



World Bank Administrative Tribunal

2011

No. 455

**BP,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

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

**BP,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, composed of Florentino P. Feliciano (a Vice-President of the Tribunal) as President, Mónica Pinto (a Vice-President of the Tribunal), Jan Paulsson and Zia Mody, Judges.

2. The Application was received on 24 November 2010. The Applicant was represented by Veronika Nippe-Johnson, Schott Law Associates, LLP. The Respondent was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 3 May 2011. On 14 December 2010 the Tribunal granted the Applicant's request for provisional relief and ordered the Bank to suspend implementation of its decision to terminate her employment pending the Tribunal's judgment on the merits of the case. Pursuant to the Applicant's request, oral proceedings were held in her case on 29 April 2011.

3. The Applicant challenges the Bank's decision to terminate her contract of employment, pursuant to Staff Rule 3.00, paragraph 10.09, which governs mandatory termination of a staff member's service if s/he is convicted of a "felonious criminal offense."

THE ESSENTIAL FACTS

4. It is possible for World Bank staff to bring domestic employees to the U.S. under what is known as a G-5 visa. This possibility, often described as a “privilege,” is warranted by sympathetic concerns, such as staff members’ interest in having infants cared for by persons who will ensure that they are not estranged from their home culture and language. Over the years, it transpired that the G-5 program could be (and occasionally was) abused by staff members. There were cases of onerous living and working conditions, prevention of free movement, and illicitly bringing domestic employees to the U.S. under a G-5 visa to work for non-staff. The Bank has been vigilant in adjusting its own rules in view of lessons learned so as to curtail abuse. The Program Manager of the Human Resources Service Center testified impressively before the Tribunal, describing how the current G-5 regime evolved to the point where formal employment contracts are vetted by the Bank, and G-5 employees are given careful explanations of their rights. In addition, non-governmental organizations (“NGOs”) generally concerned about manifestations of human trafficking see it as their mission to ensure in particular that abuse is not tolerated under the cover of the Bank’s G-5 program.

5. The Applicant had a G-5 employee here referred to as S. This employee, apparently encouraged by third parties, complained about her treatment, both to U.S. law enforcement officers and to the Bank. The Federal Bureau of Investigation (“FBI”), an enforcement arm of the U.S. Department of Justice, decided to conduct an investigation into the Applicant’s dealings with S based on allegations of human trafficking. The Bank says it was asked by the FBI to take no action until the investigation had run its course.

6. The factual record as to S’s life with the Applicant’s family, in the U.S. and prior to that in their home country in Africa, is long. It covers the better part of a decade. It is

essential, for reasons to be explained, to focus the present exposition of the case to matters which are properly before the Tribunal.

7. The central factual elements of this case are these:
- (i) the FBI never charged the Applicant with any abuse of S, let alone human trafficking;
 - (ii) indeed the Applicant was never indicted of any crime; rather the FBI offered her the possibility to plead guilty without indictment to two counts of felony for having made false statements to the FBI;
 - (iii) on 29 March 2010 the Applicant pleaded guilty to those two counts in a U.S. federal court;
 - (iv) the transcript of the court hearing when she pleaded guilty reveals that the Applicant's lawyer, responding to questions from the judge as to the "impact [of] two felony convictions" on the Applicant's "employment situation with the World Bank," answered only that "it might violate a World Bank agreement to abide by minimum wage laws." He suggested that, while the Applicant would continue to work if put on probation, incarceration (self-evidently) would end her employment, but he showed no awareness of the Bank's Staff Rule that felony convictions in principle lead to dismissal;
 - (v) the same lawyer, in an e-mail message to the Applicant dated 21 June 2010, informed the Applicant that "I do not see any provision [in the Staff Rules] calling for automatic termination";

- (vi) on 24 June 2010 the Vice President of Human Resources (“HRSVP”) placed the Applicant on administrative leave pending review by the Office of Ethics and Business Conduct (“EBC”) of allegations of misconduct;
- (vii) at the sentencing hearing before the U.S. court on 2 July 2010, another of the Applicant’s lawyers referred to “newspaper stories ... quoting a spokesman from the World Bank saying that they will have to terminate [her employment]”; nevertheless, the judge’s sentence of two years’ probation (in addition to a single day’s jail time) specifically contemplated the possibility that she might “remain employed by the World Bank” (one of the reasons for that observation was to establish how her passport might temporarily be restored to her if her work duties should require travel);
- (viii) on 8 July 2010 the Applicant received a Notice of Misconduct, referring to her two guilty pleas and to the conduct of the review by EBC under Staff Rule 3.00 (Sections 8, 9 and 10);
- (ix) on 26 July 2010, contrary to what was stated in her Notice of Misconduct, EBC informed the Applicant that it would not interview her. On 5 August 2010, when the Applicant met with EBC officials to submit her Response to the Notice of Misconduct, she was given a draft “Summary Case Report” recommending a finding of misconduct by reason of the guilty pleas, adding that the false statements had been made “in connection with a U.S. Government investigation into allegations of human trafficking and abuse of [her] G-5 Visa holder domestic employee.” The Report was post-dated 12 August. The Applicant was told any written comments she had would be

added to the Report. She did provide these comments (in particular complaining that EBC's conclusions had been made without having taken into account her Response to the Notice of Misconduct which presented her side of the story). The comments were attached to the Report and sent to HRSVP;

- (x) in light of the Applicant's complaint that she had not been given a chance to present her case (states the Bank), HRSVP suspended his review until the Applicant could have a further meeting with EBC. Such a meeting was held on 24 August. The transcript of the meeting shows that it lasted 34 minutes (including a pause, according to a staff member attendee, to allow the Applicant to recover from a surfeit of distress). EBC representatives explained that there was no need to interview her; there had not been "what we would consider under the staff rule a full investigation" because the Rules stipulate the consequences of a felony conviction and "we prepare basically a summary report referencing ... the felony conviction" after "we had received the official documentation." The "purpose" of the meeting was "because [she had] asked for that [meeting]"; it was described as a "courtesy" to her. EBC did not engage the Applicant with respect to any part of the context of the guilty pleas, and stated: "[t]here wasn't anything to look at either way, either mitigating or aggravating ... once there has been a felony conviction there is really honestly nothing to fact-find other than the documents from the court ... any extenuating circumstances outside of that would be outside of our scope";

- (xi) on 1 September 2010 the Applicant sought to have her pleas vacated, notably on the ground that S had initiated a civil suit against her and that this was contrary to her understanding of the conditions of her pleas. On 12 October this request was rejected by the U.S. court;
- (xii) on 29 October 2010 HRSVP notified the Applicant of his decision to terminate her employment;
- (xiii) the Applicant filed an Application with the Tribunal on 24 November 2010.

WHAT THIS CASE IS NOT ABOUT

8. The above review of the essential facts enables the Tribunal to put peripheral issues to the side.

9. The first such issue relates to any notion of exemplary discipline. HRSVP claimed in his Notice of Termination to the Applicant that a perceived failure by the Bank Group to exercise appropriate oversight over staff members employing domestic employees under the Bank Group's G-5 visa program would result in the U.S. State Department's suspension of the issuance or renewal of G-5 visas and in corresponding reputational harm to the Bank Group in its relations with its host country. Yet, as seen, the U.S. federal court assumed that the Applicant might well pursue her employment with the Bank. The U.S. State Department in the present case could scarcely criticize the World Bank for being lax with respect to the G-5 visa program in the context of a Justice Department inquiry into human trafficking and abuse of a G-5 employee *which was discontinued without any charges being filed*. And as the Lead Human Resources Specialist of the Human Resources Vice Presidency, Corporate Operations ("HRSCO"), testifying on behalf of HRSVP, put it very plainly in his testimony to the Tribunal, not every false statement to a

law enforcement officer, even if a felony as a matter of legal interpretation, will lead to automatic termination. He gave the example of a false statement with regard to substance abuse.

10. The second issue relates to the danger of conflating the *actual* guilty pleas with *potential* charges that were never made. Although EBC's Summary Case Report was certainly accurate when it observed that the guilty pleas related to false statements "made in connection with a U.S. Government investigation into allegations of human trafficking and abuse of ... [a] domestic employee," the prominence of that observation in EBC's Report suggests an unfortunate confusion and emphasis on that characterization of the misconduct. The Bank cannot have it both ways; EBC can not give any weight to trafficking and abuse *allegations* while at the same time stating that "once there has been a felony conviction there is really honestly nothing to fact-find other than the documents from the court," *given that the conviction was not based on human trafficking or abuse*.

11. Illustration of the prejudice imposed upon the Applicant was given in her cross-examination before the Tribunal, when counsel for the Bank asked her questions about the admissions she made to the U.S. court, for example, about whether S's passport had been withheld from her. If the Bank were to base its ultimate decision on such matters, it was bound to investigate them and come to some determinations. To repeat: they were simply not part of the felonies which triggered Staff Rule 3.00, paragraph 10.09.

12. Thirdly, it is pertinent and proper to agree with the Bank's assertion in its Rejoinder that this case "should not be about the fairness of the Staff Rules in the abstract, but only about whether they were applied to Applicant in a fair and reasonable way. Resolving this limited issue does not require the Tribunal to evaluate whether or not Applicant actually

coerced or mistreated her former domestic employee” On the other hand, it is quite improper for the Bank to argue – as it has – that the guilty pleas allowed the Applicant “to avoid a trial on human traffic charges, for which the prosecutors had ample evidence.” No charges were filed. The comment about “ample evidence” appears gratuitous. If there was ample evidence, why were there no charges? Any such evidence would be subject to adversarial scrutiny and to the assessment of the trier of fact. Moreover, there may have been valid objections to the admissibility of any such evidence. Were search warrants required? Were they obtained? Was their scope respected? Were rights of privacy and non-self-incrimination respected? The answers were unknown and will remain so. Reaching conclusions on the basis of mere assumptions, unfavorable to the Applicant, breach the most fundamental notions of fairness to an accused.

13. The grave potential prejudice of this confusion of allegations and admissions should be evident. The Bank’s comment that if it were “not able to terminate Applicant’s employment under these circumstances, it is difficult to imagine any situation in which its Staff [R]ules may be applied to this end” illustrates this danger, for the evocation of “these circumstances” appears to constitute a way to bring in the merits of the trafficking and abuse allegations through the back door. The U.S. federal judge may have yielded to the same impulse at the sentencing hearing, when she commented, referring to the Applicant, that “with great intelligence and great education, there goes a certain lack of humility, and this case is troubling because it has vestiges of almost Middle Age involuntary servitude.” No such thing as “servitude,” and certainly no “involuntary servitude,” had been formally charged, let alone proved. (The same judge had showed commendable punctiliousness in seeking to establish the bona fides of the guilty plea.) The Tribunal has no inclination to

criticize the U.S. court, and makes this observation only because the Bank appears to have sought to use the “lack of humility” remark to its own advantage in its concluding written arguments in this case. Similarly misplaced and regrettable is the Bank’s reference to the Applicant as “highly assertive and self-confident.” The Applicant was dismissed from a position for which she had invested years of demanding studies and in which she has excelled. Whatever the nature of her misconduct, she is entitled to invoke her rights to be treated fairly in the circumstances, without need of being apologetic and diffident.

14. The Tribunal has fundamental concerns with the Bank’s position on two separate features of this case. The first is procedural; it relates to the duty to pay due attention to an individual staff member’s personal circumstances before exercising discretion. The second is substantive; disciplinary matters, as the Tribunal’s decisions have firmly and repeatedly established over the years, involve a broader standard than abuse of discretion, and specifically justify the Tribunal’s need to appraise the proportionality of sanctions. In this respect, the review of any decision on sanctions “will take into account such factors as the seriousness of the matter, any extenuating circumstances, the situation of the staff member, the interests of the Bank Group, and the frequency of conduct for which disciplinary measures may be imposed.” (*S*, Decision No. 373 [2007], para. 50.) These factors were to have guided HRSVP in the exercise of his discretion concerning what disciplinary measures to impose.

DUE PROCESS

15. If the meaningful criteria of due process are to be satisfied, consideration of the specific circumstances of each individual case is required. EBC's mission to determine whether there has been misconduct might appear to be simple because the definition of the relevant misconduct seems simple and objective: "Conviction of a felonious criminal offense" (Staff Rule 3.00, paragraph 10.09(b)). It was certainly EBC's role to determine whether such a "conviction" had occurred. EBC determined that the documentation was clear, which in essence did not require more than verification of the authenticity of the judgment of the U.S. District Court for the Eastern District of Virginia dated 2 July 2010. EBC's Summary Case Report of 12 August 2010 went on to recommend the "imposition of disciplinary measures" on the Applicant. However, EBC's role did not stop there. For reasons pointed out later in this judgment, the Tribunal considers that EBC did not exhaust its mandate under the Staff Rule.

16. The Tribunal notes that it is not EBC's role to determine how the exercise of discretion in deciding on disciplinary measures should be carried out. This is a matter for the President of the Bank, who may delegate such decisions to HRSVP – and often does so. But HRSVP has no authority to sub-delegate. The exercise of his delegated authority is his responsibility. This does not mean that he may not consider evidence marshaled by others. Nor does it necessarily require him personally to interview the suspect staff member. The difficulty arises when HRSVP purports to rely on others' *evaluation* of the evidence, if such evaluation was not focused on determining factors bearing upon the exercise of discretion, such as extenuating circumstances or the seriousness of the matter.

17. In this case, the Program Manager, Investigations, EBC, testified that it had been EBC's task to deal with "guilt" but not with "sentencing." This view explains why EBC

saw no purpose in interviewing the Applicant; nothing she could say could alter the objective fact of her conviction for two counts of felony. In accepting nevertheless the Applicant's Response to her Notice of Misconduct, her written comments to the Summary Case Report and to hear her oral account of the circumstances, EBC would appear to have responded to the Applicant's requests as a matter of "courtesy." The Applicant may have been led to believe that this was her chance to establish the circumstances to be evaluated in the exercise of disciplinary discretion. HRSVP subsequently took the position that he has no fact finding resources at his disposal and therefore had to rely on the record established by EBC. EBC apparently passed the matter on to HRSVP once it had determined the fact of misconduct without addressing any other circumstances, and HRSVP in turn determined the disciplinary measures by reference to what he could glean from EBC's report (and any attached documents) as to the *context* of the misconduct, although the determination of that misconduct, in EBC's view, did not require the gathering or evaluation of circumstantial evidence of surrounding or contextual circumstances.

18. The ultimate consequence was that the Applicant was not properly heard before HRSVP exercised his authority, with its mandatory discretionary component.

19. The Bank's position is that since it had been established that the Applicant had been convicted of a felonious criminal offense as required in paragraphs 6.01(d) and 10.09(b) of Staff Rule 3.00, it was not necessary for EBC to establish other facts in order to conclude that the Applicant had committed misconduct. The record, however, does not show that the U.S. court judgment was simply forwarded to HRSVP for decision. Some "fact finding" as prescribed by Staff Rule 3.00, paragraph 10.01, was initiated and carried

out. The question is therefore whether this fact finding (or further review by EBC under the Staff Rule) was conducted properly and whether the provisions of the Staff Rule were complied with.

20. Staff Rule 3.00 describes EBC's scope of review of misconduct allegations as follows:

6.01 Subject to the exclusions provided in paragraphs 6.02 and 6.03 below, *EBC shall review and assist* in the resolution of allegations of misconduct. Misconduct does not require malice or guilty purpose, and it includes failure to observe the Principles of Staff Employment, Staff Rules, Administrative Manual, Code of Conduct, other Bank policies, and other duties of employment, *including the following acts and omissions:*

(d) Conviction for acts that are criminal in nature, including theft, forgery, fraud, corrupt practices, use of or possession of illegal drugs, physical assault, or domestic abuse.

21. The Staff Rule requires the same investigation of conviction for acts criminal in nature under paragraph 6.01(d) as for the other types of misconduct referred to in paragraph 6.01. No exceptions are made for conviction of felonious criminal acts which would result in mandatory termination under paragraph 10.09(b). There is thus no warrant for a merely "limited" review in case of misconduct consisting of conviction of a "felony." In other words, relevant circumstances are not exhausted by showing the presence of a "felony" as technically distinguished from a "misdemeanor," or other types of misconduct. Paragraph 10.01 of Staff Rule 3.00, which deals with the Decision to Conduct Fact Finding, provides that:

If [following the initial review] the Chief Ethics Officer, or a designated EBC official, determines that there is sufficient basis to believe that facts may develop that would effectively be addressed through ... disciplinary measures, or that a fact finding may otherwise be useful in understanding ... the matter, EBC ... may conduct *a fact finding to determine further information regarding the substance and circumstances of the matter.* (Emphasis added.)

22. In the present case, the Applicant was in fact informed by the Notice of Misconduct that EBC had determined, after conducting an “initial review,” that further review would be appropriate in her case, that “fact finding” would take place and that all steps constituting this further review under the Staff Rule would follow. The Applicant was therefore entitled to expect that fact finding would be carried out which could unearth “information regarding the substance and circumstances of the matter” underlying the technical legal nature of the “felony” – and thus any mitigating factors. Such would have been, among others, the duress, undue pressure or lack of knowledge that led her to sign the plea agreement, or the actual circumstances under which she made the false statements when interviewed by the FBI. An examination of the circumstances would have also included a review of the underlying facts regarding the two false statements.

23. *Koudogbo*, Decision No. 246 [2001], involved allegations of “misuse of Bank funds or other public funds for private gain in connection with Bank activities or employment, or abuse of position in the Bank for financial gain,” a misconduct also punishable by mandatory termination. The Tribunal granted the applicant two years’ salary in compensation for serious irregularities in the investigative process, noting that the Managing Director, who had the discretion to decide on the basis of a number of factors and the particular circumstances of the case, had unavoidably based his decision on erroneous facts or misrepresentations presented in the investigation report provided to him.

This, the Tribunal found, was done through no fault of his own, stating at para. 54:

It is the duty of the [Ethics Office], and the Bank provides it with the appropriate resources for this purpose, to conduct investigations of misconduct diligently and to present accurate findings so that the Managing Director can make appropriate determinations based on these findings.

24. Based on the actual admission of the Program Manager, Investigations, EBC, during the oral proceedings before the Tribunal and EBC's communications with the Applicant that no extensive fact finding was required as the facts of her misconduct had already been established by the decision of the U.S. court, and that supplemental information had been provided through her written comments and additional documents attached to the Summary Case Report, the Tribunal considers that EBC did not meet its duty under paragraph 10.01 to conduct "a fact finding to determine further information regarding the substance and circumstances of the matter," causing prejudice to the Applicant. An examination of the procedure followed in the case confirms this conclusion.

25. Initially the Applicant was given a Notice of Misconduct, which referred to Staff Rule 3.00, and discussed every step and requirement of the process for further review as governed by the Staff Rule. However, these steps were either not followed at all or not followed in the order required by the Staff Rule.

26. First, the Applicant was clearly notified that she would be invited to an interview and that she would be contacted to schedule it, but was subsequently informed, while she was preparing her written response to the Notice of Misconduct under paragraph 8.02 of the Rule, that EBC would not be conducting an interview after all, and that written documentation would suffice. The meeting of 24 August 2010 that the Applicant had with the EBC investigators, pursuant to the request of HRSVP in response to her repeated pleas, at the end of the process, was, as seen, described as "a courtesy meeting." No substantive questions were posed to the Applicant regarding her case nor was she informed at the time that HRSVP had asked EBC to hold such a meeting. In addition, it appears that the investigators were disingenuous in informing the Applicant during that "courtesy meeting"

that the Applicant's written Response to the Notice of Misconduct had been so "detailed" that it had "fully answered" all questions by EBC rendering unnecessary a further meeting. In fact, EBC had already informed the Applicant on 26 July 2010, several days before she handed in her written Response on 5 August 2010, that they would not interview her. The Applicant was not afforded the opportunity to present her side of the story early on during an interview, as the Staff Rule and her Notice of Misconduct require. She was granted a delayed and merely nominal interview. This was a violation of due process. Any facts that she could have related during the interview were never made part of the Report submitted to HRSVP to help him in his decision. Nor did the transcripts of her "courtesy meeting" reveal any facts that would have facilitated HRSVP's review and decision.

27. Second, it is a matter of record that the Applicant was handed the Summary Case Report of the investigation at the same time (5 August 2010) that she provided her response to the Notice of Misconduct. The Report was post-dated; EBC had already drafted its recommendation that the Applicant's employment be mandatorily terminated under Staff Rule 3.00, paragraphs 6.01 and 10.09. The draft Summary Case Report to which the Applicant was expected to submit her comments was evidently issued without taking into account her Response to the Notice of Misconduct. Not having been provided with an interview at that time, the Applicant was denied for a second time a meaningful opportunity to respond and present her side of the story which was to be included and weighed in the findings of the Report. This, too, was a failure to comply with Staff Rule 3.00, paragraphs 8.02 and 10.01 and the Notice of Misconduct. Third, it is also clear that the Summary Case Report whose findings were presented to HRSVP did not incorporate any other information from the attached documents.

28. The Tribunal's insistence on due process in the investigation of allegations of misconduct is manifested in numerous decisions (*see, e.g., Koudogbo*, Decision No. 246 [2001], *Ismail*, Decision No. 305 [2003], *Mustafa*, Decision No. 207 [1999]).

29. In *King*, Decision No. 131 [1993], para. 29, the Tribunal emphasized that the Staff Rule describing disciplinary proceedings was "intended to give expression to the basic principles of due process of law with respect to disciplinary measures. It contains a number of essential components – *none of which can be neglected if it is to be properly applied.*" (Emphasis added.) Even though the Respondent had argued in that case that "the Applicant [had] not shown the use to which he would have put any opportunity that he might have been given to respond to a properly formulated accusation," the Tribunal found such an argument to be misconceived and stated at para. 59:

It is enough that there has been a serious departure from the requirements of due process. As was said in *Gyamfi*, Decision No. 28, WBAT Reports [1986], paragraph 47, "The Tribunal cannot be sure that, if the requirements of procedural due process had been followed, the result of the investigation would have been the same"

30. As the Tribunal has stated in *K. Singh*, Decision No. 188 [1998], para. 21:

Staff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered.

31. Although EBC observed prominently that the Applicant's false statements had been "made in connection with a U.S. Government investigation into allegations of human trafficking and abuse of [the Applicant's] G-5 Visa holder domestic employee," no facts underlying the circumstances and the substance of the matter of that conclusion, as required by the Staff Rule when fact finding is conducted, were presented in the body of the EBC report. Simply attaching documents without presenting and justifying conclusions drawn from them, or recording the summary findings of a court judgment

without any investigation of the facts surrounding its circumstances, while nevertheless alluding to them in the conclusion without any explanation, led to an incomplete presentation of findings likely to result, in turn, in an erroneous review of the factors to be properly taken into account when HRSVP decided the disciplinary measure to be imposed.

PROPORTIONALITY

32. The Tribunal has no mandate to take over the exercise of HRSVP's disciplinary discretion; but it is required to assess the exercise of that discretion. Since neither HRSVP nor EBC allowed the Applicant a meaningful hearing for the purposes of HRSVP's exercise of discretion, the Tribunal heard the Applicant in order to determine whether the Applicant suffered prejudice as a result of having, as it were, fallen between the two chairs (of EBC and HRSVP). The Tribunal finds that she had.

33. The gravamen of misconduct here was that the Applicant pleaded guilty to making two false statements to FBI investigators: (a) misrepresenting the nature of a financial transaction with a domestic employee, saying that the latter had entrusted her with the sum of \$3,500 to purchase land in their common home country in Africa, and (b) denying that she had threatened the same employee by saying that if she left the Applicant's employ, she would call the FBI, which would then deport her.

34. The Lead Human Resources Specialist, HRSCO, quite properly, in the view of the Tribunal, conceded that there might be types of "felonies" which, while unquestionably within the reach of Staff Rule 3.00, paragraph 10.09, and thus constituting misconduct sanctionable by dismissal, nevertheless would, as a matter of official discretion, not necessarily lead to such a drastic consequence. He gave the example of substance abuse, with the obvious implicit caveat that it must depend on the circumstances: repeated and

substantial abuse of particularly dangerous drugs notwithstanding prior offenses and warnings is not the same thing as a first-time offense involving small amount of a less pernicious substance.

35. And so it comes down to what HRSVP might have made of the Applicant's circumstances had he properly addressed them as a matter of sanctioning discretion, particularly as to extenuating circumstances and seriousness of the case of the felony.

36. The Applicant's testimony before the Tribunal was, in this perspective, measured and substantive. Insofar as it related to the two counts of felony, her account of the "threats" and "financial transaction" might have been contradicted by S, but it was not, and there is no reason to make any assumption to that effect.

37. In August 2009, the Applicant was intending to return to her home country, where her father was dying from cancer. She went to the airport with her children and S. In the course of exit procedures, S was taken away by officials in circumstances that were unclear to the Applicant, but which caused the trip to be aborted. She later learned that S had been cooperating with the FBI, which was investigating the possible occurrence of the crime of "human trafficking." On 4 August 2009 her husband called her home from work, and she found her house surrounded by numerous local and federal law enforcement personnel and their vehicles, armed and wearing bullet-proof vests – "like ... in [the] movies." She gave lengthy accounts of her long relationship with S, backing them up later with documentation, which apparently satisfied the FBI that there was no ill-treatment or abuse of S, and no coerced or involuntary servitude. No charges of "human trafficking" were ever brought against her. On 8 December 2009, the day after her last interview with the FBI, the Applicant's passport was confiscated and not returned, as a result of which she

was unable to travel as required for her work. She was dissatisfied with her legal representation, in particular with the recommendation of her first lawyer, to whom she had been referred by a legal consultant to the Bank, that she agree to a plea in which she accepted the risk of significant imprisonment on account of two false statements to the FBI. She felt trapped. She could not travel to visit her father who was terminally ill as her passport had been confiscated. She ultimately signed the guilty pleas on 29 March 2010 to escape the impasse and the frustration, paying the price of a suspended prison sentence and “restitution” of a very high amount of allegedly unpaid wages to S. She was not advised that this would or could result in her dismissal from the Bank’s employment. Contrary to what she had understood, her passport was not given back to her once she had entered her guilty plea. Her father died in April 2010 without her having seen him again.

38. What matters, in the view of the Tribunal, is not so much the ultimate accuracy of the detailed account by the Applicant of her predicament, but the *plausibility* thereof and the light that it would shed on the circumstances of her misconduct, including the failure of EBC and the FBI to present any contradictory evidence. HRSVP, however, stated that he had considered and rejected her comments, including her account of possibly extenuating circumstances, without any attempt to verify their accuracy. It is difficult to believe that if the Applicant’s account were accepted as true, it would have no impact on the mind of a reasonable person who must decide whether to impose the sanction of termination.

39. The matter of the \$3,500 (her misstatement as to which resulted in her conviction of the first count of felony) is objectively puzzling in a number of ways. The FBI investigators believed that the Applicant had set up a rather elaborate scheme “to prey upon S’s lack of sophistication about bank accounting to obtain S’s labor at a rate far

below the contractually and/or legally required minimum wage rate.” They may have suspected that payments due to S were made into an account at the Bank’s Credit Union in the joint names of the Applicant and S, as required at the time, making it appear that S was being paid proper wages, but only a part of those wages was transferred into an account in the name of S alone at a branch of Wachovia Bank. The Applicant would thus have been able to retain a part of S’s ostensible wages in the Credit Union account, where it was less accessible to S and over which the Applicant supposedly retained effective control. The Applicant answers that S in fact disposed fully of the Credit Union account, writing checks and making ATM withdrawals against it through the years 2004 – 2008, including extended periods when S was back in their home country. As of early 2009, long before the crisis of the FBI investigation, G-5 visa holders were allowed for the first time to maintain Credit Union accounts in their sole names, and the Applicant at the time withdrew as a joint account holder. If this is true, the misappropriation theory is highly questionable. If the Applicant had wanted to “skim” for her own benefit it is plausible that she would have done so continuously, rather than waiting for an occasion to obtain the lump sum of \$3,500 from the Credit Union account on 16 or 17 July 2009. In other words, the fact that the account contained at least \$3,500 makes the “skimming” hypothesis implausible. It is also noteworthy that at the time that the Applicant obtained the \$3,500, S was in communication with the FBI. Above all, these circumstances could easily have been verified by the Bank without the exercise of extraordinary police powers, and, if so verified, would have cast considerable doubt on the materiality of the Applicant’s false statement to the FBI.

40. The Applicant stated at the oral hearing that the \$3,500 represented a short-term loan given by S in view of the financial hardship to the Applicant and her family caused by the Applicant's father's serious illness, and to the expenses associated with the voyage the Applicant was planning, with her children and S, to their home country where her father was dying from cancer. Not wanting to admit that she was reduced to borrowing money from a domestic worker, the Applicant yielded, she acknowledged, to the temptation of inventing an explanation (the land purchase) which had no substance.

41. It suffices for the Tribunal to consider two things. First, if it were determined that the Applicant had not skimmed off portions of the salary she paid to S, the falsehood about the land transaction would be immaterial to the issue of whether she was mistreating or abusing S. Secondly, given the circumstances recounted of the FBI's initial appearance at the Applicant's home, essentially blocking off the street with marked and unmarked cars, arriving with a large contingent of local and federal officers, armed and wearing bullet-proof vests, a level of pressure was plainly exercised on the Applicant which could lead many innocent people to say whatever their powerful questioners wanted to hear. It is hard to imagine that she would have invented such a story, which she could not have proved, if questions had been put to her in less dramatic fashion.

42. As for the second falsehood, namely her denial that she had threatened S that she would call the FBI to escort her out of the U.S. if S followed through with S's decision to terminate her employment, the words recorded by the FBI's hidden audio and video recording device, which it had provided to S directing her to record her conversations with the Applicant, obviously had context. The Applicant had arranged for a trip to their home country via London in the beginning of August 2009 in order to visit her ill father,

originally intending for S to remain in London with the children at the Applicant's sister's house. The FBI however had already created a ruse whereby a friend of S would send her a postcard inviting her to go on a weekend trip to New York on the same weekend that the Applicant and S had planned to travel with the Applicant's children. The Applicant observes that her recorded words were uttered in a moment of great agitation due to the acute difficulty in which she was being placed by S's seemingly arbitrary volte-face in insisting on going to New York and thereby making it impossible for the Applicant to carry out the agreed plan to visit her seriously ill father. As against the background of her long relationship with S, that moment of anger should not be blown out of proportion. Moreover, her words did not indicate an attempt to keep S in any form of servitude. To the contrary, the Applicant's words made it clear that S was free to go, but should first respect her commitment to go with the Applicant since the latter clearly needed to have someone look after her sons.

43. The FBI had evidently mobilized itself to investigate a possible ring of human traffickers within the Bank. This would explain the size of the operation and the insistence with which they pursued the Applicant on lesser charges even after determining not to charge her for either trafficking or abuse. The Applicant testified that the FBI agents who interviewed her commented to the effect that they suspected her case was part of a larger problem within the Bank: "we know these kinds of things happen a lot at the World Bank and that ... you trade in your G-5s, you take them from one family to another and basically it is like there is an internal market of Bank staff trading people and maybe you can give us a few other names of staff who are doing this kind of thing." The Applicant answered that she had not heard of such things and could not give them any leads. The Bank would

surely have been aware of the FBI's interest in a broad pattern of collusion and abuse – and HRSVP could have had such information verified (or asked to be verified).

44. It is surely proper that the Bank is concerned by the reputational consequences of abuse of the G-5 program. This was clear from the testimony of the Program Manager, Investigations, EBC, and the Lead Human Resources Specialist, HRSCO. In this respect, the Bank cites the Tribunal's judgment in *S*, Decision No. 373 [2007], which held that it was the financial nature of the felony in that case which tipped the balance against the retention of the applicant in *S*, "given the Bank's 'well-publicized and strong emphasis on and commitment to combating corrupt activity.'" The Bank argues that by parity of reasoning, and in addition to the seriousness of the matter in her case, the Applicant in this case deserved no discretionary mercy given the Bank's important interest in ensuring respect for G-5 visa holders. But, as noted, once more this argument in effect impermissibly incorporates into the Applicant's felony conviction a matter with respect to which she was never in fact charged, i.e., trafficking or abuse of a G-5 employee.

45. A more relevant precedent is *O'Humay*, Decision No. 140 [1994], which precisely involved alleged abuse of a G-5 employee. Unlike the Applicant in the present case, the applicant there was investigated by the Ethics Officer for misconduct. By coincidence, the applicant in *O'Humay* was of the same nationality as the Applicant here and a professional staff member (financial analyst, level 23). The existence of an unpaid debt of the applicant to his former employer was established. In addition, it was found that the applicant had misrepresented the amount of salary payable to the G-5 visa applicant to a U.S. official (the U.S. Consul in the home country), that this "had the effect of calling the reputation and integrity of the Bank into question," and that the applicant "had not met his personal

and legal obligations as a Bank staff member.” The Director of Personnel, Operations, imposed the following sanctions: disqualification from the G-5 program in the future, a written reprimand, a warning that a failure to pay back wages due could result in further disciplinary actions, and a loss of any salary increase that might result from the salary review of the year of the decision. The Tribunal did not accept the applicant’s denial that he had made misrepresentations to the U.S. Consul and found that the insufficiency of wages paid had been substantiated by the Bank’s Ethics Officer, and that the applicant had failed to file accurate “reports relating to social security taxes.” On the other hand, taking into account the extenuating circumstances and the situation of the staff member, the Tribunal found that one of the sanctions had been disproportionate given the absence of “malice” (para. 41). That was the elimination of a salary increase, which the Tribunal held should be limited in effect to a single year, i.e. without “any cumulative effect over subsequent years, e.g. in relation to the level of the Applicant’s salary, to the calculation of his pension and to any other benefits.”

46. Comparing the misrepresentations in *O’Humay* to those in the present case, the Tribunal does not see any substantive difference. Was there “malice” in the present case? There is no answer, because there was no inquiry of anything but the fact of the guilty pleas and the resulting conviction. Was there in fact a misappropriation of wages, as was found to have happened in *O’Humay*? There is no answer, unless one assumes that whatever is said in the context of a guilty plea is a conclusive admission, as opposed to an acknowledgment as the price of avoiding prosecution. It is therefore very difficult to say that the Applicant was guilty of more severe misconduct than what was on evidence in *O’Humay*, and yet the sanctions in the two cases are grossly disparate. This disparity

could only have been justified on the basis of a full examination of the detailed circumstances of the misconduct. There was no such examination by the Bank, and so the Tribunal considers that the failure of due process did in fact lead to very significant prejudice for the Applicant.

47. As discussed above, the Program Manager, Investigations, EBC, was asked during the oral proceedings specifically whether it is “EBC’s role ... to conduct any fact finding in extenuating circumstances.” This question was pursued at length, and her ultimate answer was crystal clear:

Q: And once again, it is not for you to recommend how discretion is going to be exercised or conduct an investigation with a view to that. You are just determining whether or not there has been misconduct.

A: That’s correct.

48. Accordingly, the critical question is how HRSVP did indeed conduct his evaluation of factors pertaining to extenuating circumstances as to proportionality. The Lead Human Resources Specialist, HRSCO, referred to HRSVP’s “limited discretion” – but the actual qualifying adjectives of the Staff Rule are “full and sole.” The word “limited” is not to be added to the text of the Rules to restrict the permissible discretion to cases of unusual felonies or of manifest lack of due process. His own example of substance abuse (see above at paras. 9 and 34) might involve a felony in most countries and no lack of due process, yet he raised it as an instance or kind of felony justifying discretion not to terminate.

49. The Lead Human Resources Specialist, HRSCO, went on to suggest a broader category of “personal matter[s] without any connection with the World Bank at all” as contrasted with behavior that involves the staff member’s employment. In the instant case, he took the view that the felonies of lying to the FBI do concern the Applicant’s status as a

Bank staff member, insisting that the refusal of HRSVP to exercise discretion in her case in her favor was based on the *context* of her guilty plea rather than on the simple fact of falsity of particular statements to the FBI. As he put it:

the challenge to the HR Vice President was to look *at the effect of lying in the context of an FBI investigation about abuse of a G-5*. (Emphasis added.)

50. In reaction to the Tribunal's expression of some puzzlement as to where HRSVP's consideration of the *effect* rather than the *fact* of lying would lead him, the Lead Human Resources Specialist, HRSCO, continued:

the lie itself, but without going into an independent investigation of the underlying case, because that would not be the role or the position of the HR Vice President. (Emphasis added.)

and

[HRSVP] stayed with the fact that *there was an investigation by outside authorities*, in particular, behavior by the staff member. What he looked at, that *type of investigation itself*, without prejudice to the outcome of the investigation *was serious on its own*. (Emphasis added.)

51. This, the Lead Human Resources Specialist, HRSCO, concluded, explains HRSVP's reference, in his decision, to "the seriousness of the matter" which was decisive in concluding that termination was not disproportionate.

52. The simple fact of the occurrence of an "outside investigation" (by the FBI) was deemed particularly "serious" as an *aggravating* circumstance, even though the investigation had led to no charges nor to any investigation whatsoever by the Bank itself of the Applicant's conduct in reference to the Rules of the G-5 program. Her plea of guilty to the felony of making false statements thus somehow sealed her fate because, it seems, it came in a nebulous "context" where it was particularly important to tell the truth.

53. If the word “context” is to have substance, it must refer to more than making a single connection to the fact that the *occasion* of the falsehood was an inquiry into a matter which is sensitive for the Bank. The Tribunal believes that “context” requires an appraisal of the materiality of the falsehood in light of broader circumstances, and a sense of proportionality consonant with the Bank’s own precedents.

CONCLUDING OBSERVATIONS

54. In the course of her oral testimony before the Tribunal, the Applicant was asked by counsel for the Bank on cross-examination what the term “due process” meant to her. Her extemporaneous answer was as follows:

My understanding is that when there is any issue that comes up concerning a staff member, every staff member has to be treated as an individual, and that the Bank, as an employer, has the responsibility to listen to that staff member before it makes any decision so that any decision that it makes is fully informed and takes into account all the factors that are important in that issue, and that, first, the staff member has to receive the complaint from the employer that we think that what – your behavior has been unacceptable according to the rules that have been set, and we are going to list what those misconducts are and we are going to provide you with an opportunity to respond before we make up any decisions in terms of – before we make up our mind and before we make up any decisions concerning your employment.

Part of due process, I think, would be to take all issues into account before – take all issues into account and provide all the opportunities possible for the staff member to respond to those allegations before any decision is made. That is what I understand by due process.

55. This is indeed what staff are entitled to expect before disciplinary measures are taken against them. HRSVP’s decision appears more as an exercise of sheer authority, rather than a reasoned act of discretion. Discretion obviously requires a sincere evaluation of relevant elements – here principally extenuating circumstances, and proportionality. Simply declaring that they have been considered will not do, when it is perfectly clear that there was no investigation of those elements as such. The desire to show severity with

respect to abuse of G-5 employees in the Bank's own "reputational" interest is no excuse for failing to accord due process in the individual case.

56. The Tribunal accordingly concludes that HRSVP's decision was a disproportionately grievous sanction for the misrepresentations made by the Applicant.

DECISION

The Tribunal decides that:

- (i) the Bank's 29 October 2010 decision terminating the employment of the Applicant is hereby rescinded, and all references to it shall be removed from the Applicant's personnel file;
- (ii) the Bank shall reinstate the Applicant to the same position or to a position similar to the one she was occupying at the time of the termination of her employment;
- (iii) the Bank shall pay the Applicant compensation in the amount of one year's salary net of taxes;
- (iv) the Bank shall contribute to the Applicant's costs in the amount of \$35,000;
and
- (v) all other pleas are dismissed.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 25 May 2011