

**ADMINISTRATIVE TRIBUNAL
OF THE AFRICAN DEVELOPMENT BANK**

QUORUM:	Professor Glele Ahanhanzo	President
	Professor Christian Tomuschat	Member
	Professor Yadh Ben Achour	Member
	Judge Salihu Modibbo Alfa Belgore	Member

APPLICATION No. 2004/08

Ms. BATE Arrah, Applicant
African Development Bank, Respondent

Judgment of the Tribunal rendered on 25 November 2008

I. THE FACTS

1. The Applicant, Ms. BATE Arrah Mary, was recruited by the African Development Bank on 4 October 1991. At the time of the facts of this case, she occupied the position of principal secretary in the Financial Control Department.

In February 2003, she was informed that she would be among 400 staff designated to leave Abidjan for Tunis, within the framework of relocation of Bank operations. The Applicant arrived Tunis on 11 February 2003.

She complains that following the change in the mission status as decided by the Board of Directors through Resolution B/BD/2003/05 of 2 April 2003 entitled: *“Temporary Relocation of the Operations of the African Development Bank: Status and Financial Regime Applicable to Staff during the Period of Temporary Relocation”*, she encountered several financial and installation difficulties which caused her both material and emotional damage, for which she seeks compensation.

2. During the proceedings, the Respondent raised a motion to dismiss. By its judgment of 1 December 2005, the Tribunal acceded to the motion insofar as the Application seeks to directly challenge regulatory decisions, but turned down the motion to dismiss with regard to all other points of the Application. The Tribunal shall now examine the substantive issues of the case.

II. THE APPLICANT’S ARGUMENTS

3. The main reason for the Application is to contest the change in mission status, pursuant to the above-mentioned Resolution B/BD/2003/05. The Applicant also challenges other decisions taken in the wake of that Resolution, especially document ADB/BD/WP/2003/77 entitled: *“Status of Staff in the Context of the Temporary Relocation Extended Mission Regime”*, Presidential Instruction 02/2003 of 24 July 2003 and the memorandum dated 24 July 2003 from the CHRM Director, all of which the Applicant claims are contrary to the Staff Rules and Staff Regulations.

Furthermore, she seeks some financial compensation and payment for material and emotional damage that she suffered following the unexpected change of regime, particularly the loss or deterioration of her personal effects following the termination of the lease contract between her and the Bank.

4. The Applicant maintains that the change in regime violates the Resolution of the Board of Governors adopted in Accra on 19 February 2003 and texts in force, particularly Rule 33.03 of the Staff Rules.
5. The said Rule 33.03 states: “A change of duty station shall take place when a staff member is transferred from one duty station to another for a continuous period of more than six (6) months. A staff member who is sent on a mission or to a conference shall not be deemed to have changed his/her duty station.” In other words, the Applicant claims that she is entitled to enjoying the mission regime set forth under Rule 33.03 for six months. Resolution B/BD/2003/05 which suddenly modifies that mission regime breaches Rule 33.03.
6. Contrary to the Respondent’s claim which relies on Judgment No. 2129 of the ILO Administrative Tribunal, the Applicant states that the situation in this instance is different. In the ILO case, the measure taken by the Respondent with regard to the mission expenses was covered under ILO’s internal laws. Such is not the case in this instance which is entirely governed by Rule 33.03 of the Staff Rules and the 18 February 2003 recommendation of the Governors’ Consultative Committee setting the ordinary mission regime in Tunis at 180 days, after which the staff member would be considered as having changed duty station and regime. Since her arrival in Tunis and for the subsequent six months, Abidjan should be considered as the Applicant’s duty station – as indeed confirmed by the 2 April 2003 meeting of the Board of Directors and the 10 February 2003 e-mail from the CHRM Director. According to the Applicant, it would be contradictory to consider the staff as having changed duty station while being “on mission” in Tunis. Supposing the situation corresponded to change of duty station, the Respondent would then be obliged to assume the responsibilities set forth under Rules 91.12 (e), 91.12, 91.13 and 52.03 (b) of the Staff Rules.

Moreover, even going by the mission expenses assumption, the ILO Administrative Tribunal ruled that the Administration must base its decision on objective considerations, with a view to protecting the independence of international civil servants. Non-discrimination is one of such principles. The Applicant maintains that the change in regime breaches the principle of equality and non-discrimination insofar as it creates a distinction in the manner in which Executive Directors/Board members are treated, compared to other staff, especially support staff. The Applicant does not challenge the difference of treatment in principle; concretely, she challenges its application in connection with *per diem* payment and coverage of transport expenses.

7. Lastly, in her Reply, the Applicant argues that the new extended mission regime had a retroactive effect in her case because, at the time of her transfer to Tunis, her status was governed by Rule 33.03 cited above. The decision to change regime was enforced after the start of her mission in Tunis and one month before the end of the 180-day statutory mission termination period. Therefore, the decision challenged breaches the principle of good faith and loyalty. Being retroactive, it is vitiated by abuse of discretion even as it violates acquired rights, contrary to Regulation 11.1 of the Staff Regulations, according to which: “these regulations may be supplemented or amended by the Board of Directors without prejudice to the fundamental acquired rights of staff members.”
8. On the grounds of the irregularity and unforeseeability of the decisions challenged under paragraph 3 above, the Applicant requests an upward review of her salary and financial entitlements in Tunis,

pursuant to Regulation 5.4 of the Staff Rules, the payment of the balance of mission expenses between what she received and what she would have received from 12 March 2003 to 1 August 2003, transfer of her personal effects from Abidjan to Tunis from 12 August 2003 following the change of duty station, a monthly compensation of UA 10 000 with effect from April 2003 until the date that the Tribunal would render its judgment, EUR 50 000 as compensation for damages resulting from the termination of her lease contract, the payment of “hardship allowance” at the time of her arrival in Tunis, and the coverage of her legal costs. In her Reply, the Applicant also claims installation allowance, pursuant to Rule 52.03 of the Staff Rules.

III. THE RESPONDENT’S ARGUMENTS

9. Regarding the decision challenged, the Respondent maintains that the Tribunal’s deliberation should be limited to the issue initially submitted to the Appeals Committee regarding the request filed on 2 September 2003 by the Applicant claiming payment of her entitlements following the temporary relocation of the African Development Bank to Tunis. In her letter of 2 September 2003, the Applicant requested payment of her entitlements with effect from 12 February 2003 when she arrived Tunis within the relocation framework, in accordance with modalities approved by the Governors’ Consultative Committee (GCC) during its 19 February 2003 Accra meeting and illegally modified by the Resolution of the Board of Directors on 2 April 2003. In other words, the Applicant requested the enforcement of the ordinary regime applicable to staff on mission, namely:

- per diem of UA 40 per day for the period from 12 March to 1 August 2003 (UA 40 x 150 days = UA 6 000); and
- payment of the cost of transporting her personal belongings with effect from 12 August 2003 when the ordinary mission regime limited by regulations in force to six months expires, after which the regime applicable to change of duty station would apply.

10. The Respondent maintains that the decision taken by the Board of Directors through Resolution B/BD/2003/05 concerning the new regime applicable to the relocation is, on the one hand, in line with previous decisions of the Board of Governors and, on the other, is taken in the normal exercise of the functions of the Board of Directors, pursuant to Article 32 of the Agreement Establishing the African Development Bank and Article 4 (3) of the Bank’s General Regulations, which states:

“For the avoidance of doubt and in accordance with Article 32, it is hereby provided that, with respect to its responsibility to conduct the general operations of the Bank, the Board of Directors shall in accordance with Article 32 of the Agreement have the sole and exclusive power to:

- i) Formulate and adopt general policies for the conduct of the business of the Bank;*
- ii) Issue general administrative and operational policies, directives and guidelines; and*
- iii) Exercise supervision aimed at ensuring that policies, directives and guidelines are properly implemented by the President.”*

To the Respondent, Resolution B/BD/ 2003/05 is perfectly legal.

11. To support its argument, the Respondent invokes the judgment delivered by the World Bank Administrative Tribunal on 5 June 1989 on *De Merode et al vs. the World Bank*, in which that Tribunal stated that while the fundamental and essential elements of the conditions of employment may not be amended unilaterally, the non-fundamental and non-essential elements are subject to unilateral amendment. In its Rejoinder, the Respondent adds that since mission expenses was neither fundamental nor essential, even less so immutable, no staff could under these conditions claim entitlement to such benefits. It is not for the Tribunal to substitute its own judgment in place of the discretionary power vested on the management of an international organization. In the *De Merode* case, the Administrative Tribunal of the World Bank was careful to note that discretionary power was not absolute power and was subject to a number of principles such as the principle of non-retroactivity, the principle of good faith, the principle of non-discrimination, or the principle of necessity. The Applicant contests the Respondent's arguments with regard to the above WBAT judgment. To the Applicant, the rules governing the status of staff of the African Development Bank does not allow an interpretation that considers mission expenses, the reimbursement of transport expenses and installation allowance as ancillary rights. Such entitlements are of an essential and fundamental nature.

12. Contrary to the Applicant's claims, the Respondent maintains that Resolution B/BD/2003/05 does not contradict the decision taken by the Governors' Consultative Committee of the African Development Bank on 17 and 18 February 2003. The Respondent advances two reasons in support of its position. Firstly, the Governors' Consultative Committee is a consultative body, not a decision-making body whose decisions would be binding on the Board of Directors of the Bank. Discussions during the Accra meeting did produce imperative decisions of a legal nature, but mere proposals. No request can be based on a mere proposal. Secondly, pursuant to its statutes, the Committee limited itself to issuing recommendations or guidelines only.

The Respondent adds that all decisions of the Board of Directors regarding the temporary relocation were submitted to the Board of Governors in its capacity as the Bank's highest decision organ. The Board of Governors approved all decisions taken by Management and the Board of Directors of the Bank.

13. Concerning the alleged violation of the principle of non-discrimination, the Respondent maintains that the difference between the salary of Executive Directors and other staff is attributable to the fact that the two categories enjoy different legal status. Since they are governed by different text, they are rightly entitled to different salaries. Furthermore, a minimum and maximum remuneration threshold was fixed in order to attenuate the difference in salary.

14. Consequently, the decision by the Board of Directors complies on all accounts with the requirements of the rule of "good management and sound financial policy", pursuant to Article 5.2 of the Staff Rules.

In fact, the regime instituted by Resolution B/BD/2003/05 was decided in the Bank's general interest. The ordinary regime for staff on mission - designed for a brief period not exceeding six months - could not adequately govern the relocation whose duration had become unspecified. This was an unusual and specific situation, on account of which the Bank had taken a measure which not only protected the Bank's financial interest but also that of staff, preventing any impoverishment to the detriment of some or any enrichment to the benefit of others. The Respondent adds that the legality of such measures was recognized by international tribunals, especially the Administrative Tribunal of the International Labor Organization in Judgment No. 2129 of 15 July 2002 in a similar case of relocation of the ILO Regional Office from Brazzaville to

Harare, followed with a 50% reduction in the mission coverage (*per diem*) usually granted. In that case, the ILO Administrative Tribunal ruled that the Applicants could not plea a breach of acquired rights following measures decided by the Organization insofar as their basic salary was not affected by such measures.

15. Arguing further, the Bank maintains that since the relocation remained temporary, it cannot be considered as a change of duty station. All measures taken by the Bank were decided in the light of that specific and unprecedented relocation situation, the exact duration of which could not be determined. Therefore, the benefits regime decided by the Board of Governors constitutes a special “extended mission” regime which neither corresponds to ordinary mission regimes nor a change of duty station regime. This regime was established in order to protect staff. The regime included a single relocation allowance, corresponding to an installation allowance that could have been paid in case of change of duty station.
16. Concerning payment of the cost of transporting the Applicant’s personal effects, the Respondent considers that it has no obligation whatsoever in that regard. Indeed, within the relocation framework, staff receive financial compensation, independent of the fact that the Respondent assumes the obligation to move their personal effects at the end of the relocation period. Lastly, regarding the termination of the lease contract between the Bank and the Applicant, the Respondent recalls that according to the said contract, the lease terminates at the expiration of a three-month notice.
17. On these grounds, the Respondent requests the Tribunal to dismiss all claims made by the Applicant.

IV. THE TRIBUNAL’S ORDER TO POSTPONE THE HEARING

18. During the hearings, the Respondent, in support of its arguments, submitted a document (Inter-Office Memorandum of 6 August 2008), in which it maintains that the Applicant had suffered no harm for which she was entitled to compensation, and that she had benefited from the greater payments under the new mission regime (temporary relocation extended mission regime) than what she was claiming in her Application. The Respondent equally denied having been negligent with respect to accommodations for staff and the Applicant in particular. In a document (in Annex 7 of the Inter-Office memorandum of 6 August 2008), the Respondent showed that, based on its analysis, payments received by the Applicant (28 991.11 UA), in accordance with the new relocation mission regime applied by the Bank, were greater than those of the special mission regime claimed by the Applicant (11 983.7 UA) as well as the normal mission regime. Thus, according to the Respondent, the Applicant, contrary to what she claims, has suffered no harm.
19. The Tribunal, by its order of 8 August 2008, adjourned the matter to the next session and gave the Applicant 30 days to respond to the document produced by the Respondent and another 30 days for the Respondent to reply to the Applicant’s response.
20. In her response to the document produced by the Respondent, while admitting that the burden of proving harm rests on the one demanding it, the Applicant asserts that compensation for damages suffered was not limited to purely financial aspects, but should include moral injury, flowing particularly from the loss of personal effects and psychological stress and such harm was only the direct result of the Bank’s negligence toward her. The Applicant adds that she made every possible effort to find accommodation and put an end to the crisis and that, contrary to what the Bank maintains, her attitude was far from being passive.

21. Furthermore, to refute the Bank's allegations, the Applicant believes that the crucial and specific period to be used for assessing harm is between 11 February and 11 August 2003, although the Bank had considered a global period from 11 March 2003 to 20 June 2008, which effectively reduced the assessment of harm considerably. Thus, for the Applicant, from the moment she was no longer lodged at the hotel (from 17 April 2003), she was entitled to payment of allowance of 65 UA per day for the period from 17 April to 11 August 2003. Whereas the Bank gave her an allowance of 330 UA per month, which added up to a daily allowance of 11 UA.

V. THE LAW

22. The resolution of this matter depends on the answer that the Tribunal should give to two fundamental questions. While agreeing that it is not within the Tribunal's competence to annul a decision of the Board of Directors of the Bank, the Tribunal must deliberate over the extent to which the Board has the legal competence to modify the terms of staff employment, and the limit of that competence. The second question, indissociable from the first, is to establish whether, in the event of modifying the terms of employment, the Bank can be held responsible for damages individually suffered by a staff member on account of such modification.
23. The Bank's Staff Rules clearly define the legal relationship between the Bank and its staff, namely an employment contract. Being a voluntarily accepted contract, its terms cannot be subject to unilateral modifications. The two parties to the contract must consent. However, from another angle, this employment contract falls within the framework of pre-set regulations, accepted by the staff member at the time of his/her employment, decided by the Board of Directors of the Bank and manifested both in the Staff Rules and Staff Regulations. Concretely therefore, the contract is a mixed legal framework in which the will of the contracting parties is the core source of the rights and obligations of each party, even though such rules and obligations are determined in advance in the Staff Rules. The Tribunal must take these two factors into account.
24. The question now arises as to the competence of the Board of Directors to modify staff terms of employment. The Tribunal accepts the Respondent's argument according to which Article 32 of the Agreement Establishing the African Development Bank and Article 4 (3) of the General Regulations of the African Development Bank vests the Board of Directors with the power to issue "general administrative and operational policies". Article 4 of the General Regulations is followed by Article 5 entitled "Rules and Regulations" which states as follows: "*The Board of Directors may, subject to these Regulations, adopt such rules and regulations, including financial and staff regulations, as are necessary or appropriate for the conduct of the general operations of the Bank. Any rules and regulations so adopted, and any amendments thereto, shall be subject to review by the Board of Governors at its next annual meeting.*" Therefore, it is incontestable that the Board of Directors enjoys broad regulatory competence with regard to Staff Regulations.
25. Furthermore, the Tribunal agrees with the Respondent's argument concerning the decision rendered on 5 June 1981 by the World Bank Administrative Tribunal in *De Merode et al vs. the World Bank*. In that decision, it was ruled that while the fundamental and essential elements of the conditions of employment may not be amended unilaterally, the non-fundamental and non-essential elements are subject to unilateral amendment. Based on these elements, this Tribunal does not contest the Bank's right to modify staff terms of employment, particularly those elements that do not fundamentally affect staff status. Obviously, that right is not unlimited and must respect a number of guarantees, especially the non-retroactiveness of the modifications decided. In some legal systems, this right is expressed by the adage: "nobody is entitled to unchanged regulations."

26. The Tribunal must also recognize that the Bank's Board of Directors modified the mission regimes in response to a critical situation of crisis. It acted in the interest of the Bank and in a situation of extreme urgency. To respond to this exceptional situation, the Bank was forced to act as it did.
27. Based on the preceding, the Tribunal concludes that Resolution B/BD/2003/05 of 2 April 2003 was taken legally and in accordance to the texts governing the officers of the Bank.
28. The Applicant demands reparation for some harm suffered because of her transfer to Tunis. The Tribunal does not contest her assertions in this regard. However, legally, it must find the responsible party. In this regard, the Tribunal notes, first of all, that the difficulties and stress caused by the Bank's relocation was endured at various levels by the Bank's staff as a whole.
29. The Applicant suffered specific harm, particularly the deterioration of her furniture, the loss of her personal effects and souvenirs dear to her. She attributes this to the Bank, particularly the wrongful termination of the rental contract between her and the Bank for her apartment in Abidjan. This unilateral termination forced her to move her things to friends' homes under bad conditions, which resulted in the above-mentioned damages and losses.
30. In addition, the Applicant complains of having had a painful emotional and material experience because of her transfer to Tunis under previously described conditions. While deploring this situation, the Tribunal must however weigh the Bank's responsibility solely from a legal perspective.
31. Regarding the loss of personal effects and furniture, which were destroyed or lost after having been entrusted to a personal friend of the Applicant, it is true that the Respondent did not exhibit conduct fully in conformity with the spirit of Regulation 3.12 of the Staff Rules. The Applicant was in an extremely difficult situation after the termination of her rental contract. The Respondent had advised all members of staff not to go to Abidjan. Since the Respondent was linked to the Applicant not only as employer, but also as landlord, it owed the Applicant an increased measure of diligence. It should therefore have seriously considered the Applicant's request to store her belongings at the Bank's warehouse in Abidjan instead of denying categorically that such an option could be taken into consideration. However, the Applicant was able to find a place for her belongings by making use of her private connections in Abidjan. Her friend thus became the custodian of her belongings. The fact that this friend was subsequently forced to leave her residence and that, as a consequence, the furniture and other effects were damaged or lost, cannot be attributed to the Respondent since there was no direct link between the emptying of the apartment of the Applicant and the injury which eventually materialized by unforeseen occurrences.
32. Now regarding the difficulties that the Applicant experienced during the first period of her transfer to Tunis, the Tribunal cannot find any unfair act by the Bank's management towards the Applicant, which could lead to responsibility by the Bank. In this case, the Bank, in its treatment of the Applicant, respected the standards of this type of international administration. The Bank was not negligent and did not violate its governing texts. The Applicant was unable to demonstrate that the Bank exhibited, in her case, a blatantly negative attitude or wrongful behavior.
33. Based on the foregoing, the Tribunal, legally, concludes that the Bank cannot be held responsible for damages or harm suffered by the Applicant.

34. On the other hand, the Tribunal concludes that the amount of 50,000 Euros requested by the Applicant, without any specification of the components of that amount, as compensation for the damages resulting from the termination of the rental contract, does not include the rent amounts deducted from her salary even after the termination of that contract. The Tribunal refrains, therefore, from making a determination on the right of the Applicant to have those amounts reimbursed.
35. The Applicant requested a reimbursement of a part of her legal fees since she won partially on the question of admissibility of the Application. This request must be rejected. The Tribunal can only contemplate a reimbursement of legal fees if an application is well founded (Article IX (4) of the Statute of the Tribunal).

VI. THE DECISION

36. For the preceding reasons, the Tribunal decides that:

The Application is dismissed.

Professor Maurice GLELE AHANHANZO

President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

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