefits to which he was entitled.
17. Secondly, concerning the memorandum of 19 April 2007 sent by the Vice-President, OSVP, to the Applicant, the Respondent argues that it was not an administrative decision and, for that reason, could not be challenged before the Administrative Tribunal. According to Article III of its Statute, "the Tribunal shall be competent to hear and pass judgment upon any application by a member of the staff of the Bank contesting an administrative decision for non-observance

³ Presidential Instruction No. PI 004/99 concerning the continuation of management functions during absences of incumbents and for vacant positions.

of the contract of employment or the terms of appointment of such staff member.” The memorandum of 19 April 2007 had no legal effect on the Applicant’s contract of employment or terms of employment and thus could not be considered as an administrative decision within the meaning of the above Article. To the Bank, the memorandum is only a warning, without legal effect. Consequently, the Respondent argues that the Tribunal cannot consider the issue.

18. Thirdly, regarding the disability pension claimed by the Applicant, the Bank recalled in its Answer to the Application that the matter was pending before the Pension Appeals Committee. As such, the Tribunal could not rule on it since the internal remedies had not yet been exhausted. Subsequent to the filing of the parties’ written submissions, the Pension Appeals Committee decided that the Applicant was entitled to disability pension. For the Respondent, this request has thus become moot.
19. Fourthly, the Respondent maintains that the Applicant’s claims of harassment and abuse of power did not follow the procedures in force, especially Presidential Directive 04/2006. Consequently, the Bank considered that the Applicant did not exhaust the internal remedies laid down by the Staff Rules as earlier indicated.
20. The Tribunal must now examine the Respondent’s objection regarding the admissibility of the Application.
21. The Tribunal finds that, the Bank terminated the Applicant’s appointment following his request to do so on health grounds and, consequently, paid him his due entitlements in accordance with the regulations in force. On that point, the Bank is above all reproach. However, the Tribunal notes that the subject of this case concerns the damage that the Applicant may have suffered due to the climate of hostility caused by conflict between him and his manager, which directly caused his health to deteriorate. The conflict situation was engendered by several causes. First, the Applicant was surprised by the appointment of a staff member with less seniority than him, who the Applicant had previously supervised but due to the appointment had then become the Applicant’s supervisor. That appointment fostered the conflict situation in question. Faced with that situation, the Applicant asked to be transferred to another department, which had the effect of drawing the Bank’s attention to the abnormal situation. The Bank did not respond to this request. Therefore, both his supervisor’s action and the absence of reaction from the Bank triggered the deterioration of the Applicant’s health which had already been affected by the two accidents of which he was victim in 2000 and 2001. The Bank knew that the Applicant was fragile and that keeping him under the supervision of Mr. Abou Sabaa could not but aggravate his condition. Consequently, by not taking the necessary measures to end the situation that caused the Applicant suffering, the Bank failed in its obligation to protect and assist its staff. Hence, the Bank cannot distance itself from the damage that the Applicant suffered following his deteriorating health, in the wake of several

measures taken by the supervisor vis-à-vis the Applicant, which the latter perceived as hostile.

22. The Bank's second objection concerns the memorandum of 19 April 2007. The Bank affirms that this memorandum which is without legal effect on the Applicant's contract of employment or terms of employment and does not constitute an administrative decision within the meaning of Article II of the Administrative Tribunal's Statute. The memorandum in question does not affect the Applicant's legal status. However, the Tribunal must recall that even when it does not have an immediate and direct legal effect on the status of the staff member, an administrative decision can still have a tangible effect on the staff member's conditions of employment, especially when it includes threats of disciplinary action as is the case in this instance. Furthermore, where such a decision is likely to negatively affect the staff member's conditions of employment or render them more difficult, more constraining or more demanding materially, physically or psychologically, it must be considered as an adversely affecting act and thus an "administrative decision" within the meaning of Article II of the Tribunal's Statute. As such, it is therefore subject to recourse before the Administrative Tribunal under conditions contemplated by Article III of the Statute of the Tribunal. The Applicant was able to prove before the Tribunal that that decision brought serious consequences on his psychological state. Hence, the Tribunal is competent to rule on this memorandum.
23. Regarding the claim for disability pension, the Tribunal accepts the Respondent's position. Since the Pension Appeals Committee has acceded to the Applicant's demands on that matter, the Applicant's request regarding the disability pension has become moot. Consequently, the Tribunal shall not examine that issue.
24. At this juncture, the Tribunal must examine the issue of harassment and abuse of authority raised by the Respondent. It is true that paragraph 7 of Presidential Directive 04/2006 in question provides for a special procedure for reporting, examining and deciding harassment cases. That special procedure, which may lead to disciplinary action, is applicable when the complaint is restricted solely to harassment. However, the Tribunal considers that when the issue of harassment is no more than an argument used by an applicant to invoke the Bank's responsibility, such an applicant is not bound by the special procedure. In this case, the Applicant invokes the Bank's responsibility for the damage he suffered as his health deteriorated following the poor working conditions that he endured. The harassment that he claims to have suffered is only one factor among many others that the Applicant advances to demonstrate the scope of the damage suffered. It is not the core subject of the claim. The Administrative Tribunal will consider it in its global evaluation of the situation, as the Tribunal had done in case No. 2001/01, *Alioune CAMARA*, of 9 November 2001.
25. The Tribunal must now rule on the substance of the case.

26. In the course of his career in the Bank since 1993, the Applicant demonstrated competence and unfailing capacity for work, receiving favourable evaluations and written commendation from his supervisors. The two accidents that he suffered in 2000 and 2001 by no means diminished his ardour. In that regard, he received several congratulatory messages from upper management after his air crash. The Tribunal must point out that it was only after Mr. Abou Sabaa's appointment that the Applicant's performance became erratic, caused by his deteriorating health. Reaching an intolerable level, the deteriorating health led the Applicant to first request to be transferred, then to terminate his appointment with the Bank on health grounds.
27. As the Tribunal states in paragraph 21 above, the Bank's attitude contributed largely to the Applicant's difficulties. The Bank was aware of the situation but did not take the necessary measures to put an end to it. As was noted by the Tribunal in paragraph 22 of this judgment, the memorandum of 19 April 2007, especially given its psychological impact on the Applicant under such circumstances, rendered his working conditions more difficult. A number of actions by the supervisor, particularly appointing a staff member junior to the Applicant as acting head of department on three occasions, was likely to perplex and discourage the Applicant. Furthermore, the Tribunal notes that apart from the fact that these *ad interim* appointments may cast discredit on staff members who had served the Bank longer, they are in breach of Article 2 of Presidential Instruction 004/99 of 1 June 1999 which requires that the most senior professional staff normally be appointed as officer-in-charge.
28. Consequently, the Tribunal concludes that both the action of the supervisor and the inaction of the Bank are at the origin of the deterioration of the Applicant's health that led to the termination of his appointment with the Bank. To the Tribunal, there is a causal relationship between the Applicant's deteriorating health, proven by medical certificates, the manager's actions and the Bank's failure to protect this staff member and provide him with assistance in case of job-related difficulties.
29. However, in weighing the Bank's overall responsibility, the Tribunal must take two factors into account that are likely to attenuate that responsibility. The first factor is that the Applicant received both termination benefits and a disability pension as awarded by the Pension Appeals Committee. Moreover, the Tribunal believes that the Applicant's excessive reaction to Mr. Abou Sabaa's appointment, the very reaction that justified the memorandum of 19 April 2007, is such as to mitigate the Bank's responsibility.

V. THE DECISION

30. Based on the foregoing, the Tribunal decides:

- (1) That the Bank pay the Applicant the sum of 9,000.00 US Dollars for damage suffered;
- (2) All other claims are dismissed.

Professor Yadh BEN ACHOUR

Vice President

Ms. Albertine LIPOU MASSALA

Executive Secretary

THE APPLICANT

Mr. S. Z. M., assisted by:

Mr. André NZAPAYEKE, member of staff

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