

Decision No. 142

Winston Carew,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. World Bank Administrative Tribunal, composed of A.K. Abul-Magd, President, E. Lauterpacht and R.A. Gorman, Vice Presidents, and F.K. Apaloo, F. Orrego Vicuña, Thio Su Mien and P. Weil, Judges, has been seized of an application, received September 7, 1994, by Winston Carew, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on April 11, 1995.

The relevant facts:

2 The Applicant was a Production and Control Assistant in the Printing and Graphics Division, General Services Department, (GSDPG), at Level 14. As part of his job, the Applicant was responsible for photocopying in the Print Shop and was available for overtime work on the photocopying machines for jobs needed on a rush basis. In November 1992 the Print Shop Supervisor cautioned the Print Shop staff about overtime abuse. In May 1993, the Ethics Officer (EO), upon request by the new Division Chief of the Print Shop, undertook an investigation of allegations of abuse of overtime as a part of which overtime claims submitted by the Print Shop staff from November 1992 to April 1993 were compared to security sign in/out registers for World Bank lobbies and garages.

3. The Applicant met with the EO alone on May 10, 1993 and subsequently in the presence, also, of the Applicant's supervisor and the Applicant's Division Chief on July 5, 1993 to explain discrepancies found between his entry and exit times and the overtime hours claimed by him. Among other things, the Applicant explained that during the weekends he would park outside the Bank on the street, since it was easier for him to get to the copy machines from the street than from the garage and easier to carry food in and so he would enter through the "D" Building service entrance where no identification was required. As to overtime done in the evenings the Applicant stated that when he had two or three jobs in one evening he would occasionally carry over this work to the next morning before his regular hours started and in those cases no log-in was required for staff after 7:00 a.m. Then the Applicant would put the hours together in one lump sum because this would make it easier accurately to allocate the hours to the client who was to be billed for the overtime. The Applicant also explained that it was the responsibility of the Print Shop supervisors to split up the time worked on multiple jobs.

4. By memorandum, dated July 6, 1993, to the Applicant, the EO asked the Applicant to explain in writing by July 20, 1993 discrepancies between the log-in and log-out times and the amount claimed as overtime.

5. By memorandum, dated July 15, 1993, the Applicant submitted his response to the EO. His explanation was similar to that which he had given earlier and he requested that each job be examined in the light of his explanation.

6. On September 7, 1993 the Applicant had a meeting with the EO and the Applicant's Supervisor and Division Chief. He was asked to explain his July 15, 1993 memorandum. The next day, based on information given to him by his supervisor, the Applicant changed one figure in his original response, which reduced the number of copies he had claimed he had produced on one of the dates.

7. The Applicant by memorandum, dated September 14, 1993, to the EO further clarified his earlier response to the EO's questions. He reiterated what he had stated earlier. He explained that on one particular occasion he had left through the "D" Building entrance, where there was no guard. Regarding the carrying over of work to the next day, he stated that, had he been warned by his supervisors that he was not supposed to do this, he would never have done it. He also apologized for any honest mistakes he had made.

8. By memorandum, dated October 14, 1993, to the Director, Personnel Management Division (PMD), the EO recommended separation of the Applicant from the Bank effective October 29, 1993, but not repayment by the Applicant of the overtime in light of the Applicant's G-iv visa, his low level of income, the small amount of money involved and his loss of employment. The EO stated also that the Applicant's explanations fell into four categories: a) on a weekend or holiday and in the morning, the Applicant parked his car first on the street, entered the contractor service entrance which required no staff sign in, and parked in the Bank only after driving out for breakfast a little later; b) on weekends the Applicant parked in the Bank first and drove out for lunch, parking outside the Bank on return and using the contractor service entrance; c) on weekday evenings the Applicant worked early the next morning but charged the time to the previous evening; d) the Applicant presented evidence of jobs done on the copying machine which would have taken at least the time claimed as overtime. The EO found that these explanations raised issues of credibility. He pointed out to him at a meeting that parking on the streets on the weekends was very difficult, while parking in the Bank's garage was fairly easy; that the Applicant couldn't have left twice from the "D" Building entrance, as he had claimed, on one specific occasion, since the "D" Building entrance had been for years closed on weekends; during the week, putting the overtime on the previous night's time was not acceptable, considering that the Applicant's supervisor had already warned the Print Shop staff in November 1992 to be particularly correct in their overtime charging; and the Applicant had in some instances claimed overtime for jobs done by others. The EO further stated that when meeting with him, the Applicant had also said that when using two machines he felt justified in claiming the time it would take to do the job on one machine; also that some overtime included travel time from home, which although contrary to the Staff Rule had been approved by the Applicant's supervisor, something denied by the Applicant's supervisor; also the Applicant had stated that for time over 1/2 hour, he would claim the next highest hour, although the Bank's policy called for charging to the nearest quarter hour. As a result, the EO had concluded that the evidence strongly suggested that the Applicant fraudulently claimed more than 29 hours of overtime in over fifteen instances from November 1992 to April 1993, with an additional eight-plus hours likely in two other instances. Because fraud was a ground for separation from the Bank, the EO recommended that the Applicant be separated from the Bank.

9. By memorandum, dated October 21, 1993, the EO informed the Applicant that the Director, PMD, had concluded that his overtime claims were fraudulent in at least 15 instances in the period between November 1992 and April 1993 and had, accordingly, decided that his appointment with the Bank should be terminated effective October 29, 1993. In a subsequent memorandum, dated October 22, 1993, the EO informed the Applicant that the Director, PMD, had extended the date of the termination of his employment to November 30, 1993, in order to provide the Applicant more time to prepare for his transition.

10. By memorandum, dated October 25, 1993, to the Director, PMD, the Applicant requested administrative review of the decision communicated to the Applicant in the memorandum from the EO, dated October 21, 1993. He asked to be given 30 days to obtain the evidence required and to be allowed a response regarding all the instances that the EO had cited. He also attached analysis of four overtime claims, contending that in respect of these instances the EO had erred in his findings.

11. By memorandum, dated November 5, 1993, to the Applicant the Director, PMD, answered that the Applicant's termination date had already been extended and that he had been placed on administrative leave because of his G-iv visa status to give him time to prepare for the transition and not to give him additional time to respond. Furthermore the Director, PMD, stated that more than three months had passed from the beginning of the investigation until the October 21, 1993 memorandum informing the Applicant of the decision to terminate his employment, which was adequate time for response and satisfied the requirements of Staff Rule 8.01, paragraph 5.03. He also pointed out that if the EO's questions were unclear the Applicant should have asked

for clarification at that time and that the memorandum of October 21 was, in accordance with Staff Rule 8.01, paragraph 5.06, the written notice of the disciplinary measures taken and of the reason for their imposition. The Director, PMD, also stated that in two of the four instances which the Applicant had dealt with in his request for administrative review the Applicant had in one instance overstated the number of pages photocopied and the time taken, and in the other instance there were inconsistencies between the exact time reported in the overtime claims and the allocation of hours for the photocopying of the specific number of pages cited.

12. By memorandum, dated November 24, 1993, to the Director, PMD, also entitled "Administrative Review", the Applicant attempted further to "clarify the many points of confusion in the record". In this memorandum the Applicant requested that his date of separation be extended until after he had received an answer to his administrative review. He tried to explain the two specific instances mentioned in the memorandum of the Director, PMD, dated November 5, 1993. He also disputed that the requirements of Staff Rule 8.01 had been fulfilled because the basis for the decision to terminate his employment had not been made clear to him. He also described the loose administrative practices in the Print Shop in order to show that they made difficult the sorting out of the record and the establishment of the allegation of misconduct, or the fact that misconduct did not occur. He questioned the accuracy of the log sheets. He claimed that all jobs were completed within reasonable periods of time consistent with average production times; and that the few unrecorded hours that could never be explained, because of the loose administrative record, were greatly less than the 29 hours alleged.

13. On November 30, 1993 the Applicant, after receiving oral notice that the Director, PMD, would not change his earlier decision, filed a Statement of Appeal with the Appeals Committee against the decision of the Bank to terminate his services. The Appeals Committee recommended in accordance with the Applicant's request that provisional relief be granted to the Applicant so that he could retain his G-iv visa until a decision was taken on his appeal. By memorandum, dated December 27, 1993, the Director, PMD, informed the Applicant that he had decided to accept the recommendation of the Appeals Committee on provisional relief by placing him on annual leave or, when that was exhausted, on leave without pay, until a decision was rendered on his appeal.

14. By memorandum, dated January 4, 1994, the Director, PMD, confirmed to the Applicant that, after he had examined the record of the review by the EO of the additional information provided in the Applicant's memorandum, dated November 24, 1993, his decision remained unchanged. He attached copies of the relevant log sheets that the Applicant had requested along with the record of the review by the EO. In this review, submitted by memorandum, dated January 4, 1994, from the EO to the Director, PMD, the EO stated that several clarifications had been made in earlier questionable log entries and one additional overtime discrepancy came to light. While he analyzed each one of the submissions of the Applicant in his attachment to his November 24, 1993 memorandum to the Director, PMD, the EO concluded that the overall result strengthened the conclusion that overtime fraud had been practiced by the Applicant.

15. In its report, dated June 2, 1994, the Appeals Committee found that the disciplinary proceedings in this case were carried out in accordance with Staff Rule 8.01. Furthermore, after reviewing the evidence in the files and hearing testimony, the Committee concluded that the Applicant had made fraudulent claims for overtime in several instances. It, therefore, thought that the serious disciplinary measures taken by the Respondent were appropriate in the case. It recommended that the Applicant's request for relief be denied. By letter, dated June 9, 1994, to the Applicant the Vice President, Management and Personnel Services (MPS), stated that he accepted that recommendation.

The Applicant's main contentions:

16. The Respondent has produced insufficient evidence to show that the Applicant intentionally defrauded the Respondent in submitting overtime claims. Among other things, the Respondent had not instituted the proper controls over overtime recording, and the disclosure of evidence was selective, placing the Applicant in a difficult position.

17. Because this case involves disciplinary measures, the Tribunal must review the factual findings de novo.

18. The Applicant should not bear the burden of proof.
19. Confrontation of the Applicant with evidence, an essential ingredient of due process, designed to enable him properly to defend himself, was missing in this case.
20. The Applicant was entitled to notice that termination was being considered which was not given.
21. The sanction of termination for the Applicant's alleged offence violates the principle of proportionality, considering the lack of seriousness of the offence, extenuating circumstances, the situation of the Applicant and the interests of the Bank Group.
22. The Applicant has himself paid a vast portion of his counsel's fees and should be reimbursed.
23. The Applicant made the following pleas:
 - (i) reinstatement at his former grade with all within-grade and structural increases he would have received had his employment not been wrongfully terminated;
 - (ii) back pay from the date of the Respondent's wrongful termination of his employment to the date he is reinstated;
 - (iii) restoration of all employment benefits, including leave and retirement benefits, to the level at which they would have been had his employment not been wrongfully terminated;
 - (iv) restoration of the annual leave he expended while on administrative leave without pay status during the pendency of his administrative appeal;
 - (v) compensation in lieu of reinstatement in an amount of three years' salary; and
 - (vi) attorneys' fees in the amount of \$3975.

The Respondent's main contentions:

24. The Respondent was entirely reasonable, and neither arbitrary nor capricious, in determining that the Applicant committed fraud repeatedly during the six-month period reviewed by the EO.
25. While it is clear that the Tribunal may review a finding by the Bank that a staff member committed misconduct, there is no support for the Applicant's assertion that the judgment of the EO, who interviewed the Applicant and thoroughly reviewed the evidence over a period of eight months, and the subsequent decision of the Director, PMD, should be disregarded.
26. The investigation was properly conducted and was based on sufficient evidence which had been properly established. It was not conducted on the assumption that the burden of proof was on the Applicant.
27. The Applicant was afforded due process, insofar as he was confronted with the relevant evidence and given a chance to defend himself. There is no longer a requirement that the Bank provide an additional, earlier notice that termination is under consideration; notification is to be given after it has been determined what measure is to be taken.
28. Termination of employment is not significantly disproportionate to the offence of fraud.
29. The Applicant should not be awarded attorney's fees, because the fees charged by the Applicant's counsel are, apparently, not being borne by the Applicant.

Considerations:

30. Having concluded that the Applicant had engaged in serious misconduct, the Respondent terminated the

Applicant's service as of October 29, 1993, later extended to November 30, 1993. The nature of the misconduct the Bank claims to have established against the Applicant is that on numerous occasions between November 1992 and April 1993, he submitted false overtime claims and led the Respondent to pay him more than that to which he was entitled.

31. The Applicant contests that decision and invites the Tribunal to quash it, order his reinstatement and also grant him other relief. The main grounds set out by the Applicant for seeking the quashing of the decision are: first, "there is no sufficient evidence that the Applicant intentionally defrauded the Bank"; second, as this case involves the imposition of a disciplinary sanction, the Respondent's factual findings should be examined de novo; third, as the Applicant was not confronted with the evidence, there was infringement of his right to due process; and fourth, the sanction imposed on him infringed the principle of proportionality.

32. It is convenient to consider the second ground first, as it relates to the scope of the powers of the Tribunal in disciplinary cases. In such cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed. The Applicant is, therefore, correct in his assertion that the Tribunal, in reviewing decisions in disciplinary cases, is not limited to determining whether there has been an abuse of discretion.

33. The Tribunal must, therefore, consider what appears to be the Applicant's principal ground of complaint, namely, that "there is no sufficient evidence that the Applicant intentionally defrauded the Bank." The Respondent contends that the discrepancy between the Applicant's overtime claim forms and the Bank's entry-and-exit logs confirms that the Applicant knowingly and repeatedly claimed payment for overtime work in excess of time actually worked, and that the Bank relied on those false claims and paid him therefor. The Applicant, however, contends that these logs are neither a reliable nor complete reflection of the overtime hours actually worked by him.

34. Staff members claiming pay for overtime work are required by the Bank to fill out report forms by setting forth the precise times, before and after the usual work day, when overtime work was done. In addition, the Bank keeps security logs which record the arrivals and departures of staff members to and from Bank premises on weekends and before 7:00 a.m. and after 7:00 p.m. on weekdays. Thus, the number of hours that the Applicant claimed to have worked overtime should have dovetailed with those shown in the security logs for his early arrival and late departure times. When these two were compared for the period between November 1992 and April 1993, considerable discrepancies were discovered. These were itemized in the memorandum dated July 6, 1993 from the Ethics Officer (EO) to the Applicant. This memorandum documented that the Applicant claimed and received from the Bank overtime pay for a number of hours in which he could not have been on the Bank's premises. He was asked to explain the discrepancy.

35. Despite the Applicant's attempts to do this, the EO and the Director, Personnel Management Department (PMD), both of whom interviewed the Applicant and were able to observe his demeanor, found his explanations unacceptable. Subsequent to this, the Applicant repeated substantially these same explanations to the Appeals Committee. The latter also, having seen and heard the Applicant and having considered lengthy submissions made on his behalf, concluded that the explanations were implausible. In his application and reply to the Tribunal the Applicant reiterates his twice-failed explanations for the discrepancies between his overtime claims and the security logs.

36. The Applicant makes an issue of the accuracy of the security logs. He contends that they are unreliable and that the Respondent itself concedes this, and that they are so inaccurate that the Bank had to alter them. The Respondent denies these claims. The accuracy and reliability of the security logs are important because it was on their integrity that the case of fraud against the Applicant was based.

37. The record shows that at the relevant period, whenever the Applicant entered or exited the Bank through staff entrances or a garage during weekends, or before 7 a.m. or after 7 p.m. on weekdays, he had to sign 'in' and 'out' personally. As the Applicant himself made his 'in' and 'out' entries, he cannot now question their

accuracy. These entries were made under the supervision of the Bank's security staff who were on hand to assist him in correcting any errors. The evidence shows that when the Applicant made his overtime claims, he filled out the Bank's overtime report form, entering the date the overtime was performed, the times when work was commenced and completed, and the total number of hours for which payment was sought. His supervisor completed the portion which described the type of work for which the overtime was to be paid and signed his approval. It seems clear that the supervisor did not check the hours stated in the overtime report against the security logs nor was there any reason for him to do so.

38. The Applicant mischaracterizes the evidence when he says that the Respondent admitted that the logs were unreliable or inaccurate and that that was why it corrected them. The record shows that of the 18 instances in which discrepancies were discovered the Applicant, obviously in error, in four cases filled the 'in' column when he was exiting, and the 'out' column when he was entering the Bank. These are the only corrections the Bank admits making. They have nothing to do with either the hours the Applicant claimed as overtime or the times of arrival and departure recorded in the logs. It seems odd that the Applicant should seek to dispute the accuracy of entries he himself had made in the security logs or to regard his own corrected clerical errors on an unrelated matter as evidence of the unreliability of the Bank's record keeping. On this issue the Tribunal concludes that the logs offer a sufficiently accurate measure of recorded time spent on the Bank premises, which in this case clearly does not match the claims for overtime. The Tribunal also concludes that the Applicant's assertions that he worked additional overtime not reflected in the Bank's logs – because, principally, of his parking outside the Bank premises and his entry and departure through unmonitored entrances – are outweighed by evidence to the contrary and are, therefore, not to be credited.

39. Accordingly, on this main ground the Tribunal concludes that the Applicant falsely represented to the Respondent's officers that he performed overtime for the hours shown on his overtime slips; that those representations were false to his knowledge; and that the Respondent believed those representations and paid to the Applicant, by way of overtime, sums of money over and above what he legitimately earned. The Tribunal finds that the Applicant defrauded the Respondent and, consequently, that the Respondent's finding of misconduct against the Applicant was warranted.

40. It was also contended by the Applicant that his right to due process was infringed because he was not confronted with the evidence on which the adverse conclusion against him was reached. The record belies that contention. As stated above, when the discrepancies between his overtime claims and the security logs were discovered, the EO and the Applicant's supervisor and Division Chief met with the Applicant, confronted him with the discrepancies, and sought his explanations. The Applicant proffered explanations which the Respondent's officers did not credit.

41. On July 6, 1993, the EO sent him a formal memorandum professedly under Rule 8.01 of the Staff Rules in which he sought explanation for the differences between the Applicant's overtime claims and the times recorded in the log sheets. Particulars of no fewer than 18 such differences were given.

42. Having been made aware of the accusation as well as the evidence against himself, the Applicant responded at some length to the queries. Indeed, after consulting the Staff Association, he provided further response to the accusation. In those circumstances the Tribunal concludes that the contention that the Applicant was not afforded due process cannot be accepted.

43. Staff Rule 8.01, Section 4.01, refers in effect to proportionality in providing that the Bank shall determine the imposition of disciplinary measures on "a case-by-case basis," taking into account, among other elements, "the seriousness of the matter," "extenuating circumstances," "the situation of the staff member," and "the frequency of conduct for which disciplinary measures may be imposed." It is proper, therefore, for the Tribunal in this case to consider "the seriousness of the matter" and "the frequency of conduct" in assessing the proportionality between the Applicant's wrongdoing and the Bank's decision to terminate his services. The Tribunal considers that fraud is always a most serious matter. This is particularly true where, even if the amounts improperly claimed as compensation are not large, the conduct consists of repeated acts of unethical behavior. Thus, in this case, where the Applicant persisted in and showed a pattern of abuse, the Respondent is entitled to take a

serious view of his misconduct.

44. However, if other elements envisaged in Staff Rule 8.01, Section 4.01, are taken into account, the disciplinary measure imposed by the Bank is significantly disproportionate to the misconduct. Here, the Tribunal notes the long service of the Applicant as a staff member of the Bank for a period of 14 years, his diligent performance in the discharge of duties, and the positive performance reviews and evaluations he received. Moreover, the Tribunal notes as well that the amount of money improperly claimed for alleged overtime work was modest, and that the Applicant's employment was not one involving higher management responsibilities.

45. The Tribunal therefore concludes that termination of employment, in these circumstances, is not proportionate to the Applicant's misconduct. This conclusion is further reinforced by the Tribunal's examination of Staff Rule 8.01, Section 4.02, which sets forth a wide range of possible disciplinary sanctions, of which termination of service is obviously the most severe.

46. The Respondent asserts that, despite the severity of termination, such has been the discipline which in earlier instances has been consistently imposed upon staff members found guilty of fraud. Although it would be appropriate in many cases to terminate the employment of a staff member who commits fraud, a mechanical and uniform imposition of this discipline is inconsistent with the obligation that Staff Rule 8.01, Section 4.01, imposes upon the Bank to impose disciplinary measures "on a case-by-case basis," taking into account the various factors listed there.

Decision:

For the above reasons, the Tribunal unanimously decides:

- (i) to quash the decision of the Respondent terminating the employment of the Applicant;
- (ii) in the event that the Applicant is to be compensated without further action being taken by the Respondent in the case, that the Respondent shall pay to the Applicant a sum equivalent to six months net pay;
- (iii) costs in the amount of \$2,000 are to be paid to the Applicant; and
- (iv) all other pleas be dismissed.

A.K. Abul-Magd

/S/ A.K. Abul-Magd
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, May 19, 1995