

**ADMINISTRATIVE TRIBUNAL
OF THE AFRICAN DEVELOPMENT BANK**

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

APPLICATION No. 2009/02

Lassissi ABIBOU, Applicant
African Development Bank, Respondent

Judgment No.74 of the Tribunal delivered on 29 June, 2010

INTRODUCTION

The Bank seeks the summary dismissal of an application brought by Mr. Lassissi Abibou on the basis that it was commenced outside of the 90 day period provided for in Article III of the Statute of the Administrative Tribunal of the African Development Bank. The Bank further contends that the Tribunal lacks the competence to deal with the application in the absence of an administrative decision concerning the terms and conditions of Mr. Abibou's employment. For the reasons that follow, the Tribunal has concluded that the Bank's motion should be granted, and the application dismissed.

I. THE FACTS

1. Mr. Abibou joined the Bank on October 1, 1980 as a member of the Bank's permanent staff. At the time of the matters in issue, he was a Senior Finance Officer in the Loans Accounting Division in the Financial Control Department.
2. Mr. Abibou applied for a scholarship under the Special Presidential Staff Scholarship Programme to allow him to enrol in a Specialized Masters Programme in International Financial Analysis at Reims Management School in France. Mr. Abibou was advised that he had been awarded the scholarship by means of a letter dated January 13, 2005 from the Officer-in-Charge of the Human Resources Department. The notification letter went on to note that "In line with Bank Staff Rule 73:00, the period of study will be reckoned as **Special Leave with Pay** for study purposes, and will be treated as effective service with the Bank for all purposes of Staff Rules and Regulations". [emphasis in the original]
3. Mr. Abibou was away from the Bank between October 17, 2005 and January 7, 2007, a period of approximately 15 months, while pursuing his education. Following the completion of his studies, Mr. Abibou returned to active service with the Bank.
4. Annual salary adjustments based upon the previous year's performance evaluations are implemented in August of each year. At the end of August, 2007, Mr. Abibou noted that his pay slip did not include any performance-related salary increase resulting from

a 2006 performance evaluation. Following an exchange of emails with Bank personnel, Mr. Abibou was advised by the Director of the Bank's Human Resources Management Department (CHRM), that:

[S]ervice with the Bank and duty while in service are two separate issues and the performance based pay is that part of the financial reward which the Bank links directly to the performance of the staff member and that financial reward is given for performance achieved. In your case, the element of performance did not arise since you were on leave for the full year, and hence cannot be treated as being on duty, although you continue to be in the service of the Bank.

5. Not satisfied with this response, on January 8, 2008, Mr. Abibou forwarded a Request for Administrative Review to the Bank's Vice-President, Corporate Services, highlighting the various financial damages that he claims to have incurred as a result of the Bank's actions, including a reduction of entitlements, fall in pension, and an erosion in his purchasing power. On February 7, 2008, the CHRM Director responded on behalf of the Vice-President, rejecting Mr. Abibou's demands.
6. Mr. Abibou then appealed to the Staff Appeals Committee. Mr. Abibou sought the application of Rule 73.00 of the Staff Rules in accordance with the terms governing the award of the scholarship, along with interest at 4.5% in relation to the unpaid salary increase to which he claimed to be entitled. In addition, Mr. Abibou asked the Committee to upgrade his position as a result of his newly-acquired a Masters degree and his acquisition of higher skills.
7. The Staff Appeals Committee recommended that the appeal be dismissed. According to the Committee, merit-based remuneration is intended to compensate staff members for their contribution to the Bank's business. Given that Mr. Abibou did not carry out any activity for the Bank in 2006, it followed that his performance over that period could not be evaluated, and the refusal to grant him a salary increase as a result was therefore neither arbitrary nor illegal. Insofar as Mr. Abibou's request to have his position upgraded was concerned, the Committee observed that "this issue was not the subject of an administrative decision likely to be brought before it for review". The Committee further noted that Presidential Directive No. 06/2004 stipulates that at the end of an approved training period, staff members are to be reintegrated into the Bank "in their former positions or into a position at the same level and grade". The Staff Appeals Committee held that it was not competent to upgrade a staff member, and advised Mr. Abibou to pursue the appropriate recourse mechanisms in this regard. The Committee did, however, recommend that in the future, letters notifying successful applicants should spell out the benefits to which the recipient would be entitled, and those from which he or she would be excluded.
8. The recommendation of the Staff Appeals Committee was accepted by the President of the Bank, and this decision was communicated to Mr. Abibou by means of a letter from the President. While the copy of the President's letter produced by Mr. Abibou is undated, Mr. Abibou says that he received the letter on January 9, 2009, and the Bank does not take issue with this assertion. Mr. Abibou filed his application with the Tribunal on April 14, 2009.

9. At this stage in the proceeding, the Tribunal is required by Article XIV of the Tribunal's Rules of Procedure to limit its consideration to the question of the admissibility of Mr. Abibou's application: *see* Judgment No. 11 of the ADB Administrative Tribunal delivered on November 24, 2000 in Application No 2000/01, at para. 11.

II. THE LAW

10. The Bank argues that Mr. Abibou's application should be summarily dismissed as it was filed outside of the 90 day limitation period prescribed in Article III (2) (ii) of the Tribunal's Statute. Given that Mr. Abibou himself acknowledges having received the President's decision on January 9, 2009, the Bank submits that the application was filed five days late. The Bank recognizes that Article III (4) of the Statute does confer discretion on the Tribunal to receive applications that are commenced more than 90 days after receipt of the decision under review. However, the Bank argues that Mr. Abibou has not demonstrated the existence of exceptional circumstances that would entitle him to such relief.

11. The relevant portions of Article III (2) of the Tribunal's Statute provide that:

2. No application shall be admissible unless:

...

(ii) the application is filed within ninety days after the latest of the following:

...

(b) receipt of notice (after the applicant has exhausted all other remedies available within the Bank) that the relief asked for or recommended will not be granted...

12. Mr. Abibou refers to Article III (3) of the Tribunal's Statute, the French version of which states that "Le calcul des délais prévus dans le présent Statut ne comprend pas le jour de la survenance de l'évènement, mais comprendra le premier jour ouvrable qui suit un jour non ouvrable à la Banque". According to Mr. Abibou, the 90 day period therefore commenced on Monday, January 12, 2009 and ended on Saturday, April 11, 2009. Mr. Abibou further submits that although April 13, 2009 was considered to be a working day at the Bank, it was Easter Monday, and most Christian staff members prefer to take one of the floating days granted by the Bank to celebrate that holiday. Mr. Abibou received the President's letter on January 9, 2009, and filed his application at 9:22 on the morning of April 14, 2009. As a consequence, he submits that his application was filed only one half-day late.
13. It should be noted that there appears to be a discrepancy between the English and French versions of Article III (3) of the Tribunal's Statute. That is, the English version contains an additional phrase that does not appear in the French text. The English version of the Statute provides that "The calculation of a period of time shall not include the day on which the event has occurred, and shall include the next working day of the Bank *when the last day of the period is not a working day*" [emphasis added].
14. Thus, it is arguable that in accordance with the French version of the Statute, the time limit for Mr. Abibou to have commenced his application to the Tribunal only started to run on Monday, January 12, 2009. In contrast, the wording of the English

version of Article III (3) of the Tribunal's Statute would suggest that time started to run on the day after Mr. Abibou received the President's letter, that is, on Saturday, January 10, 2009.

15. What is clear is that whether one applies the interpretation suggested by the English version of the Statute or the French version of the Statute, by his own admission, Mr. Abibou's application was not filed within the 90 day period stipulated in Article III (2). The question for the Tribunal then is whether it should nevertheless exercise its discretion to admit the application.

16. Article III (4) of the Tribunal's Statute states that:

Notwithstanding the provisions of paragraph 2 of this Article, the Tribunal may decide **in exceptional circumstances**, where it considers the delay justified, to waive the time limits prescribed under this Article in order to receive an application that would otherwise be inadmissible. [emphasis added]

The Statute does not identify what will constitute "exceptional circumstances" for the purposes of Article III (4). However, the jurisprudence that has evolved in the international administrative law area provides some guidance in this regard.

17. By way of example, in Judgment No. 2722 of 9 July 2008, the Administrative Tribunal of the International Labour Organization had the following to say with respect to the need for applicants to comply with statutory time limits regarding the commencement of applications:

As the Tribunal has repeatedly stated ... time limits are an objective matter of fact and it should not entertain a complaint filed out of time, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar...

*[T]he only exceptions to this rule that the Tribunal has allowed are where the complainant has been prevented by **vis major** from learning of the impugned decision in good time [...] or where the organisation by misleading the complainant or concealing some paper from him or her has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith... [emphasis added]*

18. The discrepancy between the language of the English and French versions of Article III (3) of the Tribunal's Statute would most certainly provide Mr. Abibou with a reasonable explanation for not having commenced his application with the Tribunal until Monday, April 13, 2009. Indeed, based upon the French version of the provision, such an application would have been filed within the 90 day period contemplated by Article III (2).

19. However, Mr. Abibou himself concedes that he was late in filing his application, even on his own understanding of how the limitation period should be calculated. There is no suggestion in this case that Mr. Abibou was prevented by *vis major* from learning of the President's decision in good time. Nor is there any suggestion that the Bank has

conducted itself in any way that would have impeded Mr. Abibou's ability to commence his application to the Tribunal within the statutory time limit. Indeed, he has provided no real explanation for his delay in this regard. He acknowledges that he was aware that Easter Monday was a working day at the Bank. However, he chose not to comply with the statutory timelines for commencing these proceedings. While Bank employees are most certainly entitled to observe religious holidays in accordance with the tenets of their individual faiths, there is no suggestion in the wording of the Statute that the time for commencing an application before the Tribunal would be extended accordingly. The Tribunal further notes that there is no issue of religious observance in this case.

20. Consequently, Mr. Abibou has not demonstrated the existence of exceptional circumstances that would justify the exercise of the Tribunal's discretion under Article III (4) of the Statute in his favour.
21. Having found that Mr. Abibou's application is inadmissible because it was filed outside of the time period specified in Article III (2) of the Tribunal's Statute, it is not necessary to deal with the Bank's alternative argument that the application does not involve an "administrative decision on the part of the Bank, and is therefore inadmissible on that basis as well.

IV. THE DECISION

22. For the above reasons, the motion to dismiss the Application is granted and the Application is dismissed as being inadmissible.

Professor Yadh BEN ACHOUR

President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

THE APPLICANT

Mr. Lassissi ABIBOU

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Benson MAINA

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