AFRICAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

QUORUM: Professor Yadh BEN ACHOUR President
Judge Salihu Modibo Alfa BELGORE Vice-President
Judge Benjamin Joses ODOKI Member
Judge Anne L. MACTAVISH Member
Judge Leona Valerie THERON Member

APPLICATION No. 2014/04

S. O., Applicant,
African Development Bank, Respondent

Judgment No. 91 of the Administrative Tribunal, rendered on 12 June 2015

I. THE FACTS

1. The Applicant, a Burkinabe, assumed duty at the African Development Bank on 3 July 2006 as a GS7 staff at the Bank’s Field Office in Burkina Faso (BFFO). At the time of the decision challenged, he was a Procurement Assistant (GS8).

2. His first contract, offered on 3 July 2006, and confirmed after the probationary period was extended for the first time on 3 July 2008, for a period of three (3) years and a second time on 3 July 2011, for another three (3) years. The third contract should have ended on 3 July 2014.

3. In 2012, the Respondent decided to reclassify the position of Procurement Assistant (GS8) in its field offices as Procurement Officer (LP6), that is, in the Locally Recruited Professionals category. All staff members in these positions in all field offices were evaluated.

4. On 27 September 2012, the Applicant was notified in a letter that he had not been recommended for the reclassified position of Procurement Officer (LP6). In the same letter, the Respondent informed him that efforts would be made to transfer him to another position compatible with his skills, but in the absence of such a possibility, the Respondent would terminate his contract.

5. On 23 October 2012, the Respondent informed the Applicant of the termination of his employment contract due to the abolition of his position from 1 November 2012.

II. PROCEDURE

6. The Applicant submitted a request for an administrative review of the decision of 23 October 2012, by letter dated 31 October 2012, to the Corporate Services Vice-President. Having received no response to his request, the Applicant appealed to the Staff Appeals
Committee on 9 May 2013. On 24 February 2014, the Appeals Committee declared the appeal inadmissible on the grounds that it was submitted outside the time limit.

7. The Applicant was notified of the Appeals Committee’s report and recommendations on 27 March 2014 and again on the next day, as the first version submitted was illegible. On 30 June 2014, the Applicant filed an Application with the Tribunal. In accordance with Rule IX – 7 of the Tribunal’s Rules of Procedure, on 17 July 2014, the Executive Secretary of the Tribunal granted the Applicant a thirty (30) day extension of time in which to regularize his Application, which was incomplete. The regularized Application was therefore due by 20 August, but was only submitted to the Tribunal on 21 August 2014.

8. Having been satisfied that the formal requirements of the Rules had been met, on 23 September 2014, the Executive Secretary notified the Bank of the Application. The Application did not mention the exchange of mails between the Tribunal’s Secretariat and the Applicant concerning the corrections pursuant to Article IX - 7 of the Rules of Procedure. The Respondent raised, in limine litis, an objection to inadmissibility on 23 October 2014 based on the Applicant’s non-compliance with time limits.

9. The Applicant responded to the Bank’s Motion to Dismiss on 22 December 2014.

III. ARGUMENTS OF THE PARTIES

The Respondent

10. The Respondent raised, in limine litis, an objection to inadmissibility of Application 2014/04. It submits that, pursuant to Article III – 2 (ii) of the Statute of the Administrative Tribunal, the Application was filed more than ninety (90) days following the notification of the Staff Appeals Committee’s Report. Indeed, it is clear from the proceedings that the Applicant received the legible version of that report on 28 March 2014. On 10 April, he wrote again to the Appeals Committee to request for information on the procedure for submission to the Tribunal. The Respondent argues that by submitting his Application on 27 August, the Applicant did not comply with the time limit because it should have been submitted by 30 June 2014 at the latest. According to the Respondent, its view is buttressed by the African Development Bank Administrative Tribunal’s case law and that of the International Labour Organization Administrative Tribunal.

11. The Respondent also stated that the objection to inadmissibility was based on the failure to establish exceptional circumstances. The existence of such exceptional circumstances could justify the Tribunal finding the Application to be admissible, pursuant to Article III – 4 of the Statute of the Administrative Tribunal. The Bank submits that the Applicant did not raise the existence of such circumstances.

12. The Respondent also bases its objection to inadmissibility on the fact that the Applicant had not exhausted all remedies before approaching the Tribunal pursuant to Article III - 2 (ii) of the Statute of the Administrative Tribunal. The Applicant had filed an appeal with the Staff
Appeals Committee, but the Appeals Committee had submitted a report and recommendations on 24 February 2014 stating that: "The Appeals Committee is of the opinion that the Appellant is time-barred from filing an appeal pertaining to his Appeal No. 224"... “Consequently, the Committee hereby declares this Appeal inadmissible and recalls that as a result of this decision of inadmissibility of the appeal, it is not competent to hear the conclusions and arguments."

13. The Respondent argues that by exceeding the time limit for engaging the Staff Appeals Committee, the Applicant made the Application inadmissible. Therefore, he did not exhaust all legal remedies available to him. The Respondent reiterated that the time limits for applications are objective and that the Tribunal could not consider an Application submitted beyond the time limit because any other solution, even based on grounds of fairness, would effectively undermine the necessary legal relations which justifies the institution of time limits.

The Applicant

14. The Applicant believes that he had been wrongfully dismissed from his position. He argues that, contrary to the Respondent, his position was not abolished, that no official note to this effect exists and that the position is still mentioned in the Delegation of Authority Matrix. Moreover, according to the Applicant, the expert’s recommendations tilted towards a reclassification of the Procurement Assistant position and not towards its abolition. This conclusion was the basis for the decision to declare him unfit to hold the position of local Procurement Officer at PL6.

15. The Applicant objected to the Motion to Dismiss on the following grounds. The inadmissibility of the Application based on non-compliance with time limits for appealing to the Administrative Tribunal pursuant to Article III – 2 (ii) of the Statute of the Administrative Tribunal. The Application was filed with the Tribunal on 30 June 2014. It was returned on 17 July 2014 for correction pursuant to Article IX of the Rules of Procedure of the Administrative Tribunal. As he returned the Application within the stipulated thirty (30) day time limit granted for corrections, the Application is deemed to have been filed within the legal timeframe.

16. The inadmissibility resulting from failure to establish exceptional circumstances which could justify the dismissal of his Application is moot because it was filed on time.

17. The inadmissibility of the Application based on the fact that the Applicant had not exhausted all the remedies, cannot stand. The Applicant asserts that by referring the matter to the Vice-President Corporate Services and, subsequently, to the Appeals Committee, he had exhausted the remedies. The fact that he did not receive a positive response from the Vice President or that the Staff Appeals Committee had declared his appeal inadmissible did not change the fact that he had availed himself of the remedies provided for by the texts. He explained that he had been excluded from the Bank’s IT system from 30 October 2012 and that he had waited for a response to his review request, thinking that his situation
would be regularized even after the expiry of the expiry of the two (2) months. Feeling "cheated", the Applicant finally seized the Appeals Committee accordingly and, despite everything, requested the Application of Rule 103.5 (d) of the Staff Rules for the suspension of time limits. He raised his confusion regarding the understanding of provisions 103.04 and 103.5 whose interpretation misled him.

IV. REQUESTS OF THE PARTIES

18. The Respondent requests that the Tribunal:
   - Adjudge and declare the Application inadmissible and
   - Dismiss all the Applicant’s claims.

19. Following the introduction of the objection to inadmissibility by the Respondent, the Applicant requests the Tribunal:
   - To annul the Appeals Committee’s inadmissibility decision;
   - To remit the matter for examination on its merits.

V. THE LAW

20. The Respondent raises an objection to inadmissibility based primarily on three grounds.

The first ground of the objection to inadmissibility

21. In its written and oral submissions, the Respondent contends that after filing his Application, the Applicant was advised by the Executive Secretariat to correct his Application. He was granted a period of 30 (thirty) days by the Executive Secretariat to effect the corrections. Given that the Applicant acknowledged receipt of the letter from the Executive Secretariat on 21 July 2014, the Respondent submits that the period lapsed on 20 August 2014. Therefore, the Respondent contends that by submitting his corrected Application on 21 August, the Applicant had exceeded the time limit by one day.

22. The Administrative Tribunal disagrees with the Respondent. It is apparent from a review of the record that upon receipt of the revised Application on 21 August 2014, the Executive Secretary exercised her discretion to accept the Application for filing. Accordingly, this ground of the Respondent’s Motion to Dismiss is dismissed.

The second ground of the objection to inadmissibility

23. The Respondent contends that, under Article III – 2 (ii) of the Statute of the Tribunal, for the Application to be deemed admissible, it must be made within 90 days from the date of receipt of the notice indicating that the relief sought or recommended will not be granted. The Respondent believes that this notice is, in this case, evidenced by the notification of the Staff Appeals Committee’s report on 28 March 2014. According to the Respondent, the
calculation of time must therefore be done, taking into consideration the Staff Appeals Committee report. The Respondent concludes that when adding 90 days to the agreed notification date, that is, 28 March 2014, the referral to the Tribunal should have taken place at the latest, by 30 June 2014, whereas the Applicant referred the matter to the Tribunal on 27 August 2014.

24. However, the Tribunal cannot accept this argument. According to Regulation 10.3 of the Staff Rules (Settlement of Disputes):

“In order to safeguard further the rights of the staff members:

(a) the Staff Rules shall provide for an internal machinery for the settlement of disputes as well as for appeals relating to administrative decisions affecting the contractual rights and benefits of staff members or the development of their career.”

25. This internal dispute resolution and administrative review mechanism comprises the Appeals Committee provided for in Rule 103.01 of the Staff Rules. However, the Staff Appeals Committee’s role is advisory, since, according to this Rule, the Staff Appeals Committee “shall consider, and advise the President on, any appeal by a staff member against an administrative decision alleged to be in breach of the staff member’s terms of appointment or conditions or benefits of employment.”

26. If it is admitted that the referral to the Staff Appeals Committee is mandatory, this is not the case with the Appeals Committee’s decisions. According to Rule 103.06 (a) (Recommendations and Reports of the Appeals Committee) “The Appeals Committee shall as soon as possible, but not later than thirty (30) days after proceedings have been concluded, submit its recommendation in writing to the President, which recommendation shall not be binding on the President.”

Therefore, contrary to the Respondent’s view, the notice relating to the Appeals Committee’s report cannot serve as the notice referred to in Article III – 2 (ii) indicating that the relief sought or recommended will not granted. Indeed, pursuant to Rule 103.06 (c) (Recommendations and Reports of the Appeals Committee), “The President shall review the recommendation of the Appeals Committee and make such decision as considered appropriate in the interest of the Bank.” This implies that the final decision on the relief sought or recommended is not the responsibility of the Appeals Committee, as claimed by the Respondent, but the responsibility of the President of the Bank.

27. Accordingly, the Tribunal considers that the starting point for calculating the 90 days under Article III – 2 (ii) shall not be from the date of receipt of the notice of the Appeals Committee report which is 28 March 2014. This objection to inadmissibility must therefore be rejected.
The third ground of the objection to inadmissibility

28. The Respondent raises a third ground for submitting that this Application is inadmissible, namely the failure of the Applicant to exhaust his internal remedies as required by Article III – 2 (ii) of the Statute of the Administrative Tribunal. Staff Rule 103.04 provides that "The staff member may, if dissatisfied with the response of the Vice-President, file an appeal with the Staff Appeals Committee within thirty (30) days of the date of the letter of response or, where there is no response from the Vice-President, within sixty (60) days of the date of the staff member's request for review".

29. The Respondent submits that although the Applicant did pursue an appeal before the Staff Appeals Committee, he only did so after the expiry of the time period prescribed in Staff Rule 103.04. This led the Staff Appeals Committee to find that the Applicant’s appeal was inadmissible by reason of his failure to adhere to the regulatory time limit specified in the Rule. The Respondent submits that this appeal is inadmissible for the same reason.

30. The parties are agreed that the principle emerging from ILOAT cases (Judgment No 2781 of 4 February 2009, Judgment No 3330 of 28 April 2014 and Judgment No 3331 of 9 July 2014) is that an Applicant can appeal an inadmissibility decision of the Staff Appeals Committee to this Tribunal.

31. This case is not, however, framed as a challenge to the inadmissibility decision of the Staff Appeals Committee. What the Applicant seeks to challenge through his appeal is the original decision to terminate his contract and to not offer him a new position after the reclassification exercise. The relief the Applicant seeks from the Tribunal is monetary compensation for the loss of his position.

32. The Applicant has not directly challenged the decision of the Staff Appeals Committee. Indeed, apart from making passing references to the decision of the Staff Appeals Committee in his original Application and in his Reply to the Bank’s motion, the Applicant has not set out any basis upon which the Tribunal could or should allow an appeal from the decision of the Staff Appeals Committee. The Applicant has also not identified any error on the part of the Staff Appeals Committee in finding that he had failed to lodge his appeal in a timely manner.

33. Insofar as the Applicant’s challenge relates to the original decision to terminate his contract and not offer him a new position after the reclassification exercise, the Applicant has failed to exhaust his internal remedies by pursuing an appeal to the Staff Appeals Committee in a timely manner. The Applicant has further failed to demonstrate the existence of any “exceptional circumstances” that would justify the exercise of the discretion conferred on the Tribunal by Article III – 4 of the Tribunal’s Statute in his favour.
VI. **DECISION:**

34. For these reasons,

The Administrative Tribunal therefore grants the Respondent’s motion and declares this Application inadmissible.

Yadh BEN ACHOUR President

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