



World Bank Administrative Tribunal

2008

No. 387

**Jianwen Liu,
Applicant**

v.

**International Finance Corporation
Respondent**

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

**Jianwen Liu,
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Jan Paulsson, President, and Judges Sarah Christie and Francis M. Ssekandi. The Application was received on 30 January 2008.

2. This case concerns the non-confirmation of a staff member on probation. The Applicant complains that the decision of the International Finance Corporation (“IFC”) to terminate his employment by non-confirmation was an abuse of discretion, as it was based on improper motives and violated due process.

FACTUAL BACKGROUND

3. The Applicant accepted a position as a Short Term Consultant in May 2005, in the principal office of the China Project Development Facility (“CPDF,” later renamed “IFC-PEP China”) in Chengdu, Sichuan Province, in south west China. The Facility is a multi-donor funded technical assistance facility managed by IFC. On 5 August 2005, the Applicant joined that office as a Business Development Officer on a “coterminous” Term appointment under Staff Rule 4.01 (Appointment), paragraph 2.02, for a period of two (2) years at Grade F. His appointment was terminable after the first year by IFC should there no longer be funding for his position, and was subject to a probationary period of one year. IFC-PEP China was developing a so-called “Business Edge” development program which

aimed to strengthen the management capabilities of local enterprises. The Applicant was part of a small team supervised by a Program Manager (“the Manager”). According to his job description, the Applicant’s main responsibilities were to: (a) find new training partners and trainers; (b) develop existing training partners and trainers to improve their skills; (c) analyze the market to understand training needs; and (d) introduce new training products. In his Performance Evaluation Plan for 2005-2006, the Applicant agreed with his Manager on a work program, which detailed a number of objectives to be achieved by June 2006.

4. During a team meeting held on 29 November 2005, the Manager revised the Applicant’s work priorities so as to focus on a single pilot project rather than two. On 13 December 2005, in the course of a team meeting, the Applicant expressed the view that a bid presented by a service provider contained insufficient information and was not ready for evaluation. On 15 December 2005, the Manager expressed dissatisfaction with the Applicant’s continued activity on what she considered was a second pilot project, which was inconsistent with her preference that he focus on a single project. In the course of a team meeting held on 16 December 2005, the Manager confirmed and elaborated on the revision of the Applicant’s priorities. She invited the Applicant for a meeting on that same day, which the Applicant viewed as a performance evaluation. The dialogue did not go well and the meeting was aborted.

5. On 20 December 2005, the Manager again invited the Applicant to a meeting. The Manager raised with the Applicant her concerns about his performance including the feedback received from others indicating that he was difficult to work with. According to the Applicant, this was the first time that he was notified of any performance problems. The Applicant sought to meet the General Manager of IFC-PEP China (“General

Manager”) to discuss the outcome of his meeting with the Manager as well as the cancelled meeting of 16 December 2005. The General Manager met him on 11 January 2006. At this meeting, the General Manager informed the Applicant that he needed to improve his performance and follow his Manager’s instructions. The General Manager did not inform the Applicant directly that his employment with IFC-PEP China would be terminated if his performance did not improve. He suggested to the Applicant, however, that he look for other jobs for which he might be better suited.

6. The Manager invited the Applicant again on 25 January 2006 for a meeting she described as a performance review. Following the meeting, the Manager handed the Applicant a memorandum which was described as a Performance Improvement Plan (“PIP”). The memorandum set out a number of priorities and areas of improvement and concluded that “[i]n view of the areas of improvement, I suggest we review again by end of March 2006.” However, by her admission, the Manager did not inform the Applicant that his services with IFC-PEP China would end if he did not improve his performance.

7. On 28 March 2006, the Applicant was called by his Manager and was informed that his employment would be terminated. The meeting followed an incident on 27 March 2006, at a Master Trainers’ workshop at which, according to some participants, the Applicant shouted and insulted one of his assistants, reducing her to tears. However, other participants at the workshop stated that they had not noticed any arguments or unpleasantness. On 31 March 2006, the Applicant was handed a letter of termination dated 30 March 2006, which stated, in part:

Based on our PIP discussions dated on January 25 & March 28, 2006, we have raised our concerns regarding your performance and general behaviour with the team members and have encouraged you to improve and further develop your skills in this regard. Unfortunately, though there have been improvements in some areas, your performance has not attained

the desired level. Despite your best efforts and intentions, which we recognize and appreciate, you have not been able to meet the criteria set out in the PIP and achieve key program objectives. We therefore regretfully have to terminate your employment with [IFC-PEP China].

8. On 28 July 2006, the Applicant filed an Appeal challenging the termination decision. In its Report issued on 3 May 2007, the Appeals Committee found that while there was sufficient evidence in the record to support IFC's decision that the Applicant was not suitable for his position, IFC had failed to follow applicable procedures and had not given the Applicant the opportunities for assessment and improvement required for a probationary appointment. It concluded, however, that the termination decision was not based on any improper or illicit motives.

9. The Appeals Committee recommended: (a) compensation to the Applicant in the amount of eleven (11) months net salary for lost wages incurred and intangible injuries suffered; (b) reimbursement for attorney's fees and costs up to \$10,000; and (c) giving the Applicant the option to resign and amending the applicable Bank records including the Applicant's personnel file to reflect the Applicant's resignation.

10. By letter dated 16 July 2007, the Acting Vice President, Human Resources ("HRSVP"), accepted the Committee's recommendations in their entirety.

11. The Applicant filed his Application with the Tribunal on 30 January 2008, challenging the termination decision and requesting rescission of the decision, reinstatement with back pay and all benefits from the date of termination as well as compensation in the amount of three years' net salary, moral damages, and costs.

THE PARTIES' CONTENTIONS

12. The Applicant states that the decision to terminate his employment was arbitrary and without an observable and reasonable basis because the evidence on which it was

based lacked substance and was incredible, inconsistent, and insufficient. The Applicant produced documents which intended to support his assertions that he had met the objectives agreed upon with his Manager and that he had received positive feedback from his supervisors, colleagues, and clients. He contends that his relations with the Manager deteriorated after his questioning of the procedures followed for engaging a firm that had submitted a bid containing insufficient information, and his questioning of a consultant being paid extra fees without justification. The Applicant also asserts that IFC's decision not to confirm his appointment was improperly motivated as it was taken in retaliation against him for having raised such questions. The Applicant states that the testimony of the Manager and witnesses at the Appeals Committee hearing was false.

13. Furthermore, the Applicant points out that the Bank's Staff Rules were not followed in the termination of his employment. He was never properly informed of his unsatisfactory performance with examples as to how to improve; he was not told which aspects of his behavior were unacceptable; and he was not given the opportunity to rebut the accusations against him.

14. IFC responds that the Applicant failed to achieve the objectives of his work program. It also contends that his unsatisfactory behavior, including his difficulty in prioritizing his work to meet deadlines and his lack of professional maturity and judgment, as well as his inability to work effectively as part of a team, is clearly documented by multiple independent sources.

15. IFC states that the Staff Rules were followed in its treatment of the Applicant. Under Staff Rule 4.02 (Probation), paragraph 3.03 and Staff Rule 7.01 (Ending Employment) paragraph 6.02, the appointment of an unconfirmed staff member may be terminated at any time during or at the end of the probationary period. As required by

Staff Rule 4.02, IFC: (i) established the Applicant's work program shortly after his appointment; (ii) gave him a written assessment of his performance in January 2006, within six months of his appointment; (iii) offered him regular feedback and coaching and ample opportunities to improve his performance; (iv) provided him with written notice of termination more than 60 days prior to the effective date of separation; and (v) accepted the Appeals Committee's recommendations in their entirety.

16. IFC disputes the Applicant's allegations of retaliation and states that the Applicant has provided no convincing evidence to support his claim. IFC states that the Applicant should not be reinstated because, *inter alia*: (i) his Application is not well-founded; (ii) his "coterminous" appointment was dependent on funding and the resources allocated for the Applicant's contract are already fully depleted after IFC paid him 11 months' net salary as recommended by the Appeals Committee; (iii) IFC is actively considering downscaling the project in China, as a result of funding difficulties; and (iv) IFC has no business need for a candidate with the Applicant's particular area of expertise. IFC further states that since it implemented the Appeals Committee's recommendations to award the Applicant certain remedies as accepted by the Acting HRSVP, the Applicant should not be provided with any additional relief by the Tribunal.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

17. The Applicant's appointment was subject to the conditions of employment of the World Bank Group. Staff Rule 4.02, which governs probationary appointments, provides in paragraph 1.01 that the purpose of the probationary period is to assess the suitability of the Bank Group and the staff member to each other. Paragraph 2.01 provides that a probationary period may be shortened or lengthened by the staff member's manager in

consultation with the appropriate Sector Board or Staffing Group. Paragraph 2.02 provides:

During the probationary period, the Manager or Designated Supervisor shall:

- a) as soon as practicable, meet with the staff member to establish the staff member's work program;
- b) at the end of each six months of the probationary period, or earlier, share with the staff member a written assessment of the staff member's suitability and progress based on achievement of the work program, technical qualifications and professional behaviors; and
- c) at the end of the probationary period, complete a performance review in accordance with the provisions of Rule 5.03, "Performance Management."

18. Paragraph 2.02 of Staff Rule 5.03, requires an annual review of a staff member's performance, based on a "written summary assessment of the staff member's performance during the review period." In the course of that review, the staff member is entitled to submit written comments on that assessment.

19. In *Buranavanichkit*, Decision No. 7 [1982], para. 26, the Tribunal confirmed the Bank's discretion to decide whether a person employed for a probationary period should be confirmed. In *Salle*, Decision No. 10 [1982], para. 30, the Tribunal stated that it would not substitute its own judgment for that of the Bank as to a staff member's suitability for permanent employment. The Tribunal has, however, also consistently held that the Bank's decision in this regard will be reviewed by the Tribunal for the purpose of satisfying itself that there has been no abuse of discretion and that the appropriate standards of justice have been met. "In assessing whether there has been an abuse of discretion, the Tribunal will review whether the Bank has extended to the probationer the procedural guarantees of due process and the right to have a fair opportunity to prove her ability." (*See Khan*, Decision

No. 293 [2003], para. 39 citing *McNeill*, Decision No. 157 [1997], para. 44.) In addition to reviewing whether the requirements of due process have been observed, the Tribunal will examine whether one of the basic rights of an employee on probation, namely the right to receive adequate guidance and training, has been respected. (*See Rossini*, Decision No. 31 [1987], para. 25 and *Salle*, Decision No. 10 [1982], para. 32.)

20. The record shows that the Applicant's work program was established by agreement with his managers, but there is insufficient evidence that the Applicant was provided with adequate guidance and training during his probationary period. Much of what may pass for guidance from his Manager was given at the team meetings of which minutes are of record. If problems in his performance were evident, as IFC alleges, it is not shown that the Applicant was given sufficient written notification of their existence or of specific guidelines on how to deal with them successfully. The very succinct memorandum of 25 January 2006 titled "Performance Improvement Plan" only referred in general terms to work program priorities, improving work relations and willingness to accept feedback, without indicating the specific incidents that gave rise to these observations. Furthermore, the record shows that even after the Applicant was given the memorandum of 25 January 2006 outlining the performance areas in need of improvement, which were to be reviewed after two months, no specific guidelines or coaching were given to him to address these areas. Even the Notice of Termination of 30 March 2006 spoke only of nebulous concerns with the Applicant's performance and general behavior with the team, with scant specificity.

21. In addition to the lack of guidance and training, the record reveals several instances of due process violations amounting to abuse of discretion.

22. First, the Applicant was not given an interim performance evaluation as required by Staff Rules 4.02, paragraph 2.02(b), and 5.03, paragraph 2.01. In *Lusakueno-Kisongele*, Decision No. 327 [2004], para. 41 and in *Motabar*, Decision No. 351 [2006], paras. 26 and 31, the Tribunal found a serious procedural irregularity in the violation of these Staff Rules which require an interim evaluation of the probationer at the end of six months or earlier. Here, the Applicant's employment started in August 2005 and he should have been provided a formal evaluation of his performance by February 2006. While there is evidence of discussions with the Applicant about his work and the efforts being made to meet the agreed program objectives set out at the beginning of his contract, there was no formal interim performance evaluation as required by the Staff Rules. The memorandum of 25 January 2006 did not meet the criteria for such evaluation. Any negative performance evaluation should have been provided to the Applicant in writing with an invitation to confirm or respond otherwise to the evaluation. Furthermore, the Applicant ought to have been given clear indications that failure to improve within a given period or by the end of his probation would result in termination of his contract.

23. In this case, while the Applicant and the Manager agreed on the staff member's work program for the 2005-2006 period, there was no clear assessment of the Applicant's suitability and progress measured against the agreed work program, as required under paragraph 2.02(b) of Staff Rule 4.02 and Staff Rule 5.03, paragraph 2.01. The 25 January 2006 memorandum was not a true assessment of Applicant's performance; it simply listed a number of priorities and suggestions on areas in which he needed to improve, and ended by proposing a subsequent review by the end of March 2006. Instead of the promised review, the Applicant was handed a Notice of Termination on 31 March 2006.

24. IFC suggests that the meetings between managers and the Applicant on 20 December 2005, 11 January, 25 January, and 28 March 2006 satisfied the assessment requirements of Staff Rule 4.02. Yet there is no record of a written performance evaluation preceding any one of these meetings which would give the staff member a point of reference for the discussions that ensued, and an opportunity to respond to specific alleged performance and behavioral failures. The sole written record, apart from the Notice of Termination, concerning the Applicant's performance is the memorandum of 25 January 2006.

25. Notably, the meeting on 11 January 2006 with the General Manager was held at the Applicant's request to discuss his difficulties with his Manager. It appears that the General Manager used the occasion to criticize him for not following his Manager's instructions and to suggest that he look elsewhere for employment. The Applicant did not receive a clear warning at this meeting that if he did not improve his performance his appointment would not be confirmed.

26. No contemporaneous record substantiates IFC's reliance on the incidents mentioned relating to the Applicant's performance or behavior before 13 December 2005. The alleged performance issues were not described in any detail either in the memorandum of 25 January or in the Notice of Termination. The memorandum of 25 January 2006 certainly did not give the Applicant adequate warning to improve his performance.

27. The absence of a formal performance evaluation at the end of the probationary period, as required by Staff Rule 4.02, paragraph 2.02(c), and Staff Rule 5.03, paragraph 2.02, is another serious procedural irregularity. In *Khan*, Decision No. 293 [2003], para. 52 (citing *Zwaga*, Decision No. 225 [2000]), it was explained that such formal

performance review should be given at the end of the probationary period even if the probationary period is terminated early:

In *Zwaga*, Decision No. 225 [2000], the Tribunal leaned towards the view that the Rules require a formal performance review at the time a probationary staff member is given an early notice of non-confirmation. Due process requires this, and also that there be an opportunity to respond or explain. This implies that there should be a reasonable time available to the probationer before a final decision is taken on confirmation or non-confirmation.

28. In this case, the Applicant, whose probationary period was also terminated early, was simply provided with a Notice of Termination on 31 March 2006 containing only general expressions of concerns with the Applicant's performance and general behavior with the team; most importantly, the Applicant was not afforded the opportunity to respond in writing to the statements in the Notice to defend his record.

29. The Tribunal finds that since IFC did not afford the Applicant fair treatment in that it did not provide him with adequate supervision and guidance, the termination of his probationary appointment was not based on a proper assessment of his work performance and was taken in violation of due process requirements. These failures to observe the Applicant's rights under the Staff Rules have caused the Applicant harm for which he is entitled to compensation.

30. IFC concedes that irregularities were committed; a similar conclusion had been reached by the Appeals Committee, whose recommendations were accepted by IFC. The Applicant has requested reinstatement. IFC states that reinstatement of the Applicant is not practicable because the post to which the Applicant had been appointed no longer exists and the resources allocated for the Applicant's contract have already been depleted by payments already made to him.

31. In the circumstances and in accordance with Article XII(1) of the Statute of the Tribunal, IFC must pay restitution to the Applicant “in the amount that is reasonably necessary to compensate the applicant for the actual damages suffered.” It is clear that had the Applicant’s employment not been terminated he would have expected to serve out his two-year contract. The Applicant had almost 14 months left on his appointment from June 2006 when his termination became effective. Reasonable compensation in these circumstances should include payment corresponding to the balance of time he would have served on the contract had his employment not been prematurely terminated. This compensation was properly reflected in the recommendations of the Appeals Committee. In addition, the Applicant is entitled to some reparation for the failure to receive an evaluation of his performance at the end of the probationary period and the abrupt manner in which his appointment was terminated.

DECISION

For the above reasons, the Tribunal decides that:

- (i) IFC acted improperly in terminating the Applicant’s employment and shall pay, in addition to the amounts already paid pursuant to the recommendations of the Appeals Committee, an amount of \$10,000; and
- (ii) all other pleas are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Paris, France, 18 July 2008