

**ADMINISTRATIVE TRIBUNAL
OF THE AFRICAN DEVELOPMENT BANK**

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

APPLICATION No. 2009/01

K. M. R., Applicant
African Development Bank, Respondent

Judgment No. 73 of the Tribunal delivered on 29 June 2010

I. THE FACTS

1. The Applicant, Mr. K. M. R., an Egyptian national, was recruited by the African Development Bank (ADB) and began his employment on 2nd June 2007. At the time of leaving the Bank, the Applicant was a Private Sector Specialist at the ADB Egypt Field Office in Cairo (EGFO). At all times relevant to this case, the Applicant served under the direct supervision of Mr. O. A., then Resident Representative of EGFO.
2. On 24th February 2008, the Applicant challenged the Bank's right to provide his salary information to Egyptian authorities in an e-mail to his supervisor, following a meeting with the latter on the 21st of February about a Court request to release the Applicant's salary statement. On 27th February 2008, the Applicant's ex-wife wrote to the President of the Bank requesting that the Bank waive the Applicant's immunity and provide information regarding his salary and wages, in respect of a child support matter before the Egyptian court. The matter was subsequently referred to CHRM¹ for follow-up.
3. On 16th March 2008, the Applicant sent an e-mail to his supervisor, complaining of acts of intimidation and threats by his supervisor against him. That e-mail was subsequently forwarded to the Bank's Legal Department, the Ombudsman and copied to several Vice Presidents. On 17th March 2008, CHRM informed the supervisor that the Applicant had lodged a complaint of harassment against him and requested a response from the supervisor. CHRM equally informed the Applicant that it was investigating the complaint.
4. From 22-24 March 2008, CHRM conducted an on-site investigation into the Applicant's allegations of harassment, intimidation and other acts in the EGFO office. In his Back-To-Office Report (BTOR), the Division Manager, CHRM.3 who conducted the investigation, concluded that, following meetings with the protagonists

¹ Human Resources Management Department.

and interviews with other EGFO staff members, the work environment in EGFO was commendable, though there was a need to address “miscommunication” between one staff member and the Resident Representative. He made several recommendations, including that the Regional Director, in consultation with CHRM, review the case of the staff member so as to foster the good working relationships in the office and that the performance issues should be looked at within the framework of performance evaluations and probationary appraisals².

5. On 4th April 2008, the Embassy of the Arab Republic of Egypt in Tunis sent a *Note Verbale* to the Bank requesting information about the Applicant’s salary in compliance with an Egyptian Court order. In a memorandum dated 16th April 2008 to the Applicant, the Director, CHRM instructed the Applicant to provide information concerning his salary to the Egyptian Court within forty-eight (48) hours and submit copies confirming the said information had been provided. The memorandum stated that failure to comply with this instruction could lead to disciplinary measures taken against the Applicant, including termination.
6. On 21st April 2008, the Director, CHRM sent an e-mail reminder to the Applicant regarding the memorandum of 16th April 2008. The Applicant responded, alleging harassment on the part of the Director, CHRM and indicated that he would be travelling to Alexandria to obtain the requested documents. He further inquired about the Director CHRM’s role and motivation in the matter and demanded that he be left alone and not harassed. The Applicant copied this e-mail to several officials of the Bank’s Upper Management as well as all staff members of the Bank, including the Bank’s Field Offices.
7. By memorandum from CHRM of 22nd April 2008, the Applicant was suspended with pay for failing to comply with the Director, CHRM’s instruction in the 16th April memorandum.
8. By letter dated 14th May 2008, from the Director, CHRM, the Applicant was informed that the Bank would not confirm his appointment and that his contract was terminated. The letter confirmed that the Applicant would receive 60 days’ salary in lieu of notice in accordance with Staff Rule 612 (g) and one month’s salary in accordance with Staff Rule 612 (c).

II. ARGUMENTS OF THE PARTIES

THE APPLICANT

9. The Applicant alleges that he was harassed by his supervisor, Mr. O. A., from the day he was recruited into the African Development Bank’s Egypt Field Office. This harassment, the Applicant claims, came in the form of provocation and humiliation “on a daily basis”, and using the Applicant’s dispute with his ex-wife to threaten and get rid of the Applicant. The Applicant further claims that though he reported the harassment to Bank officials, no reply was ever sent to him explaining how the Bank was handling his complaint and no protection was afforded him. Rather, the Director, CHRM participated in the harassment by threatening to terminate the Applicant’s contract in a 16th April 2008 memorandum to the Applicant.

² The BTOR is attached as Annex 10 of the Respondent’s Answer

10. The Applicant also asserts that the refusal to confirm his appointment was unjustified. He states that the performance evaluation carried out by his supervisor contained “fabrications” which were not supported by any evidence or document. Moreover, his supervisor was in no position to evaluate his work as he was not an expert in private sector operations. The Applicant notes that following the poor performance evaluation rating, he requested that a Review Committee review the performance evaluation; however, the Committee hearing, scheduled for 22nd April 2008, was cancelled for no apparent reason. To discredit the poor performance evaluation, the Applicant points to E-mails attached to his Application that “proves (his) good performance” as well as the request by the Director of OPSM³ that the Applicant travel to Tunis for a six-month mission. The Applicant maintains that were his performance inadequate or unsatisfactory, the OPSM Director would never have made the unprecedented request that the Applicant travels to Tunis and work in OPSM for six months. The Applicant contends that despite his good performance, the Director CHRM did not confirm his appointment. Rather, the Director, CHRM decided to suspend him from duty and subsequently terminate his contract.
11. Finally, the Applicant maintains that the Staff Appeals Committee’s decision to dismiss his appeal was erroneous and its assertion that it was not competent to review the Applicant’s case was unjustified.

THE RESPONDENT

12. The Respondent submits that with respect to the Applicant’s claim of harassment, the latter’s E-mail of 16th March 2008 does not constitute a formal complaint of harassment as contemplated in Presidential Directive 04/2006; hence the claim should be dismissed by this Tribunal. The Respondent asserts that the Applicant did not adhere to the formal requirements of Presidential Directive 04/2006 by filing a formal complaint in writing that was signed and dated and addressed to the Director, CHRM or the Vice President, Corporate Management⁴ as the case may be. The Respondent further maintains that though a formal complaint was not filed, the Respondent took steps to investigate the Applicant’s allegations by requesting a response from the Applicant’s supervisor and sending the Division Manager, CHRM.3 on a fact-finding mission to Egypt. The Applicant’s supervisor responded that the Applicant’s claims of harassment were linked to the ongoing performance evaluation exercise. For his part, the Division Manager, CHRM.3 concluded in his Back-To-Office Report that there was no evidence to support the Applicant’s claim of harassment and recommended that the situation be reviewed within the context of the performance evaluation and probation appraisal. On this claim, the Respondent concludes that the Staff Appeals Committee made a wrongful assumption that a formal complaint of harassment had been filed when it recommended that the Respondent set up a Panel of Inquiry as provided for in Presidential Directive 04/2006. According to the Respondent, a proper investigation of the Applicant’s claim of harassment was conducted and found to be baseless, noting that the problem between the Applicant and his supervisor was caused by the Applicant’s disruptive personality and not any acts of harassment by the supervisor.

³ Private Sector Department

⁴ Currently called Corporate Services

13. With respect to the Applicant's claims of wrongful suspension and refusal to confirm his appointment, the Respondent argues that these claims are not properly before the Administrative Tribunal because the Applicant has not complied with the requirements of Article III (2) (i) of the Tribunal's Statute⁵. The Respondent supports the decision of the Staff Appeals Committee and reiterates that the failure of the Applicant to exhaust all other administrative remedies before filing the Application with the Administrative Tribunal is a "fatal flaw to the application being heard" by this Tribunal and as such the Application should be dismissed. The Respondent notes that the Applicant neither utilized the administrative review mechanism afforded to staff members under Staff Rule 103.04, nor the conciliation mechanism of the office of the Ombudsman stipulated in Staff Rule 103 (b) (ii). Consequently, the Respondent asserts, the Application is inadmissible. The Respondent maintains that even if the Applicant pursued the relevant administrative review mechanisms, his claims would still have failed, as the reasons for the non-confirmation of his appointment were his refusal to comply with official instructions, his unsatisfactory performance and his disruptive behavior.
14. The Respondent states that the decision of the Staff Appeals Committee, although correct in rejecting the Applicant's claim regarding his suspension from duty, was nonetheless erroneous when it concluded that the Respondent had not complied with the requirements of Presidential Directive 04/2006 regarding the Applicant's claim of harassment⁶. Specifically, the Respondent notes that the Staff Appeals Committee's erroneous decision was based on a wrongful assumption that a formal complaint of harassment had been filed by the Applicant under the guidelines of Presidential Directive 04/2006. The Respondent notes further that the Staff Appeals Committee also erred in its interpretation of Presidential Directive 04/2006. Pointing to paragraph 34 of the report, the Respondent submits that contrary to what the Staff Appeals Committee states, Presidential Directive 04/2006 mandates that CHRM establish a Panel of Enquiry only when a formal complaint of sexual harassment is filed by the staff member. In cases relating to harassment of a non-sexual nature, CHRM has discretion on how to proceed with the investigation in light of paragraphs 7.1 and 7.3.1 of Presidential Directive 04/2006. The Respondent maintains that in this case, no formal complaint was filed by the Applicant. The Application is therefore inadmissible as the Applicant failed to exhaust all internal administrative procedures as mandated by Article III (2) (i) of the Tribunal's Statute.

III THE PROCEDURE

15. Following the decision of the Respondent not to confirm the Applicant's appointment, the Applicant filed a Statement of Appeal with the Staff Appeals Committee on 28 May 2008, alleging harassment and contesting the decision to suspend him from duty. The Staff Appeals Committee rendered its decision in a report dated 5 February 2009. It rejected the Applicant's claim against his suspension as inadmissible for failure to follow relevant procedures. In particular, the Staff Appeals Committee stated that the

⁵ Article III (2) states in relevant part:

No application shall be admissible unless:

- (i) The applicant has exhausted all other administrative review remedies available within the Bank, except in cases when the applicant and the bank have agreed to submit the application directly to the Tribunal.

⁶ Paragraph 38 (ii) of the Staff Appeals Committee Report (attached as Annex 12 of Application and Annex 2 of the Answer) recommended that "the Administration apply the procedure provided in Presidential Instruction No.04/2006 to this case."

Applicant had failed to request a review of the CHRM decision from Vice President, CSVP as required by Rule 103.04 of the Staff Rules. Furthermore, the Staff Appeals Committee concluded that it could not hear the merits of the appeal on the claim for harassment because the Respondent had not complied with the procedure stipulated in Presidential Directive 04/2006 of 1 September 2006 establishing rules and procedures dealing with harassment in the Bank. Consequently, the Staff Appeals Committee dismissed the Applicant's appeal of the suspension decision and recommended that the Respondent apply the procedure laid out in Presidential Directive 04/2006 with regards to the Applicant's claim of harassment.

16. On 28 May 2009, the Applicant filed an application with the Administrative Tribunal of the Bank, alleging harassment and humiliation by his supervisor and non-confirmation of his employment following probation. The Applicant also contested the dismissal of his appeal by the Staff Appeals Committee.

IV. REQUEST BY THE PARTIES

The Applicant

17. The Applicant requests the Tribunal to:
- Order the Respondent to pay compensation for material damages in the sum of one million American dollars (\$1,000,000);
 - Order the Respondent to pay compensation for material damages in the sum of fifty thousand American dollars (\$50,000) for each year remaining in his original contract (x 2 years), totalling one hundred thousand American dollars (\$100,000); and
 - Order the Respondent to issue a letter clarifying his situation and indicating that his contract was abusively terminated despite his good performance.

Respondent

18. The Respondent requests that the Tribunal:
- Affirm the decision of the Staff Appeals Committee to reject the Applicant's claim for failure to exhaust administrative remedies, consistent with Article III (2) (i) of the Tribunal's;
 - Reject the Applicant's claim of non-confirmation of his contract for failure to exhaust all available administrative review remedies; and
 - Reject the Applicant's claim of harassment as inadmissible for failure to follow the prescribed procedures for such claims.

V. THE LAW

19. The Applicant challenges the decision of the Respondent to suspend him and the decision of the Staff Appeals Committee dismissing his application as inadmissible for failure to exhaust administrative remedies. The Respondent challenges the

admissibility of the application and supports the decision of the Staff Appeals Committee in this respect. The Respondent further challenges the recommendation of the Staff Appeals Committee that the Respondent deal with the complaint of harassment in accordance with the Presidential Directive on Harassment No. 04/2006.

20. It is incumbent on the Tribunal to consider first the issue relating to the admissibility of the application before dealing with any substantive issues concerning the merits of the application. The Respondent contends that the application is inadmissible before the Tribunal because the Applicant has not exhausted all other administrative remedies as required by Article III (2) (1) of the Statute of the Tribunal.
21. The Respondent further argues that the administrative remedies which the Applicant ought to have exhausted included review mechanisms provided for under Staff Rule 103.04 and conciliation mechanisms facilitated by the Ombudsperson under Staff Rule 103.00 (b) (ii). In this connection, Rule 103.04 (a) states:

“A staff member who wishes to appeal an administrative decision pursuant to Staff Regulation 10.3, shall, not later than six (6) months from the date of the written notification of the appealed administrative decision, submit a request for review addressed to the Vice President, who shall have thirty days (30) in which to make a response. The staff member may, if dissatisfied with the response of the Vice President, file an appeal with the Staff Appeals Committee within thirty (30) days of the date of the letter of response or where there is no response from the Vice President, within sixty (60) days of the date of the staff member’s request for review.”

On the other hand, Rule 103.00 (b) (ii) provides

*“(b) The duties of the Ombudsperson shall be as follows:
(ii) To assist through conciliation at the option of a staff member, with the resolution of disputes arising from the administrative decisions affecting the contractual rights and benefits of staff members or the development of their career.”*

22. The Staff Appeals Committee came to the conclusion that the Applicant’s appeal was inadmissible for failure to comply with the requirements of Staff Rule 103.04. The Committee observed,

“According to this provision, in order to be admissible, the Appeal should be preceded by administrative review process introduced within the prescribed deadlines. The rule of exhaustion of internal remedies is intended on the one hand to permit the Administration to ensure that it has complied with internal rules when taking its decision and on the other hand to permit the Administration and the staff member dissatisfied with an administrative decision to discuss it and eventually to reach a solution by mutual agreement. Complying with this stage is obligatory and Staff Rules do not permit exceptions.”

23. In its written arguments before the Tribunal, the Respondent underscores the importance and purpose of administrative review process when it submits:

“The purpose of the administrative review process referred to in Staff Rule 103.04 and Article III (2) (i) of the Tribunal Statute is to provide the Respondent the opportunity to re-examine administrative decisions so as to enable errors to be corrected early, thus ensuring that only unresolved disputes are filed with the Administrative Tribunal. It also enables the staff member to test his claims against the rules and to decide whether he has a viable case to be pursued to the next level of the conflict resolution process. This is in the interest of both parties.”

24. The Tribunal agrees with the views expressed by the Staff Appeals Committee and in the Respondent’s submissions that it is obligatory that Applicants exhaust internal administrative remedies before filing appeals to the Staff Appeals Committee and Applications to the Tribunal. The Tribunal notes that recourse to the Ombudsman process is not mandatory. Moreover, in the present case, the Tribunal does not agree with that the Applicant was required to exhaust internal administrative remedies because the decision taken by the Respondent to terminate his contract following his suspension amounted to disciplinary action governed by Staff Rules 101 and 102. The decision was not merely an administrative measure governed by Staff Regulations 103.4 and 10.3 (3) (ii).
25. Staff Rule 101.01 states that “suspension shall be without prejudice to the rights of the staff member or the staff member’s entitlement to the benefits; and shall not constitute disciplinary measure”. However, in the present case the suspension, which would normally be temporary pending further investigation or other determination, was in this case, followed by the termination of his contract based on the perceived misconduct and possibly unsatisfactory performance of the Applicant.
26. The conduct of the Applicant, which led to his suspension and ultimate termination, was his refusal to comply with the instruction of the Director CHRM to supply information about his salary to the Egyptian court within 48 hours. In his memorandum dated 16 April 2008, the Director CHRM informed the Applicant to “[k]indly note that your failure to comply with this instruction will result in disciplinary measures (including termination) being taken against you by the Bank”. The anticipated disciplinary action was indeed promptly taken on 22 April 2008, when the Applicant was suspended with pay. On 14 May 2008, the Applicant was informed that he would not be confirmed in his appointment.
27. In order to exhaust internal remedies, the Applicant filed an appeal before the Staff Appeals Committee, which held that it was not competent to deal with the matter. Staff Rule 103.01 states that the Appeals Committee shall not be competent to consider “an appeal against the imposition of disciplinary measures, including summary dismissal.” The Tribunal agrees that the Staff Appeals Committee was not competent to consider the Applicant’s appeal against the suspension and termination of his contract, given that these actions were clearly taken for disciplinary reasons.
28. Rule 102.09 of the Staff Rules provides that a Staff member against whom a disciplinary measure has been imposed should have a right of appeal against such a

measure and may lodge his or her appeal with the Administrative Tribunal within sixty (60) days of the date of the letter or notification of the disciplinary measure. The Tribunal therefore concludes that the Application in respect of the termination of the Applicant's contract is admissible.

- 29.** The Applicant raised a complaint against the decision of the Staff Appeals Committee rejecting his complaint of harassment. The Tribunal is of the view that the complaint of harassment was raised to bolster the Applicant's allegation against his supervisor's assessment and to justify his rather uncompromising and disruptive behavior. The Applicant filed no formal complaint of harassment as required by the Presidential Directive on Harassment, nor did he produce any evidence to support his claim. On the contrary, the allegations he made against his supervisor were thoroughly investigated by the Respondent and found to be baseless. The Tribunal finds the complaint in respect of harassment to be without merit.
- 30.** The next issue to consider is whether the termination of the Applicant's contract complied with due process as provided for by the Respondent's internal procedures and the law of international civil service. Under the Staff Regulation 10.1, the Respondent may impose disciplinary measures on a staff member whose conduct is unsatisfactory or prejudicial to the interests of the Bank, or falls seriously short of the norms and standards established by the Bank. Such measures shall be imposed in conformity with the disciplinary process provided in Regulation 10.2. Misconduct is defined as failure by a staff member to comply with his or her obligations under the Agreement, or the Regulations and Rules of the Bank.
- 31.** The Staff Rules emphasize the need for due process to be observed during disciplinary proceedings. Rule 101.02 requires a staff member to be given an opportunity to answer the charges against him or her and to be informed of the allegations in writing. Except in cases of summary dismissal, all charges of misconduct must be submitted to a Disciplinary Panel. Summary dismissal shall be imposed only upon determination by the President that the staff member concerned is guilty of serious misconduct touching upon the financial or other important interest of the Bank.
- 32.** In the present case, the Applicant was not accorded due process as provided in the Staff Regulations and Rules. There was no Disciplinary Panel established to investigate or consider allegations against the Applicant and make findings and recommendations to the Vice President. Instead, the Applicant's contract was terminated without the Applicant being afforded any opportunity to be heard.
- 33.** It has not been argued nor is there any evidence to show that the President determined that the Applicant was guilty of serious misconduct touching upon the financial or other interest of the Bank. The process initiated by the Bank in this case was clearly initially intended to be disciplinary in nature. However, the procedural safeguards guaranteed by Rule 101 of the Staff Rules were not respected.
- 34.** To the extent that the Bank purported to convert what started as a disciplinary action into an administrative one by characterizing the termination of the Applicant's employment as the refusal to confirm the appointment of a probationary employee, other procedural safeguards should have then been engaged. Specifically, the Applicant should have been offered recourse to the Staff Appeals Committee in accordance with Staff Rule 103.01. This too was denied to him.

35. The Applicant was serving on probation and the confirmation of his appointment was dependent on satisfactory performance and conduct. His appointment could be terminated by the President in accordance with Regulation 6.11.2. Although a staff member on probation may not enjoy the same terms of service as a confirmed staff member, he or she had to be notified at least sixty (60) days before the end of his probationary period whether the President has decided to confirm the appointment or to terminate it or extend the probationary period. It is not clear what procedure was followed in terminating the Applicant's appointment but it all points to termination without due process.
36. Notwithstanding the procedural irregularities identified above, the Tribunal observes that the Applicant significantly contributed to the termination of his probationary appointment by stubbornly refusing to comply with official instructions and persisting in his combative and disruptive behavior. He must therefore blame himself for what befell him. This did not exonerate the Bank from its obligation to grant the Applicant proper due process before terminating his appointment. However, in light of the conduct of the Applicant, the Tribunal will limit the remedy awarded to moral damages for the Bank's breach of procedure.

VI. THE DECISION

37. Based on the foregoing, the Tribunal decides:
- a. The Application in respect of suspension and termination of appointment succeeds;
 - b. To award the Applicant the sum of two thousand US dollars (\$2000) in moral damages;
 - c. All other claims are rejected.

Professor Yadh BEN ACHOUR

President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

THE APPLICANT

Mr. K. M. R.

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