

**ADMINISTRATIVE TRIBUNAL OF
THE AFRICAN DEVELOPMENT BANK**

QUORUM:	Professor Maurice Glele Ahanhanzo	-Vice President
	Professor Christian Tomuschat	-Member
	Judge Lombe Chibesakunda	-Member
	Judge Pio Marapi TeeK	-Member

APPLICATION No. 2001/04

K. K. C., Applicant
African Development Bank, Respondent

Judgment of the Tribunal – delivered on 16 December 2004

I. THE FACTS

1. Mr. C. K. K., the Applicant, was recruited by the Bank on 2 May 1974 as a clerk, grade G1. He was assigned to the management of stocks and then entrusted with the supervision of Cite BAD property from 1974 to 1980. From 1981 to 1983, he was in charge of property management. From 1983 until 31 August 1998, he carried out various duties as assistant to the stores manager at the warehouse in Zone 4, Abidjan. After leave in September 1998, he was assigned, on 5 October 1998, to stock reception.
2. On 21 October 1998, a Bank internal audit revealed the disappearance of 5605 reams of paper from the Bank's warehouse located in Zone 4 in Abidjan. On 11 November 1998, subsequent to a complaint filed by the Bank, the Applicant, as well as two co-workers who, as he, were assigned to the Bank's warehouse (Mr. A. A. O. and Mr. J. N. N.), was questioned by the Ivorian police. The police requested that the immunity be lifted for these three people, which initially the Bank refused.
3. After the creation of a Committee of Inquiry chaired by Vice President Boucher, the Bank questioned the Applicant as well as his two co-workers who were all suspected of being involved in the theft of reams of paper. This Committee submitted its report, which was just a compilation of testimonies, without comments, collected from the people questioned, on 18 November 1998. A week later, on 25 November 1998, the Applicant was suspended without pay, with immediate effect, by a letter signed by Mr. H.P. Van de Moesdijk, Director CHRM. On 26 November 1998, the entire Bank staff was informed of the suspension of three staff members (without specifying names) and the lifting of their diplomatic immunity.
4. The Applicant, as well as his two co-workers, was summoned before the Disciplinary Committee to answer to the accusation against him of theft of reams of paper. The hearing took place at an unspecified date in February 1999. The Disciplinary Committee finalised its report on 24 April 1999. First, the Applicant was not informed of the report's conclusions.

5. These conclusions were clearly in favour of the three people concerned. Literally, the Disciplinary Committee stated:

“The Disciplinary Committee was unable to establish negligence leading to, or culpability or involvement in, the theft of the paper on the part of any of the three staff members. The Disciplinary Committee concludes, therefore, that the charges brought against the staff members cannot be sustained on the basis of the evidence before it, and recommends that the charges should not stand.”

It should be noted that the Disciplinary Committee was not mandated to conduct an investigation for the purpose of clarifying the responsibilities that could have led to the theft of the reams of paper. The only purpose was to shed light on this theft.

6. Despite these conclusions of the Disciplinary Committee, in a letter from the Director CHRM (20 May 1999), which was virtually identical to the letters received at the same time by his two co-workers, the Applicant was dismissed for poor performance. The letter did not specify in detail the facts on which the performance evaluations deemed poor were based. It was limited to pointing out that the dismissal decision was taken following the theft of reams of paper from the warehouse in Zone 4, while taking into account a 1996 Audit Report (ADB/BD/IF/96/261) and the report of the Committee of Inquiry.¹ Furthermore, reference was made to Staff Regulation 6.11.1 (ii), which stipulates “The President may terminate the appointment of a staff member if it is established that the services of the staff member have proved unsatisfactory or that the staff member has failed to carry out his duties and obligations satisfactorily”. The Applicant’s salary was paid up to 26 April 1999. Furthermore, the Applicant received allowances in accordance with Staff Regulation 6.12.4. In this context, the Applicant signed, on 3 August 1999 a release form intended to clarify legal relations between the parties. The text of this release specified that the payment received by the Applicant constituted a “final and integral settlement”.
7. The Applicant attacked the Bank’s letter of dismissal by referring the matter to the Tribunal on 29 July 1999, without first exhausting all the internal remedies available in the Bank to challenge any administrative decision negatively affecting the claimant. Consequently, the Bank filed a motion of inadmissibility pursuant to Article XIV of the Rules of Procedures of the Administrative Tribunal. In a judgment of 14 December 1999, the Tribunal declared this motion well-founded. The Application was therefore dismissed as inadmissible at that time.

¹ The French text of the dismissal letter is slightly different from the English text. The French text (original) reads as follows: I refer to the various investigations conducted pursuant to the theft of reams of paper from the warehouse in Zone 4, to inform you that Management has taken the Audit Report and the report of the Committee of Inquiry into account, to decide to dismiss you for poor performance...” whereas the English text reads: “With reference to various investigations conducted in connection with the theft of reams of paper from the Zone 4 warehouse, I would like to inform you that Management, taking into account the Audit Report... and the report of the Committee of Inquiry, has decided to terminate your appointment for poor performance...”

- 8.** The steps undertaken by the Applicant to have the dismissal decision taken against him repealed were not successful. In a letter dated 24 January 2000, Vice President Boucher rejected his request for administrative review. In this letter, the Vice-President reiterated the fact that the Applicant's services in fact were unsatisfactory. This time, details were given. Three complaints were advanced
- « - the Applicant had ignored rules for the management of Bank properties placed in the Zone 4 warehouse by not conforming to the appropriate practices regarding inventory, bookkeeping, and control of stock records recommended in Audit Report ADB/BD/IF/96/261.
- The quality of his performances in the exercise of his tasks was mediocre, and he had shown negligence in keeping stock records and in taking reception of supplies; consequently, inventory and materials in the Zone 4 warehouse were in a deplorable state.
- the Applicant had not pointed out the abnormal reduction of stocks caused by thefts.»
- 9.** Subsequently, the Applicant seized the Staff Appeals Committee. The Committee transmitted its conclusions and recommendations to the President of the Bank on 16 February 2001. They are given here below:
- « i) pay to each of the Applicants one (1) month's salary for damages for prejudice suffered according to the indications of paragraphs 23 and/or 22 of the Appeals Committee's conclusions and recommendations;
- ii) pay to each of the Applicants at least six (6) months' salary for damages. This corresponds to the additional six (6) months' salary that each of the Applicants would have received in the context of termination of appointment with the parties' consent;
- iii) bring the Respondent, in future, to ensure that dismissals for poor performance are carried out in compliance with the procedure as indicated in the internal rules of the Bank in order to avoid any denial of justice as in the Applicants' case;
- iv) dismiss all the other claims of each of the Applicants”.
- 10.** The Bank did not comply with these recommendations. On the contrary, in a letter of 8 May 2001, it requested the reopening of the proceedings before the Appeals Committee affirming that some essential elements had not been taken into account during the proceedings. The Appeals Committee considered (decision of 21 June 2001) that the request contained no new element and that, in addition, it had not been made within the prescribed time stipulated in its rules of procedure in accordance with general rules evolved by international administrative jurisprudence.

11. By the silence it maintained subsequent to receipt of the recommendations of the Appeals Committee, the Bank made known by implication that it did not have the same views on the assessment of the facts as reflected in these recommendations.
12. The Applicant again seized the Tribunal in an Application dated 6 July 2001. The Bank once more contested the admissibility of the Application by mentioning the renunciation clause contained in the release declaration signed by the Applicant on 3 August 1999. In its interlocutory judgment of 19 July 2002, the Tribunal dismissed that motion of inadmissibility and instructed the Bank to submit a statement on the merits by 20 September 2002 at latest. For all the details, reference is made to the motives of that judgment.

II. THE ARGUMENTS OF THE PARTIES

13. The **Applicant** affirms that the dismissal decision is vitiated by misuse of power. It lacks effective and serious grounds. The Bank had suspected him of involvement in the theft of reams of paper. However, when the procedure before the Disciplinary Committee did not produce the anticipated results, the Bank changed the legal perspective by declaring the dismissal not for misconduct infringing on the rules of discipline, but for unsatisfactory performance. That shows, according to the Applicant, that the Bank had sought a pretext in order to be able to found in law the dismissal of which he was a victim.
14. His evaluations in the Bank had always been excellent. He had only one evaluation that was not so good, the evaluation for 1997, which was due to the arrival of a new supervisor. However that could not remove the positive evaluations of the previous years. In addition, the Bank's management had stated in a circular dated 5 June 1998 that the evaluations for 1997 would not be taken into account for decisions affecting the career of staff members
15. It was also erroneous to blame him for negligence in the management of stocks. When the theft was committed, he no longer had direct responsibility for stock management, having been assigned to reception. In October 1998, he entered the warehouse only once, on the 15th of the month. All the investigations conducted after the discovery of the theft had produced no indication susceptible to imply that he was involved in any manner whatsoever in the theft.
16. Furthermore, the Applicant affirms that dismissal according to Staff Regulation 6.11.1 (ii) requires that a performance evaluation report first be established. He draws this conclusion from the words "if it is established" employed in this Regulation, claiming that in such instances it is necessary to evaluate "the entire service profile of the person concerned". If a Bank staff member committed an error, dismissal is legal only on the basis of Staff Regulation 6.11.1 (iii).
17. The 1996 Audit Report cannot be held against him because it was stamped confidential and was not diffused to staff members.
18. Finally, the Applicant criticises the Bank's silence regarding the recommendations from the Appeals Committee. He mentions that the Bank has never cleared him of the accusation of theft, that it has broken his contract by invoking unsuitable and

erroneous motives, and that it has abstained, without justification, from making up for the errors it had committed.

19. The **Bank** pleads for the dismissal of the Applicant's arguments. It submits that it has not mixed the disciplinary procedure and the administrative procedure predisposed to sanction unsatisfactory performance. In the dismissal letter, the Bank had clearly shown its determination to use administrative means according to Staff Regulation 6.11.1 (ii). After the discovery of the theft, it had initiated, as preparatory measures, an array of procedures to clarify the facts and to be able, eventually, to select the most appropriate approach for the final decision.
20. As regards the key reason for the Applicant's dismissal, his unsatisfactory performance, the Bank contends that no rule requires that under such an assumption a written evaluation report be first established. Although the text of the 1996 Audit Report was considered confidential at the time it was adopted, the observations contained in the said report were not. The Bank was compelled to translate these observations into acts by communicating pertinent items to the various services concerned. It was therefore "highly unlikely that the Applicant did not apply, on a daily basis, the standards and performance criteria for the tasks prescribed by the audit and that the audit was not known to him."
21. When the Applicant went to the warehouse on 15 October 1998, he had in fact noticed the unusual reduction of the paper stock. However, he did not make a report because, as he was only replacing Mr. N., he considered that he was not fully responsible. This omission was a serious violation of his professional obligations.
22. Furthermore, the Applicant can be criticized for having gone to the warehouse several times in August and October 1998, to get office supplies without his presence having been duly recorded.
23. The Bank also sustains the dismissal on the grounds of the Applicant's bad evaluation in 1997, the year immediately preceding the theft, while nevertheless highlighting the fact that that evaluation was not directly taken into account, but rather served as a framework to correctly assess the Applicant's professional profile. Moreover, the evaluation for 1997, dated 5 August 1998, specified in openly critical terms that the Applicant

"-Does not assume responsibility

-Has no initiatives

-Gives the minimum of himself"

and goes on to add with regard to his competence and aptitude

"Acquired minimum skills on the job but requires training."

24. The Bank affirms that it never publicly denounced the Applicant as the alleged author of the theft. It did initiate the required procedures, as was its duty. However, it never mentioned the Applicant's name except in these formal procedures.

III. CLAIMS MADE BY THE PARTIES

25. The Applicant considers that the Bank, because of the violation of his employment contract, is obliged to pay him the following amounts:

- 1) Compensation for absence of motive for the dismissal decision:
CFAF 35,850, 888
- 2) Compensation for unfounded accusation of theft: CFAF 23,900,592;
- 3) Damages for moral prejudice: CFAF 35,850,880
- 4) Damages for financial prejudice: CFAF 23,900,592
- 5) a) Leave 1998: CFAF 796,686
b) Leave 1999: CFAF 613,885
- 6) Reimbursement of legal fees: CFAF 1,150,000.

26. No specific justification was given to calculate these amounts.

27. The **Bank** requests that the Tribunal dismiss the Applicant's Application and dismiss all claims.

IV. THE PROCEDURE

28. After completion of the written procedure, the oral hearing took place on 21 and 22 August 2004.

V. THE LAW

29. The Tribunal must state and judge whether Staff Regulation 6.11.1 (ii) could legitimately serve as a basis for the dismissal decision that was taken against the Applicant on 20 May 1999. According to this provision, the President can terminate a staff member's appointment "if it is established that the services of the staff member have proved unsatisfactory or that the staff member has failed to carry out his duties and obligations satisfactorily".

30. The Tribunal is not convinced by the affirmations of the Applicant according to which the breach of deontological obligations by a Bank staff member can only be sanctioned on the basis of Staff Regulation 6.11.1 (iii). The Bank should be in a position to guarantee optimal performance of its services at any time. Should it discover that one of its staff members is not up to the task that has been assigned to him, it should be in a position to correct this shortcoming by drawing the consequences that are required.

31. In any event, an equitable procedure must be ensured for the persons concerned so that they can defend their rights by demonstrating that the accusations against them do not correspond to the reality of the facts. Staff Regulation 6.11.3 stipulates for that

purpose that the President shall establish an administrative mechanism for the termination of appointment foreseen in Regulation 6.11.1 (ii). The interpretation of this provision leads to the conclusion that such mechanism must specifically cover instances where a staff member is dismissed for unsatisfactory performance, i.e. a mechanism in addition to the mechanisms that already exist within the Bank and which permit a posteriori administrative review of decisions taken against staff. Clearly therefore this mechanism is to be understood as a preliminary procedure, that precedes a dismissal envisaged by the Bank.

32. The Tribunal notes that this mechanism does not yet exist. It was not introduced by Staff Rule 6.11.02 which is mainly limited to repeating the words pronounced in Staff Regulation 6.11.1.(ii). However, this omission on the part of the Bank does not make illicit, at the current time, all the dismissals pronounced by the Bank, given that the significance and the scope of the regulation in question have not been recognized within the Bank, not even by staff representatives. Above all, it should be noted that the Staff Regulations became effective only on 20 March 1998, just a few months prior to the Applicant's dismissal. It is apparent that the drafting of an appropriate mechanism requires careful preparation. Nevertheless, it is the Bank's responsibility to implement Regulation 6.11.3 as soon as possible.
33. In the dismissal letter, the Bank made explicit reference to two reports, the Audit Report of 13 November 1996 and the Report of the Committee of Inquiry, which had been chaired by Vice President Boucher himself. Although the Bank has very broad discretion concerning the qualification of the performance of one of its staff members, the relevant decision cannot escape all jurisdictional control. If the employer justifies its action based on the grounds of some documents, these documents should in fact be apt to provide the alleged justification.
34. The Tribunal also notes that the fact of having pointed out two documents does not mean that all the other means of proof should be excluded. The Bank "took into account" the two specifically identified reports, but it clearly refers to all the investigations that were carried out after the theft, and therefore also the knowledge that it acquired from these investigations. The two reports thus do not constitute the only basis that permitted the Bank to assess the Applicant's comportment.
35. First of all, as regards the Audit Report of 13 November 1996, the Tribunal is not convinced that this report permits a negative judgment to be made on the Applicant's performance. The text of the report initially remained confidential. The Bank was not capable of proving how it had been brought to the Applicant's knowledge. In an extremely cautious manner, it limits itself to affirming, "it is highly unlikely that, the Applicant did not apply, on a daily basis, the standards and performance criteria for the tasks prescribed by the audit and that this audit was not known by him". This negative presumption does not constitute a valid basis for so serious a decision as the dismissal of a staff member. This conclusion is essential especially because, from the production of the report in November 1996 up to October 1998, the Bank apparently did not make any effort to translate this report's recommendations into acts.

36. Before the Disciplinary Committee, Mr. B Sidibe, Director CADM, stated in brief at an unspecified date (but which is situated between 25 January 1999 and 24 April 1999):

“(a) Mr Sidibe described the stock management system as unreliable. This, he stated, was primarily due to bad management. He revealed that up to the time of his appointment as Director, the Department had no inventory and stock management system. This resulted in shortages and panic buying.

(b) Mr. Sidibe stated that the storekeepers were unqualified, poorly supervised and operated without any knowledge of rules, regulations or an operational manual.

(c) Mr. Sidibe revealed that no one in the stock management system knew what goods were available or not. On several occasions shortages of office supplies were reported when the items in question were available at the warehouse.”

37. Likewise, Mr. J.H. Gandhi, Manager CADM.1, on the same occasion stated that serious flaws existed in the stock operational system (once again a summary):

“...there was a crisis in the Bank’s stock management system because of the absence of inventory and effective control. This, he stated, was compounded by the lack of clearly defined rules and responsibilities of the staff members involved.”

38. This evidence, collected over two years after the production of the report, clearly falls on the Bank’s management. Lower ranking staff members cannot be begrudged for not having taken measures that should have been taken by those responsible for the organisation of the services concerned. The Audit Report of 13 November 1996 very clearly recommended (item 2.4) that:

“a circular should be issued to recall to all the departments, the rules and procedures in force vested in CADM regarding the reception of all goods belonging to Bank properties”.

It would appear that this recommendation was not followed. In fact, at the hearing the Bank’s representatives were not capable of indicating to the Tribunal the appropriate measures that had been taken. They limited themselves, essentially, to affirming that the report was accessible to all. For a lower ranking staff member, who is accustomed to following instructions which he carries out, the mere fact of accessibility is not sufficient to owe someone obedience. In this context, the Tribunal is bent on recalling its observations in the case of *N.* (paragraph 56).

39. However, the report of the Committee of Inquiry, the second of the documents explicitly mentioned in the dismissal letter, brought out facts that seriously compromised the Applicant. The Applicant was compelled to acknowledge, during his hearing before that Committee on 18 November, that he had noted, when he went

to the warehouse on 15 October 1998, that an unusual quantity of paper had been taken out of the warehouse but he “merely asked the workers, while consulting the stock records, how so much paper had been consumed”. Since the stock records clearly indicated that large quantities had disappeared without justification, the Applicant should have immediately warned his superiors by informing them of the irregularities noted. Later, before the Disciplinary Committee, he explained his passivity in this regard by saying: “I was only replacing N.”

40. The Bank also produced a document from the Audit Department dated 1 December 1998 which pinpoints several irregularities blamed on the Applicant. In so many words, the report specifies:

“On 11 and 13 August, Mr. K. went to the Bietry warehouse to collect office supplies. There are no traces of his passage in the badge control system.

On 19 August, Mr. K. went to the Bietry warehouse twice (at 8 H 40 and 10 H 10 according to the LOSS CONTROL register). The LOSS CONTROL register does not indicate the nature or the quantities of the office supplies taken by the Applicant. Furthermore, Mr. K.’s second passage at 10 H is not recorded by the access control system, contrary to the first passage.”

41. The Applicant did not challenge the charges brought against him by the Bank, except with regard to his personal evaluation for 1997. The Tribunal can therefore base its considerations on the facts as they are mentioned in paragraphs 39 and 40 above.
42. It is quite true, as brought out mainly in the declarations of Mr. Sidibe, that the warehouse’s management lacked a complete and coherent system of regulations. Nevertheless, there were minimum rules that stemmed from the very nature of the task entrusted to the Applicant. The observations mentioned in paragraphs 39 and 40 above point out the fact that the Applicant was considerably negligent in carrying out his duties which cast a highly unfavourable light on his sense of responsibility. In particular, his passivity during his 15 October 1998 visit to the warehouse constitutes a very serious offence for someone who had been entrusted with responsibility for the management of this warehouse for several years, although in October 1998 he was responsible only for the reception of deliveries and was only replacing Mr. N. during his last visit.
43. The Tribunal considers that the Bank was not impeded, under these circumstances, from also taking into account the Applicant’s evaluations for 1997. His performance during that year was deemed rather mediocre. Certainly, the circular from Vice President Boucher on 5 June 1998 in which the Bank’s management had “decided that the results of the 1997 evaluations would not be used by the Bank’s management to take decisions that affect the career of the staff member” concerned. However, it was normal for the Bank to consider, given the Applicant’s personal file, that despite the good evaluations he had obtained formerly, he was not adequately qualified for the duties he was supposed to carry out in store management. The theft of reams of paper visibly constituted a major challenge to his professional capacities, and he was unable to respond appropriately. It is above all the Applicant’s reliability, decisive

criterion for a storekeeper position, which was seriously jeopardised according to the Bank's findings during investigations following the theft.

44. Moreover, the Tribunal cannot replace the Bank's judgment with its own judgment. Its assessment must be limited to verifying whether the Bank could have valid grounds to doubt the Applicant's reliability. The Tribunal considers that the Bank adequately detailed the reasons that led to the Applicant's dismissal. The Tribunal cannot dismiss the Respondent's arguments as being arbitrary or void of factual basis.
45. It was in vain that the Applicant invokes the Tribunal's judgement of 19 July 2002 in the *N.* case (Application N0. 2001/03) as a precedent likely to guide its assessment of facts also in this case. The only criticism the Bank had made against Mr. N. was that he had not followed the recommendations of the Audit Report of 13 November 1996. Mr. N. had assumed duty in stock management only on 1 October 1997, and at that time, no one had informed him of the content of this report and the lessons he should learn. Even after his dismissal, the Bank refused to give him a copy of the report. The Tribunal therefore considered that the Bank could not blame Mr N. for having violated rules, the content and scope of which he had never been informed.
46. Review of the facts that it is called on to assess leads the Tribunal to the conclusion that the dismissal letter of 20 May 1999 is based on solid facts so that all the conditions of applicability of Regulation 6.11.1 (ii) were satisfied.
47. Nevertheless, this letter contains an obvious error in that it pronounces the Applicant's dismissal with retroactive effect from 26 April 1999. According to the regime instituted by Staff Regulations, a staff member who is dismissed pursuant to the terms of Regulation 6.11.1 (ii) has the right to six (6) months notice. The dismissal therefore could not take effect retroactively.
48. It is quite true that the Applicant signed the "ADB Release form, acceptance of the settlement of the termination allowance and the return of all ADB documents" on 3 August 1999 as a "final and integral settlement". Nevertheless, as clearly indicated by the title of the form, the "final and integral settlement" concerns first of all the termination allowance. Deprive the Applicant of his six-months notice would have been possible only for serious misconduct or following a disciplinary measure. As the Respondent insisted on pointing out during the proceeding, the dismissal was made on the basis of Staff Regulation 6.11.1 (ii) for unsatisfactory performance. The Tribunal considers that, under the circumstances of this case, the Applicant's declaration of 3 August 1999 does not encompass the six months notice, including the period between 26 April and 20 May, to which he is entitled.
49. The Applicant did not request a specific amount corresponding to six months notice. However, he made several claims that go even further. The Tribunal therefore does not break the rule "*non ultra petita*" by allocating this amount.
50. The Tribunal notes that the Bank conducted all the investigations with the necessary caution. By abstaining from publishing the names of the accused persons the Bank tried, insofar as possible, to avoid adversely affecting the Applicant's good reputation. In this regard it cannot be criticized.

51. Since the Bank, to a certain extent, contributed to the legal problems of the dispute, especially by the hasty manner of the dismissal procedure and the overly concise drafting of the letter of 20 May 1999, the Tribunal considers that it is right to award the Applicant a certain amount to cover part of his legal fees.

VI. THE DECISION

52. The Tribunal orders the following:

- a. The Bank shall pay the Applicant a sum corresponding to six months notice, including the period between 26 April and 20 May 1999 pursuant to Staff Regulation 6.12.3.
- b. The Bank shall pay the Applicant the sum of \$1000 to partially cover his legal expenses.
- c. The Applicant's other claims are dismissed,

Professor Maurice GLELE AHANHANZO

- President

Albertine LIPOU MASSALA

- Executive Secretary

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