

**ADMINISTRATIVE TRIBUNAL
OF THE AFRICAN DEVELOPMENT BANK**

QUORUM:	Professor Maurice GLELE AHANHANZO	President
	Professor Christian TOMUSCHAT	Member
	Professor Yadh BEN ACHOUR	Member

APPLICATION N° 2004/07

Mr. B. M., Applicant
African Development Bank, Respondent

Judgment of the Tribunal delivered on 11 May 2006

I. THE FACTS

1. Mr. M. B., the Applicant, a national of Morocco, born on 29 December 1950, was recruited by the Bank on 12 April 1978. He worked successively in different departments (both in operations and finance) between 1978 and 1991. He believes that the termination of his appointment violated the Staff Rules and Staff Regulations of the Bank. Consequently, he requests damages for the wrongful termination of this contract of appointment. At the time of the contested decision, he was Director of the Loan Administration Department and, subsequently, Special Advisor to the Vice-President for Finance.

2. On 28 December 2001, the President of the African Development Bank Group addressed correspondence to Mr. B. stating the following:

“Following the adoption and implementation of the new organizational structure of the services of the Bank, the Loan Administration Department of which you are director will cease to exist as an organizational unit of the Bank with effect from 1st January 2002. I have therefore decided that you be separated from the service of the Bank in accordance with the provisions of Regulation 6.11.1 (vii) of the Staff Regulations and Rule 611.06 of the Staff Rules. This letter shall serve as notice of your separation from the Bank under the terms of the Staff Regulations and the Staff Rules.”

3. The President added:

“In the interest of the Bank, and in recognition of your service, I have further decided to postpone your separation from the Bank and to reassign you as a Special Advisor to the Vice-President, Finance....”

This reassignment was subject to certain conditions: “for a maximum period of one (1) year with effect from 1st January 2002”. The letter from the President of the Bank concluded as follows:

“Let me take this opportunity to acknowledge your contribution to the work of the African Development Bank Group and to urge you to continue in the same spirit in your new assignment.”

“If you accept the offer of reassignment set forth above, please communicate your acceptance to the terms of the conditions of the offer by signing and returning a copy of this letter to the Bank.”

4. The termination of the Applicant's employment contract followed a major restructuring of the Bank decided by the Board of Directors on 13 June 2001 (Resolution B/BD/2001/17), the purpose of which was to “revitalize” the Bank especially by improving its development action. Within that context, a reconfiguration of the finance complex was considered a necessity. The five departments existing at the time were to be reconfigured into three departments. The Applicant was personally affected by that change.
5. The letter of 28 December 2001 led to a dispute between the Bank and the Applicant. After taking his case to the Bank's administrative authorities and not succeeding in persuading the Institution to reverse the decision to terminate his employment contract, the Applicant seized the Tribunal by filing an application on 18 August 2004. The Respondent raised a motion to dismiss the application by principally arguing that the Applicant had not respected the procedural timeframe for administrative review as set forth in the Bank's internal rules. By judgment dated 1 December 2005, the Tribunal rejected the motion to dismiss.
6. The other essential facts of the case are stated in the judgment of 1 December 2005.

II. ARGUMENTS OF THE PARTIES ON THE MERITS

THE APPLICANT

7. The Applicant maintains that the termination of his employment contract violated the applicable rules governing the termination of separation from service.
8. According to the Applicant, the Bank indeed was entitled to terminate his appointment pursuant to Rule 6.11 of the Staff Rules, provided it made an effort to reassign him to another vacant position within the Institution prior to such a decision (Rule 611.06[b] of the Staff Rules). Regulation 6.3 of the Staff Regulations according to which persons already in the service of the Bank should be given some preference when making appointments to vacant positions further amplifies that requirement. Obviously, however, the Respondent did not fulfill that obligation. It is of import that neither the contested letter nor the submissions drew specific attention to the second section of Rule 611.06 of the Staff Rules.
9. Moreover, the decision communicated to the Applicant by the letter of 28 December 2001 was marred by illegality due to its contradictory nature. It violated existing law by informing a staff about the termination of his appointment while telling him in the same letter that he had been reassigned to another position.
10. Following the Bank's restructuring, ten new departments were created. In fulfillment of its obligation to guarantee employment continuity, the Applicant holds that the Bank should have assigned him to head one of these departments. To argue his case, the Applicant invokes a number of decisions rendered by international administrative

tribunals, especially the *Marchesini* decision taken by the World Bank Administrative Tribunal (decision No. 260 [2002]). Although the Tribunal in that decision acknowledged its limited jurisdiction in such matters, except where there was arbitrariness or abuse, it undertook a detailed verification to determine whether the Bank actively tried to assist the applicant in searching for another position within the World Bank system. The Respondent in the present case had failed to do so.

11. Furthermore, the Applicant maintains that there were undisclosed reasons behind the Bank's decision. The Applicant had repeatedly made the Bank uneasy by adopting an independent attitude. He had testified in cases before the Tribunal involving four staff unduly affected during previous Bank restructuring exercises; he had opposed irregular instructions and had adopted an independent position while serving in the Investments Committee.
12. The Applicant concludes that he had suffered material and moral damage following his illegal and wrongful dismissal.

THE RESPONDENT

13. The Respondent claims that:
 - The termination of contract complied with the rules in force;
 - The Applicant suffered no moral prejudice following the termination of his employment contract;
 - The Applicant is not entitled to the compensations that he claims.
14. The legality of the termination of the Applicant's appointment cannot be seriously contested. To begin with, the content of the letter of 28 December 2001 is in no way ambiguous. It clearly expresses termination in addition to reassignment under specific conditions. That the two are combined can in no way be criticized.
15. Furthermore, the termination of the appointment meets the formal conditions of legal separation due to the abolition of post conducted pursuant to Regulation 6.11 of the Staff Regulations. These conditions are set forth under the combined provisions of paragraphs 6.12.1 and 6.12.3 of Regulation 6.12 of the Staff Regulations and Rule 612.00 (c) of the Staff Rules. In line with these texts, the formal conditions required are: the written notification of the termination of the appointment, the reasons for such termination and the respect of the six-month notice. In the case in question, all those requirements were fulfilled:
 - i) The termination of appointment was notified by letter dated 28 December 2001;
 - ii) The letter stated the reasons for the termination, namely the abolition of post;
 - iii) The six-month notice required was respected since the notification was made more than one year prior to the actual date of cessation of service. Indeed, the letter clearly states in the first paragraph *in fine* that the letter serves as notice of separation. On that issue, it should be pointed out that in addition to the written notification, the Bank paid to the Applicant the amount corresponding to six (6) months of additional salary as notice.

16. Finally, the Tribunal in its judgment of 1 December on the Motion to Dismiss raised by the Bank on the same case implicitly acknowledges the formal legality of the termination of Mr. B's appointment as notified in the letter dated 28 December 2001 which, *per se*, does not necessarily require another notification. Indeed, the Tribunal ruled that "*according to its express terms, the letter of the President of the Bank of 28 December 2001 was meant as notice of separation, notwithstanding the fact that the actual separation from the Bank was postponed for one year.*"
17. The Respondent holds that the issue regarding the abolition of post and decisions emanating therefrom have, on several occasions, been brought before the administrative tribunals of international institutions. The limited jurisdiction of tribunals to review organizational matters over which institutions exercise discretionary authority is upheld in several decisions. Thus in the *Marchesini* case, the World Bank Administrative Tribunal (WBAT) invoked that principle to rule that such decisions could not be reviewed unless they constitute an abuse of discretion.
18. The Respondent maintains that the decision to appoint a staff and not another as director is discretionary and subject to the Tribunal's jurisdiction only where such a decision is marred by an error of law or of fact. However, nothing in the application supports the contention that such an error occurred.
19. The abolition of a Department having led to the elimination of the corresponding position of Director, the Applicant found himself in competition with other directors. Pitched in competition against his former colleagues, Mr. B. cannot lay claim to priority for appointment to position over such colleagues. That conclusion is in line with the decision of the International Labor Organization Administrative Tribunal (ILOAT) in the *Gramegna* Case (Judgment No. 1787 [1999], paragraph 4) which holds that "*[the Applicant] had no right to preference for any particular post, the less so since some other of his colleagues were in the same situation.*"

III. REQUESTS OF THE PARTIES

THE APPLICANT

20. The Applicant requests the Tribunal to:
- (i) Judge and pronounce that the termination of the Applicant's appointment was marred by illegality and abuse of right committed by the Bank's President;
 - (ii) Judge and pronounce that the circumstances surrounding the termination of the employment contract caused the Applicant moral damage;
 - (iii) Grant the following as damages and compensation:
 - UA 2 008 826 as loss of salary;
 - UA 148 000 as education expenditure for dependent children;
 - UA 321 411 as employer's contribution to the pension fund;
 - UA 250 000 as moral damage;

- UA 16 327 as compensation for loss resulting from failure to take the last evaluation into consideration;
- UA 32 106 as compensation for the application of an incorrect exchange rate in calculating the pension fund.

As costs and fees,

Order the Bank to pay a lump sum of UA 45 000 as legal fees and costs.

THE RESPONDENT

21. The Respondent requests the Tribunal to dismiss the Applicant's requests for payment of damages and compensation.

IV. THE LAW

22. To begin with, the Tribunal points out that the letter of 28 December 2001 was indeed meant to terminate the Applicant's appointment. This legal signification is clearly obvious in the letter's wording. The Bank unequivocally states therein that the Applicant shall cease to exercise his functions with effect from 1 January 2002 and offers as legal reason for its decision Regulation 6.11.1 (vii) of the Staff Regulations and Rule 611.06 of the Staff Rules – the two provisions that govern the termination of appointment for the needs of the Bank's service.
23. The fact that the Bank, at the same time, decided to postpone his separation from the Bank by offering the Applicant the position of Special Advisor to the Vice-President, Finance, changes nothing of the legal characterization of the situation. The Bank obviously sought to rule out the possibility of interpreting the Applicant's reassignment as a new appointment which would have required from it a new termination procedure. The letter specified that the reassignment was for a period not exceeding one year, with effect from 1 January 2002. At the same time, it stated that the letter was to “serve as notice of ... separation from the Bank”. Therefore, it was clearly stated that the Applicant's contract would end automatically. Indeed, the Applicant left the service of the Bank on 31 December 2002.
24. It is true that the combination of the termination of the Applicant's employment contract with the offer to employ him for one year beyond the end of his regular service contained certain complicated aspects. In its judgment of 1 December 2005 (paragraph 44), the Tribunal drew the conclusion that the Appeals Committee, pursuant to Rule 105.03 (d) of the Staff Rules, could legitimately waive the prescribed time limits. However, even this “factor of ambiguity” cannot affect the legality of the decision taken by the Bank. All considered, the Applicant knew exactly on what date his service with the Bank would end. The principle of legal security was in no way violated.
25. The Tribunal ruled as such in its judgment of 1 December 2005. In paragraph 42 of that judgment, it is explicitly stated that the letter of the President of the Bank of 28 December 2001 was meant as notice of separation, notwithstanding the fact that the actual separation from the Bank was postponed for one year.

26. The Applicant attacks the letter of termination of contract by claiming that the Bank had violated the provisions of Rule 611.06 of the Staff Rules. According to the Applicant, the Bank did not comply with paragraph (b) of the said Rule, having not sought another position for him prior to terminating his contract. In that regard, it is significant that Rule 611.06 is only mentioned in general terms, without its two sections taken into account separately, one after the other. Nonetheless, the Applicant acknowledges that the obligation stated therein is an obligation of means, that is to say an obligation on the employer to do its best. It is not an obligation to perform, that is to say an obligation on the part of the employer to provide another position to the Applicant.
27. The Tribunal notes that the Respondent advanced solid reasons in support of its arguments. Certainly, it did not present the Tribunal with a full list of initiatives that it took to find another position for the Applicant. Nonetheless, it enlightened the Tribunal as to the situation that prevailed in the Bank's organizational units (Departments), management of which was entrusted to a Director. The 2001 restructuring of the Bank was meant to improve its effectiveness. It will be recalled that the restructuring was based on a decision of the Board of Directors dated 13 June 2001. In the finance sector, the number of departments was to be reduced from five to three, with the Loan Administration Department and the Accounts Department merging to form the Financial Management Department (paragraphs 3.26 to 3.34 of the decision). Consequently, therefore, two Directors were to lose their position. The Tribunal is not competent to judge *à posteriori* whether the Bank made a wise choice when it appointed the three Directors for Departments in the course of implementing the resolution of the Board of Directors. Even the Applicant did not allege that the appointments in question were marred for reasons of arbitrariness.
28. Since the Applicant was part of the Bank's top hierarchy in his capacity as Director, in seeking to fulfill the obligation stipulated in Rule 611.06 of the Staff Rules it was precisely other positions of Director that were to be considered. However, the Bank only has a limited number of such positions. In selecting a candidate to fill such positions, the pre-requisite qualifications play a preponderant role. Since the Applicant had several years of experience in finance, it was naturally in that sector that he would preferably be assigned. However, as previously stated, due to the reduction in the number of Departments, no position corresponding to the Applicant's former assignment was available.
29. The Applicant maintains, on the one hand, that the Bank should have assigned him to one of the new Departments created following the restructuring. In that regard, he made reference to ten departments. However, from the Bank's explanations, only four sector departments could be called "new" - the Departments in charge of agriculture and rural development, social development, infrastructure and country operations. Furthermore, the Bank held that it had chosen for the four departments staff which, in its judgment, were better qualified than the Applicant to meet the challenges. It is not the Tribunal's role to question the Bank's selection of staff. In that regard, it must be noted that the Applicant at no time implied that the Bank was guided by undue motives during the appointment of four staff to head the Departments concerned.
30. Thus, the Tribunal considers as a matter of fact that at the time that the Bank decided to terminate the Applicant's employment contract, it was extremely difficult to find a "Director" position to ensure the continuity of his employment. Although the Bank had a few positions in that category in the wake of the restructuring, the Bank can in no way be accused of giving preference to other candidates in filling those positions. The

Applicant cannot claim to have been better qualified than his other colleagues or prove that the Bank manifestly acted arbitrarily.

31. Acknowledging the very serious consequences that the organizational restructuring was to have on the Applicant (the termination of his appointment), the Bank granted the Applicant one additional year of service, that was to enable him to “apply for any vacant position within the Bank.” For its part, the Bank did not offer another employment to the Applicant during that period. However, the Applicant himself did not make use of that option. Indeed, he did not apply for any position below the Director level.
32. Lastly, the Applicant states that the real reason for the termination of his employment contract was to be found in a number of incidents that brought him the animosity of his superiors. In that regard, he mentions his testimony in favor of staff before the Administrative Tribunal (*K., E. G., K. and A.*, Cases Nos. 2000/03 to 2000/06, judgments of the Tribunal delivered on 25 July 2001), his refusal to obey presumably irregular instructions and his stand within the Investments Committee. However, the Tribunal sees nothing on the basis of which it could conclude that indeed such reasons motivated the termination of the Applicant's employment contract.
33. Apart from attacking the termination of employment contract, the Applicant also complains that his positive evaluation for 2002 was not taken into consideration in calculating his termination benefits. As a result, he was not paid a salary increase of 14% which should have added to his entitlements. The Tribunal dismisses this claim. A salary increase could only have taken effect from 1 January 2003, therefore at a date when the Applicant was no longer in the Bank's employment. In calculating the termination benefits, the admissible base was the salary earned by the staff at the time of termination of employment (Rule 612.02[a] of the Staff Rules).
34. Lastly, the Applicant alleges that an incorrect rate was applied during the calculation of his pension benefits. The conversion of pension benefits into Euros should have been made at the rate of UA 1 = Euro 1.40 instead of UA 1 = Euro 1.29, pursuant to Rule 53.00 of the Staff Rules.
35. In response, the Bank raised a motion to dismiss. It maintains that the said claim should first have been subject to a review procedure before the Pension Committee in line with the Administrative Regulations of the Pension Plan, and that any subsequent decision of this Committee should have been taken to the Pension Appeals Committee. The Applicant did not take any of the steps mentioned. On that point, the Bank considers that request as lacking in merit.
36. The Tribunal notes that the Applicant was not sufficiently specific in his request. He did not explain the possible origin of the Respondent's alleged error, nor did he indicate, in his view, what norms governed the conversion of the pension entitlements into Euro.
37. Furthermore, the Tribunal notes that the Bank also held back from stating which Bank internal rules, in its view, governed the issue in dispute. In addition, the Tribunal notes that doubts exist as to the existence and functioning of available recourse mechanisms for the administrative review of pension-related matters. Without the active participation of the parties, the Tribunal was unable to verify the factual situation in that regard.

38. Therefore, at this stage of the proceedings, it is improper to judge on the contested issue of the applicable rate of conversion of the Applicant's retirement benefits into Euro.

V. THE DECISION

38. In the light of the foregoing, the Tribunal decides that:

1. The Application is rejected for insufficient justification of its merits, except with regard to the request contained in (2) below.
2. The matter concerning the Applicant's request to be paid the difference between the amount actually received as pension entitlements and the amount that would have been received were the correct conversion rate applied, remains pending before the Tribunal. The Respondent is invited to present its comments within thirty days (30) of this decision. The Applicant shall be entitled to respond within thirty (30) days of receipt of the Respondent's comments.

Professor Maurice GLELE AHANHANZO

- President

Albertine LIPOU MASSALA

- Executive Secretary

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