

**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
	Judge Salifu Modibbo Alfa BELGORE	Member

APPLICATION No. 2007/04

Mr. N. O., Applicant
African Development Bank, Respondent

Judgment of the Tribunal rendered on 8 August 2008

I. THE FACTS

1. Mr. N. O. joined the African Development Bank on 2 November 1981. As at the date of his dismissal – 8 June 2007 – he was on his twenty-sixth year of service in the Institution, occupying the position of Disbursement Officer in FFCO Department (Financial Control).
2. In 2001, the Applicant was in charge of disbursement for the Lower Mangoky Rice Scheme Rehabilitation Project (PRBM) in Madagascar. The project was financed by the Bank under the terms of a 1999 agreement between it and the Republic of Madagascar.
3. In November 2005, the Malagasy authorities drew the Bank's attention to the existence of corrupt practices within the context of implementation of the Mangoky Project. The names of Mr. N. O., erstwhile Task Manager of the project, and Mr. B. M., were individually cited.

Investigations

4. In November 2005, the Bank ordered an audit of the five projects that it was financing in Madagascar. The first audit mission (29 November – 17 October 2005) concluded that the Independent Anti-Corruption Bureau (BIANCO) confirmed that acts of corruption indeed occurred during the execution of the Mangoky Project.
5. The services of the Office of the Auditor-General embarked on two other missions (in January and July 2006) to meet Malagasy officials and gather additional information. In that regard, they obtained three depositions from Messrs. Ladislav Adrien Rakotondrazaka and Solofoarijaona Ratovoson, former Directors, respectively, of the Administration and Finance Unit of the Mangoky Project.

6. These depositions, attached as Annexes 3, 4 and 5 to the Respondent's Answer, are dated 23 January 2006, 11 and 14 July 2006, in that order. They implicate the Applicant to whom money from the Mangoky Project was retroceded either by "bank transfers" to a Société Générale account in Paris and "foreign exchange cash payment" obtained from the "parallel market".
7. According to statements by the former Head of the Administration and Finance Unit, the embezzlement was organized with the assistance of Garage Aroumougom, through a mechanism of bogus invoices issued for the hire of all-purpose vehicles for the period of March, April and May 2004. Double budgetary entries were made for this "expenditure" under the "Technical Assistance" and "Consultancy/Study Services" chapters in the request for replenishment of the Mangoky Project revolving fund that the Government of Madagascar submitted to the Bank on 23 July 2004.
8. On 24 August 2004, the Applicant advised the Bank to approve the requested disbursement as Revolving Fund No. 43, after ONAR Department (Agriculture and Rural Development) had on 2 August 2004 confirmed the eligibility of expenditures on the special account and lifted any objection to authorizing the settlement of the said request for replenishment of the revolving fund.

Appearance before the Services of the Office of the Auditor-General

9. On 28 November 2006, the Applicant was summoned by the Anti-Corruption and Fraud Investigation Division (Office of the Auditor-General). Hearings continued until 30 November 2006.

Application of Interim Measures

10. Pursuant to Rule 101.01 of the Staff Rules, the Applicant was informed on 30 November 2006 about his first suspension from duty for "an initial period not exceeding three months, with pay".
11. The measure was extended thrice, each time for a month: 28 February 2007, 30 March 2007 and 3 May 2007.

The Query

12. By correspondence dated 4 May 2007, the Director, CHRM Department (Human Resources Management), addressed a query to the Applicant following the outcome of investigations conducted by the Office of the Auditor General. The correspondence leveled against him a complaint of possible serious professional misconduct, for the following reasons: disbursements in violation of procedures in force in the Bank in the absence of expenditure justifying documents, suspicion of misappropriation of public funds during the implementation of the Mangoky Project in view of the multiple transfers made [into his account] between 2002 and 2004, including one in the amount of five thousand Euros (EUR 5 000). The Applicant was ordered to give satisfactory explanations, failure of which he would be subjected to the applicable sanctions.

13. The Applicant's reply dated 11 May 2007 confirmed in writing the answers given by him to questions raised during the auditions recorded by the Office of the Auditor-General. The Applicant stated that he complied with the norms set forth in the Bank's Disbursement Manual during the processing and payment of Disbursement Request No. 43. He affirmed that he "never received funds from the Mangoky Project, other projects in Madagascar or any other country where he managed disbursements." Moreover, he emphasized the fact that he had put "all statements of all [his] accounts at the disposal of the Office of the Auditor-General for verification."

Notice of Dismissal

14. Following this process, the Applicant was dismissed by notification letter dated 8 June 2007. The dismissal without notice or benefits with immediate effect was pronounced, pursuant to Regulations 3.5, 3.7 and 10.2 of the Staff Regulations, and Rules 35.00 (d), 37.00, 101.02 (c) and 105.00 of the Staff Rules.
15. The notice of dismissal for serious misconduct highlighted that the Applicant did not conduct himself in a manner befitting his status as an employee of an international institution by:
- accepting payments in relation with the PRBM project in which he was working in an official capacity ;
 - approving disbursements for some suppliers that were not supported by justifying documents from these suppliers;

and that, as a consequence, he had severely breached his responsibilities under the Staff Rules and Statute likely to harm the credit and financial interest of the Bank.

II. ARGUMENTS OF THE PARTIES

16. The Applicant

The Applicant attacks the Respondent's decision from three angles:

- Violation of the Respondent's own whistleblowing rules and procedures and handling of grievances;
- The arbitrary nature of the decision which is nothing but abuse of discretion, based on error of facts, law and erroneous conclusions drawn from facts;
- The disproportionality of the sanction vis-à-vis a misconduct that had not been proven.

Abuse of Discretion

17. To the Applicant, the facts justifying his dismissal have not been established. The Respondent has shown no proof of his culpability in each of the three charges retained: violation of disbursement procedures in force in the Bank, collection of bribe of five

thousand Euros from the Mangoky project, and breach of Malagasy exchange regulations.

18. The Respondent persistently sought that the Applicant prove his innocence, thus running counter to the admitted principles of international administrative law (Decision No. 362, § 27, World Bank Administrative Tribunal, 2007).
19. Furthermore, the Respondent violated the principle underlying its own whistleblowing policy and the treatment of grievances: the obligation to give a legitimate basis to an investigation by conducting a preliminary assessment of the credibility, materiality and accuracy of information related to fraud, corruption or any other breach of duty. The denunciations made by Malagasy officials to investigators from the Office of the Auditor-General were not objectively corroborated.
20. The Respondent's decision runs counter to applicable law in the light of conditions constitutive of serious misconduct as propounded by international administrative law and the jurisprudence of international administrative tribunals. The two criteria defining *flagrante delicto*, on the one hand, and the imperative need for immediate and final separation with a view to protecting the Institution's interests, have not been met.

Erroneous Conclusions Drawn from Facts

21. The Respondent only resorted to an arbitrary interpretation of facts related to the processing of Disbursement Request No. 43, the financial transaction with the Late Malagasy Minister of Agriculture and the Malagasy exchange regulations.
22. The processing of the Disbursement Request was by no means irregular insofar as the dossier had previously been approved by various technical services in charge of the agricultural sector, i.e. ONAR Department. The absence of documents justifying payments made is explicable by the existence of an agreement exempting the presentation of those documents (a special agreement between the Bank and the borrower which grants the borrower the liberty to keep the expenditure justifying documents). This procedure is in line with provisions 1.2.1, 5.4 and 9.13.4 of the Disbursement Manual.
23. Therefore, the Applicant did not have in his possession any evidence on the basis of which he would not authorize payment for vehicles leased. It is legitimate to reason that the request was fully compliant and regular. In short, thanks to the Bank's very disbursement procedures, it was possible to make available the advance requested by the Malagasy Government, under these special circumstances.
24. The five thousand Euros (EUR 5 000) transferred to the Applicant's bank account with Société Générale (Paris) are not proceeds from a bribe taken during the implementation of the Mangoky Project but the reimbursement that the late Malagasy Minister of Agriculture, Mr. Raveloharygoan, sought and obtained from the Applicant in 2003. The Applicant maintains that he wrote out two bank checks of EUR 2000 and EUR 3 000 to his debtor during a trip to Paris (check numbers 63 and 65, dated 07 November and 27 November 2003, endorsable 14 November and 23 December of that year). Regarding the details of this transaction, the Applicant offered different versions which varied in the course of the proceedings.

25. During the transaction, the Applicant was promised that the reimbursement would be done through an intermediary whose name was kept secret. Following the death of the Malagasy Minister in December 2003, a bank transfer of EUR 5 000 was made to the Applicant by a certain Samir Goulama. To the Applicant, the said Samir Goulama who is a total stranger to him, is believed to be that intermediary.
26. The charge regarding the breach of Malagasy's exchange regulations is inconsistent. In any case, the amount that the Respondent calls into question is not above the limit authorized by Malagasy texts regulating financial relations with the outside world. All transactions took place outside Madagascar and in no way could they involve the conversion of the Malagasy franc into foreign currencies. There was neither "currency importation into nor exportation from" Madagascar.

The Disproportionality of the Sanction

27. The Respondent had not shown enough proof to establish serious misconduct. The Applicant in no way considers himself guilty of professional negligence, breach of disbursement procedures, embezzlement or breach of the financial legislation of any country.
28. The decision to terminate the Applicant's contract was taken in total violation of Rule 101.04 (a) of the Staff Rules and the principles of international administrative jurisprudence on summary dismissal without notice and benefits (Judgments Nos. 999, 1070 and 1828 of the ILO Administrative Tribunal; Decisions Nos. 142 and 304 of the World Bank Administrative Tribunal).
29. The Respondent did not take a number of positive factors into account. The Applicant has had a long and excellent career during which he rendered quality and loyal service to his employer. The Applicant cooperated fully during the investigations: he agreed to put personal documents (bank statements, check booklets, check stubs, photocopies of pages of his passport) at the disposal of the Office of the Auditor-General.

Moral Damage

30. The Applicant has suffered great public humiliation, before colleagues and peers. On notification of his dismissal, he was escorted out of the Bank like a common law criminal by the Bank's Head of Security. The badge granting him access to his office was withdrawn. He was withdrawn all possibility of reading his e-mail.
31. Nothing could justify such treatment, given the Applicant's exemplary conduct throughout his long career. The Bank caused him much grief; it damaged his personal and professional reputation. To rejoin the jurisprudence of the World Bank (*P. Gyamfi vs. IBRD*, Decision No. 28), nothing authorized the use of intimidation when conducting the Applicant from the Bank building.
32. **The Respondent**

The departure point of the Mangoky Project evaluation and verification audit is not the denunciation of irregularities by whistleblowers. The audit fell within the context of

the 2005 work program of the Internal Audit Department as approved by the Board of Directors in 2004.

33. The investigation ordered by the Respondent was not based on hearsay or rumor. By their solidity, the depositions by Malagasy stakeholders who participated in implementing the Mangoky Project provide very damning evidence against the Applicant who cannot exonerate himself from answering to accusations of bribery.

Culpable Professional Negligence

34. Such negligence belies the non-compliance with the accounting norms and obligations set forth in the Disbursement Manual, especially under Provisions 9.1.1; 9.11.1; and 9.13.2. Pursuant to Provisions 9.11.1 and 9.13.2, the special account method (used in requesting the replenishment of Revolving Fund No. 43) requires, among other documents, documentary proof for expenditures made. It was incumbent on the Applicant, in his capacity as the Disbursement Officer, to demand the documents missing from the dossier prior to its review.
35. The Applicant shows no proof of an explicit agreement between the Bank and the Malagasy State, waiving the presentation of justifying documents. Reference to the minutes of that agreement should have figured in the letter forwarding the disbursement request.
36. The approval of the eligibility of expenditures by ONAR Department would not excuse the Applicant from ensuring that the dossier complied with the requirements set forth in the Disbursement Manual. Relying solely on the point of view and recommendation of another department is not a solid argument: the financial verification conducted by a disbursement officer differs from the technical control of expenditures undertaken by a project manager or a task manager.
37. Instead, pleading not guilty of negligence by invoking the impossibility of conducting an in-depth administrative and accounting verification is to confess work unconscientiously done. Forms A2 and A3 – documents constitutive of Request No. 43 – that the Applicant was required to review, duplicated the same expenditure for vehicles leased from Garage Aroumougom under the “Technical Assistance” and “Consultancy/Study Services” chapters, for the same year.
38. A sum of EUR 70 597 was fraudulently included in Disbursement Request No. 43. That amount corresponds to an over-billing of the actual cost of leasing the vehicles. The lease was only effective from June 2004. The statement of expenditures committed on the previous advance should have indicated only the 30 days of the month of June 2004, i.e. EUR 3 270, instead of EUR 73 867 posted for the period running from 10 March to the end of June 2004.
39. Investigators from the Office of the Auditor-General were able to obtain a copy of the lease contract of four all-purpose vehicles, dated 10 March 2004. The Applicant should have required that that document be included in the statement of expenditures accompanying the Request (No. 43) for Replenishment of the Special Account.

40. From the contract signed between Messrs. Adrien Rakotondrazaka (former Director of the Mangoky Project) and Jean Aroumougom (Director, Garage Aroumougom), the lease ran for one year at a daily rate of EUR 109 per vehicle, including the cost of lease, driver's allowance, insurance and maintenance fees, fuel and lubricants. Yet, the statement of expenditures committed on the previous advance to the special account already covered expenses related to the lease of vehicles.

The Distorted Reading of the Disbursement Manual

41. Article 9.12 of the Disbursement Manual states the condition in which the Bank approves the replenishment of a special account: exhaustion of the previous advance and at least a 50% justification of funds received. The Applicant jumps on this provision to ineptly assert that the deduction of the cost of vehicle lease from the total expenditure (carried forward on Form A2) in no way affected the approval of the rolling fund replenishment, claiming that 50% of the funds paid into the special account had been justified. However, how could he arrive at that conclusion, in the absence of documents justifying each and every expenditure on Form A2?

The Illicit Source of the Money Received

42. The illegal source of the money received is clearly underlined in the depositions made by former managers of the Mangoky Project. The Applicant's implication in corrupt practices is therein clearly mentioned. The former director confirms that he personally made several Euro payments to the Applicant between 2002 and 2004. Furthermore, he adds that by approving the vehicle lease expenditures, the Applicant was well aware of their fraudulent nature and was by no means ignorant of their destination.
43. The Applicant's explanation on the origin of the EUR 5 000 paid into his Société Générale (Paris) bank account are fraught with contradictions. In an e-mail dated 28 April 2007 to the Auditor-General, the Applicant states that the former Malagasy Minister of Agriculture, presented as his debtor, died in December 2003. Yet, it is commonly known in Madagascar that the said Minister, Late Marcel Theophile Raveloarijaona, passed away on **5 November 2003**. In other words, the death occurred well before the dates that the checks were said to have changed hands personally in Paris, and the debt reimbursement by bank transaction dated 12 July 2004.
44. The observation of facts in the field by the Office of the Auditor General corroborates the depositions made by the two former Malagasy civil servants: the disbursement timeframes for the Mangoky Project (41 to 69 days between 2001 and 2003) were brought down to two or three weeks in 2004, after the Bank staff members involved in these embezzlements had received "their cut". Disbursement Request No. 43 was recommended in 16 days.

Breach of Malagasy Financial Regulations

45. As stakeholder in the above financial transactions, it was the Applicant's duty to ensure compliance with Article 6 of Decree No. 72-446 of 25 November 1972. Compliance with that regulation would have enabled him to provide written proof of the legality of the transfer or payment of which he was beneficiary.

On the Presumed Abuse of Discretion

46. The Respondent maintains that the Bank President exercises discretion in line with specific procedures provided for in cases such as this. The conclusions resulting from the investigations are backed by proof. The Applicant's dismissal without notice and benefits is based on a series of irregularities and serious misconduct for which he is responsible.
47. The Applicant's misconduct was characterized as serious based on a scale designed by the Respondent and founded on both established facts and the applicable rules, including the Staff Rules and Staff Regulations (in particular Rule 101.00 on failure to comply with the rules and regulations binding on staff, Rule 101.02 on serious misconduct touching on the financial or other important interest of the Bank and Rule 101.04 on factors determinant of serious misconduct and the consequent disciplinary measures).
48. In the case before this Tribunal, the Bank President is within his rights to consider the Applicant's conduct in approving Disbursement Request No. 43 as sufficiently comparable to fraud, embezzlement, corruption, professional negligence and malice, thus justifying the dismissal without notice and benefits. The breach of statutory obligations has a significant effect on the integrity and loyalty of an employee to his Employer.
49. In *Gnanathurai vs. Asian Development Bank* (Decision No. 79, 17 August 2007), the Tribunal judged that "reputational damage is necessarily a serious matter for a multilateral financial institution mandated to serve the needs of poor and developing countries".
50. Article 37(5) of the Agreement Establishing the African Development Bank states that "the highest standards of efficiency, technical competence and integrity" are the foremost consideration in "appointing officers and staff." The Respondent cannot tolerate acts of misappropriation of public funds and breach of its disbursement regulations, especially by an expert whose duty is to review disbursement requests and ensure the eligibility of expenditures prior to engaging any payment procedure.

On the Purported Breach of Applicable Law

51. The argument that the Respondent breached its own texts is baseless. The whistleblowing policy and treatment of grievances to which the Applicant refers had not entered into force at the time investigations on his embezzlement practices started. The text was only approved by the Board of Directors on 24 January 2007. In no way could the Respondent have breached those principles.
52. In the light of its jurisprudence, this Tribunal has already judged other cases of serious misconduct: embezzlement of education benefits, conflict of interest resulting from the remuneration of a staff member by a third party in contractual relations with the Bank. The case now before the Tribunal is characterized not only by receipt of money whose origin gives rise to contradictory explanations, but also by an active and conscious move to perpetrate embezzlement, obtain personal financial gain from the resources of

a project financed by the Respondent as loan granted to a member country that enters into debt in the process.

Concerning the Disproportionality of the Sanction

53. In *Carew vs. IBRD* (Decision 142, World Bank Administrative Tribunal, 19 May 1995), the Tribunal when concluding that dismissal was not the appropriate sanction, took the employee's low rank into consideration. In the case before this Tribunal, the issues are materially very different. The Applicant was an officer, in charge of: (i) reviewing disbursement dossiers for approval of payment; (ii) verifying that loans are allocated solely to eligible expenditures; and (iii) training on disbursement procedures for local staff in countries under his brief.
54. In the jurisprudence of *D. vs. International Finance Corporation* also invoked by the Applicant (Decision No. 304, World Bank Administrative Tribunal, 12 December 2003), the misconduct established is based on less serious facts. There is no proof that the employee received money from a third party; instead, it is the staff member who lent money and did not use his position within the institution to obtain financial gain. Moreover, the procedure was vitiated by the retroactive application of the texts.
55. The argument regarding the conditions of service within the Bank to attenuate the sanction is a line of defense already dismissed by this Tribunal. In *B. vs. ADB* (Judgment No. 2000/10), the Tribunal reasserted the extreme importance that should be given to the notion of staff integrity in an Institution committed to the promotion of good governance. Acts of corruption by its staff discredit the Institution itself. Thus, the highest sanction cannot but be inflicted when it is established that misconduct is imputable to the Applicant.
56. The Applicant confesses that "this is his first real misconduct" in twenty-six years of presence in the Bank. However, he is not specific as to what other misconduct he confesses. It is rather strange to maintain that in the current situation, dismissal without notice and benefits is a disproportionate sanction.
57. No procedural error whatsoever can be invoked with regard to the conduct of the investigations. The Applicant was guaranteed due process and given the opportunity to defend himself.

Damage to the Bank

58. By virtue of his duties, the Applicant was accountable to his employer for the management of the employer's financial resources. However, he caused the Bank harm by damaging its integrity, reputation and interest.
59. By seriously breaching the existing disbursement procedures, the Applicant paved the way for the payment of bloated and unrevealed expenditures, causing the Respondent financial loss. The malicious approval of the disbursement request by the Applicant forced the Respondent to pay for the lease of vehicles which, in reality, was nothing but expenditure to generate bribery.

III. CLAIMS BY THE PARTIES

60. The Applicant

The Applicant prays the Tribunal to:

- Annul the decision to dismiss him without notice and benefits for serious misconduct;
- Pronounce his reinstatement or, failing that, the payment of three years of salary as compensation for wrongful dismissal;
- Pay retroactively his salary and entitlements from the date of dismissal to the date of delivering the judgment;
- Pay him a compensation of USD 25 000 for moral damage, humiliation, pain, damage to his personal and professional reputation;
- Expunge from his administrative records all reference to the dismissal and deliver to him an attestation justifying his departure from the Bank on grounds of voluntary separation;
- Impute to the Respondent all expenses related to this case: legal fees, attorney's fees and all other fees.

61. The Respondent

The sanction is just and reasonable, having emanated from established facts and taken in line with the applicable texts. The Applicant went through due process but was unable to provide convincing explanations.

Consequently, the Respondent requests the Tribunal to dismiss Application 2007/04 as baseless.

IV. THE PROCEDURE

- 62.** A public hearing took place on Friday, 1 August 2008. Shortly before that hearing, first as an attachment to an e-mail of 22 July 2008 and thereafter by letter handed over to the Executive Secretary of the Tribunal on 31 July 2008, the Applicant sent an affidavit signed by Ladislas Adrien Rakotondrazaka in Antananarivo on 20 April 2008 and certified on 29 April 2008. In this affidavit, Mr. Rakotondrazaka declared that all of his former statements had been obtained by the investigating officers of the Respondent by pressure and threats. He had never assisted in any fraudulent activities. Since this document was submitted after the exchange of written memorials had already become closed, the President of the Tribunal had to decide whether he should accept the new piece of evidence under the powers granted to him under Rule XIII of the Rules of Procedure. After having consulted with the full Tribunal, he took the view that the document, since it touched upon the heart of the dispute, should be included in the file.

63. At the hearing; the Applicant requested furthermore that a back-to-office report on a mission to Madagascar should be submitted to the Tribunal. Lastly, he demanded that the three staff members who had undertaken that mission for the Bank, be heard as witnesses. The Respondent opposed this motion. The Tribunal decided that the President of the Bank must make a determination as to whether the documents requested are covered by official secrecy in accordance with Article IX (1) of the Statute. By letter of 5 August 2008, the Tribunal was informed by the Respondent that the report was protected under that provision.

V. THE LAW

64. The President of the Bank based his decision of 8 June 2007 to dismiss the Applicant on Article 10.2. of the Staff Regulations. Pursuant to this provision he is indeed authorized to dismiss a staff member summarily without notice or benefits for serious misconduct.
65. Recourse to this procedure and its handling do not reveal any mistake of law or fact. Due process was observed before the determination of separation was made. At an early date after indicia had emerged that the Applicant might be involved in misconduct, he was confronted with the charges against him (28 November 2006). He was again interviewed on 28, 29 and 30 November. On that last day, he was eventually suspended from his functions, which provided him with an opportunity to prepare his defence. The suspension was extended until 1 June 2007. Eventually, on 4 May 2007, he was enjoined to

“provide a detailed, comprehensive, and satisfactory explanation, with the relevant supporting documents, for accepting payments directly from personnel associated with the PRBM Project and processing the payment of expenses without obtaining the appropriate supporting documentation in contravention of Staff Regulations 3.5 and 3.7, and Staff Rules 37.00 and 105.00”.

It was clear, at that point in time, that those were the main charges against him. The Tribunal concludes, in the light of these circumstances, that the Applicant had a full opportunity to justify his conduct. No rash decisions were taken by the Bank. The Applicant was heard. Accordingly, due process was ensured.

66. The Applicant complains about non-observance of the rules laid down in the “Whistleblowing and Complaints Handling Policy” of the Bank. However, this regulatory instrument was not yet in force at the time when the disciplinary proceedings against the Applicant were initiated (final approval by the Board on 24 January 2007). In addition, the Tribunal observes that the investigation was not based just on information provided by one person. It had generally transpired, in particular through information received from the Malagasy authorities, that certain corrupt practices were present in the Mangoky Project. Accordingly, the Bank was under an institutional responsibility to take swift and effective action to put an end to any possible abusive practices among the members of its staff.
67. The main question is, however, whether the substantive requirements of Regulation 10.2 are met in the sense that “serious misconduct” can be attributed to the Applicant.

- 68.** The letter of dismissal of 8 June 2007 specifies the facts which were deemed to justify summary dismissal. In the first place, the Respondent stated that it had sufficient evidence to infer that the Applicant had received payments related to the PRBM (or Mangoky) Project in which he was engaged, among them a transfer of 5,000 Euros to his account with Société Générale in Paris. Second, the Respondent contended that the Applicant had authorized a number of disbursements without any relevant documentation, contrary to the rules laid down in the Disbursement Handbook that was to guide the discharge by the Applicant of his duties.
- 69.** Regarding the first charge, the Respondent relies to a great extent on the declarations of two former Malagasy officials who had been entrusted with managing the PRBM Project. The former project director, Ladislav Adrien Rakotondrazaka, who had been compelled to resign after his involvement in a corruption scheme had been discovered, admitted before OAGL on 23 January 2006 that, in addition to payments in cash (around 5,000 Euro), several transfers were made to the Applicant's bank account with Société Générale in Paris. The modalities of how these payments were allegedly made remained unspecified, however. In addition, the Tribunal notes that the declaration of 23 January 2006 was not signed by Mr. Rakotondrazaka himself. The two officers taking his deposition certified, instead, that the summary of two pages drafted by them reflected accurately the testimony of the witness. No explanation has been given why a signature was not requested. However, this defect does not mar a second declaration made by Mr. Rakotondrazaka a few months later, on 11 July 2006, through which he confirmed to an audit mission of the Respondent his earlier declaration, reiterating that payments in cash and by transfer were made to the Applicant. However, this time again, the deposition lacks the desirable clarity. While on the one hand the witness states that he himself had made payments to the Applicant, in another sentence he says:

«Il paraît que plusieurs transferts a été fait (sic !) sur son compte à la Société Générale à Paris. »

This sentence sounds more like hearsay information. On the other hand, Mr. Rakotondrazaka stated without any reservation that, since the payments to the Applicant were to be made on a regular basis, the Applicant would telephone him to speed things up whenever there were delays in the transfers (Annex 3 to the Respondent's reply).

- 70.** Another witness, whose assessment of the events were also collected by the audit service of the Respondent, Mr. Ratovoson, also a member of the Malagasy authorities entrusted with developing the PRBM Project, does not seem to have any first-hand knowledge of the involvement of the Applicant in the corruption practices that surrounded a contract with the car hire firm Garage Aroumougom that played a pivotal role in the scheme. In his deposition of 14 July 2006 he stated that, according to his Director, "il fallait prévoir un montant assez conséquent pour certains agents de la BAD". In this connection, he mentioned the Applicant by name. He admits that in order to procure the necessary means for the requested financial favours "j'ai établi avec mon équipe et approuvé des fausses factures sur la location pour la période de mars, avril et mai 2004 qui ont été payées au garage AROUMOUGOM. » However, he was not able to confirm that the Applicant had indeed received illicit payments, confining himself to the observation: " ... le Directeur m'a dit, au courant du mois

d'août 2004 que les agents de la BAD, sans les nommer, ont bien reçu la motivation qu'ils demandaient". In and by themselves, these statements do not constitute a reliable basis for any disciplinary action, more so as they have been contradicted by another affidavit produced by the Applicant.

71. Indeed, the affidavit submitted by the Applicant confirms that the investigation mandated by the Respondent to clarify the charges of corruption levelled against the persons involved in the Mangoky project was carried out somewhat lightheadedly. Although undoubtedly some suspicions remain, the testimonies of the two Malgasy officers do not constitute a solid evidentiary basis. In and by themselves, they cannot be relied upon in a disciplinary action. The Tribunal will therefore use them only for the purpose of buttressing conclusions already reached by other means.
72. However, it is an undeniable fact that a payment from a Malgasy source (one Samir Goulama whom the Applicant contends not to know and with whom, as he admitted at the oral hearing, he had only once spoken by phone) was credited to the account of the Applicant on 24 July 2004. The Respondent requested the Applicant to explain the origin of that money. In the Application, the Applicant pointed out that the amount of 5,000 Euro was in reimbursement of funds that he had previously made available to the Minister of Agriculture of Madagascar, M. Raveloharygoan (two versions of the name were before the Tribunal, also: Raveloarijoana). Since the Minister had on an earlier occasion done him a favour by providing him with a specific medicine, the Minister on his part had asked the Applicant to advance him some foreign exchange. He, the Applicant, agreed to do so and, while both were in Paris, gave Mr. Raveloarijoana two cheques – No. 63 in the amount of 2,000 Euro (dated 7 November 2003, to be cashed on 14 November 2003) and No. 65 in the amount of 3,000 Euro (dated 27 November 2003, to be cashed on 23 December 2003). The recipient had promised to reimburse the Applicant through an intermediary but did not indicate who at the time. Following Mr. Raveloarijoana's death in December 2003, a transfer was made to the Applicant's account by Mr. Samir Goulama in July of the following year.
73. In its answer to the Application, the Respondent observed that, as a matter of common knowledge, Minister Raveloarijoana had died on 5 November 2003, i.e. days or weeks before the alleged encounters had taken place in Paris.
74. These observations prompted the Applicant to modify his version of the events in his Reply. Counsel for the Applicant pointed out that the formulations in the Application were written by her, after the Applicant had contacted her by phone in the United States. The Applicant himself observed that already in his answers to the questions put to him by OAGL he had specified that the two cheques had not been handed over to the Minister personally, but to a Mr. Théodore, the late Minister's subsidiary. According to the Applicant, a further complication occurred:

“ ... upon Mr. Théodore's request for cash, the Applicant ended up having to cash the first cheque himself and giving the cash to Mr. Théodore. The Applicant then left the second cheque with a friend to cash and subsequently gave the cash to Mr. Théodore upon the Applicant's return to Paris” (Reply, para. 3).

75. The Tribunal is unable to follow the Applicant in this complex description of the alleged loan to the late Minister. It must give credit to the Respondent's argument that the Applicant's explanation is unconvincing. First, the Applicant has not been able to clarify how and when the loan instalments were given to the late Minister. The existence and identity of "Mr. Théodore", whose family name was never disclosed, could not be explained by the Applicant. He remained a mysterious figure. Second, it is rather implausible that a cheque was released in favour of the Minister after his death. But even assuming that a truly existing "Mr. Théodore" was not apprised of the passing away of his principal two days after that sad occurrence, there are in any event no reasons whatsoever that could explain that a second cheque was given to a representative of the Minister more than three weeks after his death, to be cashed again four weeks later. Additionally, the second cheque was not cashed at that time but was deposited into the payee's account and was not cleared from the Applicant's account until 31 December 2003. Moreover, an examination of the relevant original documents reveals further inconsistencies. While the Applicant has produced the stubs of cheques Nos. 63 and 65 which both indicate the name "Mr. Marcel" (Annexes 31a and 31b to the Application), the cheques themselves, copies of which have also been produced, do not confirm that identity of the receiver since they are made out to the Applicant himself (cheque in the amount of 2,000 Euro) and to a certain "Biapoh W.J." (cheque in the amount of 3,000 Euro). Lastly, it remains unexplained why all of a sudden, in July 2007, more than eight months after the death of the Minister, a person whom nobody knows and whose relationship with the late Minister has not been established, should have thought of making a payment to the Applicant. The Applicant admitted that he did not make any enquiries into the identity of that person and the reasons why that Mr. Samir Goulama felt motivated to make a payment to him.
76. On the basis of the facts set out above, the Tribunal comes to the conclusion that the Applicant has not been able to rebut the inferences which suggest that, through the transfer of 5,000 Euros, he received some form of kickback from his involvement in the Mangoky Project.
77. The second ground for the dismissal of the Applicant, explicitly referred to in the letter of 8 June 2007, is the fact that the Applicant did not follow the procedures provided for in the Disbursement Handbook when he approved disbursement request No. 43 regarding the expenses for the leasing of vehicles. An amount of US\$ 558,208.08 was requested under that heading. Given that supporting documentation must always accompany such a request (Section 9.13.3 of the Disbursement Handbook), a copy of the car rental contract with the undertaking concerned, Garage Aroumougom, should have been submitted to the Applicant and should have been verified by him. It is not controversial between the parties that the request was grossly overstated. For the lease of four vehicles from March to June 2004 an amount of 88,782,179 FMG (12,317 Euro) would have been in order according to the contract with Garage Aroumougom. However, in fact the vehicles were hired only for the month of June 2004. The fees for 30 days in June would have amounted to a total of FMG 23,570,490 or 3,270 Euro. Accordingly, the Respondent has correctly calculated that an amount of 508,269,704 or 70,597 Euro was fraudulently claimed by disbursement request No. 43.
78. The Applicant obviously failed in complying with his elementary duty, as the officer responsible for disbursement, to check the well-foundedness of the request he had to

make a determination upon. Vainly does he attempt to justify this omission. He argues that in the case of the PRBM Project there was a specific agreement between the borrower and the Bank that the supporting documents would not be attached to form A2, the form according to which a disbursement is requested (Application, para. 23). However, no such special agreement existed in the instant case. The Applicant could not simply assume that he was exempted from his duty to carefully examine whether all the requirements stipulated by the Disbursement Handbook were met. Any such clause would have had to be explicitly mentioned. This was not the case.

- 79.** The argument of the Applicant that, given the absence of any supporting documents, he was unable to carry out any administrative or accounting verification, instead of exonerating him, demonstrates very clearly that he did not live up to his obligation to assess the documents that were the basis for the expenditure to be covered by the requested disbursement. It was incumbent upon him to verify under his own responsibility the relevant documentation. It stands to reason that as the officer specifically entrusted with disbursements he knew perfectly well the task he had to discharge in the service of the Bank as defined by the relevant rules of the Disbursement Handbook.
- 80.** The fact that the technical division ONAR had approved the expenditure covered by disbursement request No. 43 (Memorandum of 2 August 2004, Annex 28 to Application) is without any relevance in respect of the Applicant's responsibilities. It was his specific duty to proceed to a verification based on the documentation supporting the request and, in case such documentation was lacking, to see to it that he be provided with the relevant documentary items. The technical department ONAR had not been tasked with that responsibility.
- 81.** Basing itself on the facts considered above, the Tribunal can proceed on the following findings:
- Two witnesses directly implicated in the scheme constructed around Garage Aroumougom have named the Applicant as a beneficiary of kickbacks that were financed from the illicit profits realized through inflated invoices for the hiring of cars. However, the first testimony was later withdrawn. Furthermore, one of the witnesses (Mr. Ratovoson) had no direct knowledge of the involvement of the Applicant. Additionally, the account of how the monies were transmitted to the Applicant reveal certain inconsistencies. Accordingly, the Tribunal will not base its judgment on this bloc of evidence that would seem to be marred by unreliability. It will only use the relevant facts to corroborate findings already made to its full satisfaction by other means.
 - The Applicant received in his Paris account with Société Générale a considerable payment (5,000 Euro) from an unknown source in Madagascar. This amount corresponds to the sums mentioned by the witnesses. The Applicant has provided contradictory and highly implausible explanations for the origin of that transfer.
 - The Applicant failed to carry out the necessary verifications before approving the expenditures listed in disbursement request No. 43.

82. Whereas the second charge is fully proven, the first one, while arousing a general suspicion against the Applicant, has remained unexplored as to certain modalities and details. However, the Tribunal joins the jurisprudence of international administrative tribunals in the cases of *Omosola* (UNAT, judgment No. 484, 19 October 1990, para. II.), *Edongo* (UNAT, judgment No. 987, 22 November 2000, para. 66) and *Gnanathurai v. Asian Development Bank* (AsianDBAT, decision No. 79, 17 August 2007, para. 33) according to which, once a *prima facie* case has been established against a staff member, it is incumbent upon that person to provide evidence to show his/her innocence:

“once a *prima facie* case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question”.

There can be no doubt that in the instant case the Respondent has presented such a *prima facie* case. The failed attempt of the Applicant to provide plausible reasons for the transfer of 5,000 Euro into his account in Paris as well as his failure to verify according to the applicable functional rules disbursement request No. 43 accord to form a coherent pattern of misconduct. Given these circumstances, the Bank could legitimately expect that the Applicant make a serious effort to rebut the elements of suspicion militating against him. Although he and his lawyer have indeed engaged their best endeavours to provide satisfactory explanations, they have not been able to convince the Tribunal that the evidence presented by the Respondent is fragmentary and unreliable.

83. The Tribunal now has to address the question of whether the President of the Bank was entitled to consider the involvement of the Applicant in corruption practices as a case of “serious misconduct” under Regulation 10.2 of the Staff Regulations, giving rise to summary dismissal. The Tribunal acknowledges that summary dismissal entails appreciable disadvantages for the person concerned. Whereas under normal disciplinary procedures a Disciplinary Panel shall be convened, which will invariably encompass a member nominated by the Staff Council, the procedure of summary dismissal lies entirely within the discretion of the President. Although also the President is obligated to ensure due process before making a determination under Regulation 10.2, the rights of a staff member charged with misconduct are of course better protected under a formal procedure comprised of different stages. Nonetheless, the procedure under Regulation 10.2 is part and parcel of the internal law of the Respondent. Its necessity for serious cases is uncontested.
84. The two parties have adduced ample evidence from the case law of international administrative tribunals, the Applicant wishing to demonstrate that, given the particular circumstances of the instant case, the gravity of a charge of “serious” misconduct could not be upheld. Most of the cases cited are not comparable to the present dispute. Generally, the persons sanctioned by disciplinary measures had engaged in trickeries concerning travel costs, costs of medical treatment or education subsidies, i.e. payments that had nothing to do with their specific professional mandate as agents of the institution concerned. To this class belong also two cases against the African Development Bank, adjudicated by this Tribunal (*C.*, Application 2004/01, 1 December 2005; *Jenkins-Johnston*, Application 2004/02, 1 December 2005).

85. The only cases that can provide some guidance in the instant dispute are *B. v. African Development Bank* (Application 2000/10, 25 July 2001), *Kwakwa v. IFC* (WBAT, Decision No. 300, 19 July 2003), and *D v. IFC* (WBAT, Decision No. 304, 12 December 2003). In all of these three cases, irregularities in the performance of the official duties of the applicants were in issue. In that regard, this Tribunal held in *B.* (para. 30)

“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 fulfil its function properly. Thus, the President could not act otherwise than to impose a harsh sanction once it had been discovered that the Applicant had engaged in gross misconduct”.

In other words, the Tribunal had no doubt that such irregularities justified recourse to Regulation 10.2 of the Staff regulations.

86. In *Kwakwa v. IFC*, the WBAT “emphatically” rejected the contention of the applicant that he had acted unobjectionably notwithstanding accepting a payment of 50,000 US\$ (§ 25). The Tribunal concluded that the applicant had abused his official position, which legitimated his immediate dismissal. His conduct went “to the heart of the ethical foundations of the IFC’s work” (§ 37).

87. The case of *D v. IFC*, on the other hand, has little weight as a precedent since no personal gain had been obtained by the Applicant. He himself had made a personal loan to someone with whom he had official contacts as an Investment Officer. Even that kind of gesture of personal friendship was considered as inappropriate conduct by the IFC, which dismissed him. However, the WBAT did not share that appraisal of the giving of the loan, ordering that he should be compensated under a separation agreement.

88. The precedents set out above confirm that the principle of proportionality, which belongs to the basic principles of international administrative law, did not require any softer sanction. The misconduct with which the Applicant has been charged lies indeed at the heart of his professional responsibility. In order to clear its reputation from any harmful prejudice, the Bank was compelled to resort to the harshest sanction at its disposal, the dismissal of the Applicant.

89. The Tribunal abstains from looking into allegations that, through his transactions, the Applicant also violated the Malgasy currency regulations in force. The letter of dismissal of 8 June 2007 makes no open mention of such a violation which, therefore, cannot be invoked to justify the dismissal. The reference to Rule 35.03 (c) of the Staff Rules cannot be regarded as a sufficiently substantiated charge.

90. Summing up, the Tribunal concludes that, by acting as set out above, the Applicant committed serious misconduct in violation of Staff Regulations 3.5 and 3.7, and Staff Rules 37.00 and 105.00. He acted contrary to his principal professional duties. As a disbursement officer, he was a trustee of the financial interests of the Bank. By enriching himself and by failing to correctly supervise the transactions he was in

charge of, he also discredited the Bank, sewing doubts as to its reputation as an honourable institution.

91. Given the gravity of the charges that have been brought against the Applicant, the Tribunal sees no need to join in the discussion on the scope of its review powers. Without pronouncing on whether review of disciplinary measures under the ordinary procedure is the same as review of determinations under Regulation 10.2, the Tribunal holds that the President was fully justified in resorting to that latter provision in dismissing the Applicant. It does not recognize any mistakes in the decision of 8 June 2007.

VI. THE DECISION

For the reasons stated above, the Tribunal decides:

The application is rejected.

For the President
Lombe CHIBESAKUNDA

Vice-President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

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