

**ADMINISTRATIVE TRIBUNAL
ON THE AFRICAN DEVELOPMENT BANK**

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

APPLICATION No. 2007/06

Ms. Clotilde Anne Isabelle BAÏ, Applicant
African Development Bank, Respondent

Judgment No.72 of the Tribunal rendered on 29 June 2010

I. THE FACTS

1. The Applicant, Ms Clotilde Anne Isabelle Bai, was recruited by the African Development Bank on 14 April 2000. At the time of the events, she served as Senior Architect in the OCSD Department.
2. On 18 September 2007, the Applicant filed an Application with the Secretariat of the Administrative Tribunal seeking to condemn the Bank for: (i) unwarranted closure of the case against Ms. Condé for violence against the Applicant; (ii) non-implementation of recommendations of the Staff Appeals Committee of 9 March 2007, endorsed by the Bank President on 30 April 2007. In its recommendations, the Appeals Committee had found that there were no grounds for closing the case and that, instead, the latter should be submitted to a Disciplinary Committee. The Applicant also claimed damages for physical and moral injury she suffered on account of the incident that pitted her against Ms. Condé on 10 April 2005 and delaying tactics employed by the Bank. Furthermore, the Applicant requested the lifting of diplomatic immunity for Ms. Condé and herself to enable her, if necessary, to take the matter before the appropriate State judicial authorities.
3. On 18 December 2007, the Bank filed a Motion to Dismiss regarding the Application on grounds that the Application had become moot following the meeting of the Disciplinary Committee. The Motion was dismissed by the Administrative Tribunal of the Bank by a decision of 8 August 2008. The Tribunal must now rule on the merits of the case.
4. The events which gave rise to this case date back to 10 April 2005. At that time, the Applicant and Ms. Condé were both in Ouagadougou at the Silmandé hotel on two different assignments for the Bank. As a result of tensions caused by differences over participation in working groups, Ms. Condé physically assaulted Ms. Bai. The Applicant contends that the blow she received caused her physical injury (permanent left ear trauma), moral damage (to her physical integrity and dignity) and material loss (very precious earrings).
5. Attempts at settlement and reconciliation by the Bank failed. Oral and written apologies by Ms. Condé in July 2005 were considered to be inadequate by the Applicant. The investigative procedures initiated by the Bank successively in 2005 and 2007, and carried out by two Committees of Inquiry, did not yield conclusive, clear and consistent results. On

7 July 2006, CHRM informed the Applicant that the case had been closed. The Applicant then requested administrative revision of the decision on 4 September 2006 and subsequently filed an appeal to the Staff Appeals Committee on 3 November 2006. On 26 March 2007, the latter recommended that the matter be referred to the Disciplinary Committee. Given the inaction of the Bank, the Applicant filed her Application on 18 September 2007, as indicated in paragraph 2.

6. On 5 November 2007, subsequent to the filing of the Application, the Bank convened a meeting of the Disciplinary Committee to examine allegations of misconduct levelled both at Ms. Condé and the Applicant. Both parties were charged with: (i) engaging in public brawls and conduct incompatible with the status of officials of an international institution during an official mission, contrary to Rules 3.2 and 3.5 of the Staff Rules of the Bank; (ii) failure to honour the commitments taken in the oath of office; (iii) hurling insults and creating an atmosphere not conducive to achievement of the Bank's mandate in breach of paragraph 4.3.1 of the Code of Conduct for Bank staff.
7. Pursuant to Rules 101.04 (a) of the Staff Rules, the Disciplinary Committee recommended that:
 - “(1) Ms. Sylvie Condé should be deprived of any salary increase for one year in application of Rule 101.4. (b) (iii) of the Staff Rules, and that a written warning should be addressed to her in accordance with Rule 101.4 (b) (i) of the Staff Rules;
 - (2) a written warning should be addressed to Ms. Clotilde Baï pursuant to Rule 101.4 (b) (i) of the Staff Rules;
 - (3) Ms. Baï should produce, within three months from the date of notification of this report, documentary evidence regarding the value of the lost earring and that Ms. Condé should pay the amount shown in the relevant documents produced by Ms. Baï.”

The recommendations were endorsed by the CSVP Vice-President. Accordingly, the Applicant received a warning on 16 January 2008 from the CHRM Director.

II. ARGUMENTS OF THE PARTIES

The Applicant

8. The Applicant accuses the Bank of: (i) attempting to cover up the case for two years using delaying tactics (non-communication of Ms. Condé's response of 26 May 2005; closure of the case, despite the seriousness of the matter; inadequate investigation procedures; reluctance to convene the Disciplinary Committee); (ii) resorting to threats and pressure; (iii) examining the matter in a partial manner by establishing unequal treatment between the two parties (promotion for Ms. Condé, career stagnation for the Applicant). In that regard, the Applicant maintains: *“However, the Bank forgets, very conveniently, that as an employer, it has the duty to care and protect its employees. Clotilde Baï deservedly expected fair and just treatment of her complaint which required the Bank to carry out a serious, comprehensive and objective investigation by taking all the necessary guarantees for sound internal justice. Having received the recommendations of the Appeals*

Committee, the Bank could have made up for its negligence by implementing them diligently and promptly, without qualms, remaining equidistant from both parties, that is, the Applicant and Ms. Condé. Instead the Bank, since 2005, has consistently shown proof of bias” (Reply, p.7). The bias, according to the Applicant, is manifest both in the terms of reference of the Committee of Inquiry denoting an “investigation for prosecution” and in the refusal to hear a key witness, Mr. Sorgho. The bias is also obvious in the humiliating measures taken by the Applicant’s managers as a consequence of her complaint before the Tribunal.

The Respondent

9. Contrary to the Applicant’s claims, the Respondent maintains that it implemented the recommendations of the Appeals Committee by convening the Disciplinary Committee. In other words, for the Respondent, convening of the Disciplinary Committee is as good as cancellation of the previous decision to close the case without further action, a decision contested by the Applicant. The Respondent contends that “there is no longer any legal basis for the Applicant’s action before the Tribunal because the Respondent rescinded the administrative decision of July 7, 2006 by implementing the recommendations of the Appeals Committee as specified in the letter of April 30, 2007 from CHRM to the Applicant. Presently, the contested administrative decisions before the Tribunal no longer exist; the Applicant’s Application consequently is groundless” (Respondent's Answer, paragraph 19).
10. Furthermore, the Respondent contends that disciplinary authority is a discretionary power of the employer that it may or may not use, as it deems fit. According to the Respondent, an employee who complains of the conduct of another employee cannot demand any one of the specific solutions provided for in the disciplinary procedure.
11. Moreover, the Respondent contends that the facts complained of by the Applicant are in no way attributable to any act committed by the Respondent. There is no relation of cause and effect between the facts complained of by the Applicant and the Respondent. The latter therefore concludes: *“However, the Tribunal should note that, the facts that the Applicant is protesting and which constitute the basis of her claim for compensation are not administrative decisions susceptible to be attacked before the Tribunal in keeping with Article III of its Statutes.”*
12. Regarding the request for the lifting of diplomatic immunity to enable the applicant to take legal action against Ms. Condé before the competent courts, the Respondent argues that since the Applicant has not initiated legal proceedings, the question of immunity cannot be raised in this case.
13. Therefore, the Respondent prays the Tribunal to dismiss all requests from the Applicant.

III. THE LAW

14. First of all, the Tribunal is called upon to rule on the subject of the motion. Indeed, the Bank maintains that the Applicant’s motion is no longer relevant, and must therefore be dismissed, given that the Bank has implemented the recommendations of the Appeals

Committee by initiating disciplinary proceedings recommended by the Appeals Committee. For the Bank, the decision of 7 July 2006, by which CHRM informed the Applicant that the case had been closed without further action, has been cancelled. Consequently, the challenged decision no longer exists and the Application is groundless (Respondent's Answer, paragraph 19). To this argument the Applicant responds that Respondent is trying, by this means to resubmit its objection to the admissibility of the Application, which was finally dismissed by the Tribunal in its ruling of 8 August 2008. The Applicant adds that when the Application was filed with the Tribunal, the Bank had not yet complied with the recommendations of the Appeals Committee made six months earlier, on 9 March 2007. However, for the Applicant, the merits of the Application must be assessed in the light of existing facts at the time of filing the Application. The Tribunal must rule on this question.

15. It is true, as the Applicant contends, that the elements of fact and law to be considered by the Tribunal must be assessed at the time of filing the Application. This general principle should not be construed in absolute terms. Some exceptions to this principle must be acknowledged. In this case, the decision challenged primarily by the Application is that of 7 July 2006, by which CHRM closed the case. However, as the Respondent contends, this decision which was reversed by the Respondent no longer exists and its annulment by the Tribunal would be meaningless. On this point, the Application has actually become moot and must be dismissed.
16. However, the Tribunal notes that the Application is not limited to this single request. Indeed, the Applicant complains of delays and stalling tactics in the conduct of the procedure, and similarly complains of partial treatment that allegedly caused her some prejudice. These two points constitute another basis for the Application and must be considered separately by the Tribunal.
17. To begin with, the Tribunal must make three important observations.
18. Firstly, the Bank cannot in any way be held directly responsible for the type of incidents occurring on account of one of its employees, as is the case herein. It follows that all requests for compensation relating to damage caused by Ms. Condé's conduct, such as physical injury, humiliation, loss of jewellery, as rightly contended by the Respondent, may not be raised before this Tribunal. The latter can only rule on the Bank's possible liability. However, the incriminating acts are not, in themselves, attributable to the Bank.
19. Secondly, the incident occurred on 10 April 2005, and although it happened on a public holiday, as pointed out by the Respondent in its oral submission on 22 June 2010, it is not unconnected to service. The two employees were actually on two separate missions, in the service of the Bank, and the conflict, at the outset, was related to what was happening during the two missions. One of the employees did not countenance the interference of the other in the mission she was charged with, while the latter was insisting on participating therein, through a consultant. Whereas the fault is mainly personal, its origin cannot be dissociated from service. This is what justified the Bank's intervention. If the fault had been purely private, the Bank would not have, as it did, carried out a formal and thorough investigation by its administrative bodies. While the Bank is not responsible for the direct consequences of the misconduct, the Tribunal finds that the latter, being connected to service, in some ways is professional in nature.

20. Thirdly, the Respondent contends that the Bank has discretion with respect to the exercise of disciplinary authority. Thus, there is no obligation for it to initiate disciplinary proceedings against employees at fault. The Tribunal agrees with this principle and has had the opportunity to recognize it in its jurisprudence. This principle is, however, not absolute. It can be tempered by two other principles. The first is that the Bank should intervene in one way or the other to protect its employees who are victims of violence in the workplace. That is what the Bank did both by trying to reconcile the differing points of view and by setting up Committees of Inquiry and convening the Disciplinary Committee. The second is that in case of serious offence, especially involving physical violence, the Bank must initiate disciplinary proceedings, as it rightly did on the recommendation of the Appeals Committee. Inaction by the Bank would have been a breach of both the duty to protect the employee and of the duty of impartiality.
21. However, in considering all of the proceedings conducted by the Bank, the Tribunal finds that they were characterized by a wait-and-see attitude, hesitation, if not contradictions, which caused excessive delays in resolving the dispute between the parties. The Tribunal notes that these events date back to April 2005 and the matter was referred to the Tribunal on 18 September 2007. In the meantime a number of procedures were implemented: attempts at reconciliation, demands for a written apology, the convening of two Committees of Inquiry and the closing of the case. The Bank only convened the Disciplinary Committee in November 2007, after the Application was filed and more than 7 months after the recommendations of the Appeals Committee of 26 March 2007. The meetings and conclusions of both Committees of Inquiry, the Appeals Committee meeting which was delayed, other administrative decisions up to the closing of the case, then the convening of the Disciplinary Committee, show that the Bank's positions and initiatives lacked determination and consistency, having regard to the gravity of the misconduct. It is only through the insistence of the Applicant that the Bank finally, but belatedly engaged disciplinary proceedings after the Application was filed. This behaviour is prejudicial to the Applicant and the Tribunal will consider this in its ruling. Timely and decisive action is what is expected of the Bank in cases of this nature because violence in the workplace is never acceptable.
22. The conduct of the Bank, although not motivated by a desire to hurt or to favour one or the other party, was understandably interpreted by the Applicant as lack of impartiality on the part of the Bank. The Tribunal does not need to consider the likely indirect origins of this incident, but only the facts themselves and the characterization thereof. From this point of view, the Tribunal notes that the incident that took place in April 2005 clearly and objectively shows that there was an act of violence. That the Applicant was hit in the face or pushed, as was admitted by the main witness called by the Applicant during the hearing of Tuesday, 22 June 2010, does not strip this act of its character of physical violence. This is substantiated by other evidence submitted, including a letter of apology in which the party concerned declared, "I am sorry I laid hands on you on Sunday, 10 April 2005 ..." (Annex 12 of the Application), and the minutes of Mr Sorgho's testimony (Annex 5 of the Reply) and the reports of first Committee of Inquiry (Annex VII of the Respondent's Answer on the Merits) and of the second Committee of Inquiry of 4 April 2007 (Annex VIII of the Respondent's Answer on the Merits), including Mr. Zemzaris's testimony (Annex VIII of the Respondent's Answer on the Merits, p.3).

23. As pointed out by the two Committees of Inquiry, there was wrongful conduct on both sides. However, the Tribunal notes that one cannot equate a clear act of physical violence against the victim's unjustified willingness to interfere in order to arrive at the conclusion that there was "shared responsibility", as reiterated by several times by the Respondent during the oral submissions of 22 June 2010. Until the time of filing the Application, the Bank's actions were driven by this idea. But in treating, as it did, this case as "shared responsibility", the Bank committed an error of law which engaged its liability.
24. The Applicant requested the Bank to waive the diplomatic immunity enjoyed by the two persons involved to enable the Applicant to take possible legal action against her opponent. The Tribunal cannot grant her request. In doing so, it would be acting in lieu of the competent authority, whereas the latter has not received any such request, neither from the Applicant nor from any authority whatsoever.
25. In conclusion, the Tribunal, taking into account what was stated in paragraph 19, considers that:
- a) The Bank's conduct, as described in paragraph 21, therefore constitutes wrongful conduct imputable to the Bank. It entitles the Applicant to compensation.
 - b) In considering this case as a matter of shared responsibility, the Bank committed an error of law, which also gives rise to a claim for compensation.
26. With respect to the request for legal costs, in accordance with the Article IX (4) of the Statute of the Tribunal, the award of legal costs is a matter within the discretion of the Tribunal. Accordingly, the Tribunal assesses the costs in this matter, having regard to all the circumstances, including the unjustified adjournment of the hearings of November 2009 at the request of the Applicant's counsel.

IV. THE DECISION

27. For these reasons, the Tribunal decides:
- 1) To declare itself incompetent with regard to compensation claims 2, 3, 4, 5, 6, 7, made by the Applicant in the Application (p. 17).
 - 2) To reject the Applicant's request to annul the decision to close the case as moot.
 - 3) To also declare itself incompetent on the issue of immunity raised by the Applicant.
 - 4) To admit the Applicant's submissions concerning the Bank's conduct, as they were set out in the Applicant's Reply on the merits (p.7, p.11, p.12, p.14).
 - 5) To award the Applicant the sum of ten thousand US dollars (\$10,000) for moral damages suffered on account of the Bank.

- 6) To award the Applicant the sum of three thousand US dollars (\$3,000) as compensation for legal costs incurred.

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