APPLICATION No. 2019/05

I. G., applicant
African Development Bank, respondent

Judgment No. 136 of the Administrative Tribunal, delivered on 24 July 2020

I. FACTS

1. Mrs. I. G. (the applicant) was recruited by the African Development Bank on 12 December 2007 and was assigned to the Protocol Division of SEGL Department where she worked for four years. Her initial contract was renewed for a two-year period from May 2014. In May 2016, her contract was renewed for a period of three years.

2. On 1 March 2017, the applicant received an official letter informing her that, following a review of all the posts in the approved structure, she had no post in the new organisational structure and she should apply for vacant posts. She was also informed that the Bank will endeavour to provide with every assistance. On 22 December 2017, she was informed of the respondent’s decision to terminate her contract for abolition of post. Her last day was on 15 January 2018.

3. On 28 February 2018, she submitted a request for administrative review of the decision to terminate her to the Vice-President of the Bank, which has remained unanswered. She appealed to the Staff Appeals Committee (Committee), which recommended that the respondent’s decision be upheld. The President approved the Committee’s recommendation in a decision dated 24 March 2019.

II. ARGUMENTS OF THE PARTIES

The applicant

4. The applicant submits that the letter of 22 December 2017 from the Director of the Human Resources Department terminating her service for abolition of post is unlawful, in that it violates Regulation 6.11.1(vii), 6.12.1, and 6.10.3 of the Staff Regulations and Rules 611.00(a) and (b), and 612.00(c) of the Staff Rules. The applicant considers that the lawfulness of the termination is subject to several conditions:

- it must be decided by the President of the Bank;
- it must be effected in strict compliance with the Rule under which it is being made as well as with Rules 612.00 to 6.10.3; and
- it must take into account the requirements of due process.

5. In addition, while it is within the President’s discretion to terminate the appointment of a staff member, before doing so, the President must comply with the obligation set out in paragraph (b) of Staff Rule 611.06, which provides that:
“The President shall endeavour to reassign the affected staff member to a vacant position in the Bank for which he/she possesses the necessary qualifications and competence.”

However, the Bank did nothing to reassign the applicant to such a position.

6. According to the applicant, the obligation that is binding on the President of the Bank is individual and specific. The endeavours of the President must be acts specifically aimed at individual staff members concerned by the abolition of their posts. Messages addressed to all staff members by CHHR on CV writing and assessment centres, the selection and recruitment process, the implementation of the new organizational structures, the presentation of the training on assessment centres and the invitation to the upcoming session for all staff members or on the training on assessment centres cannot replace individual attention.

7. Indeed, Rule 611.06(b) confers upon the President an obligation to reassign the affected staff member to a vacant position in the Bank for which he/she possesses the necessary qualifications and competence and not to have the staff member compete with other applicants for the same post. The Bank cannot claim that, by inviting the applicant for an interview for the recruitment of a Protocol Assistant on 11 March 2019, the President has fulfilled the obligation to endeavour to reassign the applicant. Moreover, the interview did not lead to an offer to the applicant of a new post at the Bank. The Bank is required to accord her preferential treatment by reassigning her to a similar position to the one she occupied, or even to a position on a lower grade, in accordance with established case law, in particular, that of the International Labour Organisation Administrative Tribunal (ILOAT).\(^1\)

8. The applicant also points out that the Bank assumed a discriminatory attitude towards her, in breach of the principle of equality governing the international civil service, by arguing that it found a solution for one of her colleagues to whom it offered a post.

9. Furthermore, the applicant asks the Tribunal to take note of the fact that the Bank failed to provide her with the report and recommendations of the Committee in her working language, which is French.

10. She submits that the excuse of restructuring and the alleged decision to abolish the post are misleading, as evidenced by the fact that the vacancy notice issued on 20 April 2018 by the Bank for the post of Protocol Clerk at grade GS6, the grade corresponding to the post which the applicant held before her termination. Even more serious is the fact that the Bank published a vacancy notice for a Principal Protocol and Events Management Officer to be assigned to Tunisia/South Africa, as well as Vacancy Notice No. ADB/18/18 for the recruitment of a Chief Protocol Officer to be assigned to Tunisia, which were both also filled. In addition to the failure to notify the decision to abolish the post or reorganize the Bank resulting in the abolition of the applicant’s post, the President made little attempt to reassign the applicant to a vacant post as required under paragraph (b) of Staff Rule 611.06.

11. The Bank did not observe the formality of notice required by Staff Regulations 6.12.1 and 6.12.3 and Staff Rule 612.00(c). This constitutes an aggravating factor and requires the annulment of the contested decision.

12. The material damage suffered by the applicant may be sub-divided into future loss and loss of earnings. Because of the failure to reassign her, the applicant was deprived of salaries, allowances, bonuses and benefits that she would have received during the remaining months of her contract. Had she retained her position until the end of her contract, and in light of her sound performance,

\(^1\) See N (No.2) v WHO, Judgment No. 4097 of ILOAT, Ms. M-J, C and others v CDE, Judgment No. 3238 of ILOAT and L (No.3) v ICC, Judgment No. 3908 of ILOAT.
acknowledged by the Bank, her contract would have been renewed at least for three years, like the contracts of many of her colleagues at the Bank.

13. As regards moral damages, it is appropriate to recall the disregard for the rules of procedure, negligence, laxity and delay in the handling of the case, thereby aggravating the applicant’s distress. For all these reasons, the applicant requests that the Bank pay her an amount of EUR 80,000. In respect of costs and expenses, the applicant is claiming reimbursement of medical and psychological assistance expenses in the amount of EUR 20,000.

The respondent

14. According to the respondent, the facts relating to this application are linked to the respondent’s reorganisation, in 2016 and 2017, of its structure and services, pursuant to the decisions adopted by its Board of Directors revising its Development and Business Delivery Model and aligning the assignment of its teams with the five top priorities (Hi-5s) of its Ten-Year Strategy. In this context, the respondent wrote to the applicant on 1 March 2017, officially informing her that, following a review of all the posts in the approved structure, she had no post in the new organisational structure. In the same letter, the Director of the Department of Human Resources Management informed the applicant:

“You are strongly advised to participate in the competitive process for vacant positions to be published internally... The Bank will endeavour to provide you with every assistance to that end.”

15. The respondent noted that the applicant had not succeeded in obtaining a post in the new organizational structure. Consequently, the respondent notified the applicant of the decision to terminate her on the basis that her post had been abolished, dated 22 December 2017, with an effective date of 16 January 2018, indicating the allowances and benefits in the event of termination of the employment contract.

16. The respondent submits that the obligation to reassign stipulated in Rule 611.06(b) of the Staff Rules corresponds to an obligation of means, meaning an obligation to deploy the best efforts and not an obligation to achieve results: that is, an obligation on the respondent to assign the applicant to another post. As described in authoritative case law on this issue:

“The Tribunal underscores the need for an international organization to endeavour to reassign a staff member whose post had been abolished to a suitable post commensurate with his or her qualifications and experience, before terminating his or her appointment. Although it is not stated how far the organization is required to endeavour to reassign such a staff member, the Tribunal is of the opinion that the organization itself must put in place necessary mechanisms to assist the staff member concerned in finding a new assignment.” (Judgment No. 97 delivered on 14 August 2017 by the Tribunal in the case of Arrah Bate v the African Development Bank).

17. The respondent established mechanisms to assist staff members by providing all staff members whose posts were affected by the restructuring exercise with the opportunity to attend training sessions organised by the Assessment Centre, to better prepare them for the recruitment process. It informed the Tribunal that over seven hundred (700) Bank staff members had participated in candidate training sessions. However, the applicant did not register and did not participate in any training session offered by the Assessment Centre even though, in accordance with Article 6.2.1 of the Bank’s Staff Regulations, staff members are recruited after a competitive process, in which the Bank invited her to participate.
18. The respondent claims that the applicant displayed a passive attitude characterised by a complete lack of diligence, as recalled by the Committee in its report. Under these conditions, evidenced by the applicant’s total inaction, the respondent cannot reasonably be accused of having failed to fulfil its obligation of means. In any event, and in accordance with the case law of international administrative tribunals (for example in Saberi v. IBRD\(^2\)) the respondent is not obliged to provide a new post for every employee threatened by termination for abolition of his/her post. The responsibility for finding a displaced staff member a new post is not solely incumbent on the respondent but the applicant must make an effort to secure a position for herself in the new organizational structure. In this case, the applicant made no effort.

19. Violation of the principle of equality, as alleged by the applicant, has neither been established nor proven. The principle of equal treatment is only applicable in identical situations and does not preclude differing treatment in the event of objectively different situations.

20. In response to the applicant’s allegation that the abolition of post of protocol Clerk at Tunis Office was fallacious, the respondent submits that restructuring is an evolving process that requires continuous adjustments and refinements. Accordingly, the publication of the vacancy notices does not give rise to a presumption that the respondent’s decision to abolish the post is unlawful.

21. The applicant maintains that the termination procedure was irregular, in that she was not notified of any decision to abolish her post and that the period of notice was not complied with. The applicant’s allegations are contradicted by her own documents she attached as annexes to the file. The decision clearly indicates that the termination of appointment is the result of the abolition of post and the relevant provisions of the Staff Rules are explicitly referred to. Long before the decision to terminate her dated 22 December 2017, the applicant was personally informed by letter from the Director of the Human Resources Management Department dated 1 March 2017 that the post of Protocol Clerk was affected by the restructuring and was not renewed in the respondent’s new organizational structure.

22. Regarding the notice period, the respondent submits that it fully complied with its obligation to pay salary in lieu of giving notice of termination for abolition of the position, which is six months’ salary. Pursuant to Rule 612.00(c) of the Staff Rules, when the Bank terminates the appointment of a staff member, the latter shall be entitled to not less than six months’ notice or payment of salary, which was done in this case. The applicant claims that the Bank should be ordered to pay her compensation for losses suffered, lost profits, damages for pain and suffering, medical expenses and costs of proceedings before the Committee and the Tribunal. The respondent states that it objects to each of the claims for compensation put forward by the applicant. These claims for compensation are formulated in a lump sum and on a random basis. The applicant has not provided any proof of damage, an unlawful act committed by the respondent and a causal link between the unlawful act and the damage suffered.

23. The contested decision cannot have caused harm to the applicant, insofar as it is lawful and was declared as such by the Committee, which rejected all the pleas of illegality submitted to it by the applicant. The same applies to the claim for compensation for what the applicant describes as “losses suffered” and which she alleges corresponds to the months’ salary and allowances she would have received between the effective date of the decision to terminate her and the date of expiry of her contract.

24. The applicant claims, by way of “lost earnings”, compensation for the loss of the opportunity to have her contract renewed for a further period of three years. This claim is unrealistic. The applicant’s fixed-term contract is exactly as stated i.e. a contract for a set period with no tacit renewal right (Rule 64.01(b) and (c) of the Staff Rules). The fact that the respondent terminated

\(^2\) Decision No. 5 of WBAT.
this fixed-term contract prior to its expiration does not give the applicant any contractual right to renewal (Judgment No. 85 of the Administrative Tribunal of the African Development Bank delivered on 12 November 2013, pages 9-10, paragraphs 41-43 and 52-53).

25. There is no basis for the request for compensation for moral damages, because the applicant did not present any evidence or analyses demonstrating any bias, malice or bad faith on the part of the respondent in the restructuring process, or in the grounds for the decision of termination.

III. RELIEF SOUGHT

26. The applicant requests the Tribunal to:

1) Declare null and void the disputed decision taken by the Director of CHHR on 22 December 2017 not to renew the applicant’s contract on the ground that the post had been abolished;

2) Order the Bank to pay the applicant the following amounts:
   - EUR 25,581 for losses suffered representing two years’ salary;
   - EUR 57,557.98 for loss of earnings;
   - EUR 40,000 for moral damages;
   - EUR 20,000 for medical expenses and psychological assistance; and
   - EUR 15,000 for legal fees;

3) Pay the retirement pension to which she is entitled under the Staff Rules;

4) Reimburse her medical expenses and the costs of proceedings before the Committee and the Tribunal;

27. The respondent requests the Tribunal to:

i) Reject application No. 2019/05 requesting the annulment of the decision to terminate the applicant for abolition of post, dated 22 December 2017; and

ii) Also, reject all other claims, conclusions and requests for compensation from the applicant.

IV. LAW

28. The applicant submits a number of complaints for the consideration of the Tribunal. For obvious reasons that will be set out in this judgment, it will not be necessary for the Tribunal to decide on each grievance raised in order to reach a decision on this case.

29. The decisive issue in the Tribunal’s view is whether the Bank acted in accordance with Staff Rule 611.06(b), which provides for the Bank’s obligations as follows:

“Before an appointment is terminated under this Rule, the President shall, however, endeavour to reassign the affected staff member to a vacant position in the Bank for which he/she possesses the necessary qualifications and competence.”

30. It should be emphasised that the Tribunal cannot substitute its judgment for that of the Bank as regards the desirability of a restructuring process and the decisions taken in this matter are at the discretion of the organisation, provided that it does not use it for improper purposes. Such decisions can only be subject to limited review and annulled if they violate a formal or procedural rule, are based on an error of fact or law, or if essential elements have not been taken into account, if manifestly erroneous conclusions have been drawn from the documents on file, or if the decisions were taken by an incompetent body. In other words, the abolition of a position or the termination of an employee’s contract must be justified by objective reasons and cannot be aimed, in particular, at removing an employee considered undesirable.
31. It is, therefore, necessary to review the measures taken by the Bank to determine whether they meet the provisions of the aforementioned Rule 611.06(b).

32. The Tribunal notes that the respondent essentially presents four actions as constituting its reasonable efforts and complying with the requirement of Rule 611.06(b) of the Staff Rules relating to the applicant's reassignment. These documents should be examined and their relevance in this case assessed. This comprises communication by means of emails from the Human Resources Management Department with different purposes and recipients. These are respectively:

- An email dated Tuesday, 8 November 2016, intended for staff in the Professional category (PL), the subject line of which indicates "Training on Assessment Centres", by which the respondent informs staff that it has set up, following the adoption of the DBDM, information sessions on the new recruitment process by setting up assessment centres to supplement the traditional competency-based interviews and invites all members of staff to register for the training modules.

- An email dated Friday, 2 December 2016, addressed to all staff and elected officers, concerning the "presentation of the training on assessment centres and forthcoming sessions for all staff members

- An email dated Tuesday, 6 December 2016, addressed to all Staff. This email also makes explicit reference to the implementation of the DBDM and invites all staff to information workshops on CV writing and training modules on the new Assessment Centres;

- An email dated 4 February 2017 sent to all staff to inform them that the Human Resources Department had set up training sessions for potential panellists and evaluators who may participate in the evaluation of candidates in future recruitments.

33. The Tribunal has had occasion, in a previous judgment (Judgment No. 97 of 11 May 2006, B. M. v African Development Bank) to consider this issue. There this Tribunal explained the obligation on the Bank in the following terms:

"...obligation of means meaning an obligation to deploy the best efforts and not an obligation to achieve results meaning an obligation for the respondent to assign the applicant to another post."

34. In Judgment 97 of 14 August 2017, Arrah Bate v the African Development Bank, this Tribunal was called upon to consider whether the respondent had endeavoured to reassign the applicant to any vacant post for which she possessed the necessary qualifications and competence. In this regard, the Tribunal opined:

"The Tribunal underscores the need for an international organization to endeavour to reassign a staff member whose post had been abolished to a suitable post commensurate with his or her qualifications and experience, before terminating his or her appointment. Although it is not stated how far the organization is required to endeavour to reassign such a staff member, the Tribunal is of the opinion that the organization itself must put in place necessary mechanisms to assist the staff member concerned in finding a new assignment."
The Tribunal went on to note that this principle is established by international administrative tribunals. In that matter, the Tribunal was satisfied that:

“...sufficient efforts were made by the respondent to reassign the applicant to a vacant post commensurate with her qualifications and competence. The respondent advised the applicant to apply for two positions which she did, but her applications were unsuccessful. The applicant could not be assigned to other vacant posts because she lacked the necessary qualifications and competence. The respondent also extended the deadline for reassigning the applicant to a vacant position for two months, but still the respondent was unable to find a suitable post for the applicant, resulting on her separation from the Bank.”

It emerges clearly from the jurisprudence of international administrative tribunals that international organizations must make genuine, serious, and pro-active efforts to reassign staff members whose positions have been abolished. The institution does not have an obligation to ensure the success of such efforts.

The Tribunal concludes that an international organization is under an obligation to do more than the respondent did in the present case. The evidence does not show that the Bank made real, serious and proactive efforts to reassign the applicant.

The Tribunal finds that the respondent did not behave in an appropriate manner after abolishing the applicant’s position. It was not disputed that the Bank advertised vacant positions similar to her allegedly abolished post, and then invited her to apply for the said positions. 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 the abolition of post, the respondent did not treat the applicant with the dignity and fairness owed to staff members. Therefore, in light of these irregularities and having regard to the circumstances of the case, the Tribunal considers it appropriate to award the applicant for damages suffered.

It was mentioned earlier that the applicant had raised a number of issues for this Tribunal to consider. The finding on the Bank’s failure to comply with Staff Rule 611.06(b) is dispositive of this matter. It is thus not necessary for this Tribunal to make a pronouncement on the remaining issues raised by the applicant, namely, the competence of the authority who made the decision to terminate her services, whether the abolition of the applicant’s post was justified in law, whether the Bank should have recruited internally before opening up the vacant positions for external competition and whether the Bank adhered to the necessary due process requirements.

However, with regard to the problem of language raised by the applicant, the Tribunal notes that the Bank is a bilingual international organisation and that one of the requirements of the rights of the defence is that the documents submitted by the Bank must be in the working language of the concerned staff member.

It is now necessary to determine the consequences that the Tribunal draws, in particular with regard to financial reparations, from these findings.

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3 The Tribunal referred to P-M (No. 2) v WHO, Judgment No. 3688 of ILOAT which was approved by this Tribunal in M. B. v African Development Bank, Application No. 2004/07 (Judgment No. 47 of 11 May 2006) and K. K. v African Development Bank, Application No. 2004/10 (Judgment No. 48 of 11 May 2006)

V. DECISION

42. The Bank is ordered to pay the applicant:

1) The salary, allowances and benefits the applicant would have received for the period from 16 January 2018 until her contract would have come to an end;
2) Reimbursement of medical and psychological expenses, for the period from 16 January 2018 until her contract would have come to an end, upon presentation of supporting documents;
3) EUR 5000 for prejudice suffered;
4) Legal fees in the amount of EUR 5000.
5) All other claims are rejected.

Leona Valerie THERON               President

Abdoulkader DILEITA                Executive Secretary

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