Judgment No. 129 of the Administrative Tribunal, delivered on 18 October 2019

I. FACTS AND PROCEDURE

1. The applicant was hired by the African Development Bank (respondent) on 3 August 2009 on a fixed-term contract of three (3) years as Senior Secretary at the GS6 level in the Operational Resources and Policies Department. The applicant’s employment contract specifically states:

“Your duty station for this post – Senior Secretary on Grade GS6 - will be the Bank’s Headquarters in Abidjan, Côte d’Ivoire. However, during the period of temporary relocation of the Bank’s activities, you will assume duty at the Temporary Relocation Agency (TRA) in Tunis, Tunisia. At the end of the Bank’s temporary relocation period and, depending on the Bank’s personnel requirements at that time, you may be proposed a transfer to the Bank’s Headquarters on equivalent terms and conditions to those applicable to GS category staff members recruited at the Headquarters.”

2. In May 2013, it was decided that the Bank would return to its Headquarters in Abidjan, Côte d’Ivoire. From December 2013, the respondent began the staggered process for the return of staff members from the Temporary Relocation Agency in Tunis to the Bank’s Headquarters in Abidjan.

3. By letter dated 27 August 2014, the applicant was notified that the date for her return to Headquarters was 1 August 2015. The applicant applied for the voluntary separation package set up by the respondent. On 21 July 2015, the applicant requested the cancellation of her request for voluntary separation, which request was accepted by the respondent. On 14 August 2015, the applicant was paid an amount of 26,726.77 euros to facilitate her relocation to Abidjan.

4. Due to a pregnancy, which she did not carry to term and a series of medical complications, the applicant’s move to Abidjan was postponed until 10 January 2016, at her request. This situation continued throughout 2016 and the first half of 2017, largely because of the applicant’s second pregnancy.

5. In On 17 March 2017, the applicant’s manager sent her the following e-mail:

“You already know that all colleagues whose duty station is Abidjan should be in place at the moment. In theory, you too should already be in place at HQ given that your maternity leave has ended. Unfortunately, there is nothing I can do whatsoever about altering the existing guidelines as a line manager.”
6. On 4 May 2017, the applicant’s manager once again sent a written reminder stressing the urgency of her return to Headquarters:

“I’ve been reminded that your duty station is Abidjan and that you should indeed already be here. I suggest that you do everything to ensure that is the case by the end of this month, latest. I am therefore asking M. to assist you in processing the logistics for your return as per existing guidelines.”

7. On 5 June 2017, the Human Resources Management Department sent the applicant the following e-mail:

“We have not received any information regarding your return dates. You were given up to the end of May 2017 to have relocated to your duty station (Abidjan). You have not given us any dates of your relocation and failure to report to your duty station by 10th of June 2017, will be deemed as abandonment of post, which may consequently lead to termination from the Bank’s services as indicated under Staff Rule 610.04 (a).”

8. The following day, on 6 June 2017, the Director of the Human Resources Management Department (Director) wrote the following message to the applicant:

“I am a bit concerned that confusion continues around your relocation to Abidjan which from my understanding should have taken place in May 2017. I am going to discuss with Doctor I. and your Manager to understand why you can’t report here earlier and if not possible what alternative solution we have as we can’t keep roles open for too long in critical departments like yours.”

9. On 8 June 2017, the applicant responded as follows:

“I am coming back to you to request your kind approval to allow me to move to Abidjan by 31 July 2017.”

10. The date proposed by the applicant of 31 July 2017 was not accepted by the Director. His response is contained in an email dated 8 June 2017 which reads:

“We can at best give you one more month as this process has dragged on for too long. Having met with the medical centre team, I am now convinced that you should have reported as earlier scheduled. Please arrange to report in Abidjan no later than 9th July 2017.”

11. On 9 June 2017, the respondent issued an instruction that the applicant’s date for assumption of duty in Abidjan was to be 10 July 2017. The applicant insisted on first receiving payment of the allowances and financial benefits linked to her return before joining her duty station in Abidjan. By two e-mails dated 5 July 2017 and 6 July 2017, the applicant told the respondent:

“I have agreed to assume duty under normal conditions on 10 July in Abidjan following my discussion with Mr. S. on 9 June 2017. It was promised that I would receive my transfer letter (I received it on 13 June 2017) and the funds.”

“I would like to emphasize that I am ready to come to HQ once I have duly received the repatriation funds mentioned.”
12. The applicant’s employment contract ended on 3 August 2017. On 22 August 2017, the respondent sent the applicant notification of the renewal of her employment contract for a period of three years.

13. On 5 December 2017, the applicant submitted a request for annual leave for the period 15 January to 23 February 2018 to her manager, who approved it. The relocation allowance was paid to the applicant on 14 December 2017. On 22 December 2017, the respondent notified the applicant that she was to assume duty in Abidjan on 15 January 2018.

14. On 15 January 2018, the day of her assumption of duty in Abidjan, the applicant was granted three days’ sick leave until 17 January 2018. This was followed by annual leave until 23 February 2018 and extended by administrative leave until 13 March 2018.

15. On 14 February 2018, the applicant informed her manager that due legal recourse taken by her husband, she was prevented from taking their child out of the country. On 21 February 2018, she sent a request to her manager seeking authorisation to work from Tunis for personal and family reasons connected to a legal dispute with her spouse concerning custody of their child. That same day, her manager rejected her request in the following terms:

“I am afraid that I cannot, yet again, support further postponement of your taking up your post here at the assigned duty station, I believe that we have been more than reasonable in accommodating your requests over the last two years .. the bulk of your tasks and work program requires that you are physically here with the team in FIRM1. This is why we have been using the services of short-term staff during the period which you were not able to take up your post in Abidjan.”

16. On 21 February 2018, the applicant wrote to the Director informing him of the personal and family reasons which, according to her, prevented her from resuming work at Headquarters on 15 March 2018 and she repeated her request to continue working from Tunis. The Director replied to this request by letter dated 23 March 2018 and stated:

“I regret to inform you that it will not be possible for you to work from Tunis as requested. Please be advised, therefore, that you are required to report for duty on Monday, April 23, 2018. I also notify you that the Bank will take action in line with the relevant Bank Staff rules should you fail to report for duty in Abidjan in Monday, April 23, 2018.”

17. On 30 March 2018, the applicant unsuccessfully challenged the decision of the Director. She filed a request for review with the acting Vice President of Human Resources, who also happened to be the Director. The applicant also contacted the Ethics Office which advised her to resume duty in Abidjan “to ensure that you will not be considered as having abandoned your post”.

18. On 30 March 2018, the applicant filed an appeal with the Staff Appeals Committee challenging the decision of the Director (appeal No. 263). The conclusions and recommendations of the Staff Appeals Committee dismissed her appeal.

19. In a letter dated 23 March 2018, the Director approved the applicant’s leave request from 26 March to 19 April 2018. On the leave expiry date, 19 April 2018, the applicant submitted a request for thirty days sick leave from 20 April 2018 prescribed by her doctor in Tunis. Thereafter, the applicant was granted further sick leave until 19 June 2018 in consequence of an eye operation. The applicant’s resumption of work date was set for 20 June 2018.
20. On 19 June 2018, the applicant submitted another medical certificate issued by her doctor for a further period of thirty days from 20 June 2018.

21. This request was rejected on 22 June 2018. The Bank’s Medical Advisor explained the reason for the rejection:

“As promised, I informed Dr. T. about your new request for 30 days sick leave from 20/6/2018. I am sorry to inform you that this certificate will not be approved by the [Medical Centre]. We discussed the reasons for this face to face.”

22. The applicant submitted another three-month sick leave request on 17 July 2018. On 6 August 2018, at the request of the respondent, she underwent a medical examination by a panel of external doctors to assess her state of health.

23. On 10 August 2018, the applicant was notified of the Staff Appeals Committee’s report. On 16 October 2018, she submitted another request for sick leave. On 25 October 2018, the applicant was notified of the decision of the President of the Bank (President) who approved the recommendation of the Staff Appeals Committee to terminate her contract on disciplinary grounds for abandonment of post. The next day, the conclusions of the panel of doctors were communicated to her.

24. On 12 November 2018, the applicant brought an application before this Tribunal for annulment of the decision of her dismissal for abandonment of post.

II. ARGUMENTS OF THE PARTIES

25. The applicant challenges the decision to dismiss her for abandonment of post. As an irregularity in the procedure, she claims that her dismissal was made by a non-competent authority. She submits that Staff Rule 610.04 was wrongly applied in her case.

26. The applicant contends that she did not abandon her post without valid reason or excuse and that she did not leave for 10 days without authorization or justification. She recalls that, in accordance with the rules, she submitted a request for extension of her sick leave from 20 June 2018, which remained unanswered by both the Director and the Medical Centre until 25 October 2018, the date of her dismissal.

27. The respondent maintains that the dismissal of the applicant was justified. It contests any irregularity in the dismissal procedure. It argues that the President has a wide discretion in respect of disciplinary decisions and that the oversight of the Tribunal is limited.

28. The respondent rejects the applicant’s argument that her absences were justified since they were preceded by the submission to the respondent of medical certificates prescribing periods of sick leave. It points out that certificates drawn up by doctors chosen by the applicant alone are not sufficient to justify a right to sick leave or to authorise absences and that their validity is subject to acceptance by the Bank in consultation with the Chief Medical Officer of the Medical Centre. The Medical Centre had indicated on 22 June 2018 that medical certificates from her doctor would no longer be approved.
The respondent argues that the conclusions of the panel of doctors who examined the applicant justify the position of the Bank not to approve the medical certificate presented on 20 June 2018.

III. REQUESTS OF THE PARTIES

30. The applicant requests that the Tribunal (i) declare that her dismissal for abandonment of post was invalid; (ii) direct that she be transferred to the Regional Development and Business Delivery Office for North Africa (RDGN) located in Tunis; (iii) direct that the Bank pay her salary and related benefits from the date of her dismissal, compensation for the inappropriate management of her case and moral damages. The respondent requests that the application and all claims made by the applicant be rejected.

IV. THE LAW

Decision taken by an incompetent authority

31. The applicant submits that the contested decision was taken by a body that lacks competence. She further submits that Rule 610.04 does not apply to her case as grounds for “abandonment of post” is a disciplinary measure. She goes on to say that in view of the disciplinary nature of the abandonment decision, it must be governed by the disciplinary measures provided for under the Staff Rules.

32. The applicant relies on Chapter 10 of the Staff Rules which provides, in relevant part,

“10.1 The President may impose disciplinary measures on staff members whose conduct is unsatisfactory or prejudicial to the interest of the Bank, or falls seriously short of the norms and standards established by the Bank. Such measures shall be imposed in conformity with the disciplinary process provided for in Regulation 10.2.

10.2 The President shall establish administrative machinery which, with staff participation, shall deal with disciplinary matters, but without prejudice to his powers to dismiss a staff member summarily without notice or benefits for serious misconduct.”

33. The applicant asserts that in her case a Disciplinary Committee should have been established to deal with the disciplinary measures to be taken against her, which was not done. She says the “abandonment of post” decision was taken by the Director who is not the competent authority to take such a decision. She argues that a Disciplinary Committee should have been established following the recommendations of the Staff Appeals Committee as the Disciplinary Committee is the only competent authority to take such a weighty decision like “abandonment of post” and who protects the rights of staff members. In these circumstances, she contends that the failure to establish a Disciplinary Committee constitutes an irregularity of procedure.

34. Should a Disciplinary Committee have been established by the Bank? The short answer is No. The decision contested by the applicant is subject to Rule 610.04 of the Staff Rules which stipulates that:

“(a) A staff member abandons his/her post when he/her fails without excuse acceptable to the Head of Department, to make himself/herself available to perform official duties. Unauthorised and unjustified absence from work for ten (10) consecutive working days shall be treated as abandonment of post.
Accordingly, the staff member’s appointment shall be deemed to have terminated.

(b) Notice of termination of a staff member’s employment as a result of his/her abandonment of post shall be given summarily and addressed to the staff member at his/her last known address.

(c) A staff member whose employment terminates by reason of his/her abandonment of post shall not be entitled to a termination benefit.”

35. This Tribunal has ruled that in cases of unauthorized absence of ten or more consecutive working days, the Bank is entitled to take the most severe disciplinary sanction, namely, summary termination of the contract, without resorting to the ordinary disciplinary mechanisms provided for in Chapter 10 of the Staff Rules.\(^1\) The decision being challenged by the applicant has the legal characterisation of a disciplinary measure aimed at sanctioning the applicant who, according to the respondent, did not fulfil her professional obligations.

36. The legal consequence flowing from this characterisation of the decision is that it will only be set aside by the Tribunal “if it was taken without authority or in breach of a rule of form or procedure, or if it was based on a mistake of fact or of law, or if it left essential facts out of account, or if it was tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts”\(^2\).

37. It follows that there is no merit in the contention that the dismissal decision was taken by an incompetent authority.

Sick Leave

38. Staff Rule 81.05 deal with the application and approval of sick leave and provides:

“(a) A staff member who is incapacitated from the performance of his/her duties by illness or injury shall be granted sick leave in accordance with the provisions of the present Rule.

(b) A staff member shall be granted aggregate sick leave of up to three (3) months on full salary and three (3) months on half salary in any given calendar year. However, a staff member on probation under Rule 64.03.(b)(ii) shall, during the probationary period, be entitled to half the aggregate sick leave under this Rule.

(c) The amount of aggregate sick leave that may be granted in any four (4) consecutive calendar years shall not exceed twelve (12) months: six (6) months on full salary and six (6) months on half salary.

(d) No staff member may be granted sick leave without producing a certificate from a duly registered medical practitioner to the effect that the staff member is unable to perform his/her duties and indicating the probable duration of the incapacity. The staff member shall ensure that his/her immediate supervisor is notified of his/her inability to attend to duty and that the Director is informed accordingly.

(e) Further sick leave may be refused or the unused portion withdrawn if the Director is satisfied, after consultation with the Chief Medical Doctor, that the staff member is fit to return to his/her duties.

(f) A staff member shall not, while on sick leave, leave the area of the duty station without prior authorisation of the Director.

\(^1\) N.K. v African Development Bank, Application No 2013/01 (Judgment No. 86 of 20 June 2014) paragraph 22.

\(^2\) In re LAKEY, Judgment No.475 of ILOAT.
(g) Entitlement to sick leave shall lapse on the date on which a staff member’s appointment ends.”

39. The applicant contends that her continued absence from work was justified as she had submitted medical certificates to the respondent. This contention is unfounded and must be rejected. Sick leave is not an automatic entitlement. It must be requested and approved in accordance with Rule 81.05. It is clear from this Rule that a medical certificate issued by any medical practitioner prescribing sick leave does not automatically suffice to entitle a staff member to sick leave nor to justify or authorise their absence from work.

40. The respondent, in terms of Staff Rule 81.05(e) reserves to itself the right to challenge the medical certificates submitted by a staff member. It may approve sick leave when it considers it justified. This is in fact what it has done since the applicant’s recruitment in June 2009. However, it may also reject and disapprove sick leave and this is exactly what it did in this matter, from 20 June 2018, when it notified the applicant in writing of the Medical Centre’s decision to not approve any further medical certificates issued by her doctor.

41. In order to circumvent the respondent’s decision not to approve her thirty days sick leave from 20 June 2018, the applicant, aware that her absence was no longer justified on medical grounds submitted a new request for annual leave for the same period from 20 June 2018 to 20 July 2018. This was also rejected by her manager.

42. In terms of an email dated 20 July 2018, the Director confirmed that the applicant’s absence from work since 20 June 2018 was not justified as her request for sick leave had not been approved. He also explained the reason why the medical certificate prescribing sick leave from 20 June 2018 had not been accepted. He wrote:

“We note that since this recent sick leave request was declined, you have not reported to work on June 20, 2018 after your previous approved sick leave. You also requested additional leave, which your manager has not approved due to the continued strain on the department operations.”

The email went on to request that she make herself available for examination by a panel of experts “for an evaluation of your medical situation and required care”.

43. The applicant alleges that all the medical certificates are at the Medical Centre. The respondent does not dispute that it received those documents but it does not accord them any probative value. On the contrary, the staff at the Medical Centre, in view of their medical expertise and familiarity with the applicant’s medical file, decided as from 20 June 2018 to reject these medical certificates. The applicant was informed of the decision not to approve her sick leave requests.

44. As mentioned, the applicant did not resume work on 20 June 2018 at Headquarters on expiry of her sick leave. Since her further sick leave request from 20 June 2018 was not approved, her absence from that date was no longer on medical grounds. This is so especially since the Medical Centre had informed her that medical certificates would not be approved.

45. It is indeed remarkable how the applicant was able to take advantage of all the opportunities available to her to cover her absence, which was clearly unjustifiable, from her duty station in Abidjan. On 20 June 2018, both the sick leave and annual leave requests were rejected by the respondent. The sick leave request was rejected on the ground that if the applicant was suffering from a psychiatric problem, such a problem could, according the evaluation carried out by the Medical Centre and accepted by the applicant, be treated locally in Abidjan. The request for
annual leave was rejected because of the respondent’s work-related demands and the strain on the Department of Operations caused by the applicant’s absence.

46. This unjustified absence paved the way for the respondent to take disciplinary measures against the applicant as provided for under the Bank’s Staff Rules. The applicant received a warning to that effect in a letter from the Director dated 17 May 2018 which ended as follows:

“You are expected to report to work on Monday, May 21, 2018 and the Bank will take the necessary disciplinary measures should you fail to comply with this instruction.”

47. The decision by the respondent not to approve the applicant’s sick leave request from 20 June 2018 was justified in light of the independent medical experts’ conclusion that she was fit to resume her professional activities. It follows that her absence form work since 20 June 2018 was unjustified.

48. The applicant challenges the medical reassessment carried out by the independent medical experts. This challenge is not sustainable in fact or law.

49. The applicant continued to produce medical certificates from her doctor, and to challenge the decision of the respondent not to approve her further leave requests. In order to settle the dispute, the respondent set up a panel of independent medical experts to examine the applicant and decide on her medical fitness to resume work. The panel concluded that the applicant was fit to resume her professional activities. This suggests that the rejection of the various medical certificates by the respondent was justified.

50. The only conclusion to be reached in this matter is that the application is ill-conceived. On a strict interpretation, the applicant can be said to have abandoned her post from 20 June 2018. The applicant has not shown that the respondent’s decision to dismiss her for abandonment of post was vitiated in form or substance. On the contrary, the respondent has established that its dismissal decision was based on a plethora of evidence, including the conclusions of a panel of independent medical experts and corroborated by the conclusions and recommendations of the Staff Appeals Committee which dismissed her appeal. The applicant’s sole objective was to avoid assuming duty in Abidjan.

51. The applicant also alleged that her case was mismanaged pointing to non-compliance with procedures and time limits. In particular, she alleged a conflict of interest on the part of the Director. There is, therefore, no merit in these claims. The respondent, recognising the possibility of a conflict of interest while the Director occupied the position of Vice President, advised that staff members could approach the Staff Appeals Committee directly without first seeking a review from the Vice President. She also sought to raise claims about the relocation allowance paid to her, the late renewal of the contract, the late approval of her performance assessments and the alleged failure by the Bank to pay her for the “good “and “very good” ratings she had received. These complaints are not properly before the Tribunal as the applicant has failed to exhaust internal procedures in relation to these claims. These claims are accordingly rejected.
V. **THE DECISION**

52. For these reasons, the application is dismissed.

Leona Valerie THERON President

Abdoukader DILEITA Executive Secretary

**THE APPLICANT**

A. O.

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