

**Decision No. 327**

**André-Guy Lusakueno-Kisongele,  
Applicant**

v.

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

1. The World Bank Administrative Tribunal has been seized of an application, received on March 15, 2004, by André-Guy Lusakueno-Kisongele against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Bola A. Ajibola (President of the Tribunal) as President, Jan Paulsson (a Vice President of the Tribunal) and Francisco Orrego Vicuña, Judges. The usual exchange of pleadings took place and the case was listed on October 27, 2004.
2. The Applicant contests the Bank's decision not to confirm his Open-Ended appointment. The Applicant also alleges harassment, retaliation and a lack of support and guidance from management.
3. The Tribunal needs first to address a jurisdictional issue. The Bank asserts that the Applicant received a letter from the Bank by registered mail on October 3, 2003, informing him of its acceptance of the Appeals Committee's recommendation that his grievance be denied. The Applicant filed his application on March 15, 2004. The application is therefore outside the 120-day time limit established by Article II, paragraph 2(ii)(b), of the Tribunal's Statute. The Bank also asserts that if it had been aware earlier that the Applicant had received the letter on October 3, 2003, it would have submitted a jurisdictional challenge within the twenty-one day limit established by Rule 8(1) of the Rules of the Tribunal.
4. The Applicant answers that the signature appearing on the receipt for the registered mail of October 3 is neither his nor that of the persons authorized to receive his mail in Paris. He says that he received the Bank's letter on November 10, 2003. He asserts that, having posted his application on March 8, 2004, he was within the 120-day time limit established by the Tribunal's Statute. Finally, the Applicant argues that because the Respondent did not object to jurisdiction in time under Staff Rule 8(1), it waived its right to challenge jurisdiction.
5. The Tribunal doubts that the fact that the signature that appears on the receipt for the registered mail is neither that of the Applicant nor that of the persons authorized to receive mail on his behalf could lead to the conclusion that the Applicant was not properly notified. International courier services ensure the delivery of a document to a specific address, but it may or may not be personally received by the addressee. The ultimate answer would require a further look into the factual circumstances. That is not necessary here, however, because the Respondent did not provide an explanation as to why it did not know earlier about the date on which the Applicant had received the letter, nor did it invoke the existence of any exceptional circumstances to justify the lateness of its jurisdictional challenge.
6. The Tribunal thus dismisses the Bank's jurisdictional challenge. As the Tribunal held in *Schiesari*, Decision No. 314 [2004], para. 6:

The Respondent ought to have notified the Tribunal within 21 days of its challenge to jurisdiction and of its grounds. The objection to jurisdiction thus fails for want of compliance with Rule 8(1).

7. The Tribunal now turns to the examination of the relevant facts. In March 1997, the Applicant joined the Bank's Paris office as a Temporary mail clerk. His contract was extended several times until it was finally converted in May 2000 to an Open-Ended position, subject to a probationary period of up to two years.
8. The Applicant's tasks included, among other things, receiving, sorting and distributing newspapers, handling the incoming and outgoing mail, and researching alternative cost-effective mail and courier services.
9. In mid-September 1998, after he questioned the selection process for a position in the mailroom to which he wanted to apply, the Applicant asserts that management "forge[d] a thesis of Applicant's performances[sic] weaknesses." He acknowledges that his application for the post was accepted for consideration. A panel consisting of staff from Paris and Washington carried out the selection process. The position was finally given to the person who would become his immediate supervisor.
10. The Applicant asserts that in early January 2000, he asked the General Manager of External Affairs, Europe, to improve his working conditions. On January 27, 2000, the Applicant's workload was accordingly distributed to his apparent satisfaction. But soon after a new General Manager took up his duties in May 2000, the Applicant asserts that the agreed workload distribution was no longer respected.
11. On February 4, 2000, the Applicant was offered an Open-Ended appointment as a mail clerk.
12. On February 8, 2000, the Applicant provided his managers with the results of his 360 Degree Feedback Report, which had been carried out at the end of 1999. This Report had mixed results: on the one hand, it had positive remarks from clients and colleagues, while on the other hand, it had negative comments from his managers. The Applicant asserts that the Report shows that his managers' claims that clients were dissatisfied with his work were unsubstantiated. Moreover, he argues that his Overall Performance Evaluation (OPE) for the period from April 1, 1999 to March 31, 2000, which includes the period in which the 360 Degree Feedback was done, also contradicts the results given by his managers in the 360 Degree Feedback, since in the OPE he was much better rated by them.
13. On May 30, 2000, the Applicant accepted the offer of the Open-Ended appointment.
14. On July 6, 2000, the courier company used by the Bank's Paris office presented a bill for June 2000 in which 27 invoices were charged to destinations not normally in contact with the Paris office. The Applicant asserts that he immediately informed his supervisor of this situation, but it was not until January and March 2001 that management started taking action on the issue. A fraud investigation was launched, which concluded that someone within the Bank's Paris office knew about the procedure followed with the courier company. The Applicant claims that this incident occurred under his supervisor's responsibility. He says that he was unfairly blamed for not informing his managers of this issue in a timely fashion.
15. Furthermore, the Applicant acknowledges that in May 2001 he helped a Bank Consultant carry out a survey unrelated to the Applicant's work activities. He asserts that he worked on the survey during his free time and while on sick leave, but admits that he was paid for it without informing his supervisors.
16. On November 22, 2001, an incident occurred involving a box containing undelivered mail. It is disputed whether the Applicant had previously received instructions on how to handle such mail. According to an e-mail from the Applicant's manager to him, the Applicant did in fact receive clear instructions. Nevertheless, the Applicant did not carry out the required task; and it was ultimately his supervisor who sent out the pending mail in December 2001.
17. The Applicant suffered a nervous breakdown on December 3, 2001, and then spent a few weeks under medical treatment. After a further sick leave, the Applicant was evaluated and found fit to work. He returned to the Bank on March 4, 2002. The Applicant alleges that his medical condition was due to his hostile work environment.

18. On March 4, 2002, the Applicant's manager sent an e-mail to the staff in Conferences Services indicating that, in order to allow the Applicant "to re-enter the work at his pace," it was decided to extend the contract of a Short-Term employee to help the Applicant in his work, and that his tasks would be somewhat reduced (e.g., he would no longer be in charge of all conference-related requests). However, the Applicant alleges that he continued to suffer from the same hostile environment that had caused his nervous breakdown. The Applicant refers to an e-mail on March 13, 2002, in which his supervisor remarked that the Applicant had intervened with respect to a conference instead of restricting his activities to the mailroom and print shop.

19. On March 27, 2002, a meeting was held between the Applicant, the General Manager, and a Human Resources Assistant in order to discuss the Applicant's future. At that meeting, the Applicant raised his concerns as to what he considered to be a "destructive work environment." That meeting's discussion is recorded in an e-mail dated March 28, 2002, from the Human Resources Assistant to all the persons involved in that meeting. The e-mail states that it was agreed by all parties that: (i) the General Manager would request, on an exceptional basis, a 6-month extension of the Applicant's probationary period, from May 30 to November 30, 2002; (ii) the Applicant's job description would be revisited and, if necessary, updated; (iii) the Applicant would maintain a log of incoming and outgoing mail volumes as well as print shop-related requests; (iv) for the 2002 OPE, there would be a change of the Designated Supervisor, as well as of the Reviewing Manager; (v) the Applicant's 2002 Results Agreement would be discussed and submitted to the General Manager; (vi) the Applicant, along with the General Manager and the Human Resources Assistant, would have a mid-term review meeting in early September 2002, and a final review meeting at the end of November 2002; and (vii) an open-door policy would be established by which the Applicant would be able to meet with the General Manager and the Human Resources Assistant whenever needed or requested.

20. In late May 2002, the Applicant was questioned about 34 hours that he had charged as overtime without proper authorization from his managers. In the Applicant's opinion, there was no need for prior authorization from management to work overtime.

21. On June 13, 2002, the General Manager offered the Applicant a mutually agreed separation due to allegedly recurrent problems, i.e., late arrivals and reluctance to comply with the Bank's rules and policies.

22. On July 4, 2002, during a meeting with the General Manager, the Human Resources Assistant and the Office Administrator, the Applicant rejected the General Manager's offer. According to an e-mail dated July 11, 2002 from the Human Resources Assistant, it was decided in the meeting that: (i) as of July 8, 2002, the Office Administrator would become the Applicant's direct supervisor; (ii) the Applicant's remaining OPE discussions would be held in the presence of the Office Administrator and the Human Resources Assistant; (iii) the Applicant would show to the Office Administrator and the Human Resources Assistant the detailed log of activities that he had been asked to keep; (iv) the Office Administrator and the Human Resources Assistant would meet with the supervisor and the Applicant to review his Terms of Reference, workload distribution and back-up arrangements, and once that was done, the Applicant was to prepare and discuss his Results Agreement with the Office Administrator and the General Manager; and (v) a decision on the Applicant's confirmation would be taken in mid-September 2002.

23. On July 9, 2002, the Applicant met again with his managers to evaluate the working procedures in the print shop and mailroom, and to review his workload. The Applicant's managers proposed to move the mailroom activities to the print shop to make his job more efficient. They also decided to hire Temporary staff for the conference activities.

24. On September 18, 2002, the Applicant met with the General Manager, the Office Administrator and the Human Resources Assistant to review the Applicant's performance between early April and mid-September 2002. The General Manager explained to the Applicant the problems that she and other managers had found in the Applicant's performance during that period, i.e., the Applicant was consistently far behind in the preparation of his daily logs, and his pattern of late arrivals was again resurfacing. The General Manager was also concerned about the Applicant's reluctance to abide by the Bank's rules and felt that his performance was

below what was expected from a Bank staff member. Although she acknowledged that toward the end of the period under review the Applicant had made an effort to improve his performance, this effort was insufficient. Thus, the General Manager offered the Applicant two alternatives: (i) resignation; or (ii) termination due to non-confirmation. In early October 2002, the Ombudsman explained to the Applicant the consequences of both alternatives.

25. On October 4, 2002, the Applicant informed the General Manager that he had decided not to resign and questioned her decision to terminate his contract. In the Applicant's opinion, there were inconsistencies between her decision not to confirm him and the results from his 360 Degree Feedback Report of 1999 as well as the May 2000 offer by the Bank of an Open-Ended position.

26. On October 7, 2002, the General Manager responded to the Applicant, reminding him of his cyclical performance problems. Finally, she emphasized that the decision not to confirm him was based on an objective assessment of his performance.

27. On October 22, 2002, the Applicant's final OPE was completed, and on the same date the notice of non-confirmation was issued.

28. On February 19, 2003, the Applicant filed an appeal with the Appeals Committee in which he challenged the Bank's decision not to confirm his Open-Ended appointment. On September 22, 2003, the Appeals Committee found that the Respondent had not abused its discretion in deciding not to confirm the Applicant's Open-Ended appointment. On September 26, 2003, the Vice President of Human Resources issued a letter accepting the Appeals Committee's recommendation.

29. On March 15, 2004, the Tribunal received the Applicant's application.

30. The Applicant contests: (i) the decision not to confirm his appointment; and (ii) the alleged lack of guidance and supervision from management.

31. As to the decision not to confirm the Applicant's appointment, the Tribunal recalls the holding in *McNeill*, Decision No. 157 [1997], para. 30:

The probationer has no right to tenure; pending confirmation his situation is essentially provisional and his future with the Bank depends on his suitability for permanent employment. The assessment of his suitability is a matter of managerial discretion, as the Tribunal has ruled in *Salle* (Decision No. 10 [1983]):

It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests, and to decide whether, judging by the staff member's performance during the probationary period, he does or does not qualify for permanent Bank employment. These determinations necessarily lie within the responsibility and discretion of the Respondent.... (para. 27).

It is, therefore, for the Bank to establish the standards which the probationer should satisfy. The Tribunal has determined that these standards

may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members. The merits of the Bank's decision in this regard will not be reviewed by this Tribunal except for the purposes of satisfying itself that there has been no abuse of discretion.... (*Buranavanichkit*, Decision No. 7 [1982], para. 26).

It is also for the Bank to determine, at the end of the probation or at any time during the probation, whether

the probationer has proven either suitable or unsuitable for Bank employment and to terminate his employment whenever it concludes that he is unsuitable. As the Tribunal has repeatedly stated, it will not review the exercise by the Respondent of its managerial discretion unless the decision constitutes an abuse of discretion, is arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

32. Regarding the Applicant's suitability for the position, the record reveals that the Applicant was an inconsistent performer. In this respect, the Tribunal has held in *McNeill*, Decision No. 157 [1997], para. 34, that

[r]egarding probation, the problem is not so much whether the probationer has performed satisfactorily as whether he has proven his suitability to the specific requirements of the Bank regarding the work which he would have to perform if he were to be confirmed.

33. Although the Applicant seemed to be well liked by some colleagues and clients, as his 360 Degree Feedback Report illustrates, he had serious performance problems that were identified by the Bank. For instance, the Applicant's repeated tardiness affected the Bank's operations since he had the obligation to receive, check the accurate delivery of, and distribute newspapers to the Paris office before 9:00 a.m. Otherwise, the Media Team could not prepare the daily press summary and send it to Washington, DC before 2:00 p.m. Paris time. This problem is well documented in a series of e-mails from management to the Applicant during the whole probationary period. On this issue, the Applicant acknowledged in his first OPE under the Open-Ended appointment that "[he] could improve [his] punctuality." In his application to this Tribunal, the Applicant also acknowledged his tardiness, but argues that it was caused by: (i) unreliable public transportation; and (ii) "recuperation from the previous day's extra hours."

34. The Tribunal notes that the Applicant did not abide by the Staff Rules. For example, the Applicant admitted his participation as a paid pollster, outside his Bank work program, while on sick leave from the Bank. He did not inform management about this activity, as the then applicable Staff Rule 3.01 ("Outside Activities and Interests") required. On another occasion, in May 2002, the Applicant performed some overtime work without the proper authorization of his supervisor. He did so despite having been informed one year before, via e-mail, of the guidelines concerning overtime work, and specifically that before he performed any overtime work the written approval of his supervisor was required. His actions in this respect constituted a violation of the then applicable Staff Rule 6.03, paragraph 2.02, which regulates overtime.

35. The Tribunal therefore finds that the Bank's decision not to confirm the Applicant's Open-Ended contract on the sole basis of the unsuitability of the Applicant for Bank employment was not an abuse of discretion.

36. It remains to examine whether the Applicant was given adequate supervision during his probationary period and whether the requirements of due process were observed.

37. According to Staff Rule 5.03, paragraph 2.01, as then in force:

The designated supervisor shall provide staff members subject to probation under Rule 4.02 with an interim review at the end of every six months of the probationary period. The interim review shall be conducted in accordance with the requirements of Rule 4.02.

38. According to Staff Rule 4.02, paragraph 2.02, as then in force:

During the probationary period, the 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."

39. The Applicant had three OPEs during his probationary period. The first OPE covered the period from April 1, 2000 to March 31, 2001, although the Applicant accepted his Open-Ended position on May 30, 2000. The Applicant signed this OPE on October 3, 2001. The second OPE covered the period from April 1, 2001 to March 31, 2002; the Applicant signed it on July 15, 2002. The third OPE covered the period from April 1, 2002 to September 30, 2002; the Applicant signed it on October 22, 2002, although there are indications that there was an exchange of comments between the Applicant and his managers before the date on which the Applicant signed this last OPE.

40. The Applicant asserts that the Bank did not comply with Staff Rule 5.03, paragraph 2.01, in accordance with the terms of Staff Rule 4.02, paragraph 2.02, as his first OPE was finalized 17 months after the beginning of the probationary period on May 30, 2000. The Bank has not explained this anomaly.

41. The Tribunal notes that although the Applicant did receive oral and written feedback, mainly via e-mail, during the probationary period of his first OPE, the Respondent should have complied with its obligation under Staff Rules 5.03, paragraph 2.01, and 4.02, paragraph 2.02, which require the Respondent to provide the probationer every six months of the probationary period with a written assessment of the probationer's suitability. As the Tribunal determined in *K. Singh*, Decision No. 188 [1998], para. 21:

Staff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered. Even if the Respondent is in substance right about the decision that it took with respect to the Applicant, its departure from the relevant rules amounts to an abuse of its discretion.

42. Non-compliance with Staff Rules 5.03, paragraph 2.01, and 4.02, paragraph 2.02, was a significant procedural violation. The 17-month delay in the first appraisal of the Applicant's performance is unacceptable, particularly during a probationary period where close supervision and feedback is required. As indicated above, the essential purpose of the probationary period is to evaluate the staff member's performance and to decide whether he or she does or does not qualify for permanent employment. As the Tribunal has held:

The observance of the probationer's conditions of employment is all the more imperative since the period of probation is a difficult one for the staff member in terms both of adjustment to the Bank's needs and policies and because of the inherent insecurity of his situation. (*Salle*, Decision No. 10 [1982], para. 29.)

43. In addition, during the probationary period the probationer has the guarantees of due process:

First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second, the staff member must be given adequate opportunities to defend himself. (*Samuel-Thambiah*, Decision No. 133 [1993], para. 32.) (*Zwaga*, Decision No. 225 [2000], para. 37.)

44. According to the above precedent, the Respondent should have provided the Applicant with enough time to address any shortcomings that it may have indicated during the Applicant's performance review.

45. Given that the Bank concluded the Applicant's OPE on October 3, 2001, and that the Applicant on December 3, 2001, suffered a nervous breakdown which placed him on sick leave for three months, the

Applicant had only two months in which to address any issues that the Respondent might have found problematic during the period covered in his first OPE. Moreover, the Tribunal notes that the Applicant's first OPE had mixed results. On the one hand, in the Results Assessment section the Applicant was rated "superior" in three categories, and "fully successful" in the remaining two. On the other hand, in the Behavioral Assessment section, the Applicant was found partially successful in three categories, and fully successful in one. This might have been confusing for the Applicant.

46. Furthermore, the Applicant complains that management failed to give him proper instructions, advice, warnings, adequate supervision or guidance to ensure that his probation was correctly followed. However, he also asserts that if any warnings were given to him, they were given orally and they cannot be reviewed. In this sense, the Tribunal has ruled that

one of the basic rights of an employee on probation is the right to receive adequate guidance and training (*Rossini*, Decision No. 31 [1987], para. 25) and that it is its duty to make sure that the Bank's obligation to provide a staff member on probation with adequate supervision and guidance has been complied with in a reasonable manner. (*Salle*, Decision No. 10 [1982], para. 32.) (*Zwaga*, Decision No. 225 [2000], para. 38.)

47. In addition, the Tribunal has ruled that

supervision and guidance do not necessarily take the form of recorded conversations or otherwise specific acts or activities; they may consist as well in day to day work and contacts with supervisors and colleagues and in the exposure to the kind of tasks which the staff member would have to accomplish if his appointment were to be confirmed. ... The Tribunal has stated earlier its views about the so-called problem of burden of proof. It may be noted also that the relations between staff members and superiors would become over-bureaucratic if each and every conversation or discussion were to be documented. In any event, the question whether informal discussions in fact took place or not is irrelevant, since the Administration may base its appraisal on all available elements and not necessarily on discussions with the staff member. What is relevant is whether the staff member has been given the opportunity to defend himself against the criticisms of his superiors and has been granted fair treatment. (*Salle*, Decision No. 10 [1982], paras. 36 and 59.)

48. The Tribunal notes that management met with the Applicant on numerous occasions, particularly after the Applicant returned to work from sick leave on March 4, 2002, to review his performance and to make him aware of his shortcomings. When the Office Administrator became the Applicant's supervisor, they met on an almost daily basis to discuss his assignments. She also provided the Applicant with recommendations and suggestions to improve his effectiveness. A significant and unusually high level of coaching, guidance and supervision was then invested in the Applicant. However, this improved guidance and supervision emerged only two months before the expiration of the Applicant's two-year probationary period.

49. True, the record indicates that the Respondent provided the Applicant with some guidance and supervision necessary to succeed in his assignment. Moreover, the Applicant had been working for the Bank since 1997 in the same office and he must have been familiar with most of his duties; they were not new to him when he was offered the Open-Ended position. On the other hand, the record clearly shows that the Applicant was not given the formal feedback required under Staff Rule 4.02 to be recorded in written assessments of his performance every six months during his probationary period. The Tribunal therefore finds that the feedback given to the Applicant was not properly and timely recorded as required by the Staff Rule. The Applicant may thus not have been given a fair opportunity to improve his performance so as to prove his suitability for the position. In sum, the Tribunal finds the Respondent in breach of Staff Rules 5.03, paragraph 2.01, and 4.02, paragraph 2.02, for which the Applicant deserves some compensation.

50. The Tribunal has taken note of the fact that the Applicant's managers made substantial efforts to assist and accommodate him. Moreover, it appears most unlikely that strict compliance with the Staff Rules would have

led to his engagement in a permanent position. But the Staff Rules exist, and their formal requirements were invented by the Bank itself precisely in the interest of staff members. There are undoubtedly cases where the Tribunal can be satisfied that those interests have been fully respected by alternative means, e.g., feedback in a different form but serving the same function. That is not the case here, however.

51. The Applicant has also raised ancillary contentions to the effect that he was a victim of harassment, retaliation and a hostile environment that caused him to suffer a nervous breakdown. The record, however, shows no evidence to support the Applicant's allegations. In fact, the Applicant's physician indicated that the Applicant's disorders appeared to be a reaction to life events. The Applicant indeed acknowledges that when he returned to work, the Respondent took "all steps necessary to accommodate Applicant's needs and to assist him to reintegrate to his functions."

52. The Tribunal finds that the Applicant reacted negatively to comments and recommendations from colleagues and supervisors, and had an unfortunate perception that these constituted a hostile environment. This may well have placed him under stress. As the Tribunal held in *Schiesari*, Decision No. 314 [2004], para. 34, however,

stress is not an actionable hostile environment. Managers have a responsibility to make business decisions that are not always favorable to individual employees. Criticism or adverse decisions about performance or work assignments does not in and of itself constitute harassment, discrimination or retaliation.

53. Therefore, the Applicant's contentions that he was a victim of harassment, retaliation and a hostile environment are without merit.

### **Decision**

For the above reasons, the Tribunal decides that:

- (i) the Respondent shall pay the Applicant compensation in the amount of \$10,000;
- (ii) the Respondent shall pay the Applicant legal costs in the amount of \$2,000; and
- (iii) all other pleas shall be dismissed.

/S/ Bola A. Ajibola  
Bola A. Ajibola  
President

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

At Washington, DC, November 12, 2004