ADMINISTRATIVE TRIBUNAL OF THE AFRICAN DEVELOPMENT BANK

QUORUM : Justice Leona Valerie THERON President
Justice Benjamin Joses ODKI Vice-President
Justice Mathias EPULI ALOH Member
Professor Ahmed MAHIOU Member
Justice Cécile ISIDORO Member
Justice Abdul Gaddir KOROMA Member

APPLICATION No. 2019/04

B. B. T., applicant
African Development Bank, respondent

Judgment No. 135 of the Administrative Tribunal, delivered on 24 July 2020

I. FACTS

1. The applicant joined the African Development Bank (Bank) on 1st October 2007 as a Young Professional through the Young Professional Program. Between 2007 and 2015, he held several positions working in the Bank’s former Headquarters (HQ) in Tunis, the Field Office in Ethiopia and finally the Nigerian Field Office, where he spent four years as a Senior Energy Economist at PL5 Grade.

2. On 4th September 2015, the applicant applied for a one-year renewable leave of absence on non-active status. On 5th October 2015, the Acting Director, Corporate Human Resource Management (then CHRM and now CHHR), approved the applicant’s leave of absence on non-active status effective from 4th December 2015 to 3rd December 2016.

3. During his leave of absence, the applicant worked as the Chief Operating Officer of Solektra International, a solar energy company based in the United States of America.

4. On 12th September 2016, the CHHR Department contacted the applicant to inquire about his reinstatement into the Bank, upon expiry of his leave of absence on 3rd December 2016. By email dated 20th September 2016, the applicant responded that the Government of Guinea was in the process of preparing and submitting a secondment request for his services. On 25th November 2016, the Government of Guinea requested secondment arrangement with the applicant upon expiry of his leave of absence. On 29th November 2016, the Chief Human Resources Business Partner, CHHR, informed the applicant that he was not a staff member on payroll and as such a request from the Government of Guinea required the Bank to assign an employee on active status.

5. On the same date, the applicant requested by email the Director of CHHR to have a brief discussion regarding the secondment request from the Government of Guinea. The Director did not respond. On 16th December 2016, the applicant notified the Bank by email of his intention to be reinstated.

6. By letter dated 27th January 2017, the Director of CHHR informed the applicant of the Bank’s implementation of the new Business Model referred to as the Development Business and Delivery Model (DBDM), which was aimed at reorganization of the institution. The Director further informed the applicant that his position was deemed vacant and as such he was eligible to apply for vacant positions open to internal candidates.

7. On 3rd February 2017, the applicant applied for an extension of his leave on non-active status. By letter dated 8th February 2017, the Director of CHHR extended his period of absence on non-active status from
3rd February 2017 to 2nd May 2017. The Director also notified the applicant that if he was unable to find a suitable position by the end of 2nd May 2017, he would be separated from the Bank.

8. On 3rd July 2017, while waiting for feedback on his nine job applications, the applicant requested that the Bank extend his leave of absence for six months. He received no response. By letter dated 13th December 2017, the respondent notified the applicant of his separation from the service of the Bank effective 3rd May 2017, being the date, his non-active status expired.

9. On 28th March 2018, the applicant made a request for an administrative review to the Acting Vice-President, Human Resources and Corporate Services (CHVP). On 4th June 2018, his request was rejected.

10. On 28th June 2018, the applicant commenced an appeal before the Staff Appeals Committee (Committee). On 15th March 2019, the applicant received the Committee’s recommendations approved by the President, in which all of his claims were rejected. On 14th June 2019, the applicant filed an application with the Tribunal challenging termination of his employment.

II. ARGUMENTS OF THE PARTIES

Preliminary objection

11. The respondent argues that certain paragraphs in the application regarding discussions between the HR Director or HR office and the applicant should be struck out on the ground that they are new facts. The applicant submits that the paragraphs are not new because they were included in the letter dated 28th March 2018, which was transmitted to the VP, CHVP and also presented in the papers during the appeal before the Committee.

Case on Merit

12. The applicant contends that the respondent failed to reinstate him into its service after his non-active status (leave of absence) came to an end, and that the abolition of the applicant’s post was not in accordance with established procedure or carried out in a fair, transparent and non-discriminatory manner. The applicant further argues that the respondent did not make sufficient efforts to find alternative positions for him.

13. In response to these claims, the respondent submits that the applicant failed to prove with cogent and convincing evidence that the respondent failed to re-assign the applicant to a vacant post in the Bank. The respondent stated that as an institution, it is entitled to re-organize its structures and strategy, and in relation to the case at hand, such re-organization necessitated a change in focus that resulted in the creation of more specialized posts in many staff positions with many staff members being affected by the consequent abolition of posts (as recognized and permitted under the Staff Regulations and Staff Rules).

14. The respondent further contends that, in the context of the restructuring process and in carrying out its responsibility to assist affected staff members to find alternative positions, the respondent made reasonable efforts to assist the applicant reinstate into its service. This, the respondent contends, is evidenced by the discussions and communications that the applicant had with the Resources and Human Management Department (CHHR) between November 2016 and April 2017.

15. The respondent also argues that, as was done for all other Staff members, the applicant was encouraged to apply and compete for vacant internal positions that would be advertised during the first quarter of 2017 following the organizational restructuring. The respondent notes that the applicant applied for a total of nine (9) positions but was not successful in this competitive exercise. The respondent argues
that its default basis for staff selection is competitive as is required by Staff Regulation 6.2, which provides that:

“6.2.1 Without derogation from the provisions of Regulation 6.1, the selection of staff members shall be made on a competitive basis without distinction on the basis of race, regional grouping, gender, or linguistic, cultural or religious affiliation.”

16. The respondent submits that in light of the number of vacant positions that were available, its default competitive method of recruitment to fill positions was used and was intended to give all affected Staff members the greatest and most equal opportunity to find a new position either as a result of redundancy following the re-organization, or because they were, like the applicant, trying to be reinstated after a period of non-active status.

17. The respondent denies the applicant's assertion that it did not make an effort or take measures to reinstate him and points to its actions that included the following:

   a) Staff training on the writing of curricula vitae;
   b) Initial internal advertisements of all mapped positions followed by external advertisements;
   c) Shortlisting of candidates;
   d) Invitations to selected candidates for interviews;
   e) Interviews; and
   f) Constant updating of candidates on the outcome of their applications.

18. Addressing the applicant's claim that the respondent did not find the applicant an alternative position, the respondent submits that the obligation to assist a redundant staff member in identifying opportunities for reassignment, does not include an obligation that the endeavour “to reassign” a staff member must be successful or lead to a result that is satisfactory to the staff member concerned.

19. The applicant claims that he received no notice or warning whatsoever prior to the separation letter, nor was he given the chance to interview for any open positions or afforded any support for reinstatement of any kind by the Bank. As a result, the applicant avers that between the September 2016 email regarding his intention to reinstate after the end of his non-active status and the separation letter of 13th December 2017, he received only one email emanating directly from the Bank regarding his situation. The applicant therefore claims that as a staff member returning from leave he was denied institutional support in his efforts to return to the Bank, which was his right and that the respondent displayed a level of negligence and unprofessionalism that caused him and his family hardship.

20. Furthermore, the applicant contends that the respondent failed in its duty to endeavour to assign him to a suitable vacant position, which the respondent denies. In support of his claim, the applicant provided as evidence, the exchange of emails, as set out above, between himself and the Human Resources Department representatives, indicating his proactive efforts, including his availability and intention to take an open position for which he met the requirements, and his willingness to take a lower grade position if necessary.

III. RELIEF SOUGHT

21. The applicant requests that the Tribunal order the respondent to pay him his salary for a period of one year, from 4th December 2016 (date of his return for reinstatement) to 13th December 2017 (date of separation letter) and medical expenses for the same period. He also requests payment of all travel expenses, including his family’s move to Cote d’Ivoire, as well as rent and storage fees for the three-month period during which his family was in Abidjan. He seeks payment of moving expenses from the Nigeria Field Office back to HQ and payment of six months’ salary for failure to give prior notice before
Only the English text is authoritative

separation. He also seeks payment of all legal fees and expenses. He further requests economic and moral damages.

22. The respondent requests that the applicant’s claim be dismissed in its entirety as being unfounded and lacking merit.

IV. LAW

23. Regarding the Respondent’s preliminary objection, Article III(2)(i) of the Tribunal’s Statute states that the applicant is required to exhaust all other administrative review remedies available within the Bank except in cases where the applicant and the Bank have agreed to submit the application directly to the Tribunal.

24. The Tribunal is satisfied that the issues and facts raised in the relevant paragraphs of the application were adequately raised during the internal appeal proceedings and therefore should not be struck out.

25. There is no dispute between the parties that the applicant requested and was granted approval to be absent from the service of the respondent on the basis of non-active status.

26. The issues to be decided by the Tribunal in this case are:

   (1) Whether the respondent was in breach of its obligations under Staff Regulation 6.9.2.

   (2) Whether the respondent breached its obligation in respect of transparency during reinstatement process.

   (3) What relief should be granted to the parties.

Whether the respondent was in breach of its obligations under Staff Regulation 6.9.2

27. According to Staff Regulation 6.9.1, a staff member of the Bank may be placed in non-active status on three grounds: (i) health reasons, (ii) military service reasons and (iii) personal reasons. There is no dispute between the parties that the applicant was in non-active status for personal reasons approved by the respondent under Staff Regulation 6.9.1(iii) which provides that:

   “A staff member may be placed in non-active status:
   (iii) For a period of not more than two years for personal reasons approved by the President.”

28. A staff member placed on non-active status for personal reasons can only be reinstated into the Bank in accordance with Staff Regulation 6.9.2. which states as follows:

   “…. A staff member placed in non-active status under Regulations 6.9.1 (iii) may be reinstated subject to the availability of posts and to the conditions prescribed in Staff Rules.”

29. As the respondent stated, the applicant did not have a right to automatic re-entry into the service of the Bank and he may be reinstated subject to the availability of posts. The Tribunal in A.M.B v the African Development Bank interpreted Staff Regulation 6.9.2 as follows:

   “33. Analysis of this text reveals its specific structure. First of all, there must be a position available. In that case, the Bank “may” reinstate the staff member who has
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so requested. The operative word «may», is the source of the Bank's discretionary power in this regard.

34. However, this power must be narrowly circumscribed; it cannot be as broad as in the case of the recruitment of a candidate seeking a position within the Bank. A staff member on non–active status maintains his/her ties to the Bank. The term «non-active status», as defined in the English version of the Staff Rules, is therefore apt. Generally speaking, the Bank has the duty to protect its staff members, be they in active or non-active status (Staff Regulation 3.12). Therefore, the Bank must make every effort to reinstate a staff member whose period of non-active status is ending.”

30. According to A.M.B v the African Development Bank, a staff member placed on non-active status for personal reasons under Staff Regulation 6.9.2 can only be reinstated into the Bank if there are positions available for reinstatement. In reinstating such a staff member, the Bank exercises a narrow discretion; it cannot be as broad as in the case of the recruitment of a candidate seeking a position within the Bank.

31. The issue is whether positions were available for the applicant when he expressed his intentions by email dated 16 December 2016 that he should be reinstated.

32. On 27th January 2017, the Director of CHHR informed the applicant about the implementation of the Bank’s new Business Model referred to as the Development Business and Delivery Model (DBDM), which was aimed at reorganization of the institution. The extract of the letter stated as follows:

“... Although the position you held at the Bank prior for your placement on non-active status is deemed vacant and your reinstatement in the service of the Bank is contingent upon the availability of posts and you meeting the other conditions prescribed in the Staff Rules of the Bank, you are eligible to apply to vacant positions open to internal candidates.

You are therefore encouraged to participate in the competitive process for internal vacancies which will be advertised in the first quarter of 2017...”

33. The above-mentioned extract of the letter demonstrates that the position of Senior Energy Economist, which the applicant previously occupied was still vacant, and was open for competition and reinstatement.

34. The Tribunal finds that the Bank should have exercised a narrow discretion instead of a broad discretion when seeking to reinstate a staff member who was placed on non-active status. The Tribunal notes that the Bank by encouraging the applicant to compete for internal vacancies including his previous position of Senior Energy Economist, did not exercise its discretion appropriately. The Bank acted as if it was a case of the recruitment of a candidate seeking a position within the Bank.

35. The Tribunal finds that the actions taken by the respondent in discharging its duty regarding the application of Staff Regulation 6.9.2 were general and not specific in assisting the applicant to be reinstated to available posts taking into a consideration his qualifications.

36. The Tribunal therefore finds that the respondent breached Staff Regulation 6.9.1 (iii) as read with Staff Regulation 6.9.2 regarding a staff member placed on non-active status for personal reasons.

37. The Tribunal concludes from the above that:

(1) The applicant has a right to be reinstated into the Bank following his non-active status and leave of absence.

(2) The respondent did not fulfil its obligation to reinstate the applicant at the end of the period of non-active duty, taking into consideration his qualifications and subject to the availability of posts.

**Whether the respondent breached its obligation in respect of transparency during the reinstatement process**

38. The applicant has also raised the issue of lack of transparency during reinstatement process. In view of the fact that the Bank breached its obligation under Staff Regulation 6.9.1 (iii) as read with Staff Regulation 6.9.2, the Tribunal will not decide on issue of transparency. However, the Tribunal notes that the principle of transparency under recruitment is also applicable under reinstatement.

**What relief should be granted to the parties**

39. The applicant submits that he gave up other more rewarding opportunities to reinstate with the Bank. He states that he lost a year of fruitful employment while trying to reinstate into the Bank and therefore, reasonably expects as redress, for the violation by the Bank of its contractual terms and its negligence, unfair, moral and material damages suffered by his family. The applicant maintains that his material losses and obvious moral damages, for which respondent never showed the least concern for, are a consequence of respondent’s negligence and inappropriate managerial actions. He further claims that during his first three-month reinstatement, he paid for several trips at his own expense in a proactive effort to physically speak with Human Resource and other staff members. He also states that the Bank, for its part, did not make a single effort to contact him after his email of September 2016. He therefore claims that the continuously changing of reorganization process caused so much confusion and grief to his family and professional career.

40. The respondent argues that the applicant’s claim for redress for violation of his contractual terms, negligence, moral and material damages allegedly suffered by him and his family are not founded and have no legal basis. The respondent objects to the payment of salary for a period from 4 December 2016 (date of his return for reinstatement) to 13 December 2017 (date of separation letter). The respondent submits that in accordance with Staff Regulation 6.9.2, a staff member who is on non-active status, is not entitled to salary, leave, benefit or allowance during that period.

41. The Tribunal notes that:

1) The applicant lost a year of fruitful employment while trying to reinstate into the Bank. The applicant officially notified the Bank of his intention to be reinstated at the end of his leave absence. By a letter dated 13 December 2017, the Bank notified the applicant of his separation.

2) The applicant made proactive efforts to be reinstated but the Bank did not take his efforts into consideration. The applicant travelled from the United States to Abidjan to discuss with CHHR and he did not receive proper institutional support. On 29 November 2016, the Bank informed the applicant that his request for secondment arrangement with the government of Guinea was impossible because he was on non-active status with the Bank.

42. The Tribunal is of the view that the relationship between the Bank as an international organization and its staff members must be governed by good faith and a duty of care. The evidence shows that on his
return to the Bank for reinstatement, the respondent did not treat the applicant with the dignity and fairness owed to staff members. Therefore, in light of the above established irregularities and having regard to the circumstances of the case, the Tribunal considers it appropriate to award the applicant for damages suffered.

43. The applicant also submitted a claim for moving expenses from Nigeria Field Office to Abidjan HQ. The Tribunal is unable to sustain such a claim for want of documentary evidence regarding such transfer.

V. **DECISION**

44. For the reasons set out above, the Tribunal makes the following order:

1. The Bank shall pay the applicant his salary, benefits and allowances from 4 December 2016 to 13 December 2017.

2. The Bank shall reimburse the applicant for medical expenses incurred during the period of 4 December 2016 until 13 December 2017 subject to providing proof thereof.

3. The Bank shall pay the applicant three (3) months’ salary in lieu of notice.

4. The Bank shall compensate the applicant USD 15,000 for damages suffered.

5. The Bank shall pay the applicant an amount of USD 15,000 in respect of legal costs.

6. All other claims are rejected.

Justice Leona Valerie THERON President

Abdulkader DILEITA Executive Secretary

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