

**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. 2010/02**

Mrs. L. T. K. M., Applicant  
African Development Bank, Respondent

Judgment No. 76 of the Tribunal rendered on 15 July 2011

**I. THE FACTS**

1. The Applicant, Mrs. L. T. K. M., a Tanzanian national, was recruited by the African Development Bank (AfDB) and began her employment on 29 April 1998. At the time of leaving the Bank, the Applicant was Chief Diversity Officer in the Bank's Corporate Human Resources Management Department (CHRM).
2. In early 2009, the Applicant, then Chief Gender Officer at the Bank's OSUS<sup>1</sup> Unit, requested a lateral transfer from OSUS to the position of Chief Learning Officer in CHRM. To this end, the Applicant obtained the support of the Manager, HR Policies and Strategies as well as the Executive Director for the East African Constituency. With the help of these two officials, the Applicant obtained an appointment to meet the President of the Bank in order to get his support for the lateral transfer requested.
3. On 2 March 2009, the Applicant attended a meeting with the President of the Bank to discuss her transfer in the presence of the Manager, HR Policies and Strategies and the Executive Director for the East African Constituency. During the meeting, the President made certain comments that the Applicant found to be objectionable. Nevertheless, the President approved the transfer requested by the Applicant.
4. On 16 November 2009, the Applicant addressed a memorandum to the President of the Bank<sup>2</sup>, complaining about some "objectionable" comments made by the latter to the Applicant during the 2 March 2009 meeting. In her memorandum, the Applicant accused the President of calling her a "feminist," "trouble-maker," "ambitious" and "wanting to be promoted at all costs." In that memorandum, the Applicant described her March 2009 meeting with the President and noted that the President's language, tone and demeanor conveyed the hostility which the President had against her. The Applicant also accused

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<sup>1</sup> Gender, Climate and Sustainable Development Unit.

<sup>2</sup> Application, Annex 20.

the President of not giving her an opportunity to be heard on the allegations leveled against her by the President. The Applicant requested that the President explain what he meant by the words he used to describe her, why she had not been provided with coaching or mentoring and why she had not been disciplined for such action. The Applicant concluded by requesting “appropriate” relief that both sides would deem “satisfactory.” The President did not respond to the memorandum.

5. On 31 January 2010, the Applicant addressed a memorandum to the Vice President, Corporate Services (CSVP)<sup>3</sup>, claiming harassment by the President based on the incident of 2 March 2009. In the first paragraph of this Memorandum, the Applicant admitted that her claims should be submitted to the Committee for the Enforcement of the Code of Conduct for Executive Directors (Ethics Committee), given the position of the President. However, the Applicant stated that she would “waive” her right to proceed in accordance with the rules relating to complaints against an Elected Officer of the Bank, and submit her claims instead under the rules of Presidential Directive No. 04/2006 establishing rules and procedures for dealing with harassment in the Bank. In this memorandum, the Applicant described the incident of 2 March 2009 and how she had been affected by it, then requested that the Administration undertake a “thorough investigation” and provide her redress for the mental distress suffered as a result of the 2 March incident.
6. By letter dated 12 February 2010, the Vice President, Corporate Services, informed the Applicant that her employment with the Bank had been terminated “with immediate effect and without notice<sup>4</sup>”. The letter pointed to the Applicant’s 31 January 2010 memorandum complaining of harassment against the President and noted that the Applicant’s description of the President, her tone, language and allegations against the President were unacceptable and unprofessional. The letter stated that the Applicant’s description of the meeting was “offensive, exaggerated and unfounded” and aimed at “tarnishing the image of the President, undermining his authority and ultimately tarnishing the image of the Bank<sup>5</sup>”. The letter further stated that the Applicant’s memorandum against the head of the Institution was incompatible with the norms and standards of conduct expected of a Bank staff and constituted “serious misconduct” within the meaning of Regulation 10.1 of the Staff Regulations<sup>6</sup>.
7. On 25 February 2010, the Applicant filed a request to the Vice President, CSVP to reconsider his decision, on the grounds that it was flawed, illegal and taken in retaliation of her harassment complaint. The Applicant requested that the 12 February 2010 decision be annulled, that she be reinstated to her position, paid her regular salary and entitlements and that her harassment claims be investigated by a Panel of Enquiry, with a copy of the latter’s findings and recommendations given to her<sup>7</sup>. The Vice President, CSVP did not respond to this memorandum.
8. On 27 April 2010, the Applicant filed this Application with the Administrative Tribunal, alleging procedural and substantive irregularities in the Respondent’s handling of her claim of harassment against the President of the Bank.

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<sup>3</sup> Application, Annex 21

<sup>4</sup> Application, Annex 1

<sup>5</sup> *Id*

<sup>6</sup> Regulation 10.1 provides in relevant part:

The President may impose disciplinary measures on staff members whose conduct is unsatisfactory or prejudicial to the interest of the Bank, or falls seriously short of the norms and standards established by the Bank.

<sup>7</sup> Application, Annex 2

## II. ARGUMENTS OF THE PARTIES

### THE APPLICANT

#### Procedural Irregularities

9. The Applicant argues that the Vice President, CSVP is not competent to take the dismissal decision under Staff Rule 101.02<sup>8</sup>, which gives such authority to the President alone. As President was the subject of the complaint, only the Ethics Committee for Executive Directors could take this decision. Since these superior instances were not seized of the matter, the Vice President, CSVP (an inferior officer) was not competent to take the decision.
10. Furthermore, the Respondent in its Answer acknowledges the procedural irregularity by stating that even if the Vice-President signed the letter of 12 February 2010, he did nothing but communicate the President's decision to terminate the Applicant's appointment. In the same Answer, the Respondent points out that the President was caught in a conflict of interest since he was the person accused and could therefore not be the same one to sign the termination letter.
11. The Applicant further argues that her right to be notified of the charges against her enshrined in Staff Rule 101.02 (a) was violated because the Respondent failed to give her any written notification of these charges before the summary dismissal decision. This was a violation of the Applicant's due process rights and thus rendered the dismissal decision invalid. Moreover, the Applicant maintains that the dismissal decision violated her right to be heard and to defend herself before the decision was taken. In support of her argument, the Applicant points to the AfDB Administrative Tribunal's judgment in *M.A.B.*<sup>9</sup>, which states in its paragraph 23: "[T]he staff member concerned ... must be given a full and unrestricted opportunity to exonerate himself from the relevant charges"<sup>10</sup>. The Applicant maintains that she had no opportunity to answer the charges against her or establish that she was victim of harassment. She further claims that she was refused opportunity to rebut the false and unfounded accusation that she had committed serious misconduct. She concludes that the summary dismissal decision was premeditated and malicious, and taken in reprisal for her complaint against the Bank's President.
12. In making its decision, the Respondent alleged that the Applicant's description of the event was not supported by other people present at the meeting. The Applicant asserts that though the Respondent made this allegation, it did not name those present or provide the content of their statements. Therefore, the Applicant did not have an opportunity to test the evidence and the charges made against her. She further maintains that this information is hearsay, which is baseless and does not prove that the Applicant's statements about the 2 March 2009 incident are untrue. This, to the Applicant, amounts to a violation of her due process right to cross-examine witnesses.

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<sup>8</sup> Staff Rule 101.02 states in relevant part:

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(c) Summary dismissal shall be imposed 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.

<sup>9</sup> AfDBAT Judgment No. 20, Application No. 2000/10 (2001)

<sup>10</sup> See also, ILOAT Judgments No. 69 and 907.

13. The Applicant further maintains that the Respondent violated the principle of presumption of innocence and her right to consult and obtain assistance, due to the summary nature of the decision to dismiss her. First the Applicant states that the burden of proof is on the Respondent to present evidence that her claim is false and based on malice. The accused must be presumed innocent until the facts against her are established “beyond all reasonable doubt.” This is a basic principle of due process that the AfDB Administrative Tribunal upheld in its decision of 13 November 2009 in Application No. 2008/01<sup>11</sup>. The Applicant was never given the opportunity to establish the truthfulness of her claim and the Respondent’s assumption that the Applicant’s claims were untrue or based on a malicious intent are not based on facts. Next, the Applicant states that she was not given an opportunity to obtain assistance from a colleague or retired staff member in violation of Staff Rules 101.02 (b); hence another violation of her due process rights.
14. The Applicant argues that Presidential Directive 04/2006 and decisions of international administrative tribunals<sup>12</sup> mandate that Management investigate complaints of harassment thoroughly and take appropriate measures. Therefore, the Respondent had a duty to investigate the Applicant’s 31 January 2010 harassment complaint once received. The Applicant notes that despite the above-mentioned duty, she never received any response to her complaint from any competent authority in the Bank, other than the letter of summary dismissal. The Respondent violated its duty to investigate and to take appropriate measures.
15. Lastly, the Applicant submitted additional written statements and documents, pursuant to Article XIII of the Rules of Procedure of the Tribunal. In the submission, she reiterates and points out that:
- It was to protect her procedural interests that she filed an appeal with the Staff Appeals Committee simultaneously with her application with the Tribunal;
  - The Appeals Committee had suspended action on the harassment case that she had filed. Consequently, she requests the Tribunal to hear the matter in its entirety;
  - Since the Respondent’s Rejoinder states that the Applicant was wrong to seize the Appeals Committee over facts concerning harassment involving an Elected Officer, the Respondent implicitly accepts the direct referral of the matter to the Tribunal, pursuant to Article III.2 (i) of the Statute of the Tribunal.

### **Substantive irregularities**

16. The Applicant further maintains that her complaint against the President does not constitute misconduct within the meaning of Staff Regulation 10.1 and Staff Rule 101.02. She states that she acted in good faith when filing her complaint and in the exercise of her legal rights in accordance with Presidential Directive 04/2006 relating to harassment as well as the Respondent’s Whistle blowing and Complaints Handling Policy of 1 January 2010. The President’s statements to Applicant during the 2 March 2009 meeting “stigmatized and intimidated” the Applicant; thus Applicant was entitled to file a complaint against the President. The Bank failed to demonstrate that in filing her complaint, the Applicant committed serious misconduct warranting summary dismissal.

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<sup>11</sup> AfDBAT Judgment No. 68, *S.S.M.D. vs. African Development Bank* (2009).

<sup>12</sup> Article 7 of PD 04/2006; ILOAT Judgment No. 2552 (2007); ILOAT Judgment No. 2642 (2007).

17. Furthermore, the decision to summarily dismiss the Applicant was retaliatory, lacked proportionality and constituted an abuse of discretionary power. The dismissal decision was taken in direct reference to the complaint of harassment against the President and is therefore direct evidence of the malicious character of the dismissal decision. This is evidenced by the close chronological relation between the Applicant's complaint and the summary dismissal decision and thus an abuse of power as stated in ILOAT Judgments No. 2540 of 12 July 2006 and No. 2282 of 4 February 2004. In addition, the decision patently violates the provisions of Presidential Directive 04/2006<sup>13</sup>. The Applicant adds that in determining a disciplinary measure, the Respondent must consider the criteria of Staff Rule 101.00 as confirmed by AfDB Tribunal in its Judgment No. 68 of 13 Nov. 2009<sup>14</sup>. The Applicant maintains that her actions did not constitute misconduct; however, even if the Tribunal finds misconduct, the sanction applied was disproportionate to the alleged offense. Applying summary dismissal in the present case amounts to abuse of discretionary power.
18. The Applicant submits that the abrupt termination of her contract after about 12 years of loyal and faithful service and the unceremonious way in which she was escorted out of the Bank's premises cost her respect and dignity that was owed to her as an international civil servant. She adds that having left her former employer's service more than 12 years earlier, the summary dismissal from the AfDB deprived her of the ability to obtain another employment of equal grade, prestige and responsibility. Therefore, the dismissal violated her contractual rights and dignity.
19. In her Reply to the Respondent's Answer, the Applicant points out that the Respondent not only was incapable of refuting her arguments of abuse of authority, erroneous interpretation of facts, etc., but provided no concrete proof or valid points that could establish its decision to terminate her appointment. To the Applicant, the Respondent's explanations were nothing but baseless allegations not constituting serious misconduct, and must be dismissed.
20. Furthermore, the Applicant maintains that when she submitted her complaint to the Vice-President, the Vice-President had proposed to listen to her explanations and know her expectations before deciding on the response to give. He had added that ways and means should be sought to solve the matter amicably, in view of the fact that the matter implicated the Bank President in person<sup>15</sup>. The Vice-President had recommended that she act with caution, given the consequences that could follow if the matter were brought before the Ethics Committee for Executive Directors.
21. The Applicant is all the more shocked since she only followed advice given by the President himself and transmitted to her by the Executive Director who was present during the meeting of 2 March 2009. The advice was transmitted to her after she had sought to obtain further explanations from the President over the treatment meted out to her, which she deemed unacceptable, and her request for an amicable settlement. The President is said to have asked her to "go through the system" (administrative channels for her grievance)<sup>16</sup>.

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<sup>13</sup> Section 7.3.9 of the Directive states in relevant part:

"Any retaliation or threat of retaliation to any complainant ... of harassment shall be subject to discipline in accordance with this Directive and the relevant provisions of the Staff Regulations and Staff Rules."

<sup>14</sup> *Id.*

<sup>15</sup> Reply, Annex 52.

<sup>16</sup> Reply, Annex 51.

22. The Applicant posits that the President's conduct on 2 March 2009 is regulated by Rules 3 and 6 of the AfDB's Code of Conduct of Elected Officers. Also, Presidential Directive 04/2006 defines harassment as "objectionable comments or actions toward a specific person or group" that does not serve a legitimate work purpose and is "severe or pervasive" so as to create a hostile work environment. According to this definition, "intent" is not a requirement to prove harassment. Thus, the President's intentions in making the statements to the Applicant are irrelevant. The President called her "feminist," "trouble-maker," and "ambitious." The President was antipathetic to her to her role and achievements as Gender Specialist in the Bank. His comments in the context in which they were pronounced were nothing but disparaging. These statements by the President constitute "explicit acts of harassment," which humiliated and denigrated the applicant, jeopardizing her professional career. The President's conduct, given his position in the bank, also constituted an abuse of power.

## **THE RESPONDENT**

### **Absence of Procedural Irregularities**

23. The Respondent submits that the Vice President, CSVP is duly authorized to terminate staff via summary dismissal under Presidential Directive 02/2004. Concerning the Designation of Authorized Signatories of the Bank and the Fund<sup>17</sup>. The Respondent notes that Staff Regulation 10.1 and Staff Rule 101.02 invest in the President the power to summarily dismiss staff for serious misconduct. According to the Bank's Delegation of Authority Matrix, the President delegates this authority to the Vice President, CSVP for disciplinary matters concerning staff within PL3-PL8 grades. As the subject matter of the Applicant's 31 January 2010 memorandum was the President himself and the Applicant addressed the memo to the Vice President, CSVP, it was appropriate that the dismissal letter be signed by Vice President, CSVP in order to avoid a conflict of interest. The Vice President's letter was statutorily and factually issued with approval of the President (*See, Lackey ILOAT Judgment No. 475 (1982)*).

### **Applicant's due process rights were preserved**

24. The Respondent contends that the Applicant's due process rights were preserved because she was informed in writing of the charges against her and reasons for her summary dismissal. The letter from the Vice President, CSVP was clear and therefore in full compliance with the requirement of Staff Rule 101.02. The Respondent argues that the purpose of giving the staff member an opportunity to be heard under Rule 101.02 (a) is to deny, clarify or refute allegations made against her. The Applicant was informed in writing and the fact that she disagrees with the decision does not vitiate the fact that she was fully aware of the misconduct she had been charged with.
25. The Respondent further maintains that there is a clear distinction between the Applicant's claim of harassment against the President and the offensive inter-office memo to the Vice President, CSVP of 31 January 2010. The allegation of harassment was not investigated because the Applicant failed and refused to follow the required procedure for claims against the President. The Applicant was not dismissed because of her harassment complaint against the President; rather, she was dismissed because of the tone and offensive language of her 31 January 2010 memorandum. The Respondent adds that the tone of the Applicant's memorandum "is on its face objectionable, improper and

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<sup>17</sup> Presidential Directive 02/2004, Section 1.2.

inexcusable.” Consequently, there was no need to conduct an investigation or initiate an adversarial fact finding process when these facts were undisputed. To support its argument, the Respondent points to *Re Bhandari*, ILOAT Judgment No. 159 (1970), which concludes that procedural safeguards are inapplicable where misconduct has been admitted and *Re Raj Kumar*, ILOAT Judgment No. 162 (1970) (even if procedural irregularities exist, they do not affect validity of the decision contested). Furthermore, the Respondent cites *C.G.S.*<sup>18</sup> and *M.A.B.*<sup>19</sup> for the proposition that the summary dismissal process is separate from regular disciplinary process, as decided by the AfDBAT in these cases. With respect to this argument, the Respondent asserts that the principles of due process were satisfied in this case.

26. In response to the Applicant’s claim that the presumption of innocence was violated, the Respondent asserts that it recognizes and upholds this presumption. However, in the present case, the Applicant herself admitted to writing the offensive inter-office memorandum that included serious allegations against the President in a “derogatory and totally inappropriate” manner. The Respondent further notes that the memorandum’s malicious and provocative tone is self-evident, making the Applicant’s misconduct “egregious, open, undisputed and uncontroverted.” Consequently, the Respondent’s duty to presume Applicant’s innocence was eliminated by the patency of Applicant’s own misconduct.
27. The Respondent further argues that the summary dismissal was warranted in this case because the Applicant’s conduct constituted serious misconduct. In particular, the Respondent maintains that all the criteria laid out in Staff Rule 101.04 were taken into consideration before the dismissal decision was made. Given the provocative and discourteous nature of the Applicant’s memorandum to the President and the offensive, derogatory and scandalous memorandum to the Vice President, CSVP, the Respondent’s decision to summarily dismiss the Applicant was proportionate to the gravity of the misconduct. The Applicant knowingly chose to ignore the proper procedure for filing a complaint against the President and used the memorandum to the Vice President, CSVP to embarrass the President in his bid for reelection. The offensive statements the Applicant accuses the President of making happened nine months before her memorandum to the President and eleven months before her memorandum to the Vice President, CSVP. The memorandum to the Vice President, CSVP was made during the time the Board of Governors was considering eligibility of candidates for President of the African Development Bank. The Applicant knowingly violated the established procedure for filing a complaint against the President and consequently, the Respondent could not investigate her claims. The Applicant’s admitted choice to file a complaint against the President with the Vice President, CSVP and not the Ethics Committee for Executive Directors as required under the rules, was done with the intent to inflict maximum embarrassment and damage to the President’s image and reputation. The Applicant knew the President was exempt from the regular administrative process of review, yet decided to pursue that option nevertheless. The Applicant’s motive is clearly demonstrated in the letter to the Vice President – to subject the President to a “Panel of Enquiry” and subject him to cross examination. It is therefore clear that the Applicant’s actions were “intentional, mala fides and irrational.”

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<sup>18</sup> AfDBAT Judgment No. 37, Application No. 2004/01 (2005).

<sup>19</sup> AfDBAT Judgment No. 20, Application No. 2000/10 (2001).

28. The Respondent submits that the interpretations and meaning given by the Applicant to the comments made by the President during the 2 March 2009 meeting are not based on the context of the statements or any other comment, act or conduct of the President. Rather, they are purely the Applicant's own interpretations. Had the President held those views about the Applicant, it would have been illogical, irrational or unreasonable for him to make the only decision he made on behalf of the Applicant approving the transfer she requested. By misinterpreting the President's comments and taking them out of context, the Applicant betrayed the spirit of candour and goodwill extended by the President to her. The Applicant's conduct under the circumstances therefore amounted to serious or gross misconduct warranting summary dismissal.
29. On the issue of lack of proportionality of the sanction imposed in the present case, the Respondent reminds the Tribunal that in reviewing a dismissal decision by an international organization for misconduct, the Tribunal's role is limited to determining whether the decision was flawed by mistake of fact, error of law, deprivation of due process, or vitiated by extraneous or prejudicial factors. The Tribunal is not to substitute its judgment for that of the administrative authority in matters of misconduct or discipline as evident in the jurisprudence of Administrative Tribunals in *Liu*<sup>20</sup>, *C.G.S.*<sup>21</sup>, and *In re Andreski*<sup>22</sup>. Consequently, the Applicant's argument of lack of proportionality between the alleged misconduct and the sanction is without merit.
30. To counter the Applicant's claim of retaliation, the Respondent maintains that the summary dismissal decision was not taken because the Applicant filed a complaint of harassment against the President. Rather it was based on the "grave and derogatory allegations" made by the Applicant against the President in her 31 January 2010 memorandum to the Vice President, CSVP. In the said memorandum she used insulting and offensive language so as to bring the President to disrepute and tarnish his reputation as well as that of the Institution. The Applicant made a deliberate decision not to follow the required procedure in dealing with the allegations against the President and opted for one that would have adverse publicity against the President. There is no evidence of retaliation in this case or violation of the Bank's Whistle Blowing Policy or any other relevant rules as claimed by the Applicant.
31. The Respondent argues that summary dismissal involves immediate and final separation between the Respondent and the employee. These actions are taken in the interests of the Bank. In the present case, the Applicant, after being terminated and removed from the Respondent's premises, was subsequently allowed to retrieve her belongings and close her office in a controlled manner. Therefore, there was no violation of her dignity as an international civil servant.
32. The Respondent notes that complaints against Executive Directors and the President are governed by Section 18 of the Code of Conduct of Elected Officers of the AfDB and ADF. Such complaints must be submitted to the Ethics Committee for Executive Directors as mandated by Article 2 of the Board of Governors' Resolution B/BG/2008/11<sup>23</sup>. The Applicant knowingly chose to circumvent the proper procedure for

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<sup>20</sup> UNAT Judgment No. 490 (1990)

<sup>21</sup> *Id.*

<sup>22</sup> ILOAT Judgment No. 63 (1962).

<sup>23</sup> Article 2 states in relevant part:

Any Complaint or allegation relating to the violation by the President of the provisions of the Code of Conduct shall be submitted in writing to the Ethics Committee provided for in Article 18 of said Code of Conduct either in person, through the Chairperson of the Audit and Financial Committee (AUF) of the Board of Directors or through the Auditor General of the Bank.

filing a complaint against the President, despite knowledge of that procedure. In the 31 January 2010 memo, the Applicant attempted to waive her right to file a complaint with the Ethics Committee. However, the Applicant has no power to waive the requirement of Article 2 of the Board of Governors' Resolution. Adjudication of any complaints against the President cannot be carried out by staff who are his employees, but by his peers in order to ensure integrity and impartiality in the process. Even if the Applicant was able to file her harassment complaint through the administrative process, the complaint should have been filed with the Director, CHRM, in accordance with Presidential Directive 04/2006 and not with the Vice President, CSVP. Hence, under the Code of Conduct of Elected Officers and under Presidential Directive 04/2006, the Applicant failed to follow proper procedure<sup>24</sup>.

33. In its Rejoinder and comments following the additional written statements submitted by the Applicant, the Respondent points out that the deliberate act of opting to follow another procedure than due process is confirmed; that although the Applicant reiterates the same arguments in her Reply and the additional written statements, new elements and totally distorted facts were also added.
34. Firstly, having simultaneously seized the Appeals Committee and the Tribunal on the same matter, the Applicant distorts the meaning of the Respondent's answers regarding the Appeals Committee's incompetence to recommend an investigation following her complaint of harassment.
35. Secondly, she infers that the Respondent is the cause of the suspension of proceedings before the Appeals Committee<sup>25</sup>, on the one hand, and on the other that the Respondent accepts that the Tribunal examine all issues raised in her Application – which is incorrect.
36. Thirdly, the Applicant mentions a discussion that she had with the Vice-President, CSVP, on 2 February 2010, but she produces what she calls "minutes" of the discussion, of which she is the sole author; that the said document was never read, approved or signed by the Vice-President. The "minutes" present her version, for her sole interest. The Vice-President totally refutes the content of the "minutes" both in connection with referral or otherwise before the Ethics Committee, mention of "negotiation on the General Capital Increase and the ADF Replenishment" or the possibility that certain capitals and newspapers could get wind of the matter and politicise it.
37. Lastly, the Applicant purports certain assertions made by Mr. Peter Sinon, one of the persons present at the 02 March 2009 meeting, during which the President would have acted in the manner that she claims. The Applicant believes that if Mr. Sinon were not convinced that she was a victim of the President's inappropriate conduct towards her that hurt her dignity and the respect to which she was entitled, he would not have become involved in attempts to mediate between her and the President. Mr. Sinon had categorically refuted this interpretation of his motives.
38. In summary, the Respondent considers that:
  - It is not responsible for the fact that the Appeals Committee, an independent body, did not render its conclusions and recommendations;

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<sup>24</sup> See, ILOAT Judgment No. 2811 (2009) - dismissing the complaint for failure to exhaust internal administrative remedies. See also, *Deborah Guya v. IBRD*, WBAT Decision No. 174 (1997) - lack of knowledge of internal review procedure is no excuse for failure to comply with said procedures.

<sup>25</sup> Statement of Appeal of 12 July 2010, page 5, Annex 59 of the additional written statements.

- The Applicant herself caused the "delay" by deciding as "strategy" to seize both the Tribunal and the Appeals Committee, whereas a termination without notice had been pronounced;
- Since the complaint concerned an Elected Officer, it could not fall within the competence of the Appeals Committee;
- No compensation is due her on that account and for her decision to file additional written statements.

### **III. THE PROCEDURE**

39. Following the lack of response from the Vice President, CSVP to the Applicant's 25 February 2010 request for reconsideration of the summary dismissal decision, whereas she had already filed an Application with the Tribunal, the Applicant also filed a Statement of Appeal with the Staff Appeals Committee, against the Respondent's failure to investigate her claim of harassment against the President of the Bank. The Statement of Appeal was filed on 26 April 2010. Since the Statement of Appeals did not follow the procedure for bringing matters before the Committee, it was returned for correction and filed anew on 12 July 2010. In the Appeal, the Applicant requested that the Staff Appeals Committee should refer the matter to the Ethics Committee for Executive Directors and recommend among other things, that the procedure before the Staff Appeals Committee be suspended, a comprehensive investigation be undertaken and that the Applicant should be paid compensation for moral damages as well as legal fees and costs. The conclusions of the Staff Appeals Committee are still pending.

### **IV. REQUESTS BY THE PARTIES**

#### **The Applicant**

40. The Applicant requests that the Tribunal:

- Rescind of the decision of summary dismissal dated 12/02/2010;
- Order that a comprehensive investigation be undertaken into the President's offending statements and attitude toward the applicant;
- Order that the Applicant be given a copy of the Panel of Enquiry's findings and recommendations;
- Order the Applicant's reinstatement to the position of Chief Diversity Officer or in lieu thereof, payment of 20 months' salary as compensation for wrongful dismissal;
- Award payment of Applicant's salary retroactively from the date of dismissal to the date of Tribunal's judgment;
- Award payment of two hundred thousand (200,000) US-Dollars for moral injury, pain and suffering and damage to Applicant's reputation and career;
- Expunge all references of dismissal from Applicant's records;

- Award payment of legal fees, costs and expenses incurred in connection with filing, maintaining and the Application and attendance at the Tribunal's hearings, as well as reimbursement of additional expenses for translation that she had had done, pursuant to Article XIII.2 of the new Rules of Procedure on "Additional Written Statements and Documents".

### **The Respondent**

41. The Respondent requests that the Tribunal:

- Affirm decision of Vice President, CSVP dated 12 February 2010 summarily dismissing the Applicant for serious misconduct;
- Reject the request for an investigation or the constitution of a Panel of Enquiry to deliberate on the alleged harassment of the Applicant by the President;
- Dismiss all the Applicant's claims for monetary compensation, damages as prayed for in her Additional Statement, legal fees, costs and expenses;
- Dismiss her claim for reinstatement and all other ancillary relief requested by Applicant;
- Declare that Respondent's actions were in accordance with the Staff Rules and Regulations.

### **V. THE LAW**

42. The application challenges the summary termination of the Applicant's employment with the Bank on February 12, 2010. It also seeks to challenge what the Applicant says is the failure of the Bank to investigate her complaint of harassment by the President of the Bank. There is no question that the Tribunal has the power to deal with the Applicant's application, inasmuch as it relates to her summary dismissal. However, the Bank challenged the competence of the Tribunal to examine the Applicant's allegations of harassment by the President.
43. Complaints against the President of the Bank are governed by Section 18 of the Code of Conduct of Elected Officers of the Bank. Any such complaint must be submitted to the Ethics Committee for Executive Directors, as mandated by Article 2 of Board Resolution B/BG/2008/11. The Applicant was aware that this was the appropriate procedure, but elected instead to complain to the Vice President, CSVP. In so doing, the Applicant purported to waive her right to proceed in accordance with the rules relating to complaints against Elected Officers of the Bank. However, the Applicant had no power to waive the requirements of Article 2 of the Board of Governors' Resolution. In knowingly failing to follow the appropriate procedure, the Applicant failed to exhaust her internal administrative remedies.
44. Article III of the Tribunal's Statute makes it clear that an application to the Tribunal will not be admissible unless the Applicant has exhausted all other available internal administrative review remedies prior to bringing the case before the Tribunal: see the *Judgment of the AfDB Administrative Tribunal delivered on May 11, 2006, Application No. 2005/02*, at para. 14.

45. As a result, the Tribunal ruled at the commencement of the hearing that it did not have the competence to deal with the aspect of the application relating to the alleged failure of the Bank to investigate the Applicant's complaint of harassment against the President. In these circumstances, it is therefore not appropriate for the Tribunal to determine whether the statements made by the President of the Bank at the meeting of March 2, 2009 constituted "harassment" within the meaning of the relevant Bank policies.
46. Before examining the substance of the application as it relates to the Applicant's summary dismissal, it is first necessary to have regard to the scope of the review that may be carried out by the Tribunal in reviewing a decision to summarily terminate the employment of a Bank employee for serious misconduct.
47. The power given to the President to summarily dismiss employees for serious misconduct is broad, but not without limits. As the Tribunal has previously observed, it is not the role of this Tribunal sitting in review of a decision to summarily dismiss a Bank employee to substitute its own opinion for that of the President in deciding whether the conduct of an employee constitutes "serious misconduct" within the meaning of Rule 101.02(c) of the Staff Rules. The role of the Tribunal is "limited to determining whether the decision was flawed by mistake of facts, or an error of law, or deprivation of due process or vitiated by extraneous or prejudicial factors": see *C.G.S. v. African Development Bank, Application No. 2004/01*, at paras. 35 and 37.
48. The Applicant has raised a number of arguments with respect to the process followed in relation to the termination of her employment, alleging that she was deprived of due process. It is not necessary for the Tribunal to address these arguments in light of the conclusion that it has reached in relation to the substance of the application. However, this should not be interpreted as acceptance by Tribunal of the Bank's argument that, to the extent that it may have been obliged to give the Applicant written notice of the allegations against her, that obligation was discharged by providing such notice at the same time that the Applicant was advised of her summary dismissal.
49. As was noted earlier, the Tribunal does not have the competence to rule on the merits of the Applicant's harassment complaint, with the result that it will offer no opinion with respect to whether the conduct of the President at the March 2, 2009 meeting can properly be characterized as harassment. That said, it must be recognized that the Applicant was summarily dismissed as a result of the allegations made in her harassment complaint, as well as the tone and wording of the complaint. Moreover, in the February 12, 2010, letter terminating the Applicant's employment, the Vice President, CSVP stated that the Applicant's "description of what was said at that meeting ... is contested by those who were at the meeting". As a consequence, it is necessary for the Tribunal to determine whether the statements attributed to the President were in fact made at the meeting in question.
50. The Applicant sought to adduce *viva voce* evidence from a number of witnesses at the hearing. She also sought to have an unsworn written statement provided by an individual with knowledge of the case admitted as evidence. In this regard, the Applicant pointed out that the Bank had itself included an unsworn statement from Peter Sinon as an Annex to its Answer. Mr. Sinon was one of the four individuals present at the March 2, 2009 meeting between the Applicant and the President and provided information as to what was said at the meeting. The Tribunal ruled that neither written statement would be

admitted, as neither statement was made under oath, and neither author was available for cross-examination.

51. The Tribunal granted leave to the Applicant to call Mohammad Kisubi, the fourth individual present at the March 2, 2009 meeting. The Tribunal also allowed the Applicant to call two medical doctors who treated her after the events of March 2, 2009. The Applicant ultimately chose to call just one of her doctors.
52. The Applicant gave an oral statement to the Tribunal explaining her version of the meeting. However, the Applicant was not called as a witness in this matter and was thus neither sworn nor subjected to cross-examination. The only sworn evidence properly before the Tribunal as to what went on at the March 2, 2009 meeting was that of Mr. Kisubi, who the Tribunal found to be a very credible witness. He testified in a straightforward manner and appeared to have a good recollection of the events in issue.
53. Although he was called as the Applicant's witness, Mr. Kisubi's evidence was generally not supportive of the Applicant's version of events, and contradicted her account of what occurred in many material respects. While disagreeing with the Applicant's perception of the tone and context of the President's comments, Mr. Kisubi did, however, confirm that the statements attributed to the President were in fact made at the meeting in question. Indeed, the Tribunal observes that nowhere in the Bank's pleadings has it denied that the President made the statements attributed to him by the Applicant.
54. It is clear from the February 12, 2010, letter terminating the Applicant's employment that the precipitating event for her dismissal was the tone and content of the harassment complaint that she filed with the Vice President, CSVP on February 2, 2010. An employee has considerable latitude in formulating his or her complaint when attempting to access a grievance or appeals process. This does not, however, justify the use of gratuitously offensive language: see *Judgment No. 2861 of the International Labour Organization Administrative Tribunal*, at para. 53.
55. Having carefully reviewed the document in question, the Tribunal agrees with the Bank that the language used by the Applicant in her harassment complaint was intemperate, disrespectful and inappropriate, and may have justified sanction by the Bank in the event that her allegations of harassment were ultimately determined to have been unfounded. As a senior official within the Bank, the Applicant should have known that such gratuitously insulting language was both improper and did little to advance her cause.
56. At the same time, and being mindful of the limitations on the Tribunal's power to review a Presidential decision to summarily dismiss a Bank employee, the Tribunal is nevertheless satisfied that, in this case, the finding that the Applicant was guilty of serious misconduct was based upon an erroneous understanding of the facts and that, moreover, there was a failure to have regard to certain relevant considerations.
57. First of all, the February 12, 2010, letter of termination states that in her complaint, the Applicant "describe[d] the President of the Bank as a tyrant who does not comply with the Bank's rules ...". However, it is clear from a review of the harassment complaint that nowhere does the Applicant actually call the President a "tyrant".
58. The February 12, 2010, letter of termination further alleges that the Applicant's harassment complaint was aimed at "tarnishing the image of the President, undermining his authority and ultimately tarnishing the image of the Bank". It appears, however, that

in coming to this conclusion, there was a failure to consider the context in which the Applicant's allegations were made.

59. There is no question that insulting and disrespectful comments about the President of the Bank made by a Bank employee in a public forum could potentially lead to the summary dismissal of the employee as such statements could indeed tarnish the image of both the President and the Bank itself. However, that was not what happened here. It is evident from the Bank's own harassment policies that the complaints process is intended to be a confidential one, and that complaints of harassment are to be handled with the utmost discretion so as to ensure that the reputations of those involved are not unduly damaged. There is no indication in the letter of termination that any consideration was given to the confidential nature of the communication in question.
60. The termination letter further asserts that the Applicant's "description of what was said at the meeting ... is contested by those who were at the meeting". As was noted earlier, the only evidence ... before the Tribunal as to what was actually said at the meeting came from Mr. Kisubi. While he disagreed with the Applicant's characterization of the tone and intent of the statements made by the President, Mr. Kisubi acknowledged that the statements in question were in fact made. Moreover, as was previously noted, the Bank has not disputed that the statements attributed to the President were made. Thus it appears that to the extent that the decision to summarily dismiss the Applicant was based on the understanding that her description of what was said at the meeting was incorrect, the decision was based upon a mistaken understanding of the facts.
61. The February 12, 2010, letter summarily dismissing the Applicant also refers to her "definite malicious intent" in filing her complaint. While the Bank made a number of allegations of bad faith and malice in its written submissions, it did not pursue those allegations in its oral submissions before the Tribunal. Suffice it to say that the Bank's assertion that the filing of the complaint with the Vice President, CVSP rather than the Ethics Committee for Executive Directors was calculated to inflict maximum damage on the President at a time that he was seeking re-election by the Board makes little sense. Surely it would have been far more damaging to the President had the complaint been brought to representatives of the very body that would be deciding whether or not he should be re-elected. As a consequence, although the Applicant did not follow the proper complaints procedure, the Tribunal is not persuaded that she acted maliciously in bringing her complaint to the Vice President, CSVP rather than the Ethics Committee for Executive Directors.
62. It is also clear that whatever the merits of her harassment complaint may be, the Applicant nevertheless sincerely believes that she has been harassed by the President of the Bank. Whether that belief is objectively well-founded is not for this Tribunal to say in the context of this proceeding. However, in light of the sincerity of the Applicant's belief that she was harassed, the allegation of malicious intent appears to have been based upon a misapprehension of the facts.
63. The Tribunal would also note that the Bank must act with extreme caution in disciplining an employee in circumstances such as this. The Bank insists that the Applicant was not dismissed merely for bringing her harassment complaint, but rather for the way in which she did it. Nevertheless, summary dismissal in such circumstances will inevitably be viewed as retaliatory by both the employee directly involved and by others. This will, in turn, have a chilling effect on other employees, and may dissuade them from bringing potentially meritorious complaints for fear that they too may be sanctioned for so doing.

A far more prudent course of action would be to allow the complaints process to proceed to its conclusion and then take the appropriate steps if it is finally determined that the complaint was without merit, and was brought in bad faith or for an improper collateral purpose.

64. Finally, we have not been directed to any evidence in the record that would indicate that that the Applicant had any prior disciplinary record during her nearly 12 years of service with the Bank.
65. For these reasons, the Tribunal is satisfied that the decision to summarily dismiss the Applicant was based upon a misapprehension of the facts and failed to take into account relevant considerations. Moreover, summary dismissal was grossly disproportionate to the gravity of the Applicant's misconduct. In all of the circumstances, the conduct of the Applicant, while inappropriate, did not constitute "serious misconduct" within the meaning of Rule 101.02 (c) of the Staff Rules thereby justifying her summary dismissal. Consequently, the February 12, 2010 decision to terminate the Applicant's employment is quashed.
66. The next issue is the remedy to be awarded to the Applicant.
67. The Applicant seeks two hundred thousand (200,000) US-Dollars for moral injury, pain and suffering and damage to her reputation and career. The primary focus of the Applicant's submissions with respect to her claim for moral damages was on the psychological injury that she says that she suffered as a result of the President's actions at the March 2, 2009 meeting. According to the Applicant, it was as a result of the comments made by the President that she suffers from anxiety and depression. The Applicant's claim was supported by the evidence of her family doctor who testified that her psychological problems started after March 2, 2009.
68. However, it is clear from the Applicant's own statements that she was suffering from psychological difficulties well before her meeting with the President of the Bank. Paragraph 6.2 of the Applicant's harassment complaint states "It is relevant to note that at the time that I was called to the meeting, I was on sick leave occasioned by a climate of hostility that I was experiencing at the time from my superiors ..."
69. When the Tribunal put this statement to the Applicant's family doctor, he conceded that he was not sure when it was that the Applicant began exhibiting symptoms of anxiety and depression. Surprisingly, the doctor did not maintain records of his consultations with the Applicant and thus could not confirm these matters by reference to the Applicant's medical record.
70. As a consequence, the Tribunal is not persuaded that the Applicant's psychological difficulties are attributable to the conduct of the President at the March 2, 2009 meeting. Moreover, the Applicant contributed to some extent to the loss of her employment through the reckless and gratuitously insulting language used in her complaint against the President. In the circumstances, the Tribunal declines to make any award of moral damages.
71. The Applicant also seeks reinstatement in her position as Chief Diversity Officer at the Bank or, in lieu thereof, payment of 20 months' salary as compensation for wrongful dismissal.

72. This is not an appropriate case for reinstatement, particularly in light of the evidence of the Applicant's family doctor with respect to the Applicant's ongoing mental health problems. Taking all of the relevant circumstances into account, the Tribunal awards the Applicant twelve (12) months salary and benefits as compensation for wrongful dismissal.

73. Finally, the Applicant seeking fifty thousand (50,000) US-Dollars for legal fees. This is greatly in excess of the costs ordinarily awarded by this Tribunal. Moreover, some of these expenses do not relate to this proceeding, but relate instead to proceedings before the Staff Appeals Committee. In addition, a substantial portion of the fees claimed relate to the harassment issue, which the Tribunal has determined it was not competent to address. At the same time, however, the Tribunal has determined that the Bank did not have grounds to summarily dismiss the Applicant. Taking all of these circumstances into account, the Tribunal awards the Applicant the sum of ten thousand (10,000) US-Dollars for costs.

## **VI. THE DECISION**

Based upon the foregoing, the Tribunal orders the Bank to pay to the Applicant:

1. Compensation for wrongful dismissal corresponding to the value of twelve (12) months salary and benefits;
2. The amount of ten thousand (10,000) US-Dollars for legal costs;
3. All other claims are rejected.

Professor Yadh BEN ACHOUR,

President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

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