

**Decision No. 369**

**M,  
Applicant**

**v.**

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Jan Paulsson, President, Francisco Orrego Vicuña, Sarah Christie, Florentino P. Feliciano, Zia Mody, Stephen M. Schwebel, and Francis M. Ssekandi, Judges. The application was received on 28 November 2006. The Applicant's request for anonymity was granted on 22 January 2007.

2. The Applicant joined the Bank in 1992 as a Financial Specialist in the Africa Region after having worked for major financial institutions in France and the United States. In 1998 his appointment was converted from Fixed-Term to Open-Ended. Shortly afterwards, in 2000, he was appointed Senior Financial Specialist. Effective 23 September 2004, he was appointed Country Manager in Africa, a position which he took up on or about 24 October 2004.

3. This case concerns the termination of the Applicant's employment with the Bank on 2 August 2006, following an investigation of alleged sexual harassment, retaliation and abuse of authority, as well as charges of conflict of interest. He complains that

Respondent has abused its powers in the investigation of allegations of misconduct made against Applicant through denial of his due process rights and the failure to accord Applicant fair treatment under the Principles of Staff Employment and The Staff Rules.

Respondent has abused its discretion in the wrongful decision to terminate Applicant's employment on the basis of erroneous findings of fact in the findings and conclusions of the Final Report of investigation by INT.

Respondent has abused its discretion in the wrongful decision to terminate Applicant's employment despite the clear violations of Applicant's rights to due and fair process and the clear misconduct of staff involved in the investigation who willfully sought to defame Applicant.

Respondent has abused its powers in the arbitrary and capricious denial of monies owed to Applicant and fraudulent claims of monies owed by Applicant to the Respondent.

4. With the agreement of the Bank, the Applicant brought this case directly to the Tribunal.

5. The Applicant requested provisional relief on two occasions, broadly to the effect that the Tribunal suspend the termination of his employment or place him on paid administrative leave until the Tribunal renders its judgment; that he be allowed to return to his post in what will be referred to in this judgment as the African Country and retrieve his personal belongings at Bank expense; and that restrictions on his entering Bank premises be removed. The Tribunal denied both requests.

6. The Applicant sought the production of a number of documents, as well as an oral hearing. The Bank asked the Tribunal to deny both requests. The Tribunal partly granted the request for documents and approved the request for an oral hearing.

7. The oral hearing was held on 11 December 2007. Both parties were represented by counsel. Six witnesses were called, one by the Bank, three by the Applicant and two by the Tribunal. Most of them were in Africa and were therefore heard by telephone conference. The oral hearing was limited in scope, essentially to assess the statements and declarations made in this case and the accuracy of the interpretation of the testimony of witnesses by the investigators of the Department of Institutional Integrity (INT). One witness stated that prior to the commencement of the investigation into the sexual harassment complaint he had submitted to his superiors in writing certain concerns relating to the behavior of the Applicant in administrative matters. These concerns were then joined by INT to the sexual harassment complaint for investigation. The witness for the Bank, a Lead INT Officer, was called primarily to explain the procedure followed by INT in conducting investigations.

### *Alleged sexual harassment*

#### *a) The Applicant's arguments*

8. The Applicant's first claim finds its origin in an accusation of sexual harassment made by Ms. X, a public information or communications assistant in the Country Office. Ms. X brought this allegation to her supervisor in the Bank's External Affairs Unit of the Africa Region during a retreat held in South Africa in January 2005. The matter was first referred to INT for investigation on 25 January 2005.

9. The Applicant maintains that because of the extensive work required in the Country Office he instituted organizational changes immediately upon taking up his position, some at his own initiative and others at the initiative of a headquarters official who had visited the Country Office in December 2004. It is a matter of record that the Applicant reported to his manager at headquarters that these changes had created unease among staff. He also initiated a search for a second communications officer at the same level as Ms. X. The Applicant contends that Ms. X believed this change to constitute a threat to her own position, and explains that she had been performing poorly and had failed to comply with a number of requests concerning the Office's communications and publications.

10. The Applicant embarked on a project, which he considered a priority, consisting of the publication of a magazine designed to improve the Bank's image in the Country Office. The Applicant asserts that Ms. X, who was initially in charge of this initiative, performed poorly both in terms of her dedication to the project and her French drafting skills. In fact, the Applicant asserts that as early as November 2004 he had expressed concern to headquarters managers about her qualifications and work performance.

11. Because he thought she should attend to this project, so the Applicant explains, he denied Ms. X permission to travel to a Bank retreat in South Africa. She nevertheless went there with the direct authorization from her supervisor at headquarters. Two witnesses have attested that Ms. X left unfinished business concerning the magazine and they were forced to do that work for her. It was at that retreat that Ms. X raised with her supervisor, also attending the retreat, the accusation of sexual harassment. In a letter to the Applicant dated 27 January 2005, the supervisor detailed the need to handle the recruitment of the additional communications officer with care and with the full support of Ms. X, emphasizing that she should not be marginalized as a result.

12. The Applicant argues that the true reason Ms. X raised false accusations against him was her own deficient performance. He denies each and every incident that Ms. X described as constituting sexual harassment. He asserts that he never was confronted by her on this charge, contrary to her allegations. In particular, the Applicant denies that an alleged confrontation with Ms. X on 7 January 2005 ever took place; he insists that it has not been proven. He asserts in particular that Ms. X was at the time on leave from the Office, as indicated in her leave records; no witness recalls having seen her at the Office around that time.

13. In the Applicant's view, the INT investigation was marred by flaws and prejudice. The officers who conducted it lacked the experience and language proficiency necessary to fully understand the facts of the case. Moreover, it is uncertain that the required preliminary investigation was conducted at all. On the basis of

the Applicant's criticism of the INT's First Draft Report, a Second Draft Report was prepared which, the Applicant believes, essentially replicated the first and was in consequence defective in the same way.

14. Following the intervention of the Bank's Ombudsman (requested by the Applicant), INT asked a law firm, whose identity was unknown to the Applicant until the hearing, to review the Second Draft Report. The Applicant notes that he was never asked to meet with the reviewers and that their conclusions were withheld from him. Indeed, the record discloses that another law firm had been asked earlier by the Bank to review its findings; its report was not communicated to the Applicant either. A Third Draft Report was then issued, on the basis of which the Final Report was adopted. The Final Report was not made available to the Applicant for comments either, notwithstanding substantive changes. The Final Report and the law firms' reviews concluded that there was "reasonably sufficient evidence" to support the investigators' findings.

15. The Applicant asserts that the accusations are unproven and undermined in three important ways. First, the only direct evidence against him consists of Ms. X's own statements, which lack credibility in the light of the accuser's perception that her employment was at risk.

16. None of Ms. X's allegations, the Applicant maintains, is supported by evidence of any sort, either written or testimonial. Telephone calls outside office hours prove nothing; he routinely made such calls to several other staff members as well. Indeed, Ms. X herself often telephoned the Applicant on various business matters outside office hours.

17. No record of electronic messages or other means of communication has been produced even though Ms. X asserted that they existed. An incident regarding an alleged request by the Applicant for Ms. X to accompany him to a hospital in Washington, DC, after he fell ill on Bank premises is inherently absurd, and at any rate based on testimony that is contradictory and vague.

18. Secondly, the Applicant stresses the lack of corroboration among the witnesses with regard to specific details and dates. The Applicant asserts that none of the witnesses observed any instance of physical contact or sexual advances towards Ms. X, and underlines the absence of recorded conversations or any other proof of harassment.

19. Some witnesses, the Applicant contends, simply repeated what Ms. X had told them. A witness who claimed that Ms. X told her every time a sexual advance was made could only recall conversations she had with Ms. X while on leave in Senegal between 14 January and 14 February 2005 – well after the period of alleged sexual harassment. One witness was concerned about the renewal of her own contract, and had previously made false accusations of sexual harassment against another person. Another was the accuser's mother, who would naturally support her daughter, and even so did not claim awareness of specific instances of sexual harassment but only of employment concerns. Yet another witness was evasive on the matter of sexual harassment, and was more interested in pursuing a different grievance against the Applicant. A witness who worked in the Bank's Paris Office could not corroborate anything that happened in the Country Office, and made irrelevant references to social invitations she said she had received from the Applicant in Paris. One further witness did no more than speculate about what she believed might have been the Applicant's interest in her. A final witness adds no support to the accusations because she worked from headquarters and only referred to other Bank officials whatever Ms. X had told her.

20. The third factor invoked by the Applicant is that several other staff in the Country Office, including professional staff as well as administrative and service personnel, stated that they had never witnessed any abnormal conduct on the part of the Applicant and had no knowledge of any complaints by Ms. X in this respect. This was in particular the case of the Country Office's anti-harassment advisor, who did not receive any complaint from Ms. X and only had a perception that Ms. X was having difficulties in her work, which she described as possible "workplace harassment."

#### *b) The Bank's arguments*

21. The Bank explains that it took every necessary step to ensure a full and fair investigation of these accusations. A preliminary inquiry was conducted by the INT's investigators in the Country Office. They interviewed Ms. X and other witnesses. A notice of allegations of misconduct was then issued on 12 April 2005. The Applicant was interviewed that very day. Many more witnesses were interviewed thereafter, and the Applicant was re-interviewed. He was later given a copy of the initial Draft Report for review and comment.

22. The Draft Report concluded that the allegations of sexual harassment made by Ms. X were supported in fact and that her complaints were timely, detailed and corroborated by the accounts of several witnesses. This conclusion was reached, so the Bank says, by a method that examines the allegations in light of the fact that such incidents are not often observed by third parties, and considers the degree of consistency in the statements made by the complainant and the accused as a strong indicator of veracity.

23. The Bank further notes that the Applicant identified several persons who could attest to his character, many of whom were also interviewed. While most of their statements were positive or neutral, the Bank also observes that one of these persons indicated that at the time he was the Applicant's manager, there was friction between the Applicant and his team members who felt that the Applicant was "dictatorial" and "autocratic." This same person also referred to the need to manage the Applicant's ego. Another witness had reportedly heard from the Applicant inappropriate comments concerning a friend's daughter.

24. The Bank also notes that additional interviews were conducted before a First Revised Draft Report was issued, to which the Applicant also submitted a written response. The Bank observes that as part of its quality control process, the Draft Report was reviewed by a law firm which concluded that the record contained sufficiently reasonable evidence supporting the allegations. A Second Revised Draft Report was then prepared and also commented on by the Applicant. At the Applicant's request, yet another review of the report was conducted by another outside law firm, which also concluded that the record, taken as a whole, contained "reasonably sufficient" evidence to support INT's conclusions.

#### *Alleged retaliation*

##### *a) The Applicant's arguments*

25. The Applicant explains that although he had become increasingly dissatisfied with Ms. X's work and aptitude, and even had doubts about the master's degree listed in her application for employment at the Bank, he never took decisions in respect of Ms. X for reasons other than the effective management of the Office. This is the only factor that in the Applicant's view explains that she was no longer relied upon for important tasks; nonetheless, she continued to receive interesting assignments.

##### *b) The Bank's arguments*

26. The Bank rejects the Applicant's statements about continuing to give Ms. X interesting assignments on the ground that they are inconsistent with his criticism of her performance. The Bank maintains that Ms. X's complaints about retaliation were justified, and corroborated by several staff members.

#### *Alleged abuse of position and conflict of interest*

##### *a) The Applicant's arguments*

27. A separate accusation was made against the Applicant by Mr. Y, a Resource Management Analyst in the Country Office who was primarily in charge of procurement. Mr. Y alleged that in the negotiation of a lease for the Country Manager's new residence, the Applicant had sought to obtain personal gain in the form of lower rent by offering the owner some advantage in securing a fuel procurement contract from the Bank, and in the process had enlisted the help of a former Finance Minister of the African country.

28. The Applicant responds that Mr. Y, just like Ms. X, had personal motives in making his accusation. Mr. Y,

the Applicant argues, believed that his position was threatened in the light of a reorganization of the procurement process undertaken by the Applicant upon assuming his post. The Applicant had detected questionable and suspect practices in the Office that specifically concerned Mr. Y's handling of procurement. This reorganization entailed the appointment of a person at a higher level than Mr. Y to manage the group and to ensure transparency in procurement. An audit conducted by the Bank had moreover found, in May 2005, a number of irregularities in the Office. The Applicant maintains that these factors detract from the credibility of Mr. Y's statement.

29. The Applicant explains that far from obtaining personal gain in the negotiation of the rent, he in fact obtained a benefit for the Bank because the rent payable for the Applicant's residence would be lower. The Applicant asserts that he was not involved in the fuel procurement process in the Office, which was alleged to be the quid pro quo for the landlord's willingness to lower the rent, and had no authority to influence decisions in this area.

30. Mr. Y also accused the Applicant of behaving improperly in expanding an Office contract to include private services at the Applicant's residence. He further alleged that the Applicant had requested the Office to pay for personal charges and bills. INT determined that these accusations were being resolved directly between the involved individuals and dropped the matter. The Applicant sees it as a further demonstration of the accuser's lack of credibility and personal motives, and of the investigators' bias.

#### *b) The Bank's arguments*

31. The Bank explains that the same investigative process described above was followed in respect of the alleged abuse of position for personal gain in connection with the lease negotiations. As a result, the Bank concluded that the Applicant had engaged in abuse of authority, failure to observe generally applicable norms of professional conduct, and conflict of interest.

32. INT also investigated the Applicant's alleged discussions with the landlord who was interested in the fuel procurement contract. One witness testified that the Applicant had been approached by the landlord on this matter, and that he had heard the Applicant reply to the landlord that he could expect future business with the Bank. Similarly, a nephew of the landlord acknowledged that he had discussed the matter with the Applicant during the lease negotiations.

33. The Bank maintains that Mr. Y could not have had a personal motive in making this accusation because he had an Open-Ended appointment since 2002 and could not have been concerned with the expiration of his term; thus, the Applicant's accusations about Mr. Y's credibility are unfounded. In any event, in the Bank's view, the Applicant should have disclosed these discussions at the time the supply contract was awarded.

### *The claim for monies owed and compensation for lost property*

#### *a) The Applicant's arguments*

34. The Applicant has introduced another claim that includes two components. The first concerns the decision of the Bank to withhold monies owed to him in an amount somewhat in excess of \$100,000 in connection with annual leave and separation and resettlement grants. The second represents the value of personal property left at his house in the Country Office. He asserts that he was not allowed to return to the Country Office and that his own belongings were effectively impounded by the Bank in that country.

35. A matter concerning certain property belonging to the Bank has been settled since the application was filed.

#### *b) The Bank's arguments*

36. The Bank counters that it did not pay the amount owed to the Applicant at the time of termination because he owed the Bank amounts in excess of the amounts the Bank owed to him. The actual amounts are not in



dispute. (Partial payment has been made after the application was filed as some items have been recovered by the Bank.)

37. The Bank also explains that it is not responsible for the Applicant's personal property, but nevertheless offered to send to the Country Office a person designated by the Applicant to pack and ship that property or make arrangements to have this done locally. The Applicant did not accept these offers.

### *Procedural and due process complaints*

#### *a) The Applicant's arguments*

38. The Applicant complains that the investigation was characterized by serious procedural failures that led to biased conclusions. The investigation failed to take into account the realities of the Country Office as he found them when he assumed his position as Country Manager. Continuing conflicts between different groups and closely knit cliques of staff pursuing their own interests were a constant problem. Thus, Mr. Y had been instrumental in hiring Ms. X, and had close and continuing connections with her, as apparently had some of the other witnesses who testified against the Applicant. Mr. Y and Ms. X believed that their positions were threatened, and this underlies their accusations against him. Their goal was to prevent the Applicant from taking any adverse action against either of them. This aim was accomplished as soon as INT intervened, given its policy to prohibit an accused from adopting any measures concerning the accusers.

39. Further, INT failed to take into account the personal situations of the accusers in the Office and their motives. One had been questioned because of a lack of skills and her mishandling of communications tasks, the other about his handling of procurement and misuse of the Bank's vehicles. Both made their accusations shortly after the Applicant took up his position. The Applicant believes that these accusations and related witness statements were also related to the staff's fear and resentment due to the changes he instituted upon his arrival at the Country Office, but this did not amount to any form of misconduct.

40. The Applicant further complains about the linguistic ineptness of the investigation; neither of the investigators had an adequate level of French; nor was a verbatim record available in French. Interpreters had to be used in some interviews where witnesses were not comfortable in English.

41. The testimonial evidence, the Applicant argues, rests on unverifiable summaries and not on transcripts, thus leading to misstatements of fact or attempts to attribute statements to witnesses that were never made. Particularly troublesome is the misinterpretation of the testimony of one witness who felt compelled to submit a written affidavit explaining what he had said during his testimony.

42. The Applicant moreover complains that the investigation was asymmetrical in that it concentrated on witnesses favorable to Ms. X and largely ignored those favorable to him, who were interviewed only ten months after the investigation had begun. The accusers were not challenged, nor were their motives probed. The investigation was superficial and inadequate in the circumstances of the case.

43. Worse still, in the Applicant's view, the allegations against him were leaked to the local press, and thereafter to the international press, even before the INT's first Draft Report was ready for his review. He was discredited in the eyes of the local government and of the Bank, thus making it impossible for him to resume his responsibilities in that country. The Applicant asserts that the article in question was defamatory and contemptuous. The Applicant believes that the person most likely to be responsible for this leak was Ms. X herself, given her close contacts with the press in her communication functions, and the fact that she was a national of the African Country.

44. In spite of his request, INT refused to investigate the matter on the ground that it had no means to force the journalist to disclose his source of information. But even then, the Applicant maintains that INT should have investigated the fact that the information was officially spread around the Bank at the instigation of Ms. X. Nor did the Bank issue a statement to the effect that the investigation was confidential and had not been concluded,

thus allowing the defamation to stand unchallenged.

45. The Applicant explains that this breach of confidentiality caused him great harm and irreparably damaged his right to due process and a proper defense. The investigation should have been immediately suspended and the breach fully pursued; those responsible should have been subject to disciplinary measures and the imposition of sanctions.

46. Another consequence of the leak and the flawed investigation, he argues, was that the Applicant was placed on administrative leave, told not to enter the Country Office, and denied unescorted access to Bank premises. He was later denied permission to return to the African Country, even while his family remained there.

47. The Applicant alleges other irregularities in the investigation that affected his due process rights. Principal among them was that, after he had made several requests in September, October and November 2006, the Final Report was provided to him only on 20 November 2006, almost four months after he was given his letter of termination (based on that Final Report) on 1 August 2006. In the Applicant's view, the Bank had no right to terminate his employment on the basis of a report of investigation while at the same time withholding it from him. The Applicant's requests for mediation in September and October 2006 were not answered by the Bank. Subsequently, the Bank rejected the Applicant's request for copies of the outside reviews of the Draft Reports, including the one that had been requested by the Ombudsman.

#### *b) The Bank's arguments*

48. With respect to the procedural and due process issues, the Bank argues that, as explained above, it followed every step necessary to ensure a fair evaluation of facts and supporting evidence. This included preserving the Applicant's right to comment on each Draft Report, ensuring that the Applicant's views were properly analyzed and evaluated, and showing an unprecedented degree of prudence by arranging two outside reviews of the Draft Reports. All relevant witnesses suggested by the Applicant were also interviewed.

49. The Bank adds that the pertinent officials expressed dismay to the Applicant about the leak of the investigation to the press, but informed him that INT could not pursue the case unless a Bank staff member brought to its attention specific instances of misconduct. The possibility of issuing a statement in response to the leak was also proposed but was not pursued.

50. As to why a similar leak published in the international press was circulated officially to Bank staff, the Bank explains that "[Ms. X], as part of a daily distribution of news concerning the World Bank's business in the Country Office, included that article among many others in a daily electronic distribution that was part of her duties as a member of the External Affairs team."

51. Finally, the Bank gives detailed reasons for its decision to place the Applicant on administrative leave, to prohibit his return to the Country Office, and to place restrictions on his unescorted access to the Bank, both at the local office and at headquarters.

### *The Tribunal's findings*

#### *a) Scope of the Tribunal's powers*

52. The parties express differing views as to the scope of the Tribunal's powers in a case involving disciplinary measures. The Applicant requests a full examination of the facts, issues and circumstances, while the Bank believes that the function of the Tribunal is more restricted, namely to determine whether the conclusions and decisions adopted are supported by substantial evidence, and whether the findings of misconduct and the imposition of sanctions have an adequate legal basis.

53. The starting point is to appreciate that disciplinary cases are different from the broader range of disputes

relating to managerial decisions. The Tribunal has always recognized that the Bank has discretion to run its business. But punitive measures are not business decisions. They must be subjected to meaningful checks and balances, in the interest not only of individual applicants but also to realize expectations that the Bank will eschew arbitrary behavior in this sensitive sphere. Thus, the relevant standard of review was stated as follows in *Cissé*, Decision No. 242 [2001], at para. 26:

The Tribunal has held that in disciplinary cases, it may examine: (i) the existence of the facts; (ii) whether they legally amount to misconduct; (iii) whether the sanction imposed is provided for in the law of the Bank; (iv) whether the sanction is not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed. (*Carew*, Decision No. 142 [1995], para. 32.) The Tribunal has also held that in disciplinary matters, its review is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and circumstances. (See *Mustafa*, Decision No. 207 [1999], para. 17; and *Planthara*, Decision 143 [1995], para. 24.)

In *Arefeen*, Decision No. 244 [2001], and then *K*, Decision No. 352 [2006], the Tribunal further developed the principles under which the legal sufficiency of evidence, findings and sanctions must be established.

54. The Tribunal must naturally ensure that a disciplinary measure falls within the legal powers of the Bank. This requires the Tribunal to evaluate the factual reality of the misconduct, the legitimacy of the means by which the facts were established, and the proportionality of the sanctions imposed. This does not mean that the Tribunal is an investigative agency. The Tribunal simply takes the record as it finds it and evaluates the fact-finding methodology, the probative weight of legitimately obtained evidence, and the inherent rationale of the findings in the light of that evidence. The judicial function cannot be reduced to a mechanical formula. Decisions will perforce be fact-specific; the ideal of perfect and general predictability must give way, to some degree, to the individual discernment of those called upon to judge a given case.

55. It is by this process that the Tribunal determines whether the decision to terminate the Applicant's employment was taken in violation of his rights. The standard of review that the Tribunal follows is the one explicitly defined in *Cissé*.

*b) The existence of the facts: accusation of sexual harassment*

56. A serious difficulty in reviewing the facts is that no third party observed any of the alleged conduct that gave rise to the complaint. While Ms. X testified that one witness observed at least one of the alleged incidents of sexual advances, that witness denies having seen any of them and testified only to what Ms. X told her. INT accordingly made an assessment of credibility of the accusers and the accused in the light of witness statements that did not recount observation of any specific incident of sexual harassment.

57. The Bank asserts that the record contains substantial evidence to support the finding of sexual harassment, including corroboration by means of telephone records and accounts of witnesses who stated that they too had been uncomfortable with the Applicant's suggestive talk and invitations.

58. The Bank concludes that the Applicant's argument that Ms. X had a personal motive for making the accusation because she felt her job was in jeopardy is neither supported nor credible. The Bank does not believe that Ms. X's position was threatened, because the decision to hire an additional communications officer was made independently of her performance and related to duties that were significantly different from hers. Thus she had no motive to make a false accusation on this count. The Bank concludes that her fear is more properly viewed as the result of retaliation once she had rebuffed the Applicant's advances.

59. The Tribunal has examined the record in detail and finds that the Applicant's account that Ms. X had in fact been concerned that the hiring of a second communications person would threaten her own job situation does in fact have significant evidentiary support. Contrary to the Bank's position, there is proof that as early as November 2004 the Applicant raised with headquarters the need to hire a better-qualified communications person given the lack of skills and qualifications of Ms. X. As noted, on 27 January 2005 – broadly in the same time frame as the accusations by Ms. X – her headquarters supervisor (the very person to whom she made the



complaint of sexual harassment) wrote to the Applicant to warn that the new recruitment should not result in marginalizing Ms. X. This in itself may be an indication that Ms. X had previously raised those concerns with the supervisor.

60. Sexual harassment is a grave offense that entails the sanction of termination, and the standard of proof must be demanding to the point of being clear and convincing. The fact of such misconduct cannot be “established” by conjecture or speculation. It is not enough to assert that there is “reasonably sufficient” evidence to support a finding of misconduct in this type of allegation. In situations where, because of the nature of the allegation, there might be no direct evidence, the evidence available must be so clear as to generate conviction in the mind of a reasonable person.

61. The Tribunal held in *Arefeen*, at para. 42, that

[t]he standard of evidence in disciplinary decisions leading, as here, to dismissal must be higher than a mere balance of probabilities. In several decisions, the Tribunal has emphasized that there must be substantial evidence to support the finding of facts which amount to misconduct.

The Applicant relies on this judgment to support his arguments that the Bank has not met the required standard of proof.

62. Ms. X’s performance, which was a critical part of the Applicant’s contentions as the basis for her motive, was not examined in the investigation, which concentrated exclusively on the alleged incidents of sexual harassment, thus leaving doubt as to whether her accusation could have been motivated by other reasons. Although INT made an effort to gather evidence supporting Ms. X’s representations in her job application that she possessed a master’s degree, the documents presented on their face clearly disproved that assertion, and showed that Ms. X had attended a technical school, not a university, for two years after high school. The investigators’ lack of familiarity with the French system of schooling undermined their capacity to make a rational assessment of the records and led them to the wrong conclusion.

63. In the present case, the evidence of alleged sexual advances is anything but substantial. The witnesses’ statements for the most part refer to the plausibility of hypothetical incidents, but not to their actual occurrence. Moreover, some of these statements, including those of Ms. X, are factually inconsistent with respect to places and times: some are incoherent on their own terms, others are inconsistent with other averred facts. No specific dates and times were provided for when the visits to the Applicant’s office took place, so as to permit verification. The hearing statement of the Applicant’s assistant, who was in charge of the Applicant’s appointments, shows that Ms. X habitually went into his office directly, without announcing herself to his assistant. This undisputed behavior is not consistent with the likely conduct of a staff member who is receiving unwanted approaches.

64. In the only event where a specific date is provided by Ms. X, i.e., 7 January 2005, the records show that she was in fact on leave and no explanation has emerged as to why she would have been at the Office premises. That date fell on a Friday. No witness recalls having seen her at the office that day.

65. There are vague allegations concerning the Applicant’s request to have Ms. X accompany him to a hospital in Washington, DC, and the reference to his interest in Mr. Y’s daughter, who had been babysitting for the Applicant. This latter aspect was mentioned but left uninvestigated despite its importance in providing a motive for Mr. Y’s anger.

66. In her interviews with the INT investigators, Ms. X stated that the Applicant had expressed interest in her, which she believed to have been sexual. She stated that in the beginning, her relationship with the Applicant had been good but that “everything changed” when, on 7 January 2005, she told him, in no uncertain terms, that his sexual overtures were not welcome. Ms. X described the atmosphere in the Office before 7 January 2005 as a “very warm and happy atmosphere,” and the relationship between her and the Applicant as a “good relationship.”

67. Her testimony on sexual harassment, however, refers almost entirely to the period before 7 January 2005. She said that between November 2004 and January 2005, the Applicant had come to her office almost “every day.” The Tribunal notes that this statement is in direct contradiction with that of the Applicant’s assistant discussed above. Ms. X added that the Applicant had constantly complimented her on her appearance and dress and had extended invitations to her to be together either in the office or outside the office, which she declined. He had phoned her numerous times outside office hours under business pretexts. The Applicant, she alleged, had often tried to kiss her on the mouth and had tried to detain her in his office, sometimes locking the door. At one time, she maintained, he had given her a key in order to give her the means to come to his office; she had taken it but, she said, never used it.

68. In response to the investigators’ question as to why she first complained against the Applicant to her headquarters supervisor while on a retreat in South Africa instead of to the anti-harassment advisor in the Country Office, Ms. X responded that she had not trusted the advisor who, on her own initiative, had sought to know what was going on between her and the Applicant. Ms. X said that she had chosen not to speak to anyone regarding the Applicant’s advances, except maybe for her family, Mr. Y and one other staff member. However, neither of these staff members could attest to any improper behavior.

69. The corroboration by means of the record of telephone calls is also inconclusive. While the Applicant made a number of calls to Ms. X outside office hours, their implication remains in doubt. Ms. X’s interpretation of their meaning finds no corroboration. Her mother’s statement cannot be considered independent in this context, and reveals nothing about what the calls were about.

70. It is important to note that the Applicant made many calls to other staff members at different times. The phone records show that Ms. X received 314 calls between 17 October and 31 December 2004, of which 31 were from the Applicant. For her part, Ms. X called the Applicant 22 times during this period. The Applicant called Mr. Y 35 times and other Country Office staff 28 and 32 times. Even if these calls were unwelcome, it does not follow that they were of a sexual nature or that they constituted harassment.

71. The conclusions reached by the investigation and the Vice President of Human Resources (HRSVP) are in essence based on the accuser’s own account, without probing possible underlying motives, as well as on inferences derived from witnesses and records that do not convincingly support a finding of this nature. The seriousness of the accusation does not permit conclusions to be based on insubstantial evidence.

72. The record contains a statement describing the Applicant’s managerial style as dictatorial, authoritarian and characterized by an excessive ego. If so, this may well have caused the staff to feel unhappy and may have led on a few occasions to complaints being made about it. But a proper reaction to an objectionable managerial style was not to raise unrelated accusations. It would rather have been to request that the question of his managerial style be examined, and measures be adopted to correct the situation. Whether the Applicant’s professional performance was satisfactory in this or any other regard is simply irrelevant to this case.

73. The Tribunal does not believe that the Applicant is justified in raising conspiracy theories, such as being singled out for reasons of race, nationality, gender or other prohibited grounds. There is no evidence of any such conspiracy. It is possible that several staff members could have been interested in the Applicant’s removal from the Country Office in the light of their experience with the Applicant’s personality and work style. This could have influenced a number of statements made in the record – albeit not all of them, and none by the professional staff – and this factor should have been considered. It is also possible, as a Senior Manager told the investigators, that allegations of sexual harassment may have been motivated by “reasons not connected to harassment ... where something triggers this, and ... it gets escalated fairly quickly.” The Tribunal cannot know whether there may have been reasons other than those discussed in the investigation; this can certainly not be excluded in view of the shortcomings of the record, the deficiencies of the investigation and the apparently unsettled environment throughout the Bank at the time.

74. The charge of retaliation was very imprecise, having been couched in terms of harassment between January and March 2005, when the Applicant denied Ms. X leave and treated her less favorably in terms of

work assignments. This was also the period when the Applicant was alerted to Ms. X's sexual harassment allegations by his supervisor at headquarters, and asked to avoid unnecessary contacts with Ms. X and not to disclose that he knew of such allegations until a full investigation had been commenced. There is in sum no factual basis to justify a finding that the Applicant retaliated against the complainant.

*c) The existence of the facts: accusation concerning abuse of authority and conflict of interest*

75. Mr. Y essentially provided the facts on which were based the findings of abuse of authority, failure to observe generally applicable norms of professional conduct and conflict of interest stemming from the lease negotiation. It is not clear how INT became involved in investigating issues that were primarily managerial rather than evidencing misconduct. Some were resolved through administrative action. Mr. Y explained at the hearing that he had only raised "concerns" with the managers at headquarters about the handling of administrative matters by the Applicant. How such concerns became a formal complaint before INT has not been explained by the Bank, except to state that a decision to join this matter to the investigation of sexual harassment was taken some time after the investigation of the sexual harassment complaint had begun.

76. It seems clearly established that the Applicant did not obtain personal gain from the lease transaction, as the HRSVP concluded in examining the INT's Final Report. His personal intervention in the negotiation, his discussions with the landlord that might have touched on questions unrelated to the lease of a house, and his supposed request for a demarche by a former Finance Minister on his behalf, may have been unnecessary and even ill-considered. Poor judgment is not necessarily abuse of authority.

77. INT concluded, and the HRSVP agreed, that the Applicant had placed himself in a position of conflict of interest, or otherwise conducted himself in a manner that created the appearance of a conflict of interest, in connection with the fuel supply contract and the ongoing negotiation of the lease. In addition, he had abused his authority by involving the former Finance Minister in the lease question.

78. The Tribunal is not persuaded by the Bank's arguments. First, it cannot be held that there was a conflict of interest. The Applicant had no identifiable personal interest in the contract. The effect of the lease negotiation, if any, was to the benefit of the Bank, not to him personally. Next, the Applicant argues that he was not involved in the contract decision for the fuel supply, and the Bank did not tender any evidence to rebut this. Whether the Applicant should have disclosed the discussion about this contract is a matter of judgment and prudence, and his failure to do so does not prove a conflict of interest. Again, in this matter the investigation did not probe the matter of possible personal motives.

79. Assuming the witness statements relating to this matter were reliable, they still do not evince a conflict of interest, although they do attest to the fact that the Applicant engaged in conduct that may have created the appearance of a conflict of interest. This particular finding of the HRSVP thus finds support in the record, but would not of itself justify the sanction of termination.

80. The question of personal expenses supposedly charged to the Office was not, as noted, pursued in the investigation. It will thus not be considered by the Tribunal.

*d) Determination concerning misconduct*

81. Whether the existence of the facts at issue, if established, would legally amount to misconduct is hardly in doubt. If the main accusations made against the Applicant concerning sexual harassment, retaliation and conflict of interest had been established to the Tribunal's satisfaction, there could be no question that they would have amounted to misconduct that called for sanctions under the Staff Rules. But this observation is *obiter* in this case. There is insufficient reliable evidence to support a finding of misconduct in respect of these accusations.

*e) Sanctions under the law and proportionality*

82. The third determination of the Tribunal concerns whether the sanctions imposed are provided for in the law of the Bank. Again, this is a matter inextricably linked to the facts of the case. In view of the Tribunal's conclusions above, the only plausibly legitimate accusation was that of conduct which created the appearance of a conflict of interest. Termination is not the kind of sanction that normally follows conduct that is more related to bad judgment than to an actual offense. The Tribunal accordingly concludes in connection with the fourth element of the *Cissé* standard that in the light of its determinations the sanctions imposed were wholly disproportionate.

*f) Procedural issues and due process*

83. The fifth and last determination concerns the observance of due process. The Applicant was given the required notices about the initiation and successive stages of the investigation and its outcome. He also was given the opportunity to comment at each step of the proceedings, including the INT's findings at the end of the investigation. INT carried out additional investigations and interviews. It obtained various reviews of its reports, as explained above, including two by outside law firms as a putative added guarantee. The Final Report also addressed each comment submitted by the Applicant. It was ultimately the HRSVP who determined that misconduct had occurred, and what disciplinary measures should be imposed.

84. Insofar as the formal requirements of due process are considered, the investigative process was adequate. But due process goes beyond the formalities. As the Tribunal held in *P*, Decision No. 366 [2007], at para. 34,

[t]he Bank's evidentiary burden is not met by affirmations that a multitude of interviews were carried out, that the investigators were highly trained, and that the record was carefully reviewed. Such self-serving statements seem intended to tempt the Tribunal to take a superficial view, while confiding unquestioningly in the Bank's processes; that would naturally be unacceptable.

85. There is first a question concerning the time-line of the investigation that influences due process. The Applicant points out the fact that the witnesses whom he named as persons to attest to his professional and personal standing were interviewed as late as ten months after those witnesses on whose statements the first impressions or conclusions of the investigators were based. This creates an imbalance, he argues, that is difficult to redress subsequently, and may bias the investigation. This is indeed a matter which troubles the Tribunal. An investigation into a matter as delicate and sometimes impalpable as sexual harassment should be totally evenhanded, failing which concerns about its independence or objectivity inevitably arise.

86. The suggestion of a rush to judgment is evident in numerous passages of the witness summaries and in the Final Report. For instance, the investigators note that, after recording that some interviewees stated that they had never witnessed improper behavior, their testimony "did not rule out misconduct either." Such a jejune comment bespeaks either bias against the Applicant, or intolerable ineptness.

87. A question of timing also affects the right of the Applicant to be promptly provided with the Final Report, which in this case was delivered to him only after repeated requests and almost four months after the Applicant was notified of termination. Even if there had been a need for a confidentiality agreement, as the Bank explains, it was still essential that the Applicant be informed of due detail before or at the time the actual sanctions were imposed, not months later.

88. The investigators' evaluation of the witness statements was affected by a number of due process defects. The fact that these statements were summarized by the investigators and not available in proper transcripts was in itself likely to lead to eventual misinterpretations of what was actually said or its context, a matter that may be even more troublesome if there are language barriers between the witnesses and the investigators. The Tribunal had the occasion in the course of the oral hearing to attest directly to the difficulties that a number of witnesses had, including Ms. X and Mr. Y, in following an examination in English, to the point that most of their examination had to be conducted in French and informally translated by the President of the Tribunal.

89. Some of the witness summaries reflect statements that are unclear and to some extent incoherent. Even the few transcripts available show insistence on some questions, confusion and leading questions that caused

frustration to the witness. More serious yet is the fact that the summaries were not given to the witness concerned for examination or review. The issue is well illustrated by the case of one witness who provided answers to an interrogatory by the Applicant clarifying that what he actually said as a witness was very different from what was reported in the investigators' summary of the interview, both in substance and context. In addition, it appears that one witness did in fact review the summary of his testimony, and struck out a sentence from the summary. That change, however, did not become part of the record supporting the Final Report of Investigation. All the witnesses appearing at the hearing were given the opportunity to examine the summary of their statements only a few days before they were due to be questioned before the Tribunal.

90. While no discrepancies with what was actually said were manifested at the hearing, the summaries also make patently clear that many important issues that should have been, were not in fact raised by the investigators. Furthermore, the Applicant's closing comments raised the cogent complaint that interviews that lasted four to five hours were summarized in three pages.

91. The practice of preparing summaries of interviews, which has since been replaced with the better method of securing verbatim transcripts, is not in and of itself necessarily reprehensible, but it requires authors of professional acumen. The summaries prepared by the investigators in this case were unimpressive to the point of evidentiary uselessness. Chronological inconsistencies were not noted, let alone explored. Allegations that certain persons were involved in incidents alleged by Ms. X to have occurred were not investigated by contacting (or in some cases even identifying) those persons. The plausibility of Ms. X's presence in the Office on the crucial date of 7 January 2005 was not subject to elementary verification. Although the Applicant's assistant saw who went in and out of the Applicant's office, she was not asked about the evolving frequency of Ms. X's visits or her demeanor on those occasions.

92. The Tribunal is also troubled by the fact that the testimony of Mr. Y at the hearing was particularly vague and contradictory. After repeatedly stating that he could not remember having discussed key points with the investigators, his memory was suddenly refreshed to the point that although he had earlier said no, his response to a question became yes, apparently because he suddenly remembered that he had been interviewed more than once by the investigators.

93. The difficulties concerning the evaluation of the record are compounded by the facts that corroboration was weak or nonexistent, and that important allegations, such as those concerning motives, were not adequately probed or pursued. As noted above, inferences drawn from vague and circumstantial evidence cannot validate an accusation of such gravity. The Applicant's credibility versus that of the accusers was affected; one part of the story came out as more solid than the other. While outside reviews were carried out, the names of the reviewers and law firms involved were withheld by the Bank until the information was made available at the hearing following a question from the Tribunal to the Bank's witness. This lack of information could also taint the exercise, raising legitimate doubts as to impartiality and independence.

94. The accusation of sexual harassment was not made in writing by Ms. X, nor, even orally, to the person in the Country Office tasked with dealing with such complaints. The investigation on conflict of interest and abuse of authority was initiated later than the investigation on sexual harassment, after the investigating mission to the Country Office had been "deployed." The Applicant's opportunity to defend himself from any accusation was correspondingly compromised. A serious accusation such as sexual harassment should not have been joined with the lesser and more administrative accusations concerning the Applicant's negotiations of the lease for his residence and criticisms of his management style. Such a joinder of charges makes it very difficult for the accused to defend himself. The same holds true of the necessary preliminary investigation in this matter, which also appears to have been undertaken at the last minute.

95. The fact that both of the INT investigators involved in this matter left the Bank soon thereafter, failing which each of them would have been placed on a Performance Improvement Plan, can hardly be ignored. The Lead INT Officer frankly acknowledged in his testimony before the Tribunal that with respect to at least one of them, he was concerned about a pattern of insufficient "thoroughness." This is indeed a shortcoming that is quite resonant in assessing the Final Report. One of the witnesses testified before the Tribunal that she had heard



another person, upon whose testimony the Final Report places great reliance, complain that “the investigators had put a lot of pressure on her for the purpose of inculcating the Applicant.” This is of course hearsay, as were all the third-person accounts of what Ms. X had said about the Applicant’s conduct. The ready inferences drawn against the Applicant and manifest in the Report are consistent with this account of “pressure” to convict.

96. The handling of the leak of the investigation to the press was hardly conducive to due process. While it is true that journalists do not reveal sources of information, there could have been an inquiry in respect of the Bank personnel shown to have had some interest in this matter, such as Ms. X, because quite evidently dissemination of this kind of information may have suited her interests. The Bank took no steps to counter the damaging publication and offered no explanation for its failure to do so other than the fact that its practice is not to do so. Public statements would have been appropriate.

97. The Bank’s protestations of powerlessness in the face of the vastly prejudicial press leak (or leaks) is unpersuasive. Only a limited number of people could have leaked the information, which without any doubt caused acute embarrassment and prejudice to the Applicant. Numerous interviewees revealed that they had read about the incendiary allegations in the press. The Bank’s passivity in this respect, when the matter so clearly called for clarifications from protagonists who were in fact interviewed at considerable length, is disturbing and inexplicable.

98. The Tribunal does not believe, as noted, that there is foundation for a conspiracy theory, yet the environment in which the Bank and the Country Office were working at the time appears not to have been serene or conducive to the exercise of clear judgment. In view of the shortcomings of the record and the deficiencies of the investigation, the Tribunal is quite concerned by the possibility that intra-Office conflicts may have been important operative factors never perceived by the investigators.

99. The fact that the INT findings were reviewed and found adequate by outside reviewers suggests not so much diligence on the part of INT as a perfunctory approach by the reviewers.

100. The Tribunal accordingly orders that the decision to terminate the Applicant’s employment be quashed and that he be reinstated in a position of comparable responsibility and rank.

#### *Findings on the remaining claims*

101. The question of monies having been withheld by the Bank because of alleged countervailing liability on the part of the Applicant falls away given the conclusions stated above. Related questions of annual leave and termination grants also become irrelevant given the order of reinstatement.

102. Insofar as the claim for the value of personal property is concerned, the Tribunal is satisfied that the Bank did more than was required under the circumstances to retrieve such property or have it shipped and that the Applicant refused to cooperate in this matter at the time. Accordingly, this part of the claim cannot be upheld, except to the extent that the Applicant is entitled to retrieve his property to the extent it may be salvageable, with the Bank’s reasonable assistance if required. Given the Applicant’s own conduct and questionable cooperation with regard to the termination of his lease and retrieval of his property, and the difficulty in determining the veracity of the parties’ statements, it is left to the Applicant to resolve this matter as he sees fit, and to find compensation in the substantial lump sum awarded below.

103. The severity of this judgment corresponds to the gravity of the unjustified disciplinary measure. If the defectiveness of the Bank’s conduct were to be crystallized in a single word, it would be “superficiality.” Inconclusive affirmations were given unwarranted interpretations. Minor factors of questionable relevance were given disproportionate weight. Irrelevant and trivial elements were given prominence on the flawed reasoning that they were consistent with the accusations. The process as a whole creates an overwhelming impression of hasty conclusions defended beyond reason. When a staff member’s career is at stake, such conduct is unacceptable.

## Decision

For the above reasons, the Tribunal orders that:

- (i) the decision to terminate the Applicant's employment is rescinded;
- (ii) the Bank shall reinstate the Applicant to the same position or to a position similar to the one he was occupying at the time of the termination of his employment, and shall pay the Applicant all remuneration and benefits he would have received from the date of termination to the date he resumes employment, after deduction of any monies already paid to the Applicant upon termination;
- (iii) the Bank shall pay compensation for damages to the Applicant's personal and professional life in the amount of three years' net salary, based on the last salary drawn by the Applicant;
- (iv) the Bank shall remove from the Applicant's personnel file all records relating to the allegations of misconduct, including the INT Final Report and the decision of the HRSVP, and shall substitute a copy of this judgment;
- (v) the Bank shall contribute to the Applicant's costs and expenses, in the amount of \$90,000; and
- (vi) all other pleas are dismissed.

/S/ Jan Paulsson  
Jan Paulsson  
President

/S/ Zakir Hafez  
Zakir Hafez  
Counsel

At Washington, DC, 14 December 2007

## LETTER RELATING TO DECISION NO. 369

The following letter was addressed by the Executive Secretary of the Tribunal to the parties on 24 June 2008:

In a letter dated 15 May 2008, [the Applicant] asked the Tribunal for an interpretation of its judgment in *M*, Decision No. 369 [2007]. The Bank submitted its Answer on 23 May 2008. [The Applicant] replied on 30 May and the Bank submitted additional comments on 9 June 2008, which are enclosed for [the Applicant].

Specifically, [the Applicant] asked for clarification regarding two issues. The first is whether he is entitled to “all salary and benefits as a country manager for [xxxx]” until he is “reassigned to another country manager position.” The second is whether he must apply and be subjected to selection procedures on a competitive process (“that would put him at a disadvantage”) as opposed to being appointed to such a position.

The President of the Tribunal has reviewed the comments submitted by both parties and instructs me to inform you as follows.

Regarding the first issue, the Tribunal is not in a position to make determinations regarding benefits such as leave entitlements or compensation, including those pertaining to staff members following their evacuation from a duty station outside the Bank’s headquarters and their return to Washington D.C. These determinations are the responsibility of the Bank’s Human Resources department, to be made in accordance with the applicable Bank policy and rules. The role of the Tribunal is limited to determining whether the Bank has abused its discretion in making such determinations.

In this regard, the Tribunal observes that the Bank must treat [the Applicant] as it would other similarly situated staff members. Should the parties be unable to reach an understanding of what any of these benefits should be, [the Applicant] remains entitled to challenge the Bank’s actions through the appropriate internal mechanisms in the event that he believes his rights are infringed by said actions.

Regarding the second question, the Tribunal in *M* ordered the Bank to reinstate [the Applicant] “to the same position or to a position similar to the one he was occupying.” It is self-evident that “[a] suitable ‘comparable position’ is unlikely to materialize instantly on the occasion of an order of reinstatement. Consultation and accommodation may be called for. The Bank is entitled to exercise its managerial discretion in the manner in which it implements the order (although of course it cannot alter the terms of the order).” *Yoon* (No. 3), Decision No. 267 [2002], at para. 15.

The Tribunal further recalls paragraphs 26-27 of its decision in *Yoon* (No. 4), Decision No. 317 [2004]. In that case, in order to determine whether the Bank had complied with the Tribunal’s Order of reinstatement of a staff member to a “comparable position”, the Appeals Committee had:

“(i) substantively assessed the proposals and conditions that were the subject of post-judgment

communications between the Bank and the Appellant;

(ii) examined the consultation and accommodation that occurred between the parties in placing the Appellant in a “comparable” position;

(iii) compared the Appellant’s position at the time of reinstatement to the one she was occupying when she was terminated; and

(iv) reviewed the length of time it took for the Bank to reinstate the Appellant.”

The Tribunal found that the approach of the Appeals Committee on the issue “merit[ed] to be endorsed, and to serve as a template for any future similar cases.”

The Tribunal reminds the parties of its position on the issue of reinstatement expressed in *Yoon (No. 3)* and *Yoon (No. 4)*. From the information provided to the Tribunal, it appears that the Bank is attempting to implement the Tribunal’s judgment. Whether the Bank’s efforts are adequate is a matter that must first be assessed through the applicable internal mechanisms, as illustrated by *Yoon (No. 4)*.

Yours sincerely,

/S/ Olufemi Elias  
Olufemi Elias  
Executive Secretary