APPLICATION No. 2011/05

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

Judgement No. 82 of the Administrative Tribunal rendered on 17 October 2012

I. THE FACTS

1. The Applicant, Mr. S. A. O., was recruited by the Bank on 02 May 2004 as Principal Water and Sanitation Engineer in the Water and Sanitation Division, OWAS.2.1 Prior to his transfer by letter dated 18 August 2008,2 the Applicant was Programme Officer in a previous project financed by the African Development Fund in Madagascar called “ADF DWSS”. He also worked briefly with the African Water Facility (AWF). At the time of the facts alleged, he was an international expert in the Madagascar Field Office (MGFO), responsible for the Rural Water Supply and Sanitation Programme (PAEAR), where he assumed duty on 24 November 2008. At the time of termination of his appointment on 30 May 2011, he occupied the position of Principal Water and Sanitation Expert in OWAS.2 at the Temporary Relocation Agency (TRA) that he came back to, at his request.

2. On 31 December 2008, the Applicant sent an Information Note to the Bank’s Auditor General entitled “Quarterly Meeting on Projects Financed by the Bank: Serious Professional Misconduct”3 wherein he levelled accusations against Ms. C., the Bank’s Resident Representative at MGFO; he accused her of supporting the Malagasy authorities in their intention to change pumps listed in the bids of companies selected and linked by contract to the Bank. If the change had been accepted, it would have been to the benefit of Société Malgache de Transformation des Plastiques (SMTP), whose Board Chair was Mr. ISMAEL Danil. The Applicant also accused the same individual of trying to corrupt him and other colleagues, and of being seen several times in the company of the Resident Representative in an extra-professional setting.4

3. On 10 November 2009, the Applicant was the subject of a whistleblowing letter written by Mr. Betsiaroana Jean Didier, Managing Director of the REVAFORAGE Company, in which he also mentioned Ms. M. X-D-P. The subject of this letter addressed to the Bank was: “Explanatory Note on Reprisals Endured under Contract No. 10-08/ME/SG/DGE/PAEAR.350”.5 The letter was sent twice the same day, on plain paper and on a REVAFORAGE headed paper.6 In these letters, the REVAFORAGE Managing Director blew the whistle on the following acts allegedly committed by the Applicant:

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4 Respondent’s Answer, Annex 3, page 51.
6 Respondent’s Answer: Annex 6, page 58
i. Demand for a 5% kickback on the total amount for the contract mentioned above, failing which the Applicant would resort to all means to have the contract with the Company terminated;

ii. Preparation of a schedule for the payment of Ten Thousand Euros (EUR 10 000) per attachment, to be delivered in person to his brother called A., resident in Paris and working with France Télécom;

iii. Payment of the sum of Twenty-Two Thousand Euros (EUR 22 000) to Mr. A. (sic) in Paris;

iv. In April 2009, while the Applicant was on vacation in Morocco, he forced the REVAFORAGE Managing Director under threat to employ Mr. M. H. as consultant on a monthly fee of Four Thousand Euros (EUR 4 000), whereas Mr. H.’s qualifications had no link whatsoever with REVAFORAGE’s activities. At the time of writing the letter, the fees had not been fully paid;

v. Forced to pay a Paris-Antananarivo-Paris return ticket in business class for the consultant, even though an economic class ticket had already been bought as agreed;

vi. Forced to lodge the consultant in an apartment furnished by the Company;

vii. Purchase of sports equipment for the Applicant and Ms. X. at the cost of Ten Million Seven Hundred Thousand Ariary (MGA 10 700 000);

viii. For failing to pay the kickback requested, the Applicant suspended the payment of AfDB’s share of the bills, whereas the attachments had already been approved by the Consulting Engineer, in accordance with the contract.

4. On 20 November 2009, Mr. O. again sent another e-mail to the Auditor General complaining about the difficult work situation in Madagascar, threats and reprisals against him, disparagement of his work and daily mental harassment. He also stated that the Resident Representative, Ms. C., was guilty of proven corruption and that she had confirmed having an intimate relationship with the Managing Director of the REVAFORAGE Company. Mr. O. concluded his message by requesting that the Madagascar dossier be taken away from him and that he return to headquarters (TRA), among other things.

5. On 25 November 2009, the Madagascar Minister of Water Resources sent a letter to the Bank denouncing the “abnormal behaviour” of some Bank experts in charge of the PAEAR Project. On 09 December 2009, a joint letter by the Minister of Finance and Budget and the Minister of Water Resources levelled accusations of corruption against Mr. O. and Ms. X., and deplored the fact that “no action has so far been taken against this expert who continues to use all means to block the advancement of this programme”.

6. Following the different accusations and denunciations against the Resident Representative (Ms. C.) and the two experts, Ms. X. and Mr. O., the Integrity and Anti-Corruption Division (IACD) conducted an investigation in January 2010. The Applicant was interviewed on 02 February 2010 and a report was prepared the recommendations of which drew no conclusion concerning the Applicant, neither accusing nor exonerating him.

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9 PAEAR: Rural Drinking Water Supply and Sanitation Programme.
11 Respondent’s Answer: Annex 12, pages 75 – 85.
On 09 December 2010, the Director of the Human Resources Management Department, CHRM, sent a query to the Applicant requesting his explanation as to the declarations contained in the IACD investigation report. The Applicant replied on 21 December 2010 and denied all accusations levelled in the query. Considering the Applicant’s answers as unsatisfactory, the Director CHRM seized the Bank’s Disciplinary Committee on 07 February 2011. However, prior to seizing the Disciplinary Committee, the Director CHRM received a memorandum from the IACD manager analysing the Applicant’s reply to the query of 09 December 2010 as well as the conclusions of Investigation Report No. IR/2010/08. This memorandum specified a number of issues not sufficiently developed in the said Report.

During its discussions, the Disciplinary Committee pointed out inconsistencies between the oral evidence and the facts. Hence, the Committee requested the appearance of the Applicant to clarify certain points. Therefore, the Disciplinary Committee heard the Applicant on 08 and 11 March 2011. The Committee forwarded its report to the Vice-President, CSVP, on 1 April 2011.

Among other things, the Disciplinary Committee concluded that:

- On examining all information and evidence, including the attestation issued by the Mondial Fitness delivery agent, the Committee was unable to establish a direct link between the sports equipment seller Mondial Fitness and the physical address to which the equipment was delivered.

- Therefore, the Committee could not establish that the equipment was indeed delivered to the Applicant’s residence;

- The IACD Report did not draw any clear conclusion as to the accusations levelled against the Applicant; therefore, the Committee could also not conclude as to the existence of an unquestionable link between him and the sports equipment. The Committee recommended that an additional investigation be conducted on the physical address to which the sports equipment was delivered.

By letter dated 30 May 2011, the Vice-President for Corporate Services terminated the Applicant’s appointment without notice and entitlement for serious misconduct, and with immediate effect.

In accordance with the Tribunal’s Rules of Procedure, the Applicant on 29 July 2011, filed an Application with the Tribunal challenging the Bank’s decision to terminate his appointment. The Respondent filed its Answer on 16 December 2011 challenging the Applicant’s claims and demands. The two parties filed their Reply and Rejoinder, respectively (the Applicant on 02 February 2012 and the Respondent on 02 April 2012).

II. ARGUMENTS OF THE PARTIES

The Applicant

The Applicant faults the Bank for irregularity of form. According to him:

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1) The disciplinary and termination procedures were conducted in breach of several articles of the Staff Rules and Staff Regulations;

2) No reason was given for the termination decision;

3) The Bank’s disloyalty to its employee.

13. The Applicant is also of the view that the decision is vitiated by substantive irregularity. Firstly, on the onus of proof, the Applicant challenges the accusation of corruption; some of the evidence produced by the Whistle-blower, REVAFORAGE’s Managing Director, whose credibility the Applicant challenges, and evidence presented by the Bank; the investigation was conducted to inculpate. Secondly, his private life was violated.

14. With regard to the form, the Applicant raises the Respondent’s non-compliance with the provisions under Rule 101.03 (a) of the Staff Rules concerning the conduct of disciplinary proceedings. The disciplinary proceedings should not have been set in motion since IACD had levelled no charges against him. Moreover, the Applicant is of the view that the disciplinary proceedings violated Rule 101.0 (sic). Consequently, the procedure was arbitrary and wrongful.

15. The Applicant points out the violation of Rule 102.05 of the Staff Rules setting the time limit for disciplinary proceedings. He faults the Respondent for not complying with its own rules. The Disciplinary Committee is given thirty (30) days to turn in its report; the period may be extended by another thirty (30) days by the Vice-President. After receiving the said report, the Vice-President must take or refrain from taking disciplinary measures within a further thirty (30) days. Outside this time limit, the disciplinary procedure is deemed terminated and any interim measure imposed reversed. However, in this case, according to the Applicant, given the fact that the Vice-President received the Disciplinary Committee’s Report on 1 April 2011, he should have taken a decision within thirty (30) days, in the absence of which no measure should have been taken after 22 March 2011.

16. The Applicant also pointed out the Respondent’s violation of Rule 102.08 of the Staff Rules regarding the implementation of the recommendations of the Disciplinary Committee, particularly the failure to forward the Committee’s report to the staff member. The letter of termination was provided to the Applicant on 30 May 2011 without the Separate Critical Investigation and the Report of the Committee, both of which were only received by the Applicant on 03 June 2011.

17. The Applicant also mentions the violation of Rule 102.07 of the Staff Rules concerning disciplinary proceedings. In his view, he was not given the opportunity to defend himself against the charges levelled against him.

18. Furthermore, the Applicant believes that the Respondent did not respect the adversarial principle. Throughout the proceedings, he claims that he was not given access to all of the evidence in the dossier concerning him. He also criticises the form of the Separate Critical Investigation which is nothing but an ordinary document written on a blank sheet of paper.

19. The Applicant points out that the letter of termination gives no reason or the reason mentioned is erroneous. The said reason is based on Regulations 3.5 and 3.11 of the Staff Regulations which, according to the Applicant, is not applicable to his case, insofar as the Respondent did not justify in what way he damaged its interest, pursuant to Rule 101.02 of the Staff Rules.

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20. Lastly, but still on the irregularity of form raised by the Applicant, he faults the Respondent for disloyalty towards him; the relationship between the Bank and the Applicant was based, among other things, on mutual trust. It is that mutual trust that drove his action when he opposed the change of pumps during the 15 December meeting, and subsequently when he blew the whistle on the actions of the REVAFORAGE Company by including the information in the aide-memoire of the project supervision mission that he prepared in July 2009.\(^\text{19}\) According to the Applicant, acts noted included the falsification of Contract No. 10-08/ME/SG/DGE/PAEAR.350 and other fraudulent activities by the REVAFORAGE Company, all supported by the Bank’s Resident Representative in Madagascar, Ms. S. C. In his view, the Respondent did not protect him as required under the provisions concerning whistle-blower status. Regarding the disloyalty of which he faults the Respondent, the Applicant refers the Tribunal to abundant jurisprudence of both the International Labour Organization Administrative Tribunal (ILOAT) and the Court of Justice of the European Community.\(^\text{20}\)

21. On the substance, the Applicant believes that the termination of his appointment is questionable for the following reasons:

- The accusation of corruption is founded on no proof whatsoever;
- The evidence received by IACD is insufficient and challengeable. Moreover, the evidence was not enough to establish his guilt;
- The accusations levelled against him are the result of an investigation to prove (inculpate);
- The investigation and the disciplinary proceedings were conducted in violation of his right to private life as enshrined in Article 12 of the 1948 Universal Declaration of Human Rights; and
- All the accusations levelled are based solely on allegations by the REVAFORAGE Managing Director whose credibility is questionable.

22. On the onus of proof: according to the Applicant, the onus of proof is on the Administration. He cannot be constrained to provide negative proof. The allegation of corruption is not founded, going by the very definition of corruption itself as given by the Respondent in Annex 2 of its Whistleblowing and Complaints Handling Policy: “A corrupt practice is the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party”.\(^\text{21}\)

23. The Applicant challenges the evidence presented by the Managing Director of the REVAFORAGE Company, i.e. documents justifying payment for sports equipment (bills, bank statement, extract from the ledger):

- The bill issued to REVAFORAGE by the sports equipment sales company has no stamp (no headed paper, no bill reference, no seller’s signature);
- The cheque used for the payment does not correspond with the format of cheques in force in 2009;
- The bank statement does not correspond to the generally admissible format of bank statements; what is presented is nothing but a simple Excel table;

\(^{19}\) Application: Annex 15, pages 102 – 113.


\(^{21}\) Application: Annex 16, page 129.
24. The Applicant also contested additional evidence provided by the Respondent:

- The two reports from expert graphologists: Ms. X. contests the consistency, especially in light of the documents on which they are based;

- The inventory of items shipped by Ms. X. in November 2007 from Paris to Tunis, then in May 2008 when she assumed duty in Madagascar, and lastly in December 2009 during her return to the TRA;24

- The attestation of a certain Mr. Moise:25 according to the Applicant, the document is incomplete, its authenticity is not certified and no identification document indicates the identity of its author;

- The Nosy Be hotel bills and related attestations.

25. The Applicant maintains that the allegations emanate from an investigation to prove (inculpate). The investigation did not respect the norms governing anti-corruption and fraud investigations.26 The investigation did not present all pieces of evidence – both those confirming and those invalidating the allegations.

26. Regarding the violation of private life, the Applicant points out that the Respondent used information obtained in breach of the principles requiring respect of his rights. Since Ms. X. is the sole signatory of the moving contract, the Company that provided the information should have obtained her prior authorisation or a court order. Furthermore, the Respondent drew upon claims according to which the Applicant had a special relationship with Ms. X. Were the relationship confirmed, no internal text proscribed two staff members from having a special relationship, provided such a relationship did not harm the Institution’s reputation, credibility and renown. The Respondent interfered in the Applicant’s private life in breach of Article 12 of the 1948 Universal Declaration of Human Rights.27 A staff member’s private life is also protected by other international instruments: the European Convention for Protection of Human Rights and Fundamental Freedoms, the International Covenant on Political and Civil Rights (New York, 19 December 1966) and lastly the Charter of Fundamental Rights of the European Union.28

27. The Applicant states that he was not in charge of the ADF DWSS Project, although he was principal engineer with the African Water Facility (AWF) in November 2007. From 2004 to 2007, he was project officer in charge of the Madagascar water sector. He recalls that at the time the bid was launched on 29 February 2008, the award of the contract to drill 350 boreholes to the REVAFORCE Company, the approval and signature of the contract and works start-up, he was assigned to the AWF based at headquarters and was not in charge of the new PAER Programme.

28. In his Reply received by the Tribunal on 02 February 2012, the Applicant repeated most of the arguments contained in his Application. He challenged the partisan manner in which the Respondent narrated the facts, the circumstances and chronology of events. The Applicant also denied ever staying at the Nosy Be Hotel with Ms. X. or the payment of the bill by the REVAFORCE Company. On the supposed date of travel, he was in the office in Antananarivo. The dates of stay did not correspond to holidays; he produced an attestation of his leave to show that on those dates, he was not absent from MGFO. Consequently, the said hotel bill is a forgery. Furthermore, the Applicant pointed to inconsistencies in the accusations levelled against him by the Respondent.

29. Lastly, the Applicant restates that the Respondent did not respect its own regulatory texts governing disciplinary procedure, investigation and termination, particularly in terms of respecting a staff member’s right to a fair hearing. He also deplores the fact that although he contacted the Staff Council, that body provided him with no support whatsoever. To support his arguments, the Applicant cited a number of decisions rendered by international jurisdictions, especially the International Labour Organisation Administrative Tribunal.

30. The Applicant concludes his submission by stating that the Respondent did not conclusively answer a number of questions raised, namely:

- The supposed evidence (the cheque, the bank statement, Mr. Moise’s attestation, money given to his brother by the REVAFORCE Director, the imposition of the consultant);
- The missing sports equipment;
- The Separate Critical Investigation (in form and substance);
- The mental harassment endured.

In light of his arguments, he prays the Tribunal to quash the wrongful termination decision and grant his requests for compensation.

The Respondent

31. Contrary to the Applicant’s claims, the Respondent in its Reply filed on 16 December 2011 and its Rejoinder of 02 April 2012 maintains that the decision of 20 May 2011 and all preceding administrative procedures and acts are justified.

32. The Respondent recalls that the Applicant, after assuming duty at the Madagascar Field Office on 24 November 2008, sent an e-mail message to the Bank’s Auditor General on 31 December 2008 entitled: “Quarterly Meeting of Bank-financed Projects: Serious Professional Misconduct”.

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30 Application: page 7.
33. The Respondent also recalls that it was not only this e-mail message that triggered the subsequent investigations on MGFO. In actual fact, the 2009 work programme of the Office of the Auditor General already included a mission to audit the Office. Furthermore, within the framework of the said audit, both the Malagasy authorities and the Resident Representative (hence the entire MGFO staff) were well aware of the dates and purpose of the mission. The audit mission was conducted from 08 to 25 June 2009. The audit pointed out a number of weaknesses and failures that led to the non-compliant award of the contract to drill 350 boreholes to the REVAFORCE Company. As a result, the Respondent decided to suspend disbursements to that Company and ordered that an investigation be conducted by IACD, the outcome of which led to the termination of the Company’s contract.

34. The Respondent then goes on to highlight the inconsistencies in the Applicant’s defence, particularly with regard to some of his arguments:

- The chronology of events and the unfolding of the facts that led to the launching of investigations, and the relations linking the various protagonists namely the Applicant, Ms. X., Ms. C. and the REVAFORCE Director;

- The production – according to the Applicant – of forged documents and false evidence to obtain the termination of his appointment as retaliation for blowing the whistle on Ms. C. and the REVAFORCE Director;

- The Applicant’s denial of any intimate relations with Ms. X.

35. In its Answer and Rejoinder, the Respondent also refutes arguments over non-compliance with rules and regulations, especially in connection with:

i. Disciplinary and termination procedures;

ii. Failure to provide reasons;

iii. Disloyalty and non-protection as a whistle-blower;

iv. Onus of proof;

v. Violation of private life.

36. In particular, the Respondent would like to point out that Mr. O. made his first denunciation of “serious professional misconduct” against Ms. C. on 31 December 2008. However, the Respondent has produced documents clearly indicating that as at that time, the Applicant was staying with Ms. X. and their families in a hotel in Nosy Be and that the bill was issued in the name of REVAFORCE SARL MADAGASCAR.

37. In the message of 31 December 2008 to the Auditor General, the Applicant blew the whistle on corrupt practice or attempted corruption by REVAFORCE and its Director, who supposedly maintaining intimate relations with the Resident Representative, as well as professional misconduct perpetrated by the latter for Mr. Betisiaroana’s benefit. In substance, Mr. O. stated in his message: “During a meeting with Malagasy authorities, the Resident Representative supported the authorities’ desire to change the suppliers of pumps listed in contractors’ bids and on the basis of

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which they were selected and their contracts prepared, approved by the Bank and signed. Had the change of pump suppliers been accepted, it would have been to the profit of Société Malgache de Transformation des Plastiques (SMTP) whose Board Chairperson Mr. ISMAEL Danil attempted to corrupt me on 24 November 2008. According to information that I cannot confirm, the same ISMAEL Danil has been spotted on several occasions in the company of Madam Resident Representative in a non-professional setting. Therefore, at the time of sending the first message (31 December 2008), the REVAFORAGE Company was not mentioned. The Company could not have taken retaliatory action or fabricated evidence against the Applicant.

38. According to the Respondent, it is logical that in December 2008/January 2009, REVAFORAGE would pay for the Applicant’s stay in Nosy Be; that Ms. X. on 19 May 2009 would receive sports equipment bought by REVAFORAGE at the Applicant’s residence on 18 May 2009 by personally signing the MONDIAL FITNESS delivery receipt issued in the Applicant’s name and making the following handwritten annotation thereon: “the user’s manual for the treadmill has not been delivered”. For the Tribunal’s information, the Respondent annexed the purchase receipt for the Tunturi T60 treadmill and the elliptical trainer, the delivery receipt, the extract from REVAFORAGE’s ledger and the bank statement of Mr. Betsiaroana Jean Didier, REVAFORAGE’s Managing Director.

39. The Respondent reminds the Tribunal that prior to sending the first message denouncing “the serious professional misconduct” (31 December 2008), the quarterly meeting on Bank-financed projects was held on 15 December 2008, jointly chaired by the Secretary-General of the Ministry of Finance and Madam Resident Representative of the Madagascar Field Office. The Applicant maintains that it was during the adoption of the minutes of that meeting, the content of which Ms. C. contested to the point of having two versions produced, that his problems (retaliation) with Ms. C. and the REVAFORAGE Company came out in the open. The Respondent points to the contradictions in the Applicant’s declarations. His problems could not have started at the 15 December meeting since the company accused of corruption at the time was SMTP headed by Mr. ISMAEL Danil, and not REVAFORAGE.

40. In terms of the timeline of events, the Respondent notes as follows:

- On 15 December 2008 – quarterly meeting of MGFO: attempt to change pumps by the Resident Representative, contrary to the rules; preparation of two draft summary records;
- From 31 December 2008 to 05 January 2009 – Applicant’s stay with Ms. X. at Nosy Be, paid for by the REVAFORAGE Company;
- 31 December 2008 – e-mail message from the Applicant to the Auditor General. Subject: Quarterly Meeting on Bank-financed Projects - Serious Professional Misconduct;
- March 2009 – review and adoption of the quarterly work programme of the Internal Audit Division 1 by the Board of Directors;
- 18 May 2009 – purchase of sports equipment by the REVAFORAGE Company;
- 19 May 2009 – reception of the sports equipment at the Applicant’s residence after signature and written annotations on the delivery receipt by Ms. X.;

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36 Application: Annex 9, page 63.
37 Respondent’s Answer: Annexes 40 and 41, pages 355 – 361.
38 Respondent’s Rejoinder: paragraph 1, page 2.
- 04 June 2009 – memorandum of the Division Manager, OAGL.1, notifying the Resident Representative of the audit of the MGFO Field Office;
- 04 June 2009 – Auditor General’s letter announcing the audit mission to the Malagasy authorities;
- 08 to 25 June 2009 – audit mission to the MGFO Field Office;
- 08 to 24 July 2009 – project supervision mission;
- 10 November 2009 – letter by Mr. Betsiaroana Jean Didier, REVAFORAGE Managing Director, on a blank sheet of paper blowing the whistle on the Applicant and Ms. X.;
- 10 November 2009 – letter on a REVAFORAGE headed paper on the same subject: Explanatory Note on Reprisals Endured over Contract No. 10-08/ME/SG/DGE/PAEAR.350;
- 20 November 2009 – e-mail message from the Applicant to Mr. Ouko, Auditor General, for the first time accusing the REVAFORAGE Managing Director, denouncing the existence of intimate relations between the Managing Director and the Resident Representative and requesting that he (the Applicant) be sent back to headquarters due to the difficult working conditions in Madagascar;
- 25 November 2009 – letter from the Madagascar Ministry of Water Resources to the Bank over the suspension of disbursements to REVAFORAGE, after recalling the background of the contract award;
- 09 December 2009 – joint letter from the Malagasy Minister of Finance and Budget and the Minister of Water Resources requesting the lifting of the suspension on disbursements on the REVAFORAGE contract; the letter also contains accusations of extortion perpetrated by the Applicant and request that he be recalled to headquarters.

41. For the Respondent, the timeline of events shows that the Applicant cannot claim the existence of a plot to harm him in retaliation for blowing the whistle on acts perpetrated by the REVAFORAGE Company and its Managing Director. The stay at Nosy Be and the sports equipment were paid for well before the Applicant’s denunciation by the Director of the Company in contract with the Bank. Therefore, there is no reason to justify the claim that the said Company Director cooked up forged papers or took retaliatory action against the O. – X. couple. The accusation levelled against them for corrupt practice predated (10 November 2009) the Applicant’s e-mail message (20 November 2009). Hence, this accusation is baseless and is an argument that the Respondent requests the Tribunal to dismiss. If there indeed was a victim of retaliation, that would be the REVAFORAGE Company, at the hands of the O. – X. couple.

42. The Respondent draws the Tribunal’s attention to some evidence that existed way before the Applicant’s transfer to the Madagascar Field Office. The Rural Drinking Water Supply and Sanitation Project (PAEAR) was signed on 2 March 2006. The first disbursement was made on 17 August 2006. The reality of facts shows that the relationship between the Applicant and Mr. Betsiaroana dated back in time. Indeed, it would appear that as part of the Greater South Drinking Water Supply and

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40 Respondent’s Answer: Annex 6, page 58.
41 Respondent’s Answer: Annex 8, pages 62 – 63.
Sanitation Project (DWSS ADF) in which another company belonging to Mr. Jean Didier Betsiaroana also participated, the Applicant undertook several missions to Madagascar. Consequently, to the Respondent, the argument according to which the Applicant was responsible for the Madagascar water sector for four (4) months after the award of the contract to REVAFORAGE is irrelevant.

43. Therefore, a degree of closeness existed between the parties that should be scrutinized, especially as concerns full knowledge of Mr. Betsiaroana’s previous activities. Normally, in accordance with the texts in force, it is not the duty of the Project Officer to forward to contractors proof of SWIFT transactions settling bills; the Project Officer’s job is only to check the eligibility of requests for payment sent by the contractor. However, in the case of the DWSS Project, the Applicant sent e-mail messages to Mr. Betsiaroana even though he did not work in the Disbursement Department. The Respondent maintains that the Applicant most likely had a special interest that led him to go beyond his prerogative, in order to transmit to Mr. Betsiaroana evidence of SWIFT transfers in connection with settlement of Mr. Betsiaroana’s bills.  

44. To the Respondent, it is obvious that in acting beyond his prerogative, the Applicant could put pressure on Mr. Betsiaroana to obtain favours. Another question concerns how Mr. Betsiaroana could have information on the Applicant’s brother (name, work and residential addresses), and whether Mr. Betsiaroana did not “make a deal” (sic) with the Applicant’s brother, particularly to hand him amounts of money demanded by the Applicant.

45. Actually, the Applicant’s entire argument is contingent on the belief that for blowing the whistle on corrupt practice against Ms. C., the Resident Representative, and the REVAFORAGE Company, he should be granted the status of protected whistle-blower. He considered, albeit wrongly, that the Respondent, after granting him that status, became disloyal to him by terminating his employment contract for corruption. The Respondent maintains that at no point did it grant the Applicant the said status. The Applicant presented no evidence to corroborate the whistle-blowing claimed, limiting himself to the fact that because he gave a contrary opinion during the 15 December 2008 meeting on the PAEAR Project, did not agree with the content of the summary records of the said meeting and had produced his own version of the minutes, had denounced the corruption of which the Resident Representative was guilty and had collaborated with the investigation services, he was thus threatened by the REVAFORAGE Managing Director. Yet, the Applicant produces no evidence of such a threat. The meeting in question took place on 15 December 2008 and the allegations against REVAFORAGE were levelled on 20 November 2009, that is to say more than one year later, whereas the allegations of 31 December 2008 laid accusations against Mr. ISMAIL, SMTP Director.

46. The Respondent recalls that the implementation of its Whistleblowing and Complaints Handling Policy adopted in 2007 requires that a precise procedure be followed. According to this policy, the granting of the status of protected whistle-blower must be based on evidence of risk of retaliation. The mere fact of receiving information from the Applicant and, above all, the content of that information, are not enough to grant him that status which, in any event, is not automatically given following the mere invocation of retaliation. When the whistle-blower fears retaliation, an investigation is conducted. Based on the conclusions and recommendations of the investigation, the President grants the whistle-blower the status and determines the relief open to him/her. In this case, the Applicant produced no document invoking retaliation or the granting of the whistle-blower status to him. In any case, the IACD investigation mission was not fielded to Madagascar based on denunciations by the Applicant or Ms. X. The mission was conducted within the framework of IACD’s work programme. Besides, the status of protected whistle-blower does not exonerate the Applicant from disciplinary measures for acts he may have committed if serious allegations call his integrity into question. An investigation must be conducted to check the veracity of facts alleged. This

measure is also taken to prevent individuals from hiding behind the protected whistle-blower status to escape prosecution.

47. In connection with the alleged non-compliance with texts governing the disciplinary and termination procedures, the Respondent maintains that the rules were not violated. The IACD investigations complied with norms applicable in the Bank. The remedies were followed, even if the Respondent points out that the Applicant contacted the President of the Staff Council who has no authority to intervene on disciplinary issues.

48. The Respondent did not breach the provisions of Rules 102.05, 102.07 and 102.08 of the Staff Rules and Regulations, as well as the adversarial principle.

The Respondent maintains that Rule 102.05 of the Staff Rules was followed to the letter. The Director CHRM seized the Disciplinary Committee on 07 February 2011; that seizure which specifies the charges levelled against the Applicant, constituted the effective start of the disciplinary proceedings.\(^47\) The Vice-President rejected the recommendations of the Disciplinary Committee as he is authorized to do under Rule 102.08 (b) of the Staff Rules. He considered that there were several contradictions and inconsistencies in the Committee report, in light of the contents of the dossier. He informed the Applicant accordingly, and pursuant to the said Rule, requested a Separate Critical Investigation of the facts alleged.\(^48\)

49. To the Respondent, the receipt of the Disciplinary Committee’s report by the Vice-President and the VP’s e-mail message to the Applicant on 29 April 2011 – the VP having not as at that date taken a final decision – could not be considered to have terminated the procedure. In his message, the Vice-President for Corporate Services announced the continuation of the disciplinary proceedings. Furthermore, Rule 102.05 refers to the termination of the proceedings and reversal of interim measures taken during the proceedings. The decision to terminate the Applicant’s appointment is not an interim measure.

50. Regarding compliance with the time limits, the Respondent recalls that the entire proceedings, from the Disciplinary Committee up to the termination decision, lasted from 07 February 2011 to 30 May 2011, i.e. a total of three (3) months and twenty-three (23) days:

- 07 February 2011, seizure of the Disciplinary Committee by the CHRM Director with the charges levelled, the IACD report, the query and the Applicant’s answer;
- 29 April 2011, notification of the Committee report to the Vice-President;
- 29 April 2011, Vice-President’s message to the Applicant informing him of the receipt of the Committee report and the request for a separate critical investigation of the facts, given the contradictions and inconsistencies contained in the report;
- 30 May 2011, notification of the termination.

To the Respondent, the time taken complied with the notion of “reasonable time” as defined in Article 5-3 of the European Convention on Human Rights which states that “everyone ... shall be entitled to trial within a reasonable time”, and Article 6-1 that stipulates that “everyone is entitled to a fair ... hearing within a reasonable time”. The Respondent also refers the Tribunal to the Jurisprudence of the European Court of Human Rights (ECHR) which progressively defined the scope of this notion.

\(^{47}\) Respondent’s Answer: Annex 17, pages 118–120.

\(^{48}\) Application: Annexes 29 and 30, pages 173 – 177.
51. The Respondent dismisses the Applicant’s claim according to which it did not comply with Rule 102.08 (d) in terms of forwarding the Disciplinary Committee report and the report on the Separate Critical Investigation to the Applicant. The two documents were mentioned in the letter of termination and handed over to the Applicant on 3 June 2011, without causing him any prejudice since he had enough time after receiving them to prepare his defence.

52. Furthermore, the Respondent refutes the Applicant’s argument as to non-compliance with Rule 102.07 (c) of the Staff Rules which states: “In the course of the proceedings before the Disciplinary Committee, the staff member shall be given the opportunity to be heard in his/her defence against the complaint levelled against him/her.” The Applicant maintains that his appointment was terminated for corrupt practice, whereas he was summoned before the Disciplinary Committee for “wrongful acceptance of services/gifts from a contractor on a Bank-financed project”. Contrary to the Applicant, the Respondent maintains that as characterized, these facts constitute corrupt practice as defined under the Uniform Framework for Preventing and Combating Fraud and Corruption signed between the Respondent and other international finance institutions in September 2006, namely “the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party”.49 Throughout the proceedings, the Applicant was informed of the charges levelled against him and repeatedly had the opportunity to present his case.

53. The Respondent denies violating the adversarial principle. Apart from the fact that the Respondent is not legally bound to forward the full report of the IACD investigation (as the Applicant himself acknowledges), the Respondent maintains that it complied with the requirement to forward to him the substance of the charges levelled against him. By doing so, the Respondent complied, among others, with the Jurisprudence of the African Development Bank Administrative Tribunal.50 The Respondent states also that it followed Rules 101.02 (a) and 101.03 (a) of the Staff Rules and enabled the Applicant to present his explanations within a timeframe granted him to do so. Moreover, during investigations conducted by IACD, the Applicant was heard on 02 February 2010. The purpose of the series of hearings was to check the veracity of allegations levelled both against the Applicant and the REVAFORAGE Company. At every phase, the Applicant was given the opportunity to present his case; he was provided with the evidence levelled against him and was allowed to contest such evidence. Prior to appearing before the Disciplinary Committee, he offered his explanations in writing. He was heard extensively by the Committee on 08 and 11 March 2011.

54. Contrary to the Applicant’s allegation according to which the letter of termination gives no reason, the Respondent maintains the contrary. The terms of the letter are explicit and precise. The reason given is clear, serious and founded on the relevant texts. The facts alleged are verifiable and exact; the proportionality of the measure compared to the reasons is established. The Respondent based its decision on Regulation 3.5 of the Staff Regulations and Rule 10.2 of the Staff Rules, and applied them in line with Rule 10.2 of the same Rules. Lastly, the Respondent recalls the jurisprudence of the United Nations Administrative Tribunal which states that absence of any explicit indication of the reasons for termination does not suffice to justify the rescission of the decision contested.51

55. In connection with the onus of proof, the Respondent challenges the Applicant’s claims according to which, in the absence of proof, the termination decision is illegal and must be quashed. The Respondent points to the fact that although the onus of proof in penal matters lies with the party invoking the facts alleged and must establish the guilt of the accused party, the situation is totally different in matters of administrative disciplinary procedure. The Respondent cites abundant and constant jurisprudence in this regard.52

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50 Respondent’s Answer: Annex 26, pages 205 – 212.
51 Respondent’s Answer: Annex 27, pages 214 – 220.
52 Respondent’s Answer: pages 18 and 19; Annexes 28, 29, 30 and 31, 32 and 33, pages 222 – 306.
The Respondent re-states that as established by international administrative jurisprudence, there is no need to fully prove the accusations levelled against the Applicant. There are grounds for terminating his appointment.

56. According to the Respondent, it is also not enough to maintain that an alleged misconduct does not exist, or that the evidence was not accepted by the Applicant. The evidence produced by the Respondent is not the result of hearsay. It is based on:

- Concordant allegations from the Malagasy authorities and Mr. Jean Didier Betsiaroana, especially the letters from the Ministers of Finance and Water Resources;
- The employment of a consultant, Mr. M. H., who has no competence whatsoever in REVAFORAGE’s field of activity;
- The Applicant’s unconvincing explanations;
- Proof of SWIFT payment issued by the Bank but forwarded by the Applicant to Mr. Jean Didier Betsiaroana;
- The Nosy Be hotel bill for the 31 December 2008 to 03 January 2009 stay already mentioned;
- Delivery receipt No.00875 of 18 March 2009 of the sports equipment at his residence, which bears the signature and handwritten annotation of Ms. X. with whom he had an affair;
- Reports by one expert graphologist in Fontenay-aux-Roses (France) and an expert graphologist in Reading (United Kingdom). The two expert reports lead to the same conclusion: the signature and handwriting on the delivery receipt and the specimens given are attributable to one and the same person;53
- The inventory of Ms. X.’s personal effects drawn up by the moving company, the lists of which show various items depending on the route (Tunis/Antananarivo and Antananarivo/Tunis); on the second inventory is listed as item 160 a “treadmill” and as item 217 a cycle.54 Ms. X. claims that she bought the cycle but did not produce the purchase receipt;
- The report of the Head of the Bank’s Security Unit55 which corroborates the existence of a special relationship between the Applicant and Ms. X., thus explaining the latter’s presence at his residence on the day the sports equipment was delivered;
- The attestation of Mr. Moise, the delivery agent, confirming the place of delivery,56 which is the same as the address on the Applicant’s residence security contract;57
- Attestations from MGFO staff on the existence, among others, of factions and a special relationship between the Applicant and Ms. X.58

57. The Respondent restates that the evidence produced is not questionable, that it suffices to justify the termination of a staff member’s appointment without notice or entitlement for damaging the reputation and interests of his employer, an international financial institution.

58. By recalling its previous conclusions, the Respondent dismisses the Applicant’s claims that the allegations levelled against him are the outcome of an investigation to prove (incriminate). Throughout the proceedings, all evidence to incriminate and exculpate were discussed. The Applicant was able to present his version of the facts both orally and in writing.

59. The Respondent did not violate the Applicant’s private life. The conduct of a staff member in his/her private life is of no concern to the Administration, provided that conduct does not compromise the functioning of the service by bringing the Institution into disrepute. This approach has been developed into doctrine in “Ethics and Accountability in the International Civil Service” by Chris de Cooker in his work *Accountability, Investigation and Due Process in International Organization.*

60. The Respondent denies any arbitrary or illegal interference in the Applicant’s private life. However, if the conduct of a civil servant outside the work place has a negative impact on the Respondent’s image or interests, investigations can be conducted on the staff member’s private life. Hence, it is not acceptable that respect for a staff member’s private life prevent any investigation into their fraudulent acts. Had Ms. X. not received sports equipment now the subject of denunciation for corruption at the Applicant’s residence, and doing so by appending her signature and handwriting, no interference in their special relationship would have occurred. The same is true with regard to their stay in Nosy Be. The Applicant’s relationship with Ms. X. was common knowledge to all staff of the Bank’s Madagascar Field Office who did not waive in their description of the nature of the relationship between the two colleagues. This is particularly true of the declaration by Ms. Florence RABENANTOANDRO who made revelations justifying Ms. X.’s presence at the Applicant’s residence.

61. Lastly, according to the Respondent, evidence produced throughout the proceedings indicates that these two staff members adopted a joint defence and mutual protection strategy, particularly by requesting the Security Company in charge of providing services at the Applicant’s residence to hand over the log book kept by watchmen. An examination of the log book would have revealed movements in the said residence, especially the time and date of passage of the Mondial Fitness delivery agent.

62. In conclusion, the Respondent asks the Tribunal to dismiss the Applicant’s arguments seeking to reject evidence in relation to his private life gathered during the investigations; it also asks the Tribunal to dismiss the jurisprudence introduced in the debates by the Applicant for reasons of irrelevance. The Applicant’s comportment compromised Bank operations and discredited the institution. Despite evidence produced by the Applicant to refute the proof provided by the Respondent, the Applicant actually committed the facts alleged and was at no time able to provide a valid explanation to exculpate himself.

III. **THE PROCEDURE**

63. The Applicant was the subject of an investigation conducted by the Integrity and Anti-corruption Division, IACD, starting January 2010. After receiving the IACD Report, the Director of the Human

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59 Respondent’s Answer: paragraph 69 to 71, pages 32 – 33; Annex 51, pages 442 – 450.
60 Respondent’s Answer: paragraph 69, page 32;
Resources Management Department (CHRM) sent a query to the Applicant and granted him fourteen (14) days to reply. The Applicant sent a reply to the Director CHRM presenting his explanations and refuting the allegations levelled against him in the query.

64. Not satisfied by the answers from the Applicant, the Director CHRM seized the Bank’s Disciplinary Committee. The Applicant appeared before the Committee and was heard on 08 and 11 March 2011. On 1 April 2011, the Disciplinary Committee tendered its report and notified the Vice-President for Corporate Services, VP-CSVP.

65. On 30 May 2011, the Bank terminated the Applicant’s appointment. The Applicant seized the Tribunal by Application received on 29 July 2011.

IV. **REQUESTS BY THE PARTIES**

**The Applicant**

66. The Applicant seeks the:

- Annulment of the decision to terminate his appointment for serious misconduct and withdrawal of all mention of the corruption allegations or any other accusation from his file at the Human Resources Management Department;

- Payment of his salary;

- Reimbursement of medical expenses incurred from the date of termination to the date of judgment;

- Acknowledgement by the Bank of his active role in fighting corruption in the Institution;

- Compensation for non-material damage to the tune of One Hundred and Fifty Thousand Euros (EUR 150 000) due to harassment, persecution and humiliation inflicted by the Bank;

- In the absence of reinstatement, compensation equivalent to three (3) years of salary;

- Compensation for professional damage equivalent to three (3) years of salary;

- Reimbursement for the financial loss related to the early redemption of his retirement; the loss amounts to Eighty Nine Thousand Three Hundred and Eighty Seven Point Zero Three Units of Account (UA 89 387.03);

- Compensation as judged by the Tribunal for loss of medical cover necessitated by his cardiovascular problems and his daughter’s insulin-dependent diabetes;

- Reimbursement of school fees for his three (3) children for the 2011-2012 academic year and compensation for withdrawing one of his children from school for lack of financial resources;

- Reimbursement of legal fees and other expenses incurred for his defence to the tune of Fifteen Thousand Euros (EUR 15 000).

**The Respondent**

67. The Respondent prays the Tribunal to declare the Applicant’s entire demands as unfounded and to quash them.
V. THE LAW

68. To decide on the validity of the decision challenged dated 30 May 2011 terminating the Applicant’s appointment, the Tribunal shall examine the following issues: firstly, the existence of the facts and supporting evidence, insofar as the two parties present radically opposite points of view on this matter. Thereafter, the Tribunal shall rule on the legal characterisation of the facts to determine whether they amount to corrupt practice justifying the application of disciplinary measure for serious misconduct. Lastly, the Tribunal shall examine the regularity of the disciplinary procedure engaged by the Bank against the Applicant, particularly its compliance with the regulatory time limits and the adversarial principle.

69. To justify the termination decision for corrupt practice, the Bank bases its argument firstly on the denunciations by the Revaforage Managing Director in person and the Company itself dated 10 November 2009, sent to the Auditor General.

70. According to this whistleblowing letter, the Applicant is said to have requested that the Company pay him a 5% kickback on the total value of the contract signed between the Company and the Malagasy Government for the drilling of 350 boreholes meant to supply drinking water to a number of Malagasy regions. In the same letter, the Managing Director of the Company states that he actually handed money equivalent to EUR 22 000 to the Applicant’s brother on 27 February 2010, undertook to pay to the same brother a total of EUR 140 000 via an EUR 10 000 monthly instalment, was subjected to pressure from the Applicant to recruit an acquaintance and to grant the said person a number of costly privileges, and lastly to deliver sports equipment worth Ten Million Seven Hundred Thousand Ariary (MGA 10 700 000) to the Applicant, paid for by the Revaforage Company. To prove the payment, the Respondent produces a bill issued on 18 May 2009 by the “Mondial Fitness” Company to the Revaforage Company, a cheque for the same amount bearing Mr. Betsiaroana’s name, a bank statement proving that the same amount was debited from Mr. Betsiaroana’s account, a delivery receipt signed and annotated by Ms. M. X. who, according to the Respondent, maintained intimate relations with the Applicant, and an attestation from the delivery agent testifying that he indeed handed the sports equipment over to Ms. M. X. at the Applicant’s residence. The Respondent also states in the termination letter that the sports equipment (the T60 treadmill) “is included in the list of Ms. X.’s personal effects sent from Antananarivo to Tunis in December 2009, whereas the said treadmill was not on the list of her personal effects sent in May 2008 from Tunis to Antananarivo.” To confirm that the sports equipment was indeed received by Ms. X., the Bank submitted the delivery receipt to two expert graphologists of different nationalities both of whom arrived at the same conclusions confirming that the handwriting and the signature indeed belonged to Ms. X.

71. Furthermore, the Bank bases its argument on the letter from the Minister of Water Resources dated 29 November 2009 and a joint letter by the Minister of Water Resources and the Minister of Finance and Budget dated 9 December, accusing the Applicant directly and questioning his integrity due to “suspicion of corruption”. The letter basically repeats the content of the whistleblowing letter of 10 November 2009.

72. To buttress its argument in connection with the collusive relationship between the Applicant and Revaforage, the Respondent states that that Company paid for the Applicant, Ms. X. and their families to stay at a hotel in Nosy Be between 31 December 2009 and 3 January 2011. As proof, the Respondent produces a bill for the stay paid for by the Revaforage Company, and a written attestation dated 23 June 2011 issued by the Manager of Hotel Villa Fleurie testifying that the persons mentioned indeed enjoyed the stay offered and paid for by Revaforage.

73. The Applicant challenges all these allegations. He states that the whistleblowing by the Revaforage Company is, among other things, a malicious reaction, an act of retaliation for accusations of bad
management made by the Applicant against the said Company and its Managing Director, especially his stand against Revaforage in his Information Note to the Auditor General on 28 December 2008 and during the PAEPR Coordination Committee meeting of 3 November 2009 when he denounced the excessive delays and falsification of the contract signed between Revaforage and the Malagasy Government, as a result of which disbursements to the Revaforage Company were suspended on 19 November 2009. The Applicant adds that his warnings concerning the Revaforage Company date back to December 2008 since, during the monitoring meeting held on 15 December 2008, he objected to the Revaforage Company’s wish to change 350 pumps of French origin with pumps of Indian origin, certainly less expensive “but not in line with the required technical specifications and thus jeopardizing the project objectives” (Application, page 21). The Applicant also states that during the supervision mission from 8 to 24 July 2009, he noted that the Revaforage Company had falsified its original contract. Furthermore, the Applicant while denouncing collusion between the Malagasy Ministers and Revaforage aimed at discrediting him, calls into question the probity, bad management and legal antecedents of the Revaforage Managing Director, whose accusations – according to the Applicant – should not be taken seriously.

74. Furthermore, the Applicant states that the Nosy Be stay starting 31 December 2008 is pure fabrication, and that the hotel bill produced by the Respondent is forged. As proof, the Applicant states that on 31 December 2008, he was physically present in his office in Antananarivo as proven by telephone calls from his office extension on the said date. Moreover, the Applicant adds that Wednesday 31 December 2008 and Friday 2 January 2009 were not holidays, which implies that he should necessarily be at work, not at Nosy Be.

75. The Applicant also challenges the delivery of the sports equipment at his residence and their reception by Ms. X. For the Applicant, the Respondent did not produce a certified copy of the alleged BOA Cheque 00000017 from the issuing bank with which the Revaforage Company would have bought the sports equipment. Furthermore, the Applicant challenges the validity of the bank statement produced by the Respondent as well as the delivery receipt and the delivery agent’s attestation, the latter of which, according to the Applicant, has no legal value since it is not accompanied with any document supporting the delivery agent’s identity. Lastly, the Applicant categorically denies influencing the Revaforage Company to recruit Mr. M. H. as consultant. According to the Applicant, the Company has provided no evidence to back its claims and therefore is in violation of the basic principle according to which the onus of proof is on the accuser.

76. The Tribunal shall now examine all questions concerning the facts and the evidence. In this regard, the Tribunal recalls the principle enshrined by international administrative tribunals and already admitted in its past jurisprudence, according to which the requirements of proof in penal and administrative matters differ. In administrative matters, there is a degree of flexibility with regard to evidence. This flexibility is further amplified on matters of corruption for at least two reasons. Firstly, the Tribunal must place the Bank’s interest and renown, as well as the moral integrity of its staff at the very heart of all core considerations. Secondly, in light of the nature and tenor of offences concerning corruption, international jurisprudence also admits, as the Respondent recalls, that the judge cannot demand the production of absolute proof. Consequently, circumstantial evidence, convincing cross-referencing, interlocking pointers and assumptions may be considered as sufficient evidence.

77. Although the Tribunal cannot accept the Respondent’s entire allegations on this matter, a set of concordant pointers and facts appears nonetheless convincing enough to establish the materiality of the facts. In particular, the Tribunal finds no serious reason to doubt or dismiss the Bank’s claims regarding the delivery of sports equipment to the Applicant’s residence. Concerning the Nosy Be stay, paid for according to the Bank by the Revaforage Company, the Tribunal is of the view that, in light of the documents produced during the written submissions and additional documents subsequently submitted to the Tribunal, the evidence is shaky and contradictory, and cannot be used
to establish the materiality of the facts. The same is true of the allegations that are only based on indicators and probabilities that cannot be substituted for evidence.

78. Regarding the payment and delivery of the sports equipment, the evidence presented by the Respondent comprises a bill corresponding to Ten Million Seven Hundred Thousand Ariary (MGA 10 700 000) issued on 18 May 2009 by Mondial Fitness, indicating the name of the customer in the person of Didier Betsiaroana, Revaforage’s Managing Director, and also indicating that the bill was paid for with a BOA Cheque Number 00000017 issued by Didier Betsiaroana, then by a bank statement on Mr. Didier Betsiaroana’s account dated 1 January 2009, followed by Ms. X.’s annotation and signature, authenticated by two independent expert graphologists of different nationalities, and lastly by the written testimony of the delivery agent attesting that he delivered the sports equipment in question on 19 May 2009 to Villa Vivanda Tojo, Block Bonnet Ivandry, corresponding to the Applicant’s residence. This evidence is sufficiently concordant to conclude as to the delivery of the equipment at the Applicant’s residence, their receipt by Ms. X. and their payment by the Revaforage Company. Consequently, it is the Tribunal’s view that, despite the Applicant’s efforts to dismiss the evidence, the existence of these facts can no longer be contested.

79. The Tribunal shall now examine the issue concerning the legal characterisation of the facts. The central issue is whether the facts alleged constitute acts of corruption or otherwise. Under the Uniform Framework for Preventing and Combating Fraud and Corruption signed between the Respondent and other international finance institutions, the Bank defines corruption as follows: “the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party”. For the Bank, the fact of receiving gifts or obtaining favours from a company undertaking a public works contract for the Bank is an act of corruption. The Bank accuses the Applicant of using his office to obtain undue pecuniary and material benefits from a company participating in implementing the PAEAR Programme “in simple terms, that amounts to corruption”. For his part, the Applicant considers that corruption “requires a counterpart, which is not so in this case since there is none and such existence was not even raised by the Bank”.

80. According to the Bank, the Applicant’s conduct violates Staff Regulations 3.5 and 3.11, Staff Rules 101.04 (b) the provisions of Staff Rules 101.00 and 101.04 (b) (v) and paragraphs 2.1.1, 6.1 and 6.2 of the Code of Conduct. The Bank holds that these acts constitute serious misconduct justifying dismissal. The Tribunal must now establish whether the facts alleged constitute misconduct within the meaning of the abovementioned provisions.

81. Pursuant to paragraph 2.1.1 of the Code of Conduct relating to personal integrity: "Staff members are expected to act with integrity, honesty, probity and loyalty. In the discharge of their functions and private affairs, they are to avoid any action, which may reflect unfavourably upon their position as employees of an international organisation, either in their own country or elsewhere."

82. Pursuant to paragraph 6.1 of the chapter relating to conflict of interest, “A personal interest of a staff member conflicts with the interest of the Bank, which is paramount for staff members as international civil servants, if it tends to impair the staff member’s independence of judgement and impartiality. The conflict disqualifies the staff member from taking any decision on behalf of the Bank on any question, or attempting to influence any decision, to which the conflict relates”. Paragraph 6.2 presents four examples of conflict of interest; the fourth under point (d) is defined as follows: “Soliciting, accepting, or agreeing to accept any gift, loan, or payment of a significant value from a person who, or enterprise which, would be or is likely to benefit financially from a decision by the staff member in his/her official capacity.”

83. The Tribunal does not share the Applicant’s view according to which an act of corruption requires "counterparty" in the strict sense. The concept of "counterparty" in the definition of corruption does not necessarily imply a concrete, specific, measurable and identifiable compensation, but a reasoned
expectation from the corrupter to influence the judgment of the corruptible staff member in favour of the corrupter.

84. Without further deepening the theoretical debate about the definition of an act of corruption and its difference with conflict of interest as defined by the Code of Conduct, the Tribunal is of the opinion that, in any event, facts falling within one or the other category are amenable to disciplinary proceedings which may result in dismissal. In this case, it is up to the decision-making authority, on the basis of its discretion, to decide whether to engage ordinary disciplinary proceedings for ordinary breach of duty, or to decide on dismissal without notice or compensation, for serious misconduct. But the Tribunal agrees with the Bank that, in case of serious misconduct, it is permissible for the Bank to adopt ordinary disciplinary proceedings, which is the situation in this case.

85. From all the foregoing considerations, the Tribunal notes that the Applicant accepted, from a company with financial interest in a Bank-financed water and sanitation project, gifts likely to influence his judgment in the performance of his duties. The facts of which he has thus been accused fall under the above provisions, in particular paragraphs 2.1.1, 6.1 and 6.2 of Chapter 6 of the Code of Conduct on personal integrity and conflict of interest. As such, these facts undeniably constitute breach of obligations by the Applicant as an international civil servant. Therefore, the characterisation of that breach as disciplinary misconduct is undeniable. Its characterisation as serious misconduct engages the discretion of the disciplinary authority.

86. The Tribunal shall now turn to consideration of the last complaint concerning the disciplinary procedure followed by the Bank. By way of introduction, the Tribunal notes that, having opted for regular disciplinary proceedings to sanction misconduct, the Bank must fully comply with the provisions relating to disciplinary proceedings as defined by the Staff Rules and Regulations.

87. The Applicant raises two types of objections to the procedure followed by the Bank. The first relates to the procedure itself, in connection with its formalities and time limits. The second concerns the rights of the defence and the adversarial principle which, according to the Applicant, were not complied with during the disciplinary proceedings.

88. With regard to the first objection, the Applicant argues that the Bank did not comply with the time limit defined under Staff Regulation 102.05 - a time limit beyond which the disciplinary proceedings are deemed terminated and the interim measures reversed. Considering that the disciplinary proceedings began on 21 January 2011 and the Disciplinary Committee had 30 days that could exceptionally be extended for another 30 days to make its recommendations, the Applicant, therefore, considers that the Disciplinary Committee’s report forwarded to the Vice-President on 1 April 2011, 10 days after the prescribed period, was taken outside the time limit. In addition, the Applicant contends, the Vice President rejected the recommendations of the Discipline Committee and ordered a separate evaluation of evidence, before taking his decision to dismiss for corruption on 30 May 2011, on the basis of this separate evaluation of evidence exceeding the time limit by 19 days and, consequently, violating paragraph (c) of Staff Rule 102.05 which also requires the President to take or not to take disciplinary action following the Disciplinary Committee’s report within a maximum period of 30 days. For the Applicant, therefore, there were two violations of the rules governing the time limit for disciplinary proceedings.

89. A second objection raised by the Applicant concerns the rights of defence and the adversarial principle. The Applicant claims that the Bank neither communicated to him the whistleblowing letter of 9 November 2010 produced by the General Manager of REVAFORAGE Company nor the investigation report prepared by the Integrity and Anti-Corruption Division, IACD (Application, page 9).
90. Regarding the separate evaluation of evidence, the Applicant contends that it is, by its very principle, questionable insofar as it was carried out following an investigative mission by the Division Manager of GECL.4 who is not authorized to conduct such investigation. For the Applicant, this document "is not endorsed by any department and does not bear any date or the signature of its author" (p.10 Application). Moreover, the separate evaluation of evidence presents another version of the story, since it claims that REVAFOREAGE "gave about EUR 100,000 cash to your brother", which corresponds neither to the whistleblowing letter of 9 November 2009, which indicates a sum of EUR 22,000, nor to CHRM’s query of December 2009 which mentions the amount of EUR 20,000 paid to the brother and EUR 2,000 to the Applicant (Application page 14). Thus, for the Applicant, a fundamental document in the initiation of disciplinary proceedings which, contrary to the requirements of the adversarial principle, was not discussed by the Applicant during the disciplinary proceedings. The Applicant states that the disciplinary process was therefore vitiated by the procedural irregularities and substantive flaws.

91. On the formal aspects of the procedure, Staff Rule 102.05 titled "Time Limit for Disciplinary Proceedings" strictly regulates the disciplinary proceedings. With regard to the starting point of the procedure, paragraph (a) of this provision states: "Disciplinary proceedings shall be deemed to begin on the date the complaint against the staff member is transmitted to the Disciplinary Committee." The issue of time limit is governed by paragraph (b), which in turn stipulates that: "the Disciplinary Committee shall have thirty (30) days starting from the beginning of the disciplinary proceedings, to examine the matter and submit its report. The Vice-President may, in exceptional circumstances, extend this period by no more than thirty (30) days. If on the expiry of the prescribed period, no report has been submitted by the Disciplinary Committee, the disciplinary proceedings shall be deemed terminated and any interim measure imposed with regard to the staff member shall be reversed." Lastly, paragraph (c) governs the time limit within which the Vice-President may decide to impose or not to impose disciplinary measures. This paragraph states: "Within thirty (30) days of the submission of the Disciplinary Committee's report on any complaint submitted to it, the Vice-President shall decide whether or not to impose disciplinary measures. Disciplinary proceedings shall be considered closed when the Vice-President imposes or decides not to impose disciplinary measures following the submission of the Disciplinary Committee's report. If the Vice-President takes no decision within the prescribed thirty-day (30) period, the disciplinary proceedings shall be deemed terminated and any interim measure imposed on to the staff member shall be reversed."

92. The Tribunal agrees with the Bank that the starting point of the time limit is not, as claimed by the Applicant, 21 January 2011, but 7 February 2011, when the Disciplinary Committee was officially seized by memorandum of the CHRM Director pertaining to the charges levelled against the Applicant. Consequently, the first thirty-day time limit set under Staff Rule 102.05 expires on 9 March 2011. At the request of the Chairperson of the Disciplinary Committee and following an express decision by the Vice-President, this time limit was extended, pursuant to the same Rule. As such, the new time limit expired on 8 April 2011. Consequently, the report of the Disciplinary Committee forwarded to the Vice-President on 1 April 2011 was indeed sent within the time limit prescribed under the Staff Rules.

93. From 1 April 2011, the Vice-President again had a thirty-day time frame to take or not take a disciplinary measure, pursuant to Rule 102.05 (c) of the Staff Rules. This time limit expired on 2 May 2011. The notice by which the Vice-President rejected the recommendations of the Disciplinary Committee was indeed a decision not to take disciplinary measure in the sense mentioned above. This decision was taken on 29 April 2011, hence within the time limit set forth in the Staff Rules.

94. In connection with the violation of the right of defence and the adversarial principle, respect of the right of defence requires that the staff facing disciplinary procedure be heard and offered the possibility of defending his/her cause during both the investigations and in the course of the disciplinary procedure itself. Under these conditions, the adversarial principle requires that staff
should be in a position to discuss the entire documentary, testimonial and other evidence on the grounds of which he/she is facing disciplinary procedure.

95. The Tribunal notes that the Applicant was sufficiently heard in the course of the disciplinary procedure. Although the whistleblowing letter of 9 November 2009 and the IACD investigation report was not directly forwarded to him, the Applicant was able to have full and sufficient knowledge of the report in the course of investigations conducted by CHRM and during the hearing before the Disciplinary Committee.

VI. THE DECISION

96. For these reasons,

The Application is dismissed.

Professor Yahd BEN ACHOUR

President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

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