



World Bank Administrative Tribunal

2010

No. 427

**BC,
Applicant**

v.

**International Finance Corporation,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**BC,
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session with the participation of Jan Paulsson, President, and Judges Florentino P. Feliciano, Stephen M. Schwebel, Francis M. Ssekandi and Mónica Pinto. The Application was received on 26 June 2009 (postmarked 24 June 2009). The Applicant's request for anonymity was granted on 21 July 2009.
2. The Applicant seeks compensation for a flawed and improper investigation of charges of misconduct by the Bank's Department of Institutional Integrity ("INT") which ultimately exonerated him.

FACTUAL BACKGROUND

3. The Applicant joined the Legal Department ("CLED") of the International Finance Corporation ("IFC") in 1997 as an Attorney (Grade 23). He worked with CLED for more than ten years and during this period received promotions steadily. He ultimately became the Deputy General Counsel (Level I) in August 2005, and held that position until his retirement on 1 August 2008.
4. In October 2006 INT commenced investigations of four CLED managers, including the Applicant, under Staff Rule 8.01 (*see BB*, Decision No. 426 [2009]). INT explained the basis of the investigation of the Applicant as follows:

This investigation was predicated upon INT's receipt of, and preliminary inquiry into, complaints from CLED staff and through anonymous letters

written to the Bank's President in August 2005 alleging, among other matters, that: CLED senior managers have engaged in long-standing discriminatory hiring practices and conflicts of interest through CLED's hiring of outside counsel through its "relationship counsel" program with law firms. In addition, complainants alleged that CLED managers failed to resolve conflicts of interest arising from sexual relationships between senior attorneys and subordinate staff that created an alleged hostile work environment through favoritism and discrimination in CLED recruitment and promotion practices.

5. INT served the Applicant a Notice of Alleged Misconduct dated 17 October 2006

alleging that:

1. Starting in or around 2003, [the Applicant] created and thereafter failed to resolve promptly a *de facto* conflict of interest arising out of the sexual relationship between himself (a CLED manager/supervisor) and a subordinate, [Ms. B]; [Allegation One]

2. [The Applicant] created a hostile work environment in the conduct of a sexual relationship between himself (a CLED manager/supervisor) and a subordinate, [Ms. B]; [Allegation Two]

3. [The Applicant] failed to resolve adequately and promptly a conflict of interest arising out of the sexual relationship of a CLED manager/supervisor [Mr. C] and a subordinate, [Ms. D]; [Allegation Three] and

4. Because of a complaint to the Ombudsman by a staff member in the IFC Legal Department (CLED), [the Applicant] retaliated against that staff member by adversely changing the staff member's annual performance evaluation. [Allegation Four]

6. INT concluded its fact-finding and the draft report of the Applicant's investigation in March 2007. The Applicant received INT's Draft Final Report ("First Draft Report") on 17 December 2007. In this First Draft Report, INT concluded that its investigation disclosed "reasonably sufficient evidence" in support of all the allegations stated in the Notice of Alleged Misconduct except Allegation Two. With respect to Allegation Two, INT concluded that: "The investigation did not disclose reasonably sufficient evidence that

[the Applicant] created a hostile work environment in the conduct of the relationship between himself and [Ms. B].”

7. In February 2008 the Applicant provided his comments on the First Draft Report. On 12 June 2008 he received a Revised Draft Final Report (“Revised Draft Report”) from INT. In this Revised Draft Report, INT changed its conclusions in one respect. It concluded that the investigation did not disclose reasonably sufficient evidence in support of Allegation Four. In other words, in this Revised Draft Report, INT concluded that it found reasonably sufficient evidence in support of Allegations One and Three only, and not so with respect to Allegations Two and Four.

8. In July 2008 the Applicant provided his comments on the Revised Draft Report. On 20 August 2008 INT issued its Final Report of Investigation (“First Final Report”) reaching the same conclusions as the Revised Draft Report.

9. INT subsequently amended its First Final Report and on 22 October 2008 issued the “Final Report of Investigation (Amended)” (“Amended Final Report”). In this Amended Final Report INT exonerated the Applicant on all counts, i.e., with respect to Allegations One and Three as well.

10. After reviewing the Amended Final Report, the Vice President of Human Resources (“HRSVP”) informed the Applicant by a letter dated 8 January 2009 that: “I have concluded that no misconduct occurred. There will be no record of this matter in your personnel file.”

11. Though ultimately exonerated from all the allegations, the Applicant remained unhappy with the investigation. After obtaining consent from the Respondent, he filed this

Application directly with the Tribunal. It was postmarked 24 June 2009, and was received on 26 June 2009. He states that he is challenging INT's conduct

including, not acting within its jurisdiction, acting with bias against the [Applicant] and carrying out the investigation in an untimely manner, all of which were in breach of [the Applicant's] contract of employment with the World Bank Group and caused damage to [him] and his family.

He specifies however that he "does not challenge the decision to conduct a preliminary inquiry or an investigation."

12. As relief, the Applicant requests the following: (i) compensation equivalent to 18 months' salary; (ii) an order from the Tribunal directing the Respondent to "discreetly inform those involved in [the Applicant's] investigation of [HRSVP's] decision of January 8, 2009"; and (iii) legal costs incurred during the investigation and for filing this Application.

13. The Respondent received a copy of the Application on 10 July 2009 and raised preliminary objections on 31 July 2009. By order dated 10 September 2009 the President of the Tribunal decided to join the Respondent's preliminary objections to the merits.

SUMMARY OF THE PARTIES' CONTENTIONS ON THE PRELIMINARY OBJECTIONS

14. The Respondent contends that the Application is inadmissible on the following grounds. First, the Application is untimely under Rule 7(8) of the Tribunal's Rules. Second, it is also untimely under Article II(2) of the Tribunal's Statute. Third, the Application fails to state a claim for relief that the Tribunal may address. Finally, the Application names IFC, the wrong party, as Respondent.

15. The Applicant submits that the Tribunal can accept the Application under Rule 31 of its Rules. The 120-day time limit specified in Article II(2) of the Tribunal's Statute is

inapplicable. The Applicant has alleged violations of his rights during the investigation and his claims can therefore be addressed by the Tribunal. IFC is the Applicant's employer and as such is the proper Respondent.

SUMMARY OF THE PARTIES' CONTENTIONS ON THE MERITS

16. The Applicant's main contentions are as follows: (i) INT attempted to apply U.S. whistleblower law and U.S. domestic law to reverse the onus of proof; (ii) INT improperly created a legal concept of *de facto* Deputy General Counsel; (iii) INT improperly challenged the decision-making authority of the management of CLED; (iv) INT ignored exculpatory evidence; and (v) INT failed to conduct the investigation in a timely manner.

17. The Respondent's main contentions are as follows: (i) INT conducted a good faith investigation; (ii) it took corrective measures after considering the Applicant's comments on the draft reports; (iii) INT gave proper consideration to exculpatory evidence; and (iv) the Applicant's complex investigation was linked with three other similarly complex investigations and INT needed the time to give proper consideration to all the matters involved.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

THE PRELIMINARY OBJECTIONS

Compliance with Rule 7(8) of the Tribunal's Rules

18. Rule 7(8) of the Tribunal's Rules provides that:

Where the President of the respondent institution and the applicant have agreed to submit the application directly to the Tribunal in accordance with the option given to them under Article II, paragraph 2(i), of the Statute, the filing shall take place within ninety days of the date on which the President of the respondent institution notifies the applicant of agreement for direct submission. In all other cases, the filing shall take place within the time limits prescribed by Article II, paragraph 2(ii), of the Statute and by Rule 24.

19. On 24 March 2009 the Applicant wrote to David Rivero, Chief Counsel, Corporate Administration, Legal Vice Presidency, requesting that “the World Bank and IFC agree to my appealing the decision of the VP HR dated January 8, 2009 directly to the Administrative Tribunal and bypassing any appeal to the Appeals Committee.”

20. The Respondent agreed and on 25 March 2009 Mr. Rivero wrote to the Applicant stating:

I wish to inform you that the World Bank and IFC Management have agreed to your request, and you may proceed directly to the Administrative Tribunal provided that your application is properly cognizable by the Administrative Tribunal and otherwise meets the filing requirements of the Administrative Tribunal’s Statute and Rules of Procedure including those relating to timeliness. The World Bank and IFC assent to your request but do so without prejudice to any defenses available to the Institutions other than a defense relating to failure to exhaust prior remedies.

21. The Respondent states that the Applicant received notice of its agreement on 25 March 2009 and his Application accordingly was due within 90 days from 25 March, i.e., on 23 June 2009. His Application was postmarked 24 June 2009; thus it was late by one day, failing to comply with Rule 7(8). The Respondent points out that the Tribunal has stated before that time limits are of a mandatory nature and should be strictly enforced (*Yousufzi*, Decision No. 151 [1996]).

22. The Respondent contends that the Applicant has failed to present any facts that would excuse his late filing. It argues that this is not an exceptional case – the Applicant is an attorney, and he has engaged a law firm on his behalf. Nor was there any hardship to the Applicant that prevented timely filing – he is not based in an inaccessible location, making communication difficult. In addition, the Respondent contends that, contrary to the Applicant’s assertion, “there is indeed prejudice to the Bank if it is forced to defend

against Applicant's arguments, even where they were untimely filed. This 'prejudice' is unfair here, where Respondent did nothing to contribute to the late filing." Finally, the Respondent notes that the Applicant wants an exception to the 90-day limit because of his "honest but mistaken belief," but it can be argued that INT's initial drafts of the investigations have been written with the "honest but [ultimately] mistaken belief" that there were sufficient facts to allow a conclusion of wrongdoing. INT corrected these early drafts in the Amended Final Report, but receives no credit for this from the Applicant. Nowhere is the Applicant as charitable with INT as he expects the Tribunal to be towards him.

23. The Applicant states that the mailing of the Application on 24 June 2009, rather than 23 June, was due to an "honest but mistaken belief" that the 90-day period expired on 25 June by calculating three months rather than 90 days from Mr. Rivero's 25 March letter. Prior to 23 June 2009 the Applicant had announced his intention to file an application and this was acknowledged by representatives of the Respondent, the World Bank and the Tribunal. Accordingly, notice was given within the time frame called for in the Rules. If the Tribunal finds that the Application is in default of the time limit, the Applicant then requests a one-day modification of the time limit under Rule 31 of the Tribunal's Rules. The Tribunal can excuse the delay using its discretionary power as articulated in *Yousufzi*, Decision No. 151 [1996]. Here, there has been no prejudice to the Respondent. Indeed it would be the Applicant who would be definitively prejudiced if this matter is dismissed on a technical ground.

24. The Tribunal notes that no dispute exists regarding that the Applicant received notice of the Respondent's agreement to his request for direct filing on 25 March 2009.

His Application was thus due on 23 June 2009. It is also undisputed that under the Tribunal's practice the date of the postmark is considered the date of filing; accordingly, the Application was deemed to be filed on 24 June 2009. Thus, the Application was filed one day late resulting in non-compliance with Rule 7(8) of the Tribunal's Rules. The question is whether this delay of one day is excusable.

25. The Tribunal has emphasized that an applicant must comply with the time requirements prescribed by the Tribunal's Statute and Rules. The Tribunal's Statute and its jurisprudence excuse a delay if an applicant can demonstrate "exceptional circumstances" for his or her failure to comply with time requirements. Neither the Statute nor the Tribunal's jurisprudence, however, provides a complete list of the factors to be considered by the Tribunal in determining whether exceptional circumstances exist in a given case. In *Yousufzi*, Decision No. 151 [1996], para. 28, the Tribunal stated that:

Such circumstances are determined by the Tribunal from case to case on the basis of the particular facts of each case. In deciding that exceptional circumstances exist the Tribunal takes into account several factors, including, but not limited to, the extent of the delay and the nature of the excuse invoked by the Applicant.

Thus under the Tribunal's jurisprudence, "the extent of the delay" and "the nature of the excuse" are two relevant factors in determining whether exceptional circumstances exist.

26. The first factor, "the extent of the delay," favors the Applicant because he was late by just one day.

27. The second factor, "the nature of the excuse," apparently does not favor the Applicant. Rule 7(8) states that "the filing shall take place within ninety days of the date on which the President of the respondent institution notifies the applicant of agreement for direct submission." The 90-day limit is clearly stated; the Rule does not refer to "three

months.” The Applicant is a senior attorney who worked in the headquarters of IFC for more than ten years and retired as the Deputy General Counsel of CLED (Level I). He is familiar with the Tribunal’s Statute and Rules as he sought the Respondent’s agreement for direct filing under them. Moreover, he is represented before the Tribunal by a law firm. If he misread or misunderstood the Rules or was unaware of the difference between 90 days and three months, the Tribunal would be justified in concluding that he must bear the consequences.

28. At the same time, this is not a case where the Applicant ignored the Tribunal’s Statute and Rules. He honestly but erroneously believed that he was in compliance, and as a result of this error, missed the actual deadline by just one day. This one-day delay can be considered *de minimis*. Moreover, well before the filing deadline, he did call the Tribunal’s Secretariat to ask various other questions relating to the proper filing of his Application. The Tribunal finds that there is no evidence here to suggest that the Applicant was lax in the handling of the case (*Guya*, Decision 174 [1997], para. 11). Given these circumstances, the Tribunal rejects this preliminary objection.

Compliance with Article II(2) of the Tribunal’s Statute

29. Article II(2) of the Tribunal’s Statute states that:

No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

- (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and
- (ii) the application is filed within one hundred and twenty days after the latest of the following:

- (a) the occurrence of the event giving rise to the application;
- (b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or
- (c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice.

30. To satisfy Article II(2)(ii), the Respondent contends that the Applicant would have had to file the Application within 120 days after the latest of the events giving rise to the Application. Here, the “occurrence of the events giving rise” to the Application occurred no later than 8 January 2009. Counting 120 days from 8 January results in a filing deadline no later than 8 May 2009. The Applicant missed the deadline when he submitted his Application on 24 June 2009.

31. The Tribunal rejected similar arguments by the Bank in *BB*, Decision No. 426 [2009], paras. 45-48, concluding that the time requirements set out in Rule 7(8) govern when parties agree to come directly to the Tribunal. Accordingly, the Tribunal also rejects this preliminary objection.

Failure to state a claim for relief that the Tribunal may address

32. The Respondent states that not all employee claims are proper subjects of an application. An application should be based on specific breaches of the applicant’s contractual or employment rights. Only if such a specific breach is alleged can the Tribunal provide redress. Here the Applicant was not disciplined and his employment was not terminated, so there is no adverse employment action that he seeks to reverse. INT did not take any action that violated his due process rights. Whatever objections he had

against the INT reports, INT responded to them and ultimately exonerated him. Therefore, there is no need for the Applicant to restate his winning arguments before the Tribunal. The Applicant seeks the attorney's fees he incurred in defending himself before INT. But, the Respondent argues, he has no contractual right to such reimbursement.

33. The Applicant responds that he alleges specific breaches of the Staff Rules, in particular Principle 2 of the Principles of Staff Employment and Staff Rule 8.01. As such the Application has sound jurisdictional foundation.

34. The Tribunal, in dismissing similar arguments made by the Bank in *BB*, Decision No. 426 [2009], paras. 54-55, stated that:

The Tribunal has consistently assumed jurisdiction over claims concerning allegations of unfairness, abuse, or even carelessness in decisions taken during the conduct of a preliminary inquiry and an investigation, even when such investigative processes did not result in findings of misconduct. (*See G*, Decision No. 340 [2005], para. 2; *I*, Decision No. 343 [2005], paras. 17-19; *N*, Decision No. 356 [2006], paras. 18-23 and 32.)

As a former staff member of the Bank Group, the Applicant has standing to present an application to the Tribunal and has made a claim based on an alleged violation of her contract of employment and terms of appointment. She claims that HRSVP's decision and the underlying INT investigation violated Principles of Staff Employment 2.1 and 9.1, due process and other staff rights. The Tribunal finds that, on the basis of Article II of its Statute and its well-established jurisprudence recalled above, it has jurisdiction to examine the Applicant's claim on the merits.

35. Here the Applicant, like the applicant in *BB*, claims that INT improperly conducted the investigation, was biased against him, and took an unnecessarily long period to conclude the investigation. In so doing the Applicant claims that the Respondent violated his rights under the Staff Rules. These contentions are within the subject-matter jurisdiction of the Tribunal. The discussion whether there has been a breach of the Applicant's rights pertains to the merits. Accordingly, the Tribunal shall examine these

claims on the merits as it has previously held that “[i]t would be premature and improper for the Tribunal, by declaring this application inadmissible on the ground of jurisdiction *ratione materiae*, to deprive the Applicant of an opportunity to make his case.” (*McKinney*, Decision No. 183 [1997], para. 17.)

Choice of IFC as Respondent

36. The Respondent argues that the Applicant’s choice of IFC as the Respondent requires dismissal of his Application. The Applicant does not allege that IFC, the only Respondent, committed any wrongful acts or omissions against him. IFC did not cause any of the harm alleged by the Applicant. The alleged harm, according to his own Application, comes solely from INT and the Human Resources department (“HR”) of the World Bank, and those entities are not before the Tribunal. INT and HR of the World Bank are not controlled by IFC. There is therefore no basis upon which the Tribunal could enter a judgment against IFC, let alone punish IFC by ordering it to pay damages to the Applicant. The Applicant’s claims against IFC should be dismissed.

37. The Applicant responds that the named Respondent, IFC, was his employer and is ultimately responsible for ensuring that all aspects of his contract are observed, even when it chooses to perform some aspects of that contract, such as investigation of misconduct, through a related Bank Group agency, and outside consultants and law firms. Moreover, the President of the World Bank Group serves as IFC’s President. INT in carrying out its duties was directly responsible to the President of IFC, the Respondent here.

38. The Tribunal finds that the Applicant has taken a reasonable course of action by naming IFC as the Respondent. No Bank rules required him to name other entities of the World Bank Group as the Respondent. His contract of employment, which is the basis of

Tribunal's jurisdiction over him *ratione materiae* and *ratione personae*, is with IFC. It is not in dispute that IFC employs INT to provide certain services. The Tribunal finds that IFC is responsible for the observance of all aspects of the Applicant's contract of employment, even when performed by a related Bank Group agency. It is not unreasonable for the Applicant to name his employer as the Respondent in respect of his employment-related claims.

MERITS

39. The Tribunal has held that in disciplinary matters its review is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and circumstances of the case. (*See, e.g., Cissé*, Decision No. 242 [2001], para. 26.) Concerning its review of the investigative process, the Tribunal found in *K*, Decision No. 352 [2006], para. 20:

[The Tribunal's] assessment of the Bank's conduct at the prior stage, i.e., the investigative process, is limited to verifying that the requirements of due process have been met.

40. With regard to the review of investigations which lead to a finding that misconduct has not been established, the Tribunal held in *G*, Decision No. 340 [2005], para. 73, that although not every inquiry must be "a model of efficiency," it is necessary that INT operate "in good faith without infringing individual rights." The Applicant's contentions will be examined in accordance with this standard.

Conduct of the investigation

41. The Applicant has raised limited claims before this Tribunal. He has expressly stated that he "does not challenge the decision to conduct a preliminary inquiry or an investigation" before the Tribunal. He complains of INT's conduct during the

investigation. His specific claims are: (i) INT attempted to apply U.S. whistleblower law and U.S. domestic law to reverse the onus of proof; (ii) INT improperly created a legal concept of *de facto* Deputy General Counsel; (iii) INT improperly challenged the decision-making authority of the management of CLED; (iv) INT ignored exculpatory evidence; and (v) INT failed to conduct the investigation in a timely manner.

42. *INT attempted to apply U.S. domestic law to reverse the onus of proof.* The Applicant's complaint relates to INT's investigation of Allegation Four: "Because of a complaint to the Ombudsman by a staff member in the IFC Legal Department (CLED), [the Applicant] retaliated against that staff member by adversely changing the staff member's annual performance evaluation." The Applicant complains that in investigating and analyzing this allegation of retaliation, INT improperly relied on U.S. law, particularly U.S. whistleblower law, to reverse the onus of proof. The Applicant states that by doing so INT attempted to reverse the presumption of innocence to which he is entitled under the Staff Rules.

43. The Respondent states that INT conducted the investigation in good faith even though it might not have been a "perfect model of efficiency" (citing *G*, Decision No. 340 [2005]). The Respondent adds that it is not the Tribunal's duty to evaluate every INT investigation against such a standard of perfection.

44. The Tribunal notes that it is not in dispute that INT in its First Draft Report of December 2007 concluded that there was reasonably sufficient evidence of retaliation. In so concluding, INT in its analysis mostly relied on U.S. whistleblower law. After receiving the First Draft Report, the Applicant provided his comments in February 2008 stating that U.S. whistleblower law should not apply in his case. After considering the

Applicant's comments, INT in its Revised Draft Report of June 2008 removed references to U.S. law and analyzed the issue of retaliation under the Bank's rules and the Tribunal's jurisprudence. Also in this Revised Draft Report, INT revised its position by concluding that "there is not reasonably sufficient evidence to show that [the Applicant] retaliated against [the staff member] because of her complaint to the Ombudsman." In view of this, the Tribunal finds that, after receiving the Applicant's comments on the First Draft Report, INT took corrective action and did not unnecessarily prolong the matter. Thus, INT's conduct in this respect cannot be considered an abuse for which compensation is warranted.

45. *INT improperly created a legal concept of de facto Deputy General Counsel.* This complaint relates to Allegations One and Three, i.e., the sexual relationship between the Applicant and Ms. B, and the sexual relationship between Mr. C and Ms. D. The Applicant states that INT created and applied a legal concept of *de facto* Deputy General Counsel. This concept is not found in the Staff Rules and was not substantiated by fact. Yet, it was the linchpin to INT's case that the Applicant failed to resolve conflicts of interest.

46. The Respondent answers that the Applicant makes much of INT's alleged mistake of concluding that the Applicant was acting as *de facto* Deputy General Counsel; however, it was the Applicant's own supervisor who coined this term as early as 2005 to describe his role. The General Counsel, as the direct supervisor of the Applicant, used this term to describe the Applicant's position and authority in the Applicant's 2005 performance evaluation: "[the Applicant] has worked closely for me, as a *de facto* # 2 for more than 2 years." It is not surprising, and hardly a due process violation, that INT relied at least in

part on the description of the Applicant's job duties and responsibilities contained in his evaluation.

47. The Tribunal considers that INT used the term *de facto* Deputy General Counsel in the context of interpreting the Staff Rule (both 1999 and 2004 versions) relating to a sexual relationship between a “manager/supervisor and his/her subordinate.” Staff Rule 3.01, paragraph 4.01 (April 1999), governs sexual relationships between supervisors and subordinates. As originally promulgated in April 1999, the Rule read as follows:

Sexual relationships involving a manager/supervisor and his/her subordinate are considered a *de facto* conflict of interest. The manager/supervisor shall be responsible for seeking a resolution of the conflict of interest, if need be in consultation with management, who will take measures to resolve the conflict of interest. Failure to promptly resolve the conflict of interest may result in a finding of misconduct and the imposition of disciplinary measures, up to and including termination.

48. A Bank Intranet announcement that accompanied the Rule at its initial promulgation in 1999 provided general guidance to staff as to what constituted a manager/supervisor and subordinate relationship:

Conflicts of interest are likely to arise in relationships where one party has the authority to make decisions about the other's conditions of employment (recruitment, salary, contract approval, performance evaluation, promotion, work program). When a supervisor and subordinate engage in a sexual relationship, the unequal institutional power heightens the vulnerability of the subordinate and the potential for coercion. Other negative effects include perceptions by others of unfair advantage enjoyed by the person involved in the relationship, and the potential for one or both parties to injure the other if the relationship does not end amicably. Experience of other organizations and of the Bank Group has shown that the costs of relationships between managers and subordinates, even when initially consensual, are high in terms of staff morale, perceptions of fairness, and in extreme cases, legal fees.

49. In 2004 the first sentence of the Rule was revised to read as follows:

A sexual relationship between a staff member and his/her direct report, or direct or indirect manager or supervisor is considered a *de facto* conflict of interest.

50. The record shows that the Applicant and Ms. B began a sexual relationship sometime in 2002 or 2003. During this time the Applicant held the title of Chief Counsel and Ms. B was not under the direct supervision of the Applicant. The Applicant became the Deputy General Counsel in August 2005, by which time Ms. B was transferred from CLED. Therefore, the record indicates that there was never a direct reporting line between the Applicant and Ms. B.

51. In all its reports, however, INT maintained that during the relevant period (2003 to August 2005), the Applicant served as the *de facto* Deputy General Counsel and as such had an indirect managerial/supervisory role over Ms. B. The limited question, as raised by the Applicant before the Tribunal, is whether INT had any proper basis to conclude that the Applicant was the *de facto* Deputy General Counsel during the period in question. The Tribunal in fact addressed this question in *BB*, Decision No. 426 [2009], para. 111, and found that:

INT disregarded the absence of any actual conflict under the Staff Rule in effect then and insisted, in order to support its view that a conflict did exist, that [the Applicant in the current Application] functioned as a *de facto* Deputy General Counsel, even though such a position did not exist at the time and witness testimony showed that he was part of a collective management structure with a number of co-equal Chief Counsels who did not view him as superior to them.

52. In view of the above, the Tribunal finds that INT had no convincing basis to conclude that the Applicant served as the *de facto* Deputy General Counsel during the period in question with supervisory responsibilities over Ms. B.

53. *INT improperly challenged the decision-making authority of the management of CLED.* The Applicant's complaint in this respect relates to Allegation Four, i.e., the Applicant retaliated against a staff member who complained to the Ombudsman. The Applicant states that by engaging in the performance evaluation of the staff member in question, he was exercising his legitimate managerial authority. INT should not have questioned the Applicant's managerial authority and should not have considered it as retaliation.

54. The Respondent states that INT had evidence showing, among other things, that the Applicant engaged in a long-standing sexual relationship with a lawyer junior to him in CLED, and the Applicant negatively changed the evaluation of a staff member of CLED immediately after that staff member had complained to the Ombudsman. These facts might be evidence not of minor infractions – they might show a violation of the Staff Rules, and INT had reason to pursue the investigation.

55. The Tribunal is not convinced that the Applicant has shown any actionable injury with respect to this complaint. He states that he “does not challenge the decision to conduct a preliminary inquiry or an investigation” in his case and in fact states that “the matters may have warranted investigation.” He has failed to show how INT could have ignored the allegation of retaliation by assuming that the IFC management was just exercising legitimate managerial authority. Moreover, as stated before, although INT in the First Draft Report concluded that there was reasonably sufficient evidence of retaliation, it corrected itself after receiving the Applicant's comments on the First Draft Report. In the Revised Draft Report it agreed with the Applicant and changed its

conclusion bringing the matter to closure without unreasonable delay. The Tribunal finds no abuse for which compensation is warranted.

56. *INT ignored exculpatory evidence.* The Applicant complains that:

INT has generally ignored exculpatory evidence and actions on the part of [the Applicant] and placed undue reliance on the words of those with a vested interest, namely the legal assistants disputing management's long standing position on their career paths. In particular, until the ... Amended Final Report, INT gave no weight to the exculpatory views and advice given to [the Applicant] by the senior HR management of IFC and the World Bank HR lawyer and the views of well respected staff of IFC Legal Department who were interviewed by INT and who had no vested interest in the outcome of the investigation. The evidence shows that [the Applicant] discussed from the outset with senior HR management and officers on an ongoing real time basis all of the situations which gave rise to the allegations against him, and appropriately relied on their advice, as well as that of the World Bank HR lawyer. There is no evidence to suggest that those with whom he was consulting believed that he was not complying with the Staff Rules. Indeed, [the Applicant] was promoted to the position of Deputy General Counsel in August 2005 with IFC senior HR management knowing of his relationship with [Ms. B], his future wife. [The Applicant] did exactly what he was supposed to do under the Staff Rules. Indeed, [the Applicant] would be open to criticism if he had not been transparent with and consulted with those with relevant expertise and positions.

All of the foregoing exculpatory evidence was in the possession of INT at least 18 months before it issued its [First] Final Report to the VPHR in August 2008.

57. The Respondent answers that INT could not just ignore the complaints because they came from the legal assistants in the Applicant's Department. INT did not ignore exculpatory evidence. Instead it gathered, reviewed, considered and gave such evidence the weight it believed was appropriate. There is no reason to second-guess INT for its exercise of investigatory discretion, and it is not the Tribunal's role to do so. Moreover, INT needed to consider all the circumstances because no formal memoranda existed with respect to the advice the Applicant received from the Bank's Legal Department on the

issues of conflicts of interest in cases of sexual relationships between supervisors and subordinates.

58. The Tribunal has stated before that INT must be diligent in seeking both inculpatory and exculpatory evidence and in giving them proper weight. (*See Z*, Decision No. 380 [2008], para. 27.) The Staff Guide to INT (2006) states that “[i]n keeping with INT’s role as a neutral fact-finder, INT investigators collect evidence that is both exculpatory and inculpatory.”

59. In this case, the Applicant has not provided concrete examples of what specific exculpatory evidence INT ignored or failed to weigh. He does however contend that INT placed undue reliance on allegations of legal assistants who challenged management’s long-standing position on career paths. In the view of the Tribunal, INT failed to take into account the animus of the legal assistants in appraising the validity of their complaints against the Applicant. Furthermore, in view of the Tribunal’s findings in *BB*, Decision No. 426 [2009], at least with respect to the following two matters, the Tribunal finds in favor of the Applicant. First, INT failed to give proper weight to the exculpatory evidence suggesting that the Applicant was not the *de facto* Deputy General Counsel (*id.* para. 111). Second, with respect to the allegation that the Applicant failed to resolve a conflict of interest arising out of the sexual relationship between Mr. C and Ms. D, INT failed to give proper weight to the fact that a genuine controversy existed whether Staff Rule 3.01 imposed any duty on the Applicant (*id.* paras. 84, 108, 112). INT also unnecessarily delayed giving the Applicant the benefit of doubt in this regard.

60. *INT failed to conduct the investigation in a timely manner.* The Applicant claims that he

was subjected to an investigation which substantially and unreasonably exceeded the median time for similar cases. The three and one half years required to complete this matter is six times longer than the Volcker Panel Report recommended for similar cases. This is the type of delay that is a significant breach of the [the Applicant's] right to have this matter dealt with in a timely matter.

61. The Respondent answers that the time frame was reasonable in view of the following: (i) the charges were numerous and involved three other IFC managing attorneys in addition to the Applicant; (ii) all four investigations were linked and were investigated together, and this meant that when one subject provided comments on his or her draft report, all of the reports might have had to be amended, if appropriate, in response to these comments; (iii) sometimes one subject of the investigation took a longer time to comment and that affected all the reports; and (iv) delays in approval of reports for distribution resulted from significant demands placed on INT due to leadership issues in the Bank and the Volcker Panel review of INT.

62. The Tribunal's findings in *BB*, Decision No 426 [2009], para. 124, apply here:

In view of the complexity of the allegations, the number of witnesses to be interviewed and the volume of documentation to be collected, both during the preliminary and formal investigation stage, while at the same time INT was expected to balance the need to investigate allegations thoroughly and the need to minimize disruptions to the Bank Group's business operations as its Staff Guide requires, INT's timeline up to the moment that the interviewing was completed in March 2007 was justifiable. On the other hand, INT's delay in distributing the draft reports to the Applicant and her colleagues after that point, for 248 days, was unjustifiable. Even if as the Bank asserts that this delay was attributable to the demands placed on INT due to leadership issues in the Bank and the Volcker Panel review of INT, the Tribunal is not persuaded that INT could not allocate some time earlier in these 248 days to review the reports before distribution

63. The Respondent has not pleaded before the Tribunal that the above findings should not apply to this Applicant's investigation because it was more complex or otherwise required more time. The Tribunal finds here as well that INT did not conduct the

investigation in a timely manner because it concluded its fact-finding and draft report on the Applicant's investigation in March 2007, yet the Applicant only received the First Draft Report in December 2007.

Compensation

64. The Tribunal finds that, unlike the applicant in *BB*, the Applicant in this case has pursued limited claims before the Tribunal and has succeeded only in part. The Tribunal has found that: (i) INT improperly concluded that the Applicant was the *de facto* Deputy General Counsel; (ii) INT ignored exculpatory evidence in certain respects, and failed to take account of the animus of the legal assistants who initiated complaints against the Applicant; and (iii) INT failed to conduct the investigation in a timely manner. Accordingly, the Tribunal orders the Respondent to pay compensation in the amount of six months' salary net of taxes.

Attorney's costs for representation before INT and before the Tribunal

65. The Applicant claims attorney's costs for legal representation before INT. The Applicant states that reimbursement for costs is justified because INT engaged in a complex investigation necessitating legal representation, INT violated his rights, and, since he was exonerated, the Respondent should carry the burden of costs.

66. The Respondent argues that in this case INT pursued a good faith investigation and consequently the Applicant is not entitled to reimbursement for attorney's costs. There is no evidence of malice or abuse of the investigatory initiatives in this case.

67. The Tribunal does not generally award attorney's costs for legal representation before INT for the reasons explained in *G (No. 2)*, Decision No. 361 [2007], paras. 32-33. The Tribunal, however, stated at para. 34 that

cases may arise where the Tribunal would award attorney's fees if the circumstances were to show that an investigation was initiated out of malice or if there is "evidence of harassment or other abuse of investigatory initiatives," as per the *obiter dictum* of the Tribunal's judgment in *G*, Decision No. 340 [2005], para. 78. The Applicant has not provided any convincing evidence that suggests that there was any such malice on the part of INT, that the investigation was commenced simply to harass her, or that there was an abuse of investigatory initiatives.

68. In the related case of *BB*, Decision No. 426 [2009], the Tribunal awarded costs for legal representation before INT. The Tribunal identified a number of errors and irregularities demonstrating that INT exercised inadequate judgment, largely by failing to take into account exculpatory factors in a timely manner. Specifically, such errors and irregularities, while not indicating any malice or bad faith on the part of INT, resulted in an abuse of INT's investigatory initiatives. In the present case, the Applicant has raised no convincing arguments that there was any malice on the part of INT or that the investigation was commenced simply to harass him, or that there was an abuse of investigatory initiatives. In fact he does not challenge INT's decision to initiate a preliminary inquiry and ultimate investigation in his case; he admits that "the matters have warranted investigation." The Tribunal will therefore not award attorney's costs for legal representation before INT in this case. Neither does the Tribunal find an award of costs justified for representation before the Tribunal.

DECISION

The Tribunal decides that:

- (i) the Respondent shall pay compensation to the Applicant in the amount of six months' salary, net of taxes, based on the last salary drawn by the Applicant; and
- (ii) all other pleas are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 23 March 2010