Decision No. 300

Yaw Kwakwa,
Applicant

v.

International Finance Corporation,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on January 13, 2003, by Yaw Kwakwa against the International Finance Corporation (IFC). The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Francisco Orrego Vicuña (President of the Tribunal) as President, Robert A. Gorman and Jan Paulsson, Judges. The usual exchange of pleadings took place. In view of the Applicant's allegations regarding the investigation which led to his grievance, the Tribunal called upon the Respondent to submit to the Tribunal, for its review *in camera*, all files related to that investigation or any other investigations relating to two other persons and to a certain related project which obtained IFC financing. The Respondent duly provided the Tribunal with two large boxes of documents. The case was listed on July 1, 2003.

2. The Applicant's employment as the Acting IFC Resident Representative in Accra, Ghana, was terminated on February 14, 2001 for misconduct. He seeks to have that decision rescinded, to be reinstated, and to be compensated in the amount of US$500,000 for hardship suffered and damage to his professional reputation.

3. The Respondent considers that the Applicant was guilty of financial improprieties which amply justified his termination because he accepted remuneration in connection with his duties from an IFC client and person external to the Bank Group, in violation of Staff Rule 3.01, para. 4.05. Indeed, the Respondent stresses that termination in such a case is mandatory under Staff Rule 8.01, para. 4.01(a), in cases of "abuse of position" for financial gain.

4. It is uncontroverted that on June 28, 1994, the Applicant's bank account in the United Kingdom was credited with a payment of a value equivalent to US$50,000 from a Mr. Armen Kassardjian, a businessman resident in Accra who had applied to the IFC for two loans, one for US$1,000,000, the other for US$300,000. These loans were being processed at the time. The Applicant, who since March 1993 was a full-time IFC Consultant, was the IFC's Investment Officer on both loans, and, as such – according to the IFC's then Chief Credit Officer in the Sub-Saharan African Department, who testified before the Appeals Committee after having reviewed the relevant records – "appraised those projects and structured the deal and negotiated the terms and conditions of our investment in those projects." In response to a direct question from the Appeals Committee Panel, the Applicant conceded that he was responsible for the "final decision memorandum as the lead IO [Investment Officer]."

5. The Applicant seeks to explain that the US$50,000 payment was part of an innocent transaction unrelated to his employment at the IFC. He affirms that on June 23, 1994, he happened to encounter Mr. Kassardjian on an Accra-London flight and that they fell into a conversation during the course of which it transpired that Mr. Kassardjian, in addition to the hotel projects for which he had sought the loans, had a road construction business which required Ghanaian Cedis for its local costs. The two men agreed, or so the Applicant avers, that Mr. Kassardjian would remit US$50,000 to one of the Applicant's London bank accounts, and the Applicant would immediately cause an equivalent amount in Cedis to be remitted to Mr. Kassardjian in Ghana.

6. On the occasion of his first interview with the investigator (to be described below) the Applicant asserted,

according to the investigator's report, that "no contract, note or other written documents were utilized for this transaction." Before the Appeals Committee, however, the Applicant said that his arrangement with Mr. Kassardjian was noted on airline stationery by the Applicant, who then gave it to Mr. Kassardjian. Before this Tribunal, he now contends that there was a written agreement, "but all copies of that agreement appear to have been lost."

7. The Applicant states that, after having paid the US$50,000 to the Applicant, Mr. Kassardjian "actively avoided" him and "frustrated [his] good faith and earnest attempts to return the funds in Cedis to him."

8. Apart from speculating nebulously about Mr. Kassardjian's intent to "leverage" him (apparently in order to neutralize any possible future IFC criticism of Mr. Kassardjian's performance as a borrower), the Applicant does not explain persuasively why Mr. Kassardjian, after having so quickly paid out US$50,000 in order to have access to Ghanaian currency, suddenly lost all interest in receiving it.

9. Nor does the Applicant convincingly explain how he proposed to fund his Cedi remittance to Mr. Kassardjian. Before the Appeals Committee, the Applicant claimed that his private real estate venture in Accra was at the time "stuck with about 50 million Cedis" (the rough equivalent of about US$50,000), which was depreciating against the U.S. Dollar at an annual rate of 60%. The Applicant's annual salary from the IFC was equivalent to approximately US$17,000; he had additional rental incomes, from a real estate venture whose funds were commingled with his own, in a total annual amount equivalent to US$15,000; and his wife's annual salary was equivalent to US$6,000. Ghanaian income tax would apparently have been payable at a rate of 35% (on income in excess of 17.4 million Cedis). The Applicant explained to the investigator that half of his family's net income from wages went to cover living expenses. (There are four children in the household.) The investigator, who reviewed the accounts of "twelve known bank accounts" held by the Applicant and his immediate family, involving "hundreds of transactions" (of which only those of US$1,000 and above were considered), concluded that the Applicant's accounts in Ghana did not "contain sufficient balances" to "complete an exchange of currency." The annual reports of the Applicant's real estate company (as furnished to the investigator and reviewed by the Tribunal *in camera*) show that for the year ending December 1994, cash and cash-equivalent balances were in a total amount of some 36.8 million Cedis, more than 10 million less than the then equivalent of US$50,000. The company actually ran at a loss in 1994, 1995 and 1996. Although these observations are not conclusive, they certainly do not bolster the Applicant's case.

10. At any rate, the IFC loans were disbursed to Mr. Kassardjian in 1994 and 1995.

11. On May 10, 1996, by which time Mr. Kassardjian had become a delinquent borrower, the Applicant issued a check in the amount of US$49,750 to Mr. Kassardjian. The latter did not seek to present the check for payment until October 2000, by which time the Applicant was under investigation.

12. All the above is against the background of the fact that the Applicant, according to his own explanations, did not know Mr. Kassardjian until the latter made the loan application to the IFC.

13. The Applicant was informed of the investigation on December 9, 1999. He was contacted by telephone and asked to come to the World Bank Country Office in Accra, where he met with the investigator, Mr. Alan Sharp, and an IFC lawyer. He was told that serious allegations had been made against him, that the investigator wished to speak to him about those allegations, but that before answering any questions he was entitled to be advised in writing of the allegations against him. Accordingly, before the discussion went further, he was given the opportunity to read a memorandum from the Manager of the Respondent's Professional Ethics Office, referring to allegations of misconduct "by accepting remuneration from an IFC client while in the service of the IFC" (Principles of Staff Employment, Principle 3.1(b)) and "abuse of position in the Bank for financial gain" (Staff Rule 8.01, para. 3.01(d)) and inviting him to respond as specifically as possible.

14. In response to the investigator's statement that the investigation concerned "an allegation that a pay-off had been made by an IFC client to him in connection with an IFC loan," the Applicant, according to Mr. Sharp's report, denied that he had ever received any payment or item of value "for any purpose, from any IFC client in

an amount of $100 or more." He specifically denied having accepted "any payments or kickbacks" from Mr. Kassardjian. He also described his financial assets, and those of his spouse, in some detail, and agreed to give releases so that his bank accounts could be examined.

15. It was only the following morning, when these releases were brought to him for signature, that he said "there was something further that he wanted to discuss," and proceeded to recount the circumstances of Mr. Kassardjian's US$50,000 payment to him, which he described as having had "nothing to do with the IFC." (The Applicant effectively confirmed before the Appeals Committee that he did not bring up the Kassardjian transaction until the second meeting.)

16. In his written response dated December 14, 1999 to the Professional Ethics Office memorandum, the Applicant denied having accepted remuneration from an IFC client but wrote that "it is worth mentioning" that he had a "private transaction ... in respect of currency exchange" with Mr. Kassardjian involving a US$50,000 "advance" by the latter.

17. The factual elements referred to in the two previous paragraphs have not been denied by the Applicant, whether in writing or on the occasion of his counsel's cross-examination of Mr. Sharp before the Appeals Committee.

18. In light of the uncontested facts, one cannot be surprised that the Respondent found the Applicant's conduct to be intolerable. What is surprising is that he still apparently believes that his conduct might be condoned, and that the Respondent had no right to sanction him. His defense proceeds in three branches: (i) he denies misconduct; (ii) he accuses the Respondent of having violated his procedural rights; and (iii) he contends that the sanction was disproportionate.

19. As for the first branch, the Applicant argues that his transaction with Mr. Kassardjian was not illegal under Ghanaian law and that he was entitled under the terms of his employment with the IFC to engage in independent business on his own account. The Tribunal sees no need to examine the validity of these contentions, because even if they are correct they cannot avail the Applicant.

20. The jurisprudence of this Tribunal is clear to the effect that the scope of its review in connection with disciplinary cases is broader than with respect to decisions of a purely managerial or organizational nature; indeed, the Tribunal may in a case such as this review the merits of the Respondent's decision. (*See*, *e.g.*, *Courtney (No. 2)*, Decision No. 153 [1996], para. 29.) Moreover, the threshold of proof in disciplinary decisions leading to dismissal "must be higher than a mere balance of probabilities" (*Arefeen*, Decision No. 244 [2001], para. 42).

21. One perplexing strand of the Applicant's argument pertains to his alleged ignorance of the Respondent's rules of employment. Not only does he thus rather naively plead ignorance of the law as a defense, but he has the temerity to criticize the IFC for providing inadequate guidance. This argument must be summarily rejected; the letter by which the Applicant entered into full-time employment with the IFC (dated March 16, 1993) expressly stated that his employment was "subject to the conditions of appointment of the IFC/World Bank Group as at present in effect …" and informed him that a full set of the Staff Rules was available to him in the field office. At any rate, ignorance of the Staff Rules provides no excuse; see *Dhillon*, WBAT Decision No. 75 [1989], para. 17. Moreover, when he appeared before the Appeals Committee the Applicant acknowledged that the general obligation of staff members to comply with the Principles of Staff Employment "appears on my contract."

22. It is in fact inconceivable that anyone would have any doubts as to the impropriety of the Applicant's transaction with Mr. Kassardjian. The Applicant explains at length that he in fact did not make money on the transaction, because, by the time he was able to repay the reluctant Mr. Kassardjian, a far greater amount in Cedis was required to do so; indeed, he claims thus to have lost US$15,000 in Cedi terms. This pseudo-economic explanation is difficult to follow. After all, the Applicant was purportedly the party operating in dollars, and at the end of the day he had the benefit of US$50,000 standing in his account for two years without paying

any interest. And of course the repayment was in dollars, not Cedis.

23. The Applicant's repeated insistence on the proposition that he did not enter into the transaction with Mr. Kassardjian to make money relates to his argument that he did not engage in speculative currency trading, and apparently as a purported counter to the charge of abuse of position for "financial gain." But in fact the Applicant contradicted himself before the Appeals Committee when he explained that he was willing to enter into the transaction with Mr. Kassardjian because of the depreciation of the Cedi, which he said was running at 60% per year and would quickly dissipate the cash on hand from his rental income. Leaving aside the issue of whether the Applicant indeed had such cash balances, this certainly proves that the Applicant, even if one accepts his testimony that no bribe was involved, was acting out of a profit motive. For this purpose, seeking to avoid loss is plainly a form of seeking gain.

24. The Applicant also testified that there was no way to make money in Ghana from currency exchanges because there was no prohibition on changing currency and therefore no black market. Exchanging currencies was therefore merely a matter of either: (a) needing Cedis for immediate local expenditures, or (b) disposing of Cedis in order to avoid the effects of its precipitate depreciation. On this footing, the Applicant's version of his transaction with Mr. Kassardjian becomes very difficult to accept; a businessman would hardly entrust a recent acquaintance with US$50,000, apparently on an oral agreement with not the slightest security, so as to receive Cedis which were freely available anyway.

25. The stated reason for the Applicant's dismissal was that he was in contravention of Staff Rule 3.01 in that he had accepted remuneration from a third party "in connection with service with the Bank Group" and had thus abused his position for financial gain. The Applicant's attempt to avoid this sanction by arguing that there was no "gain" must be emphatically rejected, even on an interpretation of facts most favorable to him.

26. In sum, taking the facts as admitted by the Applicant, the Tribunal has no hesitation in upholding the Respondent's finding that the Applicant abused his position in violation of fundamental principles of the Staff Rules.

27. As for the second branch, the Applicant contends that the Respondent's investigation was improper, prejudicial, deceptive and unprofessional. As a result, he argues, its findings are unreliable and should be rejected.

28. The Applicant complains that the Respondent's decision to investigate him was the result of accusations made by persons who were biased against him and were untrustworthy. This argument has no merit. Whatever may be the law enforcement system, tips are unlikely to come from pillars of the community who have benevolent feelings toward the accused. Indeed, tipsters may be wholly disreputable. The issue was whether the ensuing investigation was fair, and whether the burden of proof was met.

29. The Applicant seemingly operates under the misapprehension that the Respondent must be held to the full panoply of due process requirements that are applicable in the administration of criminal law. However, the due process requirements for framing investigations of misconduct in the context of the World Bank Group's relations with its staff members are specific and may be summarized as follows: affected staff members must be appraised of the charges being investigated with reasonable clarity; they must be given a reasonably full account of the allegations and evidence brought against them; and they must be given a reasonable opportunity to respond and explain. (*See King*, Decision No. 131 [1993], paras. 35-37.) Staff Rule 8.01, para. 5.06, does not give an automatic right to depose, confront or cross-examine persons who have been asked to contribute to the investigation.

30. It was, among other things, the failure of the Respondent to respect the right of the relevant staff member to be reasonably acquainted with the charges and evidence against her which led to the Tribunal's censure in *Koudogbo*, Decision No. 246 [2001]. In the present case, by contrast, the process was described by the Respondent as follows:

> At the outset, Applicant received a written memorandum on December 9, 1999 notifying him of the allegations of misconduct and requesting a written response. Applicant did provide a written response to the allegations. When Applicant's defense raised new issues of misconduct, Applicant received a second memorandum with allegations, and he again was afforded an opportunity to respond in writing.
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> When the investigative report was in its final draft form, the Ethics Office afforded Applicant the opportunity to review the draft report and provide comments, which he did. Applicant's comments included the request that INTIU [the Investigation Unit of the Department of Institutional Integrity] interview an additional witness. INTIU did interview the additional witness and incorporated relevant evidence into the report. Because new evidence from the interview was added to the report, Applicant was provided an opportunity to review the revised draft. For a second time, Applicant provided comments on the report.

Apart from the insignificant correction that the Applicant *read* the notice of allegations of misconduct on December 9, 1999, and *received* a hard copy on December 10 (see paragraph 38 below), this description has been verified by the Tribunal and satisfies the relevant due process requirements; it provided a legitimate basis for the finding of misconduct and for the notice of termination delivered to the Applicant in person on February 26, 2001.

31. In this case, there is no issue of proof since facts sufficient to justify the sanctions have been admitted by the Applicant. As for the investigation, it was conducted under the responsibility of Mr. Alan Sharp, a consultant to the Department of Institutional Integrity (and its predecessor, the Corruption and Fraud Investigation Unit) who had 22 years experience as a U.S. federal agent conducting mail fraud investigations. The Applicant suggests that Mr. Sharp and his colleagues were motivated by a desire to obtain a conviction irrespective of the true facts. He adduces no evidence for this serious charge, which therefore remains speculative. In a system where the investigator's work is subject to checks and balances, including recourse to this Tribunal, it would be more plausible to speculate that an investigator is motivated by the desire to be seen as doing his job properly.

32. The Applicant also complains that the Respondent has unjustifiably preferred the version of events presented by his accusers to his own. He points out that Mr. Kassardjian refused to speak directly with the investigator, and went no further than to hold up a document, which he alleged to be the Applicant's bank draft of repayment, at a distance, without allowing it to be examined. He contrasts this attitude with his own cooperativeness. It is true that the record shows that Mr. Kassardjian was not forthcoming. But then again, unlike the Applicant he was not fighting for his job, was not a staff member required to cooperate with an internal investigation, and understandably may have preferred not to accuse himself of having participated in financial improprieties. Through his associate, a Mr. Quist, he indicated to the investigator that the US$50,000 payment had been on account of the Applicant's assistance in explaining IFC procedure and in completing his loan applications. This version of the events is contrasted with the Applicant's story, namely that the transaction involved a currency exchange having no relation to the IFC. If the justification for the Respondent's disciplinary measure depended on adopting Mr. Kassardjian's version, one might very well be disturbed at the investigator's giving credence to such an informant. But there is no indication whatsoever that the investigator or anyone else involved on behalf of the Respondent believed Mr. Kassardjian's story that the Applicant had been remunerated for his advice. It is the Applicant's own story which justifies his dismissal; whether or not he mistakenly believed that it was acceptable to enter into the transaction he describes with an IFC client is irrelevant.

33. This leads to consideration of another complaint raised by the Applicant, namely that the charges against him were modified during the course of the investigation, so that they included the separate offence of currency speculation (which is explicitly forbidden under Staff Rule 3.01, para. 7.04). This is a rather baffling argument, because this charge was not a transformation of the case against him, which never changed, but was an additional element of misconduct which arose from his own explanations. This subject then gave rise to considerable arguments about the nature of his currency transactions – both the one he says he agreed with

Mr. Kassardjian and a number of others – and their legality under Ghanaian law. According to the Applicant, he had engaged in a number of such transactions as purely innocent accommodations to persons who received income in dollars in the U.S. but needed Cedis for their expenses in Ghana. One alleged beneficiary of such accommodation was in fact a staff member, and the Applicant complains that the investigator did not contact that person (Mr. B.) to obtain corroboration of the proposition that the Applicant was involved in such purportedly innocent accommodations. At the same time, the Applicant has suggested that it was inconsistent for the Respondent not to have pursued Mr. B. if it believed that such transactions constituted misconduct.

34. This line of reasoning is irrelevant. The Applicant seeks to draw a distinction between proscribed currency "trading" for speculative purposes and casual currency "exchanges" as friendly accommodations. Whether the Applicant engaged in such an "exchange" with Mr. B. does not prove that the same characterization fits the transaction with Mr. Kassardjian, and even if it did, an exchange with a fellow staff member would not be viewed in the same light as one with an IFC client.

35. The Applicant argues that great weight should be given to the testimony of Mr. Boi Fio, an accountant who worked for Mr. Kassardjian and who has confirmed that the Applicant repeatedly came to his office to ask for Mr. Kassardjian's bank account details. This, the Applicant argues, supports his version of the transaction to the effect that it was intended to be an immediate exchange of currency for no gain. Mr. Boi Fio even testified before the Appeals Committee. The Tribunal cannot see why the Respondent should have reached a different conclusion based on Mr. Boi Fio's testimony. In the first place, there is no written record of the time of the Applicant's alleged requests for Mr. Kassardjian's bank details. Secondly, there seems to be no reason why the Applicant would not have paid the Cedi amount (assuming against appearances that he did indeed have such cash on hand) into Mr. Kassardjian's corporate account, the details of which were available to the Applicant as the Loan Officer dealing with the two loans. To argue that it was a "personal" debt seems too convenient; it requires belief in the details of an arrangement the terms of which do not exist in writing and which were denied by Mr. Kassardjian. Moreover, if it was true that this was a transaction designed to avoid an annual erosion of large Cedi balances amounting to 60%, it is inconceivable that the Applicant, whose written communications within the IFC and with the investigator reflect considerable business sophistication, would not have recorded in writing – perhaps through a letter of his solicitor whom he had "entrusted" with the task of delivering the Cedis to Mr. Kassardjian, due to the Applicant's own frequent absences from Accra – that he was tendering a set amount of Cedis on a given date, and that he would not be held to a higher amount if the currency continued to slide against the dollar. Above all, as the investigator pointed out:

> there was nothing to keep Mr. Kwakwa from returning the money the very day it was credited to his account if he desired to do so. The same method he finally utilized to return the money was always available to him.

36. The Applicant seeks to take comfort from the fact that the Appeals Committee characterized some aspects of the investigation as "deficiencies." Given the fact, however, that the Appeals Committee nevertheless denied all his requests for relief in light of "the overwhelming evidence" of misconduct, it would appear that the Applicant is reading far too much into the word "deficiency." The Appeals Committee obviously used the word in the sense of an *imperfect* rather than an *unjustifiable* procedure. Moreover, the "insufficient evidence" which troubled the Appeals Committee related to the issue of whether the Applicant had engaged in foreign exchange trading. (As for evidence relating to the issues of financial improprieties, the facts on which the Applicant was dismissed are, as noted, clearly and sufficiently established by his own admissions.) The Tribunal reiterates that the charge of currency transactions was added as a result of the Applicant's own explanations. It was not a part of the original notice; indeed, the Applicant himself has concluded that "the investigator's conclusion with regard to currency exchanges is irrelevant to this Application." The fact is that the two original charges (see paragraph 13 above) were and remain sufficient and fatal to the Applicant.

37. This leads to consideration of the third branch of the Applicant's main argument: that the sanction was disproportionate. The argument is misconceived; termination is wholly justified with respect to financial improprieties of the kind demonstrated with respect to each of the two principal charges raised (see paragraph

13 above). Such misconduct goes to the heart of the ethical foundations of the IFC's work. As for the Applicant's currency operations, if they had been the Applicant's only misconduct it might have been necessary to assess the magnitude of the offense in light of all the circumstances, such as legality under local law and the Applicant's length and quality of service. For the purposes of this application, however, this issue is, to use the Applicant's own word, "irrelevant."

38. The Applicant has also raised a number of incidental arguments which may be dismissed summarily. His formalistic and belated assertion that he was not "officially" hired by the IFC until September 15, 1994, at the earliest, is belied by the terms of the letter of March 16, 1993 (see paragraph 21 above), and by his own testimony before the Appeals Committee. The similarly belated and pseudo-technical argument that Staff Rule 3.01, para. 6.01, as in effect in 1994 did not apply to the Applicant because his post was not at Level 23 or higher is equally unacceptable; the Respondent's letter of dismissal did not refer to para. 6.01 but to misuse of funds and abuse of position, which have always constituted misconduct under Staff Rule 8.01 irrespective of grade. Finally, the Applicant complains about not having been given a hard copy of the notice of alleged misconduct, but being forced, embarrassingly, to read it on a computer console over the shoulder of a secretary. If this were true, it was an improper manner of giving notice. This complaint was however also raised belatedly, and is unaccompanied by evidence. In other respects, the Applicant has given an exaggerated presentation of the circumstances. In fact, he read the notice and was given, and signed for, a hard copy of it the next day, when the printer had been restored to order. In a similar vein, he complains that the automatic response to his e-mails, which was installed when he was on administrative leave pending the investigation, insultingly informed all senders that the Applicant was out of the office and would return after "100 years," whereas the truth is that the automatic response referred to his absence until "12/31/2100," an obvious and trivial typographical error. Given his proclivity to such misleading depictions, the Tribunal is unwilling to criticize the investigation on the basis of the Applicant's mere allegations.

39. Finally, having had access to a substantial number of documents produced for its *in camera* review by the Respondent as described in paragraph 1 above, the Tribunal confirms that it has found no evidence which contradicts the findings of the investigator, suggests any prejudice against the Applicant or favoritism toward his accusers, or indicates that relevant information was withheld from him. The Applicant has expressed particular concern about the Respondent's alleged failure to provide the Applicant's employment records. In this respect, the Tribunal is satisfied that such aspects of the Applicant's terms of employment at the relevant times as are pertinent to this application have been fully disclosed.

Decision

For the above reasons, the Tribunal decides to dismiss the application.

/S/ Francisco Orrego Vicuña
Francisco Orrego Vicuña
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Paris, France, July 19, 2003