

ADMINISTRATIVE TRIBUNAL  
OF THE AFRICAN DEVELOPMENT BANK

**QUORUM : Justice Mohammed Bello, President**  
**Professor Maurice Glèlè Ahanhanzo, Vice President**  
**Justice Lombe Chibesakunda, Member**  
**Professor Christian Tomuschat, Member**

APPLICATION N° 1998/02

B. A. I., Applicant  
African Development, Respondent

Judgment of the Tribunal – delivered on 17 December 1999

**I. THE FACTS**

1. The Applicant, a Guinean national, was recruited by the Bank on 14 February 1974. After charges had been brought against him of not living up to his professional duties, he was dismissed by letter of 18 May 1995 which he received the following day. An appeal to the President of the Bank to review this decision failed. Therefore, the Applicant subsequently filed an appeal with the Staff Appeals Committee. In its recommendation, this body concluded on 28 March 1997 that the termination of the employment of the Applicant should be maintained but that the financial consequences of the decision of dismissal should be reviewed in his favour «by granting him the termination entitlements of staff members». In fact, after his separation from the Bank the Applicant had requested that a

withdrawal settlement be paid to him in accordance with Article 5.5 of the Bank's Staff Retirement Plan.

2. However, the Bank waited until 13 February 1998 before making the relevant payment (received by him on 19 February 1998), which it had calculated as FF 410,652.47 (equalling 62,546,685 CFA Francs). Taking the view that the withholding of this amount was unlawful and that in any event it should have been increased by interest running from 19 May 1995, the date of his departure from the Bank, to 19 February 1998, the date of payment of the principal due, the Applicant wrote several letters to the Vice-President and to the Administrator of the Retirement Plan, requesting that the Pension Appeals Committee be set up. Although provided for under the Staff Retirement Plan of 1989 (Article 14), this body has not been put in place until April 1999. In letters of reply of 27 January and 21 December 1998, the Bank assured him that the Committee would soon be established and that then his case would be submitted to it.
3. On 27 July 1998, a settlement was reached between the Applicant and the Bank. The Bank agreed to pay to the Applicant an additional amount of 64,310,536 CFA Francs in lieu of notice, representing 12 months' salary calculated on the basis of the salary he received at the time when the contract was terminated. As a corollary, the Applicant declared in the relevant document entitled «Irrevocable and Definitive Acknowledgement», the following :

The African Development Bank has paid directly to me, in accordance with the recommendations submitted by the Staff Appeals Committee concerning my case, an amount in lieu of notice representing twelve months' salary calculated on the basis of the salary I was receiving at the time my contract was terminated (**Sixty four million, three hundred and ten thousand, one hundred and thirty-six CFA francs**, i.e., CFAF 64,310,536), to which has been added the amount of **Sixty-two million, five hundred and forty-six thousand six hundred and eighty-five CFA Francs** (CFAF 62,546,685), which was paid directly to me by the African Development

Bank on 13 February 1998, also pursuant to the above-mentioned recommendations of the Staff Appeals Committee.

I confirm that the total amount thus received by me fully covers the end-of-service payments due me, as provided in the internal rules in force on the day that my contract with the Bank was terminated, thus representing a complete and valid discharge for my former employer, freeing it of all obligations with regard to my terminal benefits.

In view of the foregoing, I declare myself satisfied with steps decided by my former employer, with my consent, to bring to a definitive close, with effect from 18 May 1995, all the financial consequences of my recruitment by the institution.

I undertake to have carried through, upon signature of the present statement and prior to payment to me by the African Development Bank of the said amount in lieu of notice, all formalities, declarations and other administrative procedures concerning the Bank as well as administrative departments and units of Cote d'Ivoire, with a view to definitively ending all relations, past and present, with my former employer. This will include restitution of all documents and official records issued to me or to my dependants on account of my duties and still in my possession, returning the license plates of my vehicles and presenting evidence of full settlement of such amounts as I may be required to pay to any administrative department or agency in Cote d'Ivoire, in order to ensure that there will be no claims whatsoever on my former employer, following the definitive closure of my files.

4. Notwithstanding the commitments undertaken by virtue of that instrument, on 22 December 1998 the Applicant instituted proceedings against the Bank before the Administrative Tribunal. He stated that the decision being challenged was the Bank Management's «refusal to establish the Pension Appeals Committee in accordance with Article 14 of the Retirement Plan». On the other hand, he pointed out that the withholding of the retirement contributions made

by staff members who, like himself, had been wrongfully dismissed, was in flagrant violation of the Staff Retirement Plan. He also characterized as unjustifiable the refusal of the Bank to pay him the interest generated by his pension funds.

5. Consequently, the Applicant claimed :
  - payment of interests on the amount owed for 3 years at BCEAO rates;
  - payment of damages for illegal withholding of pension funds ;
  - payment of the B part (paid by the Bank) because liquidation of his pension funds should follow wrongful dismissal.

## **II. MOTION OF NON-ADMISSIBILITY**

6. By two briefs, both dated 26 February 1999, the Bank raised grounds of inadmissibility of the Application.
7. In the first one of these briefs, it drew the Tribunal's attention to an inconsistency between Article 14 of the Staff Retirement Plan and Article III.1 of the Statute of the Tribunal. The last clause of Article 14.2 (a) of the Staff Retirement Plan provides that decisions of the Pension Appeals Committee shall be "conclusive and binding". On the other hand, according to the Article III.1 of its Statute the Tribunal shall be competent .

**“to hear and pass judgment upon any application by a member of the staff of the Bank contesting an administrative decision for non-observance of the contract of employment or the terms of appointment of such staff member”.**

Article II.1.ii and iii of the Statute define “right of a staff member” and “contract of employment” or “terms of appointment” to include

the Staff Retirement Plan and the rights and benefits provided for thereunder.

8. The Bank sought guidance from the Tribunal concerning the mutual relationship between these two provisions. It submitted that pursuant to a first interpretation Article 14 of the Staff Retirement Plan would exclude pension matters from the jurisdiction of the Tribunal, whereas according to an alternative interpretation the provisions of Article 14 were overridden by Article III of the Statute.
9. In the second brief of 26 February 1999, the Bank raised four grounds of inadmissibility.
10. In the first place, it contended that the Applicant had not exhausted the available administrative remedies within the Bank. Notwithstanding the non-existence of the Pension Appeals Committee at the time of the filing of the Application, the Staff Retirement Plan had put in place a system of review. In accordance with Rule 16 of the Administrative Rules of the Staff Retirement Plan, any decision of the Administration Committee or the Plan Administrator had, as a first step, to be (re-)examined by the Administration Committee. It was only thereafter that an appeal lay to the Pension Appeals Committee (Rule 16 (d)).
11. Second, there had never been a decision not to establish the Pension Appeals Committee. The fact that the Committee had come into being in April 1999 provided ample proof to the contrary. Since being directed against an artificial construction that did not actually exist, the Application was bound to fail.
12. Third, the facts underlying the dispute had all arisen prior to 1 January 1998, the cut-off date consonant with the establishment of the Tribunal. The only event occurring after 1<sup>st</sup> January 1998 was the payment of an outstanding amount which could not possibly open up the jurisdiction of the Tribunal.

13. Lastly, the Bank relied on the document signed by the Applicant on 27 July 1998. By virtue of that instrument, the Applicant was estopped from any further claims against the Bank.

### III. **ARGUMENTS PRESENTED BY THE APPLICANT**

14. The Applicant rejects the reasons put forward by the Bank with a view to demonstrating the inadmissibility of the Application.
15. First, he contends that the Pension Appeals Committee is the only effective channel of administrative review. Because of the Bank's failure to establish the Committee, he could not defend his pension rights infringed by Management. The Administration Committee of the Pension Plan could not operate as a genuine protection mechanism: it had no members selected from any retired Bank staff, there were intimate institutional links between Management and the Administration Committee, and additionally the review procedure as such was very vague. Furthermore, the Chairman of the Administration Committee had received copies of all his letters to the Plan Administrator.
16. As regards the alleged refusal to establish the Pension Appeals Committee, the Applicant submits that this refusal may be inferred from the two letters of the Plan Administrator of 27 January and 21 December 1998 acknowledging the non-existence of the Committee.
17. Concerning the cut-off date prescribed by Article XVII of the Statute, the Applicant maintains that it should be disregarded as being contrary to Article 10 of the Universal Declaration of Human Rights. According to this provision, everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations.
18. Lastly, the Applicant contests the validity of the instrument of discharge of 27 July 1998 on several grounds. First, he observes that it is invalid because it was extorted under economic pressure ("blackmail"). Second, the instrument was discriminatory because it

had been specifically prepared for him and was not in current use in the Bank. Third, the instrument covered only the common separation entitlements provided for by the Staff Regulations, whereas matters relating to retirement were not touched upon so that the instrument could not constitute a bar to any pension benefits.

#### IV. THE LAW

19. In accordance with Article XIV of its Rules of Procedure, the Tribunal will confine its examination of the case to the issue of admissibility of the Application.
20. The Tribunal notes in the first place that its jurisdiction, which extends to any matter concerning non-observance of the contract of employment or terms of appointment of a staff member, encompasses also pension matters arising under the Staff Retirement Plan. To be sure, the last clause of Article 14.2(a) of that Plan provides that decisions of the Pension Appeals Committee shall be conclusive and binding. But this provision has been superseded by Article III.1 of the Statute of the Tribunal, which confers jurisdiction with respect to any administrative decision without any exception. Since the Statute was established in 1997, it prevails as *lex posterior* over the Staff Retirement Plan, which came into being in 1989. It has been the law where two statutes are so plainly inconsistent and repugnant to one another that effect cannot be given to both at the same time that the latter should prevail.
21. Apart from the chronological sequence, which gives precedence to Article III.1 of the Statute, the object and purpose of the establishment of the Tribunal confirm the inferences drawn from the *lex posterior* rule. Retirement payments pertain to the core elements of the rights which a staff member acquires during the time of his professional activity with the Bank. If he or she did not enjoy effective judicial protection in that regard, too, his or her personal security would remain structurally threatened. A staff member who has left the

- service of the Bank is particularly vulnerable. More often than not, he will have moved to the country of origin from where redress by informal means cannot be easily obtained. If in pension matters legal remedies were not available, the improvement of the status of all staff members, as it was sought through the creation of the Tribunal, would be affected by serious and far-reaching gaps. The clear language of Article III.1 of the Statute, which embodies a proclamation of attachment to the principle of comprehensive review of all administrative decisions, could not be reconciled with the assumption that the drafters wished to accommodate tacit subject-matter exceptions.
22. The Tribunal does not feel it necessary to delve into all of the four preliminary objections raised by the Bank. It bases its judgment on the last one of these objections. The instrument signed by the Applicant on 27 July 1998 debars him from pursuing any claim against the Bank. The language of that instrument is unequivocal and permits of no restrictive interpretation. It is intended to put a definitive end to the relationship between the Applicant and the Bank. Specifically, the Applicant has undertaken to ensure that “there will be no claims whatsoever on my former employer”.
  23. The Applicant signed the instrument of 27 July 1998 on his own free will. Nobody forced him to make the declaration he did make. To be sure, he may have been in the grip of certain economic pressures. But this is the normal background of any such compromissory transaction. In any event, the Applicant has not been able to prove that he acted under duress so that his expression of will would have to be regarded as invalid.
  24. A valid agreement of release, as it is embodied in the instrument of 27 July 1998, makes an application filed contrary to its stipulations inadmissible.

**V. CONCLUSION**

Granting the Bank's motion of inadmissibility, the Tribunal rejects the Application as being inadmissible.

Honorable Justice Mohammed Bello - President

Albertine Lipou Massala - Executive Secretary

**COUNSEL FOR THE APPLICANT :**

- Without Counsel

**REPRESENTATIVE OF THE RESPONDENT**

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