

Decision No. 353

**L,
Applicant**

v.

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

1. The present judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, Robert A. Gorman and Francisco Orrego Vicuña, Judges. The application in this case was received on 12 January 2006. The Applicant's request for anonymity was granted on 28 April 2006 on the basis that the publication of his name was likely to be seriously prejudicial to him.
2. The Applicant contests a decision by the Vice President of Human Resources Services (HRSVP) to withhold payment of the Applicant's accumulated annual leave pending completion of an investigation by the Department of Institutional Integrity (INT), and to place those funds in an interest-bearing escrow account. The Applicant seeks to recover such funds.
3. The Applicant retired from the Bank on 31 October 2005. Shortly before (on 18 October 2005), he received an e-mail from the HRSVP informing him that "pending the outcome of an on-going investigation, HRS [would] withhold all termination benefits (except those from the Staff Retirement Plan) until such time that the investigation is concluded."
4. The Applicant's first formal request for payment of his accumulated annual leave was denied by the Bank on 11 November 2005. The Applicant then requested the intervention of the Ombudsman, but this did not resolve the issue with HRS. The Applicant subsequently filed a Statement of Appeal with the Appeals Committee. The Bank suggested that the matter be brought directly before the Tribunal. The Applicant agreed, and accordingly filed this application.
5. At the Applicant's request, and with the Tribunal's approval, oral hearings took place on 23 May 2006 before a Panel consisting of Judges Jan Paulsson, President, Robert A. Gorman and Francisco Orrego Vicuña.
6. In light of the arguments raised by the Applicant and questions asked by the Panel during the hearings, the Bank requested leave to submit additional information, particularly with reference to the legal authority on which the HRSVP's decision was based. The Panel considered that the Bank's further submissions might raise new issues or information on which the Applicant should be able to comment. The order of the remaining pleadings was therefore reversed so as to allow the Bank to submit its answers to the Panel in a reply, and to allow the Applicant to respond in a rejoinder.
7. At the date of the application, no finding of misconduct had been made. As of the date of this judgment, almost a year after the investigation was begun, the Tribunal has not been informed of any such finding.
8. Although some information about the pending investigation has been provided by the Bank in these proceedings, the investigation itself is not before the Tribunal; this application concerns the question of provisional measures taken by the Bank. The Applicant has objected to the Bank's references to unproven allegations, of which he claims he has not been informed and which he has had no opportunity to answer or

contradict. He emphasizes the implications that this could have with respect to the presumption of innocence.

9. In reaching its conclusions about the Bank's authority to withhold payment of the accrued annual leave, the Tribunal considers only the legal issues raised, and no factual matters relating to the ongoing investigation.

10. The Applicant's main contention is that annual leave is part of the compensation in which a staff member has a vested interest. Such pay cannot be withheld on mere allegations, in the Applicant's view, and should be distinguished from severance benefits (to which he is also entitled and which have been equally withheld by the Bank, but he is not now contesting that decision).

11. The Bank's main argument is that the decision to withhold payment of accrued annual leave was reasonable, as it was taken by the HRSVP pending the completion of an INT investigation as to whether financial misconduct by the Applicant had occurred and whether it had resulted in a financial loss to the Bank.

12. The parties have relied on different interpretations of the Staff Rules in support of their respective positions. The Bank has in particular invoked Staff Rule 11.01 ("Claims"), paras. 1.01 and 3.05, and Staff Rule 8.01 ("Disciplinary Proceedings"), para. 3.03. Staff Rule 11.01 provides in pertinent part:

This Rule governs claims against the Bank Group for money owed and benefits accrued, and claims by the Bank Group for money owed. This Rule does not govern claims arising under the medical insurance plan, the life insurance plan, or any other insurance plan of the Bank Group, or deductions or forfeitures from pay imposed under Staff Rule 8.01, "Disciplinary Proceedings." (Para. 1.01)

In the case of a staff member who separates from the Bank Group, any balance of outstanding receivables may be deducted in full from any amounts paid by the Bank Group ... including ... salary payments ... termination grants [and] accrued annual leave The Bank Group may further pursue collection of outstanding receivables from a former staff member by exercising any rights or remedies available to it under applicable law. (Para. 3.05)

Outstanding receivables means any amounts owed by a staff member to the Bank Group, including, but not limited to, amounts relating to travel advances and benefits or allowances which the Bank Group has overpaid or entitlement to which the staff member has failed to substantiate, but shall not include financial assistance loans or advances which are made pursuant to Staff Rule 6.18, "Financial Assistance." (Para.1.03(a))

Staff Rule 8.01 provides in relevant part:

Depending on the circumstances of the case, one or more of the following disciplinary measures may be taken by the Bank Group when misconduct is determined to have occurred ...:

...

d. Restitution, forfeiture of pay or benefits, or reduction or elimination of a salary increase in respect of a prior year in which it is later determined misconduct occurred, either to penalize a staff member or to compensate the Bank Group for losses attributable to misconduct;

...

k. Loss of future employment and contractual opportunities with the Bank Group.

13. In the Bank's view, the Staff Rules described above, when read together, grant the Bank the necessary authority to deduct from annual leave any amounts owed to the Bank by a staff member upon separation, whether because of misconduct or otherwise. The Bank also asserts that, in any event, the present case does not involve disciplinary measures.

14. Independently of any specific Staff Rule governing the matter, the Bank has placed particular emphasis on the general fiduciary duty that Bank officials owe the institution, which entails the obligation to act prudently in the administration of the Bank's business and the preservation of its resources. The Bank believes that, in view of the fact that many matters do not fall squarely within established written procedures, it has the responsibility to fill gaps in the Staff Rules when necessary, as long as in doing so it does not violate the terms and conditions of employment and does not abuse its managerial discretion.

15. If it did not exercise such authority, the Bank further argues, the collection in local courts of monies owed would put the Bank's immunity in danger, as it could open the door to counter-claims, as the federal circuit court for the District of Columbia held in *Mendaro v. The World Bank*, 717 F.2d 610 (D.C. Cir. 1983).

16. The Applicant sharply disagrees. He first argues that Staff Rule 8.01 is applicable only to disciplinary proceedings, and in any event requires both a prior finding of misconduct and an explicit determination that a sum certain is owed. Staff Rule 11, which applies to non-disciplinary proceedings, refers only to "outstanding receivables" and provides staff members with a due process mechanism to dispute any amount that is allegedly due. Since no finding of a sum certain owed has been made in this case, Staff Rule 11 does not apply.

17. The Applicant also contends that accrued annual leave is part of the compensation of a staff member, and that he has earned it as such in the course of seventeen years of work. This money is not owed contingently; the Bank has no right or authority to withhold it. Invoking *Ismail*, Decision No. 305 [2003], *C*, Decision No. 272 [2002], and *Moses (No. 2)*, Decision No. 138 [1994], the Applicant urges that even with a finding of wrongdoing, the Bank cannot take away accrued annual leave because it has been earned for services already rendered and is thus his vested property. Nor can unilateral actions concerning fundamental and essential conditions of employment be adopted by the Bank, or be given retroactive effect in light of *de Merode*, Decision No. 1 [1981].

18. The Bank reads the cases invoked by the Applicant differently, noting that none of them appear to involve setting off monies which the staff member owed the Bank due to misconduct against his or her accrued annual leave. Should the Bank ultimately retain all or part of the annual leave withheld, it would be used to compensate for monies the Applicant had caused the Bank to lose; compensation in terms of annual leave would still be paid out, "but paid to Respondent to offset amounts Applicant owes Respondent."

19. The Tribunal has no difficulty interpreting the Staff Rules invoked. As to the nature of the benefit discussed, the Tribunal has held in *C* (at para. 30) and *Moses (No. 2)* (at para. 28) that accrued annual leave is part of the compensation of a staff member. Recalling those judgments, the Tribunal further held in *Ismail* (at para. 74) that the pertinent provisions of the Staff Rules "must be read together with Principle of Staff Employment 2.1(c), which states that the Bank shall 'refrain from any action that would deprive staff members retroactively of compensation in any form for services already rendered.'"

20. Staff Rule 11.01 addresses "Claims," while Staff Rule 8.01 addresses "Disciplinary Proceedings." These different matters are not to be mixed. Although the Bank argues that this case does not involve "Disciplinary Proceedings," the fact is that it originates in notifications of alleged misconduct under Staff Rule 8.01. To the extent that Staff Rule 8.01 is applicable, all of its requirements must be observed.

21. In the Bank's view, the restitution provided for under Staff Rule 8.01 could eventually be applied in the context of Staff Rule 11.01 because the "common denominator in any matter involving an outstanding receivable is that the staff member owes the Bank money." The same principle is recognized under Staff Rule 6.18 ("Financial Assistance to Staff Members"), which, as the Bank explains, allows the Bank to apply annual leave to the liquidation of outstanding loan amounts. While the Tribunal might accept the Bank's argument that the Staff Rules can be the expression of a common underlying principle, such is not the case in this context.

22. Staff Rule 11.01, para. 1.01, expressly prevents the merger of these two matters; it provides that "[t]his Rule governs ... claims by the Bank Group for money owed. This Rule does not govern ... deductions or forfeitures

from pay imposed under Staff Rule 8.01, 'Disciplinary Proceedings.'"

23. But even assuming that this transposition were permissible, it would still have to obey the underlying principle. Staff Rule 11.01, para. 1.03, defines outstanding receivables as "any amounts owed by a staff member to the Bank Group." Amounts are "owed" only if they have been established as such. So too, under Staff Rule 8.01, the "restitution" of money owed due to misconduct requires that a prior determination of misconduct be made and result in an explicit debt to the Bank. The meaning of a loan under Staff Rule 6.18 is no different in this context.

24. The issue here is that no such determinations have been made. There has been no finding of misconduct; and no sum certain has been established as actually owed. The Staff Rules do not provide for authority to proceed in the absence of such determinations, nor do they allow for the withholding of any funds in case of contingent liability.

25. The Bank's survey of the rules of other international organizations, provided to the Tribunal, shows that they allow withholding only in the event of a prior determination of outstanding amounts, unpaid debt, material damage, misconduct, or other acts triggering liability.

26. Because annual leave is part of the compensation of staff members, it is a carefully protected property right which cannot be encroached upon except in accordance with due process of law. It cannot be compromised by presumptions. In this regard, compensation is clearly distinguishable from other benefits, such as severance, that are unrelated to the basic rights of workers.

27. The Tribunal also recalls that Principle of Staff Employment 2.1, noted above, expressly entrusts the Bank administration with the duties to act with fairness and impartiality at all times, to follow a proper process in its relations with staff members, and to "respect the essential rights of staff members that have been and may be identified by the World Bank Administrative Tribunal."

28. The Applicant argues that the Bank has seriously violated due process, both with respect to his right to use the money to which he is entitled, and to the presumption of innocence. In the Applicant's view, the Bank breached the latter by basing its withholding on an allegation and not a proven fact, and by imposing itself as the sole arbiter of the length of the investigation and of the assessment of the need to obtain future recovery. The Applicant invokes his right under Staff Rule 8.01 to respond fully in due course to the allegations of misconduct, which he has been unable to exercise because the investigation has not yet been completed; the Bank's actions, he insists, are based on mere possibilities.

29. The Bank counters that due process has been carefully preserved because the decision taken was thoughtfully considered and discussed among the Office of the General Counsel, INT and HRS. The Bank further explains that the Applicant was informed in writing about the investigation and the decision to withhold payment, just as he was advised about his right to contest that decision – as indeed he has done by submitting this application directly to the Tribunal, with the Bank's agreement.

30. The Bank asserts, moreover, that the presumption of innocence has been safeguarded since the unused annual leave has not been taken away; it has been set aside only as a conservatory measure. The Bank also explains that if it were determined after the investigation that the Applicant owed money to the Bank, the matter would be one of restitution. Although the money belongs to the Applicant, it has been put in an interest-bearing escrow account so that it can eventually be used to offset any debt. In the Bank's view, the length of the investigation – about a year as of the date of the Tribunal's judgment – is reasonable in the light of its complexities.

31. The Tribunal is not persuaded that a lengthy investigation is *per se* an interference with due process if the investigation is reasonably proportionate to the complexity of the facts of the case. This may be the situation in this case. Equally, however, the Bank's decision has prevented the Applicant from using money to which he is entitled.

32. While this is the normal effect of judicially pronounced provisional measures everywhere, the question for the Tribunal is not whether the Bank is likely to suffer financial harm, but rather whether the Bank may adopt this kind of measure under its own authority. Given the applicable legal framework discussed above, it is apparent that the Bank does not have authority under the Staff Rules as presently written to adopt such measures unless it first finds misconduct and that money is owed as a consequence, and further ensures that the affected staff member can challenge the decisions taken.

33. The Tribunal is concerned about the implications of the Bank's action in respect of the duty to observe due process in this case. The Applicant has not had a chance to contest the findings that affect him. They have not been completed or finalized. No conclusions have been reached. The Applicant may well complain once the investigation is completed, but in the meantime any decision taken by the Bank will be based on allegations that have not been proven, vetted or challenged in accordance with the Staff Rules. Due process could therefore be seriously compromised.

34. The Tribunal has no reason to doubt that the various Bank officers involved in this matter took a carefully deliberated decision, but it still lacked an appropriate foundation in due process. The issue is not whether the Bank's decision was reasonable, but whether established procedures for its adoption were followed, and satisfied due process.

35. The Tribunal concludes that, in the absence of a specific Staff Rule, the Bank does not have authority to withhold annual leave payments pending the outcome of an ongoing investigation.

36. This conclusion, however, is not the end of the matter. As against the Bank's description of its action as a "conservatory measure pending completion of the INT investigation, without prejudice to the outcome," the Applicant has explained that such a matter would normally go before a magistrate to determine whether there is probable cause to justify withholding access to a person's own property. In answer to the Tribunal's question whether the Bank had thought of applying to the Tribunal for a conservatory measure, counsel for the Bank stated cogently that "under the Bank's current rules, under the Tribunal's statute, there is no mechanism for the Bank to bring an action against a staff member before the Tribunal."

37. The Tribunal has considered carefully the arguments presented by the Bank in view of the allegations that are the subject of the INT investigation. The Tribunal finds that the allegations raise a number of legitimate concerns for the Bank, which, if brought before a national court of competent jurisdiction, might well have resulted in provisional measures being ordered. Had the Bank's Staff Rules addressed such a situation and established due process protections, this application may have been obviated.

38. The Tribunal recognizes that the Bank's immunity is an important right. Should the Bank find itself in a position where it has to go to a court of local jurisdiction to collect a debt owed by a former staff member, it would risk losing its immunity before that court, and moreover incur significant legal costs in bringing its case before the local court.

39. In order to avoid a similar problem in the future, the Tribunal urges the Bank to adopt a rule that would provide clear safeguards for the withholding of monies during the pendency of investigations, taking into account staff members' due process rights and in particular defining a reasonable time period during which funds may be withheld without undue prejudice to the staff member. It would doubtless also be appropriate to ensure consideration of evidence of particular hardship. In future cases, the Tribunal's role would then be limited to reviewing whether the Bank had properly implemented such a rule and its attendant due process protections.

40. While the adoption in the future of such a rule would provide a reasonable framework for both staff members and the Bank, the Tribunal is confronted in this case with a situation where both parties have merit in taking the positions they have taken. The Applicant understandably asks that the monies held be released because the Bank has no authority to withhold them. The Bank understandably believes that there is a need to

take action to protect its interests in the light of troubling allegations. The Tribunal will accordingly determine provisional measures within the powers it has under the Statute, with due regard to the interests of both parties.

41. Although the Applicant has not shown at this stage that he has suffered specific prejudice as a result of the withholding of his accrued annual leave, the Bank should not hold the Applicant's money indefinitely. The Tribunal finds it reasonable that the Bank be given a period of six months from the date of this judgment to finalize its investigation, or otherwise to release the funds.

42. The Tribunal also orders the Bank to set aside an additional \$25,000 as an award to the Applicant for having compromised his property rights without legal basis, this money is to be deposited in the interest-bearing escrow account, together with the amount currently withheld by the Bank, until the ongoing investigation is concluded. Should the Applicant be found at the conclusion of the investigation and related disciplinary proceedings not to owe money to the Bank, all amounts withheld shall be released to him, with interest. If the Applicant is found to owe such money, however, the withheld funds shall offset the amount owed to the Bank.

43. The Bank's conduct has given the Applicant legitimate cause to take action before this Tribunal, incurring legal costs which should be recovered forthwith.

Decision

For the reasons stated above, the Tribunal hereby orders that:

(i) the Bank shall add the amount of \$25,000 to the interest-bearing escrow account held in the name of the Applicant as an award pursuant to this judgment;

(ii) if a determination that the Applicant owes the Bank money is not made within six months of the date of this judgment (in which case such debts shall be set off against the amounts withheld), the aggregate amount of the interest-bearing escrow account referred to above shall be released to the Applicant;

(iii) the Bank shall forthwith pay the Applicant attorney's fees in the amount of \$25,101.50; and

(iv) all other pleas are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

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

At Paris, France, 28 September 2006