APPLICATION No. 2016/01

P. T., Applicant,
African Development Bank, Respondent

Judgment No. 101 of the Administrative Tribunal, delivered on 26 January 2018

I. THE FACTS

1. The Applicant joined the African Development Bank (the Bank) on 15 January 2008, as a senior economist (PL5) in the Department responsible for West Africa (ORWA). Since May 2013, he has occupied the position of country economist, graded PL4, in the Department responsible for North Africa (ORNA).

2. On 11 October 2012, the Appellant submitted a request for an administrative review with the Vice-President, Corporate Services (CSVP) concerning the Bank’s decision relating to his performance evaluations for 2010 and 2011 which were respectively rated “Fully Satisfactory”.

3. The Applicant also complained about the lack of career development by the Bank since his recruitment and mentioned having made over forty (40) job applications which remained unanswered with the exception of two (2) for which, although he was declared ‘eligible for recruitment’, no offer was finally made to him. The Applicant alleges a violation of the recruitment provisions and considers his career management as a real injustice.

4. On 7 December 2012, having received no reply from the Vice-President of Corporate Services (CSVP), the Applicant filed an appeal before the Staff Appeals Committee in compliance with Rule 103.02 of the Staff Rules. This Appeal was recorded in the Committee’s register as no. 220.

5. On 8 February 2013, by letter addressed to the Director of the Human Resources Management Department (CHRM) with specific reference to Presidential Directive no. 04/2006 of 1 September 2006 establishing rules and procedures for dealing with harassment in the Bank, the Applicant filed a complaint against his former Director for moral harassment and abuse of authority during 2010. Following this referral, a Panel of Enquiry was established by the Director, CHRM in order to investigate these allegations. On 23 July, the Panel of Enquiry submitted its final report to the Director in charge of human resources.
6. On 22 August 2013, the Director, CHRM sent the Applicant a letter informing him, on the one hand, of the Panel of Enquiry’s findings which concluded that the allegations of moral harassment were unfounded and, on the other, to notify him of its decision to uphold the aforementioned findings of the Panel of Enquiry.

7. On 21 October 2013, the Applicant filed a second Appeal before the Staff Appeals Committee challenging the findings of the Panel of Enquiry and the administrative decision by the Director, CHRM to uphold the findings of the Panel of Enquiry. This Appeal was based on Paragraph 2 of Article 7.3.6 of Presidential Directive No. 04/2006 establishing rules and procedures for dealing with harassment at the Bank issued by the President on 1 September 2006. This Appeal was recorded in the Committee’s register under the reference Appeal No. 231.

8. On 2 December 2013, the Applicant submitted a request for administrative review to the Vice-President, Corporate Services (CSVP) challenging the ‘Fully Satisfactory’ rating obtained for his 2012 performance. On 2 January 2014, the Applicant received a reply from the Vice-President rejecting his request for administrative review and confirming the Bank’s decision concerning his 2012 performance evaluation.

9. On 14 February 2014, the Applicant filed an Appeal before the Staff Appeals Committee. After corrections, the Appeal was duly approved by the Secretariat to the Staff Appeals Committee on 21 February 2014. This Appeal was recorded in the Committee’s register under the reference, Appeal no. 235.

10. On 24 February 2014, the Staff Appeals Committee met in accordance with Article 9 of its Rules of Procedure and decided to merge the Applicant’s three appeals (Appeals 220, 231 and 235). This decision was communicated to the parties on 7 March 2014.

11. On 15 September and 23 October 2015, the Staff Appeals Committee met to examine the three (3) merged Appeals. On 10 December 2015, the Staff Appeals Committee’s recommendations were submitted to the President of the Bank.

12. On 6 May 2016, in the absence of any decision by the President of the Bank, the Applicant presented a Statement of Appeal pursuant to Rule 103.06 (d) of the Staff Rules which stipulates that, if no decision has been made by the President sixty (60) days after the submission of the recommendation of the Staff Appeals Committee, the staff member may file an application with the Administrative Tribunal of the Bank.

13. On 10 May 2016, this Application was returned to him to make the appropriate corrections pursuant to Rule IX of the Rules of Procedure of the Tribunal. The corrected Application was recorded on 13 June 2016 and transmitted to the Respondent on 16 June 2016.
II. ARGUMENTS OF THE PARTIES

The Applicant

14. In his Application, the Applicant states there are many grounds for his Appeal and mentions the following grievances:

i. Repeated under-evaluation of his annual performance for the 2010-2012 period and the failure to hold Performance Management Review Committee (PMRC) meetings within a reasonable period of time.

ii. Failure to provide financial compensation for three consecutive years from 2010-2012 (three years) and imposition of an arbitrary rating by the Department in charge of Human Resources, CHRM.

iii. Failure to provide any career development opportunities in terms of access to job vacancies at the Bank despite applications for forty-three positions (the Applicant was short-listed twice) and non-compliance by the Human Resources Department (CHRM) with the Bank’s recruitment rules.

iv. Inappropriate management of his case and a breach of the Bank’s commitment to uphold the values of ethics and transparency;

v. Harassment and abuse of authority by his direct supervisor; and

vi. A failure by the Bank to perform its duty to protect staff and foster equity amongst its staff members.

15. In his application, the Applicant stated that he had exhausted all available channels of redress before referring his case to this Tribunal. He noted that he had successively exercised his right of appeal to a higher authority by submitting requests for administrative review of the Bank’s decisions he was challenging to the Vice President, Corporate Services (CSVP). He also stated that he had also referred the matter to the Bank’s Ombudsman and to its Ethics Office, the Staff Appeals Committee and even to the Bank’s First Vice-President in order to reach an amicable settlement. The Applicant regrets that his initiatives were unsuccessful.

1) Performance Evaluations

16. In his Application, the Applicant stated that he was the holder of a Doctorate in Development Economics and had acquired 18-years’ professional experience in the Agencies of the United Nations System, in French cooperation and in consulting firms. In essence, and given his skills and work at the Bank, the Applicant raised in his Application the systematic under-evaluation of his work and lack of objectiveness in the evaluation of his performance since 2008, the year of his recruitment. He characterised the Respondent’s behaviour towards him as discriminatory.

17. In October 2009, the Applicant sought and obtained a lateral transfer to the East Africa II Department (OREB) which covered five (5) countries as a Country Economist for Comoros. He stated in his Application that, as from his assumption of duty in October 2009, the
Department’s Director told him that, as a result of budget and staffing constraints, he would be required to perform the duties of country economist for two countries. The Applicant affirmed that he told his supervisor that this represented an exceptionally heavy work load since he was required to assume the responsibilities of Economist and Programme Officer for the two (2) countries which were entrusted to him. The Applicant pointed out that, aware of the difficulty of the task, he had specifically asked the Director that this heavy work load be duly taken into account in his annual performance evaluation and that the latter made a verbal commitment to do so.

18. The Applicant was awarded the rating ‘Fully Satisfactory’ for his 2010 performance evaluation. He said he interpreted that rating as a subjective under-evaluation and a retaliatory measure linked to the deterioration of relations since the end of the first quarter of 2010 between himself and his Director, which subsequently led to the filing of a complaint for moral harassment against the latter. The Applicant states that he challenged his 2010 performance evaluation and requested a meeting of the Performance Management Review Committee (PMRC). The Applicant attributes the failure to convene such a meeting to the ‘obvious bad will’ of the Respondent.

19. The Applicant mentions that, in January 2011, a new Director was appointed to head his Department following a vast reorganization of services by the Respondent and that he was able to obtain assistance in dealing with a workload that was too heavy. However, the new Director awarded him a ‘Fully Satisfactory’ rating for his 2011 performance evaluation. Considering that this evaluation did not correspond to the work produced throughout that year, the Applicant challenged that rating before the Performance Management Review Committee Review Committee (PMRC) which once again, he pointed out, was never convened by the Respondent.

20. The Applicant explained to the Tribunal that, from February 2012 to April 2012, his Department had experienced considerable upheaval in management and organizational terms and that this negatively impacted on his 2012 performance. In fact, he explained that his Mid-Year Performance Review was not organized by one of the acting directors, contrary to the Bank’s regulations, and that, due to the absence of this Mid-Year Performance Review, his supervisors had ‘forced him to concentrate on a task which fell within the competency of another Department’ and in which moreover, he had no expertise. He considers that the rating "fully satisfactory" for the evaluation of his performance in 2012 does not correspond to the quality of the work he did. The Applicant challenged that rating and called for a PMRC meeting to have it reviewed.

21. In his Application, the Applicant explained that in practice at the Bank, there was a quota system whereby the highest ratings (Very Good and Excellent) are limited in number. To support his remarks, the Applicant presented an e-mail sent to the Vice-President, CSVP dated 30 March 2011.

2) Non-compliance with time limits for the organization of Performance Management Review Committee (PMRC) Meetings

22. The Applicant alleged in his various appeals challenging his 2010 and 2011 performance evaluations, ‘bad will or absence of good will’ shown by the Respondent with regard to the convening of Performance Management Review Committee (PMRC) meetings. This
resulted, in his particular case, in excessively long delays of up to nine (9) months in convening the PMRC meeting whereas, according to him, one (1) month would be a sufficient time frame.

23. The Applicant states that when he challenged his evaluation ratings for the years 2011 and 2012, the Respondent consciously attempted to schedule PMRC meetings when he was on mission or sick leave. Finally, concerning his challenging of his 2012 evaluation, the Applicant states that the meeting was organized on 11 December 2013, i.e. seven (7) months after his request for a review of his evaluations and several reminders. He considers that such behavior by the Respondent constitutes ‘a form of abuse of power’ with moral and psychological consequences for him as well as financial ones linked to the stagnation of his career. He states that he had not received any salary increase since 2010 and that the absence of performance ratings for three years (2010 to 2012) was unlikely to encourage his recruitment.

3) Discrimination in terms of career development

24. In his Application, the Applicant complains that he was not accorded any normal career development despite his confirmed and recognized skills. In this regard, he points out that he had applied for forty-two (42) positions for which he had the necessary skills but all his applications were unsuccessful with the exception of two (2) for which, although considered eligible for recruitment, the Respondent made no proposal to him in violation of the provisions of its Recruitment Manual. He stressed that in this batch were seven (7) Economist positions that exactly matched his profile, including positions in his Department at that time.

25. The Applicant states that, on several occasions, he requested information on how his applications had been handled. His different efforts were in vain. Only the intervention of the 1st Vice-President was successful since it led to his promotion to PL4 grade. The Applicant affirms that the Respondent acted in violation of its rules on recruitment and promotion.

4) Moral Harassment and Abuse of Authority

26. In his Application, the Applicant claims that he was the victim of moral harassment in 2010. He also makes various allegations against what he considers to be demeaning treatment on the part of his former supervisor and Director. This reached its peak on 17 December 2010 when the latter insulted him in public. He specifies that, initially, he contacted his supervisor and the Head of the Ethics Office to whom he complained of the considerable harassment to which he had been subjected. The Applicant pointed out that his Director had tarnished his professional reputation at the Bank. He made various allegations concerning what, in his opinion, constituted demeaning and discriminatory treatment on the part of his Director.

27. The Applicant asserts that the Respondent demonstrated a lack of diligence with respect to public sexual insults made against him by his manager in the workplace. The Respondent should have administered disciplinary action, and the failure to act constitutes a breach of its duty of protection and impartiality in violation of the Presidential Directive No. 04/2006. In a letter dated 7 January 2011, the Applicant drew to the attention of the Vice-President
in charge of Corporate Affairs (CSVP) the public insults made as well as the bad treatment inflicted on him by his Director since 2010 and, more generally, the different types of injustices suffered at the Bank since 2008. He considers that his Director benefited from the ‘goodwill and tacit protection’ of the Vice-President of his complex (ORVP) and the Vice-President in charge of the Human Resources Department (CSVP).

28. On 8 February 2013, the Applicant filed a complaint of harassment against the Director of the Human Resources Management Department (CHRM) who established a Panel of Enquiry to investigate these allegations. On 23 July 2013, the Panel of Enquiry submitted to the Director, CHRM, its final report in which it concluded that the allegations of harassment were unfounded. In his written submissions, the Applicant complained that he had been unable to see the Panel of Enquiry’s report despite his repeated requests. He filed an appeal before the Staff Appeals Committee challenging the conclusions of the Panel of Enquiry and the administrative decision of the Director of the Human Resources Department to endorse the said conclusions of the Panel of Enquiry.

29. The Applicant also calls into question the role of the Head of the Ethics Office in his litigation and accuses him of professional misconduct. He considers that he was knowingly deceived and that the Head of the Ethics Office had used delaying tactics to dissuade him from filing an official complaint against his Director. He claims that these actions caused him to lose valuable time.

5) Excessive Delays

30. The Applicant also complains of excessive delays in the processing of appeals at the Bank. He points out that management of his dispute has taken almost five (5) years before its referral to this Tribunal. He mentions the ill will of senior management, the ambiguous role of the Appeal bodies, in particular the Ethics Office, and excessively long time frames as a result of the merging of his files by the Staff Appeals Committee as well as the lack of resources provided by the Respondent.

31. The Applicant further asserts that the Respondent consistently obstructed his right to information and redress, thereby undermining his right of access to the Performance Management Review Committee (PMRC) as well as to the Staff Appeals Committee. He considers that, in addition to delaying the Staff Appeals Committee meeting for a period of three years (3), the Respondent breached its obligation under Staff Rule 103.06, to transmit the SAC report to him in order to prevent the referral to the Tribunal. This report was not communicated to him until 16 June 2016, a few days before the filing of his Rejoinder, depriving him of the opportunity to refer to it usefully, and that subsequently, the said report was sent to him without the part relating to the recommendations made to the President of the Bank, who, in addition, rendered no decision within the sixty-day (60) deadline.
RELIEF SOUGHT BY THE APPLICANT

32. In his opening statement, the Applicant made the following requests to the Tribunal:

(i) Revision and adjustment, on the basis of objective criteria, of his ‘Fully Satisfactory’ ratings for 2010, 2011 and 2012 to ‘A’ - Excellent’ for 2010 and ‘Very Good’ for 2011 and 2012 and withdrawal of written comments to be replaced by “Excellent Work” for 2010 and “Very Good Work” for 2011 and 2012 as well as readjustment of his basic salary in line with the annual increment approved by the Bank, plus 5% per year in order to cover the accumulated financial losses;

(ii) Backdating of his promotion to the PL4 grade to 1 January 2009 or his promotion to the mid-point of the PL3 grade backdated to 1 January 2011 in order to compensate for the failure to provide any career development;

(iii) An amount equal to at least 6 months of salary as financial compensation, or any other amount the Tribunal may wish to award him in respect of moral damages suffered as a result of the repeated discrimination to which he had been subjected and that the lack of a rating adversely affected his career development;

(iv) An amount equal to at least 6 months of salary or any other amount the Tribunal may wish to award him in respect of moral and psychological damages as a result of the moral harassment and abuse of authority to which he had been subjected; and

(v) Reimbursement of his legal costs.

33. In his Reply, the Applicant’s requests were amended as follows:

1) Order the Respondent to pay him the equivalent of 6 months’ salary for having deprived him of due process in the evaluation of his professional performances;

2) Order the Respondent to pay him the equivalent of 6 months’ salary for denying him his right of access to internal channels of review: PMRC, AfDB Staff Appeals Committee and consequently the AfDB Administrative Tribunal.

3) Order the Respondent to pay him the equivalent of 6 months’ salary in compensation for its lack of protection and impartiality towards him as a result of the following practices that may be considered as workplace harassment:
   - Insults and public affront to his dignity at the workplace;
   - Denial of access to information and reports concerning him;
   - Absence of answers by the Vice-President and the President;
   - Absence of pre-selection for available positions; and
   - Discrimination.

4) Order the Respondent to pay him the amounts it owes him for updating his salary for 2010 and 2011, by applying default interest at the legal rate applicable in Tunisia.
5) Increase his ratings to “A” for 2010 and “B” for 2011 and 2012, or alternatively award him financial compensation in lieu thereof.

6) Order that the PL 4 Grade be retroactive from June 2009, or alternatively award him financial compensation in lieu thereof.

7) Order the Respondent to pay him the equivalent of 6 months’ salary for moral damages suffered.

8) Order the Respondent to pay him an amount of EUR 20,000 in respect of the legal fees and legal assistance costs incurred by him during these proceedings.

The Respondent

1) On the grievances relating to the Applicant’s performance

34. In its Answer, the Respondent first points out the limited nature of this Tribunal’s control with regard to performance evaluation. It points out that the evaluation of the performance of the staff members of an organization is based on the exclusive prerogative and that Administrative Tribunals may not substitute their own evaluations for that expressed by the Administration concerned. The Respondent affirms that its opinion is based on the well-established case-law of International Administrative Tribunals and this Tribunal.

35. The Tribunal’s review should be confined to formal consideration of ‘possible irregularities that may have vitiated the performance evaluation process by raising any error of fact, law or clear error of evaluation of the aforementioned performance. The Respondent requests the Tribunal that dismiss the Applicant’s request for a review of his performance evaluations for the years 2010, 2011 and 2012 in order to improve his rating from ‘Fully Satisfactory’ to ‘Excellent’ for 2010 and ‘Very Good’ for the years 2011 and 2012.

36. In its Answer, the Respondent refutes the allegations of arbitrary treatment advanced by the Applicant to challenge his 2010 and 2011 performance ratings and his self-evaluation at a higher rating. It considers that its staff performance management system as established by Presidential Directive No. 04/2009 of 1 October 2009, is not confined to the simple acceptance or performance of additional tasks as presented by the Applicant. It quotes by way of reference Articles 4.2 and 4.3 of the said Directive.

37. The Respondent considers that the Applicant has made an erroneous interpretation of the sense of what an ‘objective’ constitutes in the Bank’s performance evaluation regulations. The Respondent considers that the work carried out by the Applicant in the years 2010 and 2011 did not meet key criteria relating to quality and time limits for completion agreed upon as objectives at the beginning of the year. The Respondent also considers that under no circumstances can the Applicant carry out a self-assessment and award himself a higher rating than that awarded by his supervisor who alone has the authority to evaluate his work in compliance with the Bank’s rules.
38. On the matter of the existence of an alleged ‘quota’ policy preventing the majority of staff members from receiving high ratings, the Respondent stresses that the Applicant did not provide any evidence that the performance evaluation ratings he was awarded were the result of the CSVP’s letter of 30 March 2015. To substantiate this, the Respondent reproduces the definition of the ‘Fully Satisfactory’ rating in Presidential Directive No, 04/2009 to show that it is not the bad evaluation that the Applicant tries to claim but, on the contrary, corresponds to the Bank’s standard and means satisfactory in respect of the objectives set at the beginning of the year.

39. According to the Respondent, the Applicant has a consistent pattern of challenging his performance evaluations despite several changes that were made at departmental, managerial and supervisory levels during the period under consideration. It points out that he wrongfully claimed that all of his supervisors had systematically undervalued his qualities, skills and efforts and that this stance can only be accepted ‘to demonstrate a collective error of evaluation concerning him throughout the organization’. The Respondent considers that the Applicant’s claim is unfounded and requests the Tribunal to dismiss it.

2) Performance Review

40. The Respondent maintains that it cannot be held responsible for the failure to convene a Performance Management Review Committee (PMRC) meeting in 2010 and 2012 to review the Applicant’s appeals and that the Applicant wrongly invokes its alleged negligence or ill will. In its Answer, it notes its many unsuccessful attempts to schedule a meeting and mentions circumstances outside its control such as the repeated unavailability of the Applicant and the absence or unavailability for various justified reasons of the members of the said Committee. It also points out the Applicant’s refusal in May 2013 to participate in a meeting, leaving it no other choice than to confirm the rating awarded by his supervisor in order to complete his annual performance evaluation. Consequently, the 2010 and 2012 ratings awarded to the Applicant are objective since they are consistent with the ratings awarded the Applicant by his evaluators and, moreover, indicate that he had achieved the key objectives set for him by his supervisor.

41. Concerning the Applicant’s challenge to his 2012 performance evaluation, the Respondent recalls that, at its meeting on 8 November 2012, the PMRC confirmed the rating awarded to the Applicant but he continued to challenge that rating on the grounds that his arguments had not been properly examined. However, the PMRC carries out a comprehensive review taking into account both the quantity of work delivered by the staff member as well as his actual achievements, the quality and timeliness of those achievements in relation to the objectives agreed upon at the beginning of the year.

42. The Respondent rejects the Applicant’s arguments that the failure to hold the Mid-Year Review was detrimental to him. It states that this stage is not as important as the Applicant claims. It is only a stage for adjusting the objectives set at the beginning of the year and that, while important in this particular case, the fact of skipping this stage was not a determining factor in the end-of-year rating to the Applicant. The Respondent informed the Tribunal that all the documents produced by the Applicant in support of his challenge to the rating awarded for his activities in 2012 were dated 2013 or 2014. It deduced from that that there was some confusion on his part concerning the activities that were assigned
to him in 2012 and 2013. In conclusion on that point, the Respondent argues that the PMRC meeting was held in accordance with the Bank’s rules and that the aforementioned Committee’s decision to endorse the Applicant’s rating was not vitiated by any irregularity that might invalidate it.

3) Career Management

43. Concerning responsibility for career management, the Respondent considers that this is first and foremost the responsibility of each staff member. In this particular case, it notes that the Applicant was promoted to PL-4 grade on 16 April 2013, while his performance evaluations for the years 2010, 2011 and 2012 had not been finalized. This is evidence of the fact that, on the one hand, the Applicant did benefit from career development and that he could not validly claim to have received no salary increase since 2010. On the other hand, his arguments concerning irregularities in his performance evaluations raised to support his allegations of bad career management and his claim for relief in terms of financial compensation and compensation for moral damages are also unacceptable.

44. The Respondent also disputes the Applicant’s arguments concerning the failure to re-adjust his salary on the basis of his performance evaluation ratings. In its answer, it states that, by refusing to acknowledge receipt of these ratings on the online system established for that purpose, the Applicant contributed to the non-finalization of his ratings for the years 2010, 2011 and 2012 and deliberately made it impossible for the financial consequences of his evaluations to be applied for the aforementioned years. It pointed out that such behaviour violates the provisions of Section 5.12 (‘Sign off the evaluation’) of the Staff Performance Management Handbook which, in a balanced way, requires staff members to acknowledge and sign off the evaluation forms while not preventing staff members from seeking further redress if they do not accept the rating given. The Respondent states that it is willing to regularise the Applicant’s financial situation.

45. With respect to the Applicant’s request to be awarded, by way of compensation, a higher position, the Respondent therefore counters this by pointing out the terms of Article XIII (Remedies) of the Statute of the Administrative Tribunal which makes no provision for such compensation. The Respondent therefore requests the dismissal of all the Applicant’s claims relating to the granting of any such promotion.

4) Harassment and abuse of authority

46. The Respondent states that it has complied fully with the provisions of Presidential Directive No. 04/2006 establishing rules and procedures for dealing with harassment at the Bank, as well as its duty to protect the Applicant. It refutes the arguments of the alleged partiality of the Panel of Enquiry by the Applicant and argues that it is his responsibility to provide evidence of his claims. It also considers unjustified the Applicant’s complaint that he had been unable to see the report of the Panel of Enquiry since Article 7.3.6 of the aforementioned Presidential Directive No. 04/2006 states that the complainant is entitled not to the full report but only to the conclusions of the Panel of Enquiry and to the decision of the Director, CHRM. This grievance cannot, therefore, be accepted.
47. The Respondent also states that the Applicant fails to assume responsibility for the deterioration in his relations with his Department’s Director. In its Reply, it quotes passages from e-mails sent by the Applicant to his supervisor dated 29 October and 29 March 2010 which are alleged to reflect the ‘to say the least irreverent and inappropriate’ language, bordering on professional insubordination.

48. On the alleged prejudicial role played by the Head of the Ethics Office, the Respondent remarked that the Applicant was not in a position to contest the failure of the informal channel of redress that he himself had initiated by deciding to seek the services of the Head of the Ethics Office.

5) **The Applicant’s failure to identify some of the administrative decisions alleged to be prejudicial to him.**

49. The Respondent considers that the Applicant does not identify in support of his Application the administrative decisions alleged to be prejudicial to him relating to his challenges. It requests the Tribunal to take note of the following three grievances which, in its opinion, are not backed up by any individual administrative decision:

1) Failure to provide any career development, discrimination in terms of access to job vacancies at the Bank (applied for 43 positions, short-listed twice, not selected twice) and non-compliance by CHRM with the Bank’s recruitment rules;

2) Inappropriate management of the Applicant’s case and failure to uphold the values of ethics and transparency; and

3) The alleged failure by the Bank to perform its duty to protect staff and foster equity amongst its staff members.

6) **Challenge to the absence of any decision by the President following the Appeal’s Committee’s recommendations**

50. In response, the Respondent answered that the challenge by the Applicant regarding the obstruction of his right to information and redress, to the discretion conferred upon the President of the Bank by Rule 103.06 (d) of the Staff Rules not to reach a decision on the Staff Appeals Committee’s recommendations is not applicable. It underscores that the Applicant may not contest any administrative decision ‘but rather an option given to the Respondent by a text in force’ and that such an opinion shall not affect the interests and rights of the Applicant since it specifically confirms his right to challenge ‘the fact that the President of ADB is authorized not to take a decision on the recommendations of the Staff Appeals Committee.’ It informs the Tribunal that, in this particular case, this provision did not present any obstacle to his effective right of Appeal before this Tribunal.

7) **Inadmissibility of new requests not included in the Application**

51. In its Rejoinder, the Respondent raises the inadmissibility of the requests made by the Applicant in his Reply and not included in the Application. These new requests are as follows:
“(i) 1. Order the AfDB to pay Mr T. the equivalent of 6 months’ salary for depriving him of due process in the evaluation of his professional performance.

[...]

(ii) 2. Order the AfDB to pay him the equivalent of 6 months’ salary for denying him his right of access to internal channels of review: PMRC, AfDB Staff Appeals Committee and consequently the AfDB Administrative Tribunal.

[...]

(iii) 7. Order the AfDB to pay Mr T. the equivalent of 6 months’ salary for moral damage.”

52. The Respondent argues that these new claims cannot be validly examined by the Tribunal in view of their late presentation at the Reply stage and consequently asks for them to be dismissed.

THE RESPONDENT’S REQUESTS

53. The Respondent requests the Tribunal to:

a) Dismiss all the Applicant’s new requests formulated in his Reply and stated above;

b) Dismiss all the Applicant’s requests for revision of his performance evaluation by the Tribunal and the modification of his ratings by the Tribunal from “Fully Satisfactory” to “Excellent” for the year 2010 and to “Very Good” for the years 2011 and 2012;

c) Dismiss all the Applicant’s claims that he be awarded a promotion by the Tribunal;

d) Determine the financial implications of the performance evaluation that the Respondent has not committed any fault that might be prejudicial to the Applicant and that would justify the payment, apart from the amounts effectively owed to him, of the compensation claimed by him;

e) Adjudge and Rule that the Respondent has dealt with the Applicant’s complaint in respect of harassment and abuse of power in compliance with its rules and that consequently it has not failed in either its obligations or its duty to protect the Applicant;

f) Take note of the absence of any administrative decision or evidence pertaining to causes (iii), (iv) and (vi) on page 3 of Application No. 01/2016 and purely and simply dismiss the aforementioned complaints; and

g) Dismiss all the other requests made in his Application no. 2016/01 and in his Reply
III. THE LAW

54. The Tribunal must first examine the Respondent’s arguments relating to the admissibility of the new claims made by the Applicant in his Rejoinder. According to the Respondent, the new requests are as follows:

“(i) 1. Order the AfDB to pay Mr T. the equivalent of 6 months’ salary for depriving him of due process in the evaluation of his professional performance.

[…] (ii) 2. Order the AfDB to pay him the equivalent of 6 months’ salary for denying him his right of access to internal channels of review: PMRC, AfDB Staff Appeals Committee and consequently the AfDB Administrative Tribunal.

[…] (iii) 7. Order the AfDB to pay Mr T. the equivalent of 6 months’ salary for moral damage.”

55. Among the most fundamental general principles of the procedure before the tribunals are the rule against splitting one’s case, the adversarial principle and the principle of equality of arms. The prohibition of new claims for relief in relation to the introductory Application is intended to prevent either party to the hearing from surprising their opponent, employing delaying tactics or modifying the general framework of the hearing. There are, however, exceptions to this rule. New claims for relief shall be admitted when there is a connection with the original Application and when they are presented at a stage of the proceedings that allows the opposing party the opportunity to respond. In the present case, the Tribunal considers that some of the claims that the Respondent considered “new” had already been made in the Application. Moreover, all of the claims made in the Reply are closely related to the main requests in the Application and do not alter the general premise of the original application. However, those claims are set out in the Applicant’s Reply, that is, at a stage where the Respondent was in a position to respond to them, present its reasons to that end and to ask the Tribunal to dismiss them. The claims presented in the Applicant’s Reply respect the adversarial principle, the equality of arms, and the rule against splitting one’s case. For these reasons, the Tribunal rejects the Bank’s claims concerning the requests made by the Applicant in his Reply. The Tribunal will now consider the merits of the dispute.

56. The essential points of focus of the dispute that the Tribunal must consider are the following. Is the performance evaluation rating of “fully satisfactory” legally valid or is it the result of a misuse of power, or error of fact or procedural flaw, for which the Bank is responsible? Has the Applicant been the victim of harassment and abuse of power by his supervisor and what was the role of the Bank in dealing with this issue? Did the Bank interfere with the normal course of the Applicant’s career path, to the detriment of his career? Did the Bank interfere with the Applicant’s right to information and redress, causing him loss of time, stress and mental distress?

57. The Tribunal agrees with the Respondent’s view that the Tribunal cannot substitute its own opinion for that of the supervisor in the performance evaluation. This rating is left to the discretion of the supervisor. This rule has been applied on numerous occasions by international tribunals and is established by the consistent jurisprudence of this Tribunal (e.g. Application 2008/03, Mr H.N.M. / ADB, 13 November 2009). The Tribunal therefore,
is not in a position, as requested by the Applicant, based on a misinterpretation of
Judgment 85 on the 2012/03 Application, either to change the "fully satisfactory" rating or
to raise the evaluation rating awarded by the supervisor.

58. However, as the Respondent itself admits (see paragraph 38 above), the Tribunal is entitled
to review and sanction by cancellation or compensation, or both, any misuse of power, or
"possible irregularities that might taint the performance evaluation process by raising any
errors of fact or any other manifest error of performance assessment."

59. The Tribunal will focus first on the procedural aspect and then on the substantive issues.
On a formal and procedural level the Tribunal must refer to Staff Rule 67.01, Presidential
August 2009. According to the cited texts, it is incumbent upon the Bank to scrupulously
ensure that the performance evaluation process is conducted in accordance with the rules
of procedure and form provided for by the above-mentioned texts. While noting the Bank's
statement that the Applicant contributed to the delays in the evaluation process, the delays
were also due to the unavailability of PMRC members. Such delays are common and were
not specifically directed to the Applicant. However, these delays were not attributable to
the Applicant. Having assigned the Applicant to duties, the Bank cannot hold him
responsible for his unavailability. Unavailability for illness is also a valid excuse. As a result,
the excessive delays in the performance appraisal process and the absence of a
performance appraisal review committee meeting for the years 2010 and 2011 cannot be
attributed to the Applicant. The lack of Performance Review Committee meetings, despite
the Applicant's requests, is contrary to the Bank's regulations and vitiates the evaluation
process. In addition, neither the rules of the yearly evaluation process, nor the mid-year
evaluation rule were respected, which undermines the Applicant's legitimate right to have
the performance evaluation reviewed. For the year 2012, the mid-year evaluation did not
take place, however, the Performance Management Review Committee met on 8
November 2013, seven months after the Applicant's request of 2 May 2013. These delays
are abnormal, vitiate the evaluation process and engage the responsibility of the Bank.

60. On the merits, the Bank disputes the argument that the Applicant was under-assessed.
According to the Bank, the additional tasks performed by the Applicant at the request of
his superiors were not a decisive factor justifying a "very good" or "excellent" rating. In
addition, a "fully satisfactory" assessment does not constitute a negative or unfavourable
rating. It is also likely that the Applicant, as the Bank argues, could have "adopted a line of
reasoning that permanently challenges his performance evaluations". The Tribunal concurs
with the Bank on these points. However, the issue of performance evaluation needs to be
considered in relation to the relationship between the supervisor and the subordinate.
There is indeed a strong chance that strained or hostile relations between superiors and
subordinates may have an impact on the evaluation. The Applicant complained of
harassment and abuse of power. The examination of the facts reveals, during 2010, the
existence of an abnormal relationship between the supervisor and the Applicant. This
culminated in December 2010 with the verbal abuse of the Applicant by his supervisor. This
situation was the subject of an administrative inquiry ordered by the Human Resources
Department and the Investigation Committee concluded that there were no acts of
harassment. This conclusion was endorsed by CHRM Vice President, Human Resources
Department. This, however, is not enough to release the Bank from any liability. As the
Staff Appeals Committee noted in paragraph 167 of its report, harassment is difficult to challenge. Indeed, this abnormal situation is such as to cast at least some doubt on the performance evaluation, at least as regards the year 2010. This situation is likely to carry over into the following years both in terms of a blow to morale and discouragement of the subordinate and the attitude of supervisors. The Tribunal cannot ignore this particular issue and will take it into account in judging the evaluation process.

61. In the light of all of the foregoing considerations, the Tribunal therefore finds that the Bank did not comply with the requirements of its own regulations with regard to the assessment of the Applicant’s performance, which invalidates the entire evaluation process.

62. The Tribunal must now consider the issue of harassment of the Applicant. This issue has been discussed previously only to the extent that it relates to the performance evaluation. It must now be examined separately to assess the degree of responsibility of the Bank towards the employee who claims to be subject to it. The Applicant claims to have been subject to multiple and varied retaliatory measures, verbal aggression and insults. He also asserts that his manager did not take into account the quality of his work and the additional work he was charged with, that did not fall within his competence, and that the supervisor undermined his professional reputation within the Bank by inflicting humiliating and discriminatory treatment on him, contrary to the Presidential Directive 04/2006. He blames the Bank for having been passive and lacking diligence in dealing with his case.

63. On 8 February 2013, the Applicant filed a complaint with the Director of the Human Resources Department, CHRM. The latter, in accordance with Presidential Directive 04/2006, set up an Inquiry Committee which submitted its report on 23 July 2013. This report concluded that there was no harassment. The Director of the Human Resources Department endorsed the findings of the Investigation Committee and communicated the findings to the Applicant in August 2013. Not satisfied with the decision of the Director of Human Resources, the Applicant appealed to the Staff Appeals Committee on 28 August 2013. While noting that the Bank did not fail in its duty to protect the Applicant, the Appeals Board nevertheless found that the existence of moral harassment could not be challenged. The Staff Appeals Committee also stated that “in interpreting the facts as a division of responsibility, the Respondent committed an error of law that thereby engaged its responsibility”. As a result of this wrongful act of the Bank, the Staff Appeals Committee found that the Applicant was entitled to compensation and awarded him 5,000 units of account.

64. The Tribunal is of the opinion that the act of harassment having been established at the place of work, publicly and during work hours, itself engages the responsibility the Bank. Contrary to the circumstances of the case judged by this Tribunal on 29 June 2010 (Application N° 2007/06, Judgment N 67 of 13 November 2009), in which the misconduct involved of personal misconduct, in the present case, a single incident, severable from the service, for which the Bank could not be held responsible, the act of harassment, which is not limited to the verbal abuse of 17 December 2011 alone, cannot be considered as severable from the Applicant’s employment with the Bank. In the present case, there was a very close relationship between the functioning of the Bank’s service and the harassment. In this case, the Bank must compensate the Applicant for the harassment.
65. The third point of the dispute is whether the Bank adversely affected the normal course of the Applicant’s career, to the detriment of his career. The Bank submits that the Tribunal cannot rule on this issue in the absence of an administrative decision. The Tribunal cannot endorse the Respondent’s overly restrictive interpretation of what constitutes an “administrative decision”. An administrative decision is not necessarily a written, identifiable and individualized decision. It may result from inaction from the administration, and therefore the absence of decision, which may, nevertheless, produce legal effects on the employee’s conditions of employment.

66. Having acknowledged the Bank's responsibility for both the Applicant's performance evaluation process and the harassment of the Applicant, the Tribunal does not have any tangible and specific evidence as to whether or not Applicant's career suffered from the attitude of the Bank's administration. The Applicant's arguments on this issue focus more on probabilities and possibilities of unfairness, or of “commonly known discriminatory Bank practices” rather than proven and tangible facts. For these reasons the Tribunal cannot find that the Bank adversely affected the normal course of the Applicant's career, to the detriment of his career.

67. The last issue to be considered is whether or not the Bank effectively interfered with the Applicant's right to information and redress, causing him loss of time, stress and mental health problems. According to the Applicant, the Bank unduly delayed the Staff Appeals Committee process, by first refusing to provide the SAC report to him, only to send it to him in the end without the recommendations, in violation of Article 103. 06 of the Staff Rules. The President of the Bank, who then had 60 days to make his decision in line with the recommendations of the Appeal Board, refrained from taking a decision. In practice, this issue partly overlaps with two other issues already dealt with. The first concerns the Bank’s excessive delays in processing the Applicant’s case. The second relates to the moral damage suffered by the Applicant as a result of all the Bank's actions. This second question will be examined in what follows. However, at this stage, the Tribunal finds that, as the Applicant asserts, the Bank's inordinate sluggishness or apathy to the Applicant's situation and right to information was detrimental in terms of time and repeated efforts to defend his cause, resulting in fatigue, frustration and stress to the Applicant.

68. After finding that these had been breaches in the performance evaluation procedures during the years 2010, 2011 and 2012, and after noting the harassment to which the Applicant has been subjected, in particular during 2010, the Tribunal is of the opinion that these actions are likely to have led to an unfavourable moral and psychological situation for the Applicant, manifested by stress, anxiety and a certain tendency towards victimization. The Tribunal must take this into account in considering the existence of the moral damage alleged by the Applicant and assessing it accordingly.

69. Regarding the readjustment of the Applicant's salary on the basis of the annual increase approved by the Bank from 2010 to 2012, the Tribunal takes note of the Respondent's argument relating to provision 5.12 of the Performance Management Manual. Pursuant to this provision, the Bank considers that the Applicant “by not acknowledging receipt of his evaluation forms in the on-line system, once again made it impossible for the Respondent to apply the financial benefits of the aforementioned evaluations” (Response, paragraph 67, p. 18). The Bank adds that it is “ready to regularize the Applicant’s financial situation by giving him the financial benefits accruing from his performance evaluations for the years 2010 to 2012”.
The Bank specifies: "...provided that the Applicant acknowledges and signs-off his evaluation forms in the on-line system (OnCore)." Accordingly, the Tribunal considers that on this issue there is no real dispute, that the debt is due and that it is sufficient for the Applicant to regularize his situation with regard to the Bank's administrative practices in order to collect the amounts due to him. In light of this failure to do so, no award of interest will be made in this regard.

IV. **THE DECISION**

On these grounds, the Tribunal decides that the Bank shall pay the following reparations to the Applicant:

1) the sum equivalent to 3 (three) months’ salary for the irregularity in the performance evaluation process.

2) the sum equivalent to 3 (three) months’ salary for the Applicant's lack of protection in respect of the harassment to which he was subjected.

3) the sum equivalent to 6 (six) months’ salary for the moral damage suffered by the Applicant.

4) the amount to which the Applicant is entitled by law and which the Bank does not dispute, as regards the readjustment of the Applicant's salary on the basis of the annual increase approved by the Bank from 2010 to 2012.

5) the sum of $ 15,000 US dollars (USD) as reimbursement for the Applicant's legal costs.

6) the other requests are rejected.

Judge Salihu Modibbo Alfa BELGORE President

Abdoukader DILEITA Executive Secretary

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