

**ADMINISTRATIVE TRIBUNAL
OF THE AFRICAN DEVELOPMENT BANK**

QUORUM:	Professor Maurice GLELE AHANHANZO	President
	Judge Lombe CHIBESAKUNDA	Vice-President
	Professor Christian TOMUSCHAT	Member
	Professor Yadh BEN ACHOUR	Member

APPLICATION N° 2004/02

Mr. Derris JENKINS-JOHNSTON, Applicant
African Development Bank, Respondent

Judgment of the Tribunal delivered on 1 December 2005

1. The Applicant was recruited by the African Development Bank on 30 April 1980. At the time the contested decision was taken, the Applicant held the position of Chief Country Economist. The facts that led to this case may be summarized as follows:

I. THE FACTS

2. During the 2000/2001 academic year, the Applicant in accordance with the regulation in force in the Bank received education allowance for one of his children enrolled in the Art Institute of Philadelphia (AIP) in the United States. The Bank paid the allowance amounting to USD 15 472 directly to the University. Since the Applicant's son only attended classes from 1 October to 15 November 2000 and from 2 April to 8 May 2001, the AIP proceeded to reimburse part of the school fees. A first check reimbursing 3 468.75 dollars was sent directly to the student on 12 January 2001. A second check for 5 918.75 dollars was issued on 3 July 2001 and received by the Applicant who sent it back to his son requesting him to pay it into the Applicant's bank account.
3. Following an inquiry by the Bank's Audit Department, the Applicant made a reimbursement to the Bank on 28 October 2002.
4. On 3 July 2003, the Director CHRM sent to the Applicant a query with an extract of the Audit Report annexed, requesting him to provide an explanation in writing before 11 July 2003 over the reimbursement (total of 9 387.50 dollars) made by AIP, in view of the fact that the Applicant's son did not attend school full time. While acknowledging the amount repaid by the Applicant (7040.06 dollars), the report pointed out that the amount repaid "*was not used for the purposes for which they were originally paid by the Bank.*"
5. On 28 October 2003, the Applicant received a letter from the Director CHRM notifying him of a number of charges and on 21 January 2004, the Applicant received a letter from the President of the Bank notifying him of his summary dismissal from the service of the Bank without notice or benefits for serious misconduct, in accordance with Regulation 10.2 of the Staff Regulations.

6. As reflected in the two documents cited, Bank Management reproached the Applicant for initially not notifying it about the change in his son's academic status which made the son no longer eligible for the education allowance. Secondly, it reproached the Applicant for not informing the Bank about AIP's reimbursements. Lastly, it reproached the Applicant for keeping the amounts repaid by AIP and for being unable to justify a balance of 6 064.32 dollars. According to the Respondent, such conduct was intentional and aimed at using Bank funds for purposes for which they were not granted, contrary to the provisions of Rule 52.00 (h) of the Staff Rules and paragraph 7 of Executive Instruction No. EI 003/91. Consequently, in his decision of 21 January 2004, the President of the Bank considered that the Applicant had not conducted himself in a manner befitting his status as an employee of an international institution, in accordance with the provisions of Regulation 3.5 of the Staff Regulations and paragraph 2.1.1 of the Code of Conduct of the Bank.
7. In his correspondence with Bank Management (memoranda of 11 July 2003, 26 September 2003 and 6 November 2003), the Applicant first recalls his 23 years of loyal service to the Bank. Furthermore, the Applicant draws attention to the fact that he had repaid 7 040.06 dollars corresponding to the period during which his son did not attend classes although registered as a full time student at AIP. He further states that until February 2001 (memorandum of 26 September 2003) or March 2001 (memorandum of 6 November 2003), he was unaware that his son had dropped out of school; that in March 2001 when he sent the 5 918 dollar check to his son, he had requested his son to attend remedial courses, after which he could enroll in another school; that he was also unaware of the first repayment of 3 468 dollars made by AIP on 12 January 2001; that in March 2002, his son was enrolled in the University of Florida where classes were scheduled to start in August 2002; that the Applicant had hoped that the amount reimbursed by AIP would be used in paying part of the 15 000 dollars representing the enrolment fees into the University of Florida; that it was precisely at that time that he was contacted by the Audit Department and that, informed about the irregularity, he immediately took steps to reimburse the Bank. While acknowledging that he made an error of judgment, the Applicant states that he acted in good faith without any intent to defraud.

II. THE APPLICANT'S ARGUMENTS

8. To contest the decision to summarily dismiss him from the services of the Bank without notice or benefits, the Applicant advances three main arguments:
- A. The Applicant not appearing before the Disciplinary Committee contravenes the principle of due process as required under Rule 101.02 of the Staff Rules.
 - B. The decision is an abuse of discretionary powers insofar as it is based on a mischaracterization of facts, an error of law and inadequate assessment of facts.
 - C. The sanction imposed is not proportionate to the offence committed. To support these assertions, the Applicant argues as follows:

A. Procedural Irregularity

9. On the first point, the Applicant contests the existence of serious misconduct that could justify dismissal without notice or benefits. The Applicant maintains that the sanction imposed could only be valid where the conduct of a staff member is so patently serious and a flagrant violation

of the Bank's written law or international administrative law that immediate action is required to protect the Institution's interests.

10. Citing a number of decisions rendered by the Administrative Tribunal of the International Labor Organization (ILOAT, 26 October 1962, N° 63, *Andreski*) or the United Nations Administrative Tribunal, the Applicant posits that the notion of "*serious misconduct*" (or gross misconduct) must not be given broad interpretation. The Applicant maintains that for an act to be legally characterized as "*serious misconduct*", a number of conditions must be met. The Applicant adds in paragraph 36 of his Reply that the evidence must *prima facie* establish conduct that may legitimately be characterized as gross or serious misconduct, or else the summary dismissal is illegal.
11. Firstly, gross misconduct requires failure in one's professional obligations and involves voluntary action and intention to defraud. The Applicant pursues that Paragraph 7 of Executive Instruction No. EI 003/91 Concerning the Staff Education Allowance System clearly states *inter alia*: "*Any staff member who is found to have knowingly and willfully submitted a false claim or who intentionally failed to notify the Bank of any change affecting eligibility shall be guilty of gross misconduct and shall be sanctioned as such.*"
12. Therefore, the Applicant contends that it is necessary to make a distinction between a proven intent to defraud and a case of mere negligence, a delay or an error in judgment. For the Applicant, the interpretation of Rule 52.00 (h) of the Staff Rules leaves no room for considering impropriety or attempted impropriety as necessarily characterizing gross misconduct *per se*. In order to characterize a conduct as gross misconduct, the intention of the staff member and the circumstances surrounding each case must be taken into consideration. The Applicant maintains that the argument finds support in Rule 101.04 (a) of the Staff Rules, according to which:

"Where misconduct is established, the severity of disciplinary measures imposed shall reflect the gravity of the misconduct. In determining the seriousness of the misconduct and in deciding upon the disciplinary measure to be imposed, the following may be taken into account:

 - (i) The nature of the misconduct and the circumstances in which it occurred;*
 - (ii) The extent to which the misconduct adversely reflects upon the integrity, reputation or interests of the Bank;*
 - (iii) The extent to which the misconduct involves intentional actions or negligence;*
 - (iv) Whether the misconduct involves repeated actions or behavior;*
 - (v) The prior conduct of the staff member; and*
 - (vi) Any extenuating circumstances."*
13. To support this point of view, the Applicant makes specific reference to Rule 101.02 (a) and (c) of the Staff Rules. In particular, sub-paragraph (a) states: "*Except where a staff member is summarily dismissed, all charges of misconduct shall be submitted to a Disciplinary Panel, as prescribed in these rules*". For its part, sub-paragraph (c) states: "*Summary dismissal shall be*

imposed only upon determination by the President that the staff member concerned is guilty of serious misconduct, touching upon the financial or other important interest of the Bank.”

14. From paragraph 32 of his Reply, the Applicant contests the Respondent’s argument according to which it is not mandatory to characterize the misconduct in accordance with the provisions of Rules 102.00 and 101.04 of the Staff Rules since Staff Regulation 10.2 on the basis of which disciplinary measures have been taken against the Applicant, empowers the President to dismiss a staff member without notice or benefits for serious misconduct, and overrides any other provision. Arguing against that opinion, the Applicant underscores the fact that according to Rule 21.00 of the Staff Rules, both the Staff Rules and Staff Regulations form a part of the contract between the Bank and each staff member. Consequently, the President must himself follow and demonstrate that he followed the procedure provided in Staff Rules 102.00 and 101.04, in order to determine whether the Applicant’s conduct may be properly characterized as serious misconduct.
15. However, according to the Applicant, the conduct for which he stands accused cannot be characterized as gross misconduct. To start with, as soon as he became aware that he had to reimburse the Bank, he immediately did so (in October and November 2002). The Applicant recalls that he made the reimbursement to the Bank on 28 October 2002, but not by way of an official query. It was only in October 2003 that charges were brought against him, one year to the date of his making the first reimbursement. That, according to the Applicant, is evidence that there was no urgency or gravity. In paragraph 39 of his Reply, the Applicant states: *“The interest of the service clearly did not require immediate or final separation in this situation. The conduct, with which the Applicant was charged, if so serious, would not have been known to the Respondent for a whole year before the Respondent took any action at all to bring formal charges against the Applicant.”* Furthermore, his conduct did not so threaten the Institution’s interests as to warrant summary dismissal. This was an internal matter that affected only the Bank and the Applicant. Lastly, his conduct was neither intentional nor fraudulent, the Applicant having made an error of judgment or shown negligence, but doing so in the utmost good faith.
16. The Applicant recalls that at the time he made a request for the education allowance, his son was indeed enrolled at the AIP. However, the Bank cannot require a commitment from its staff that a child would be in school for the entire academic year. Poor health or any number of events could interrupt the academic year. For the Applicant, his son was accepted for enrolment into the school in Florida in March 2002 and a deposit had been paid. However, the child was only able to start his course in August 2002 due to the School’s academic calendar. The Applicant particularly draws the Tribunal’s attention to the fact that the Bank did indeed pay fees to the school in Florida for the 2002/2003 academic year, and therefore was fully aware that the Applicant’s son was in another institution. The interruption of his son’s studies did not affect the child’s eligibility *per se*, *“but rather suspended it”*. Although it affected his son’s eligibility for the 2000/2001 academic year, it did not completely bar his son from receiving an educational allowance.
17. The Applicant stresses the fact that his son suffered serious emotional problems, in spite of which he tried to remain in school, that the e-mail sent by his son on 1 July 2001 is not only evidence of the son’s poor health but also the father’s unawareness of the son’s condition. The Applicant maintains that intent to defraud is the only criterion for serious misconduct, and that intent to put the Bank’s funds for personal use would warrant misconduct so severe as to justify dismissal. The retention of the funds *per se* is not enough evidence nor does it establish a *prima facie* case that the Applicant intended to conceal information with a view to defrauding the Bank.

18. Furthermore, the Applicant recalls in his Reply that paragraph 7 of Executive Instruction EI 003/91 does not require staff to “*promptly*” notify the Respondent of any changes affecting eligibility. The paragraph merely provides that:

“Any staff member who is found to have knowingly and willfully submitted a false claim or who intentionally failed to notify the Bank of any change in eligibility shall be found guilty of gross misconduct and shall be sanctioned as such. In addition, the staff member shall indemnify the Bank in full for any payments that may have been made to him as education allowance”.

Paragraph 7 does not set the time limit within which a staff member must notify the Bank of the change in eligibility.

19. The Applicant maintains that at the time that AUDT requested reimbursement, his son was eligible to receive an allowance as he was within the qualifying age limit and had been registered for enrolment in a full-time course of study in a qualifying educational institution. If the Applicant retained custody of the funds, he did so in order to use the funds reimbursed to pay fees in a new school in Florida.
20. Without challenging the President’s powers to terminate a staff member’s appointment for gross misconduct, the Applicant maintains that his case should have been submitted to a Disciplinary Committee to determine the severity of sanction applicable, taking into account the set of factors and circumstances surrounding the matter, in accordance with Rule 101.02 (a) and (b) of the Staff Rules.

B. Improper Exercise of Discretionary Powers

21. On this issue, in paragraphs 5 and 18 of his Application, the Applicant states that during a meeting held in January 2004, the President of the Bank had adopted a position of principle with regard to issues raised by the Audit of education benefits, according to which *he would have no mercy on anyone*. Furthermore, based on the letter of 28 October 2003 from the Director CHRM and prior to receiving the Applicant’s reply dated 6 November 2003, the decision to summarily terminate his appointment without notice or benefits had already been taken well in advance.
22. The Applicant maintains that that position is a violation not only of the above-mentioned Rule 101.04 (a) of the Staff Rules but also of the generally admitted principles of international administrative law, in particular the jurisprudence established by the World Bank Administrative Tribunal (Case No. 142, 19 May 1995, *Carrew v International Bank for Reconstruction and Development*).
23. According to the Applicant, although the President is vested with discretionary powers to summarily dismiss a staff member without notice or benefits for reasons of serious misconduct, those powers are not absolute. It must be exercised on a “case by case” basis, and not abstractly or mechanically, pursuant to Regulation 10.1 of the Staff Regulations already cited and the principles of international administrative law. It involves much more than arbitrarily invoking discretionary powers. The Applicant maintains in paragraph 11 of his Application that the facts of the case must be clearly established.

24. The exercise of discretion is limited and, as such, subject to jurisdictional control. Such control is broader in matters of disciplinary decisions, and as stated in the *Kwakwa* Case (Judgment 300/2003 of the WBAT), the threshold of proof “*must be higher than a mere proof of probabilities*”. In exercising such control, the Applicant maintains that it is incumbent on the Tribunal to particularly examine the existence of the facts and determine whether they legally amount to gross misconduct, and whether the sanction imposed is provided for in the law, or whether the sanction is not significantly disproportionate to the offence. In that regard, the Applicant refers to the *B. Case* (2000/10) in which this Tribunal (Judgment of 25 July 2001) states that “*the requirements to be complied with by the Bank must therefore be derived from principles of natural justice*”.
25. In his Reply, the Applicant cites the *Couton* Case (ILOAT Judgment 1070) and the *Kalla* Case (ILOAT Judgment 1028), to establish a contrast with his case and those others where there was *prima facie* evidence considered strong enough under the circumstance, to support dismissal. In the cases cited, evidence supported fraudulent and persistent acts of falsification, as well as corruption involving persons outside the Bank and having serious consequences on the Bank’s reputation.
26. The Applicant maintains that in his case, the facts have not been established and do not legally amount to gross misconduct. Due process was not followed because the matter should have been submitted to the Disciplinary Committee. The disciplinary measure imposed was illegal in the light of the related facts, the Bank’s internal law and international administrative law. The sanction was disproportionate to the offence. Therefore, the decision was illegal.

C. Disproportion Between the Offence and the Disciplinary Measure

27. On the third issue, the Applicant contends that the Bank is bound by its internal law to take into account factors stated in Rule 101.04 (a) of the Staff Rules earlier cited in determining the gravity of the misconduct. Rule 101.04 states that “*where misconduct is established, the severity of disciplinary measures imposed shall reflect the gravity of the misconduct*”.
28. Rule 101.04 (b) sets forth a range of sanctions, from written warning to termination, proportionate to the seriousness of the offence committed. The Applicant maintains that had the Bank taken into consideration the Applicant’s unblemished career, his good and loyal service to the Bank, among other positive factors, it would not have summarily terminated his appointment. In that regard, the Applicant recalls Judgment No. 142 of 19 May 1995 on *Carrew v. International Bank for Reconstruction and Development*, in which the Tribunal, despite a proven offence of false overtime claims to obtain personal gain, however took into consideration not only the Applicant’s fourteen long years of service, but also his diligent performance in the discharge of duties, the positive performance evaluations, his position and the amount unduly obtained, deciding that in the light of the extenuating circumstances the termination of the Applicant’s appointment was not proportionate to the offence committed, as a result of which the Employer’s decision was quashed.
29. Furthermore, the Applicant cites other similar decisions, in particular Judgment No. 304 of 12 December 2003 in *D. v International Finance Corporation* delivered by the World Bank Administrative Tribunal in which the Tribunal, basing its ruling on the principle of proportionality, reproached the Respondent for not exercising its discretion in such a manner as to

take account of the particular facts of the case, and decided to set aside the disciplinary measure challenged due to disproportion between the offence committed and the disciplinary measure. Consequently, the Applicant believes that his case must be resolved in accordance with this case law of the World Bank Administrative Affairs Tribunal. In paragraph 38 of his Application, he recalls that this was the first offence during the twenty-three years of his career, that he did not hesitate to cooperate and refund to the Bank when requested to do so, and that there were circumstances in the matter that were beyond his control.

D. Error of Law

30. In addition to these arguments, the Applicant points out another irregularity, the error of law, that mars the decision challenged. He maintains that he should not have been charged simultaneously under Rule 52.00 (h) of the Staff Rules and paragraph 7 of Executive Instruction EI 003/91. According to the Applicant and pursuant to Rule 110.00 (b) and (c), sub-paragraph (b) supersedes “*all previous administrative instructions and memoranda, executive instructions, presidential instructions, circulars and other personnel directives which cover the same subject matter...*” According to sub-paragraph (c), the Staff Rules take precedence over the directives contained in Annex 1 of the Staff Rules in the event of conflict between a Directive and a Rule.
31. Indeed, Executive Instruction EI 003/91 set forth in Annex 1 should be set aside since it contradicts the Rule. Contrary to paragraph 7 of Executive Instruction EI 003/91, Rule 52.00 (h) does not automatically characterize the Applicant’s conduct as serious or gross misconduct that warrants summary dismissal.
32. Furthermore, the Applicant maintains that Rule 35.00 (a) of the Staff Rules, which is one of the bases of the disciplinary measures taken against him, is not applicable to the Applicant’s case insofar as it relates to the exercise of an occupation, profession or any other outside activity incompatible with the official function and status of an international civil servant.
33. Lastly, the Applicant argues that he did not violate paragraph 2.1.1 of the Code of Conduct, contrary to the Respondent’s assertions. Hence, Management of the Bank committed an error of law in applying the provisions of the Code of Conduct to his case whereas the facts of the case do not establish that the Applicant knowingly, willfully and intentionally committed an act to defraud the Bank. The Applicant maintains that Regulation 3.5 of the Staff Regulations and paragraph 2.1.1 of the Code of Conduct are applicable to cases where the staff member’s actions involve fraud or attempted fraud, corruption or other types of dishonesty or similar unseemingly behavior – which is not his case.
34. On the basis of the foregoing, the Applicant prays the Tribunal to:
 - a. Rescind the decision taken by the Bank to summarily dismiss him;
 - b. Reinstate him or in lieu thereof pay him three years of salary as compensation for wrongful dismissal;
 - c. Pay his salary and all benefits retroactively from the date of dismissal up to the date of the Tribunal’s judgment;
 - d. Pay him 25 000 dollars for moral injury;

- e. Expunge from his records all references to his dismissal;
- f. Pay the legal costs.

III. THE RESPONDENT'S ARGUMENTS

A. Exercise of Discretionary Powers

35. With regard to failure to exercise discretion by the President of the Bank, the Respondent maintains that the Applicant has never given proof of the statement that the President is said to have made in January 2004. For the Respondent, it was incumbent on the Applicant to prove the abuse of discretion and not for the Respondent to refute these accusations to justify the merits of its decision.
36. Furthermore, the Respondent maintains that beyond any shadow of doubt, the President of the Bank held discretionary powers to characterize the conduct of a staff member, pursuant to Regulation 10.2 of the Staff Regulations according to which:

"The President shall establish administrative machinery which, with staff participation, shall deal with disciplinary matters, but without prejudice to his powers to dismiss a staff member summarily without notice or benefits for serious misconduct."

The Respondent posits that it is not in every instance that such a characterization must be made in accordance with the provisions of the Staff Rules cited by the Applicant. Since the Staff Regulations are superior norms of law to the Staff Rules, the procedure provided in Staff Rule 102.00 and Staff Rule 101.04 are not applicable to the case under consideration. Where there is conflict between Regulation 10.2 and other internal laws of the Bank, the former must prevail, as the Tribunal itself determined in the judgment delivered on 25 July 2001 in the *O.* Case (2000/08). The Respondent underscores the fact that the Bank's internal law made provision for two types of disciplinary procedure – the procedure for serious misconduct specifically reserved solely to the President pursuant to Regulation 10.2, and the administrative machinery on which staff members are represented.

B. The Seriousness of the Offence

37. In terms of the characterization of the conduct *per se*, the Respondent maintains that the Applicant received a check from the Philadelphia Art Institute which he patently knew did not belong to him, and which he willfully instructed his son to pay into the Applicant's private account. Moreover, the Applicant did not inform the Bank about the reimbursement until he was contacted by the Director of Audit. The Respondent adds that although these fact may not of themselves demonstrate intent to mislead, they showed him to violate the education allowance system as clearly prohibited under Rule 52.00 (h) of the Staff Rules. Furthermore, the Respondent does not contest the definition of serious misconduct on which the Applicant is charged, which is patent and for which the interest of the service requires immediate and final separation. However, the Respondent contends that the Applicant's conduct could be so characterized since it constituted financial impropriety harmful to the Respondent's interests and qualifiable as serious misconduct. Although not alleging that the Applicant committed fraud, the Respondent maintains that the Applicant willfully and knowingly retained custody of funds

reimbursed to his son which did not belong to him. That was sufficient *prima facie* evidence of the existence of gross misconduct. The Applicant only informed the Bank following an official query by AUDT. The Respondent wonders what would have happened to the refund if Audit had not officially queried the Applicant.

C. The Procedure Followed

38. With regard to allegations of procedural irregularity, the Respondent maintains that the Applicant was contacted at each stage of the investigation to clarify the facts as they were evolving. Precise charges were formulated and notified to the Applicant. These measures prove that due process was followed at each stage of the procedure.

D. Proportionality

39. On the issue of proportionality, the Respondent refutes the use by the Applicant of the *Carrew v. IBRD* case, contending that that case is distinguishable from the Application under consideration, and that the World Bank Staff Manual differed in several material aspects from Regulation 10.2 of the Bank Staff Regulations. With respect to the *D. v. International Finance Corporation* case, the World Bank Administrative Tribunal had ruled that the termination measure taken by the International Finance Corporation would constitute a retroactive application of a text in that case, which in no way was comparable with the Applicant's case. In contrast, the Respondent invoked the *M. A. B. v. African Development Bank* case (2000/10) judged by the Tribunal on 25 July 2001. In that judgment, this Tribunal rejected the Applicant's contention with regard to proportionality as follows:

"The Tribunal rejects the contention of the Applicant that, taking into account his good record of 18 years of service with the Bank, summary dismissal was way out of proportion with the offence committed by him. The integrity of its staff belongs to the paramount interests of the Bank. If the Bank, which is committed to a policy of good governance, fell into disrepute for acts of corruption of its employees, it would be unable to fulfill its function properly. Thus, the President could not act wisely than to impose a harsh sanction once it had been discovered that the Applicant engaged in gross misconduct."

40. According to the Respondent, the above case is not substantially different from the present one. Financial impropriety is a gross misconduct, irrespective of the circumstances under which it was committed.
41. As a result, the Respondent prays the Tribunal to dismiss the Application.

IV. THE LAW

42. To start with, the Tribunal notes that both parties admit the existence of unusual conduct by the Applicant. The Applicant views the conduct as a mere error of judgment and negligence that should not be characterized as serious or gross misconduct that could lead to the engagement of a procedure for summary dismissal. For its part, the Respondent considers the conduct as gross misconduct as so characterized by the President of the Bank using his discretionary powers, and therefore punishable by summary dismissal in accordance with Regulation 10.2 of the Staff Regulations.

43. The Tribunal is of the opinion that all the contentious issues raised specifically relate to one and only question as to the legal characterization of the misconduct: how, in this case, should the offence committed be characterized? The characterization would determine whether due process was followed, whether the President of the Bank duly exercised his discretion, and whether or not there was disproportion between the termination measure and the offence committed.
44. The Tribunal accedes to the Respondent's argument according to which Regulation 10.2 of the Staff Regulations grants the President wide discretion to characterize conduct, depending on his assessment of the facts. Indeed, Regulation 10.2 grants the President the "*powers to dismiss a staff member summarily without notice or benefits for serious misconduct.*" That is the very essence of discretionary powers which grants the legal faculty to take an administrative measure based on the assessment of facts, their nature, seriousness and severity. It is not within the province of a tribunal to substitute its assessment to that of the competent authority, subject to destroying the discretionary powers granted and exceeding the limits of the Tribunal's jurisdictional competence.
45. Furthermore, the Tribunal shares the Respondent's submission that it is not in every instance that such characterization must be made in accordance with the Staff Rules cited by the Applicant. The two procedures are distinct. Therefore, Rules 102.00 and 101.04 of the Staff Rules are not applicable in the event of recourse to the summary dismissal procedure.
46. On the other hand, however, the Tribunal must underscore the fact that discretionary powers cannot be based on an erroneous characterization of facts, a mistake of facts, grounds outside the interest of the Institution and a patent disproportion between the facts and the sanction. This principle is especially paramount with regard to disciplinary measures. As the Applicant rightly maintains, discretionary power is by no means absolute power.
47. As previously pointed out, in supporting his submission, the Respondent cites a previous judgment delivered by this Tribunal (*M. A. B. v. African Development Bank* (2000/10), delivered on 25 July 2001) according to which the disciplinary measure of termination was not considered as disproportionate to the offence committed.
48. In that matter, the Applicant was accused of receiving undue payment from a consultant working for the Bank on a number of projects. Therefore, the case concerned corruption involving persons outside the Bank who had business relations with and financial interests in the Institution, and capable of seriously threatening the paramount interests of the Bank and its credibility as underscored by the Tribunal in paragraph 30 above. Commenting on this judgment, the Respondent states in paragraph 38 of its Answer to the Application:
- "The Respondent submits that the case of acts of corruption as so aptly described by the Tribunal in the above quote is not substantially different from the case where a staff member receives a reimbursement check for education benefits paid by the Respondent, and willfully and knowingly had the check endorsed and deposited into his account, as well as withholds the funds and any information concerning them until the AUDT department asks for them."*
49. On this issue, the Tribunal does not share the Respondent's opinion and considers that there is a manifest error of assessment on the Respondent's part. Indeed, there is a vast difference between

acts of corruption capable of politically and morally threatening the Bank's prestige, its credibility before its State shareholders, foreign States, public opinion and the international press, acts that could at worst threaten the Bank's very existence and legitimacy and that to all intents and purposes constitute serious misconduct pursuant to Regulation 10.2 of the Staff Regulations, and irregularities, neglect, even fraud involving the Bank's internal management and operation.

50. In no way does this mean that such acts are such as not to be characterized as serious misconduct punishable by the summary dismissal procedure, especially when for instance they involve fraud or patent forgery gravely in breach of professional code of ethics. In that respect, the President of the Bank retains all his discretionary powers. In sum, the exercise of discretion must not be based on an erroneous assessment of law or of manifestly erroneous fact.
51. The jurisprudence of international administrative tribunals is ample in that regard. To establish gross misconduct, a minimum number of conditions must be met. It must be assessed in the light of circumstances and on a case-by-case basis. In the *Carrew* case judged by the World Bank Administrative Tribunal, the Tribunal maintained in paragraph 30 of the judgment that the Applicant had consciously engaged in a fraudulent act by submitting false overtime claims. However, taking into account the Applicant's 14 years of service, his diligent performance in the discharge of duties, the positive performance, his position and the amount of money improperly claimed, the Tribunal concluded that termination was not proportionate to the offence committed. The same applies to *D. v. IFC*, judged by the same Tribunal.
52. Therefore, no matter how extensive, discretionary power is subject to minimum jurisdictional control. However, in view of the particular nature of disciplinary action and the high importance that the law gives to regular procedure that guarantees the right to defence normally exercised before a collegial disciplinary body in which staff is represented, the said body being independent vis-à-vis the authority entitled to take the final decision, jurisdictional control becomes wider on disciplinary matters and, as stated in the *Kwakwa* case (Judgment 300/2003 of the WBAT), a necessarily higher level of evidence is required.
53. Within the framework of minimum control, it is incumbent first on the Tribunal to specifically review the characterization of facts, followed by consideration as to whether there is no error in the legal characterization of the facts of serious misconduct, which in turn relates closely to the issue as to whether the disciplinary measure is not manifestly disproportionate to the offence committed, and lastly whether the decision is not based on an erroneous or tendentious motive or reason, amounting to abuse of power. Where the Tribunal doubts that these precautions in the use of discretionary power were taken, the measure in question becomes illegal and must be rescinded, pursuant to Article XIII of the Statute of the Tribunal.

In this case, the Applicant is accused of retaining money to which he knew he was not entitled, and for not informing the Bank of refunds made by AIP on 12 January 2001 and 3 July 2001. However, the Tribunal also notes that the Applicant proceeded to make substantial reimbursements (7 040.06 dollars) starting from October 2002, in effect nine (9) months before the Applicant was notified about the Audit Report and well before accusations were issued against him.

54. While understanding the highly appreciable and morally respectable reasons for Bank Management to severely reprimand punishable offences in order to prevent misconduct detrimental to the Bank's interests and the integrity of its staff, the Tribunal raises to an even

higher level the principle of right to due process that fully guarantees the right to defence. It is also in the Bank's interest and good name to show its willingness to respect this fundamental right to the highest extent possible. Pursuant to the said Regulation 10.2 of the Staff Regulations, summary dismissal is an exception to the usual disciplinary procedure set forth under Rules 101.02 (a) and 101.02 (b) of the Staff Rules and enforced only exceptionally in the event of gross misconduct. Where such gross misconduct is not established, the ordinary disciplinary procedure must be followed. When, taking the specific circumstances of each case into account, the Tribunal considers that a clear mistake was made in the characterization of the offence committed or its gravity, it must nullify the summary dismissal decision.

55. In this case, while stating its reservations over a number of gratuitous or contradictory statements by the Applicant, for instance simultaneously attempting to set aside Executive Instruction EI 003/91 (see paragraphs 24 and 25 of the judgment) for Rule 52.00 (h), only to use it to demonstrate that paragraph 7 requires intentional, voluntary and deliberate action, or that it does not set any reimbursement timeframe, or further still his arguments on his son's state of health or with regard to the "*suspended*" eligibility or concerning the positional statement *a priori* by the President of the Bank "*sometime in January 2004*" – all arguments which the Tribunal considers as unconvincing, the Tribunal cannot remain insensitive, on the one hand, to some objective factors pertaining to the situation and, on the other hand, a number of arguments put forward by the Applicant with regard to the facts.
56. In connection with objective factors, the Tribunal notes as follows:
- a. The fact that the fraudulent characterization of the offence committed remains uncertain and that the Respondent has not proven that the offence was so serious as to warrant dismissal. Furthermore, the Respondent is obviously wrong to equate cases of patent corruption as in *O.* (2000/08) and *B.* (2000/10) with the current case;
 - b. The Applicant's satisfactory career;
 - c. The Applicant's 23 years of service with the Bank;
 - d. The fact that the act concerns an internal disciplinary matter that cannot be compared with the cases of financial corruption already decided by the Tribunal.
57. With regard to the subjective factors, the Tribunal notes:
- a. The Applicant's acknowledgement of the offence and his regret to have acted irresponsibly in the least;
 - b. The fact that the Applicant proceeded, although late (the Respondent was informed latest July 2001 whereas the Applicant only began to reimburse in October 2002) and prior to being officially queried, to make a substantial reimbursement, which marks the start of redress in accordance with paragraph 7 of Executive Instruction EI 003/91. It is evident that the Applicant must reimburse the amounts received in excess of his entitlement to education benefits for the year 2000-2001.

V. THE DECISION

58. *On that basis, the Tribunal:*

- (1) Rescinds the decision of 21 January 2004 taken by the Bank President to summarily dismiss the Applicant;
- (2) Orders the payment of the Applicant's salary retroactively from the date of dismissal up to the date of this judgment
- (3) Orders that the legal costs be borne by the Bank;
- (4) In addition, authorizes Bank Management to choose from among the following:
 - Reinstatement of the Applicant or
 - in lieu thereof payment of compensation equal to:
 - * six (6) months' salary in lieu of notice of termination;
 - * one (1) month's salary for every year of service in the Bank;
 - * one (1) month's salary as compensation for moral damage;
- (5) Reject any other request.

Professor GLELE AHANHANZO

- President

Albertine LIPOU MASSALA

- Executive Secretary

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- Ms. Rose Marie DENNIS Esq.

COUNSEL FOR THE RESPONDENT:

- Mr. Dotse TSIKATA

With him

- Mrs. Cecilia AKINTOMIDE