

Decision No. 194

James McKinney (No. 2),
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on October 27, 1997, by James McKinney against the International Bank for Reconstruction and Development. The case has been considered by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of R.A. Gorman (a Vice President of the Tribunal) as President, P. Weil, A.K. Abul-Magd and Thio Su Mien, Judges. The Respondent filed a request on November 19, 1997 to separate jurisdictional issues from the merits and to file an answer limited to the jurisdictional issues. This request was granted. The usual exchange of pleadings took place and the case was listed on March 9, 1998 to decide the issue of jurisdiction only.
2. The Applicant was temporarily appointed on April 18, 1994 for an initial term of one year as a Staff Assistant in the Office of the Vice President--Environmentally Sustainable Development (ESDVP). This appointment was later extended for a second year, through April 30, 1996. The Applicant's immediate supervisor from the beginning of his service in ESDVP until September 26, 1995 was a woman, whom the Applicant ultimately accused of verbal, physical and sexual harassment. After lodging complaints against his supervisor with various members of the staff, including a Human Resources Counsellor and the Ombudsman, the Applicant on September 29, 1995, submitted a formal complaint of misconduct to the Ethics Officer in the Office of Professional Ethics (OPE).
3. The OPE promptly commenced a comprehensive investigation, and in the meantime the Applicant was reassigned to another position within the Bank. The investigation involved, among other things, interviews of, and the receipt of written materials from, the Applicant and his accused former supervisor, as well as 23 other staff members. The Ethics Officer's final report was submitted to the Manager, Human Resources Services, who determined that there was insufficient evidence to justify a finding of misconduct by the supervisor. By a memorandum of March 7, 1996, the Applicant was notified of the OPE's findings and of the Manager's decision. On April 30, 1996, the Applicant's temporary appointment expired.
4. The Applicant wrote to the Vice President, Human Resources, on June 3, 1996 to request administrative review, asserting among other things that the findings of the Ethics Officer were erroneous and that his investigation violated due process of law. This request for administrative review was rejected on June 6, 1996, on the ground that the Applicant had no standing to challenge the conclusions of the OPE or the Manager of Human Resources Services because they did not breach any obligation owing from the Bank to the Applicant.
5. Upon a timely appeal, the Appeals Committee recommended that the Applicant's requests for relief be denied. It concluded, among other things, that the OPE investigation was thorough, fair and objective, and that the Bank acted rationally and did not abuse its discretion in deciding that there was insufficient evidence of misconduct on the part of the Applicant's former supervisor in ESDVP. This recommendation was accepted by the Vice President, Human Resources, on July 14, 1997. The Applicant's application to the Tribunal was postmarked October 10, 1997 -- less than ninety days later -- but it did not actually reach the office of the Secretariat of the Tribunal until October 27, 1997. The Applicant contests the decision of the Bank not to sustain his charges of misconduct and he seeks to have that decision withdrawn and to be awarded U.S.\$1 million and legal costs.

6. The Respondent has interposed two jurisdictional objections, one *ratione temporis* and one *ratione materiae*. The Tribunal rejects both.

7. The Respondent invokes Article II, paragraph 2(ii), of the Statute of the Tribunal, which establishes as a jurisdictional requirement that “the application [be] filed within ninety days after” receiving notice, upon exhausting administrative remedies, “that the relief asked for . . . will not be granted” by the Bank. The application here was posted within ninety days of the decision of the Vice President to accept the recommendation of the Appeals Committee, but it was not received until 17 days later, which was almost two weeks after the deadline for filing as contemplated in the Statute. The Respondent asserts that “filing” is accomplished only when an application is actually received by the Secretariat of the Tribunal.

8. The Tribunal concludes that this is not the proper interpretation of the language of Article II, paragraph 2(ii). In light of the fact that so many staff members pursue their work at long distances from the Bank’s Headquarters in Washington, D.C., a requirement that their mailings reach the Secretariat within ninety days of the contested decision could result in the significant shortening of the contemplated ninety-day period for the preparation of the application, which frequently involves consultation with fellow staff members and the retention of and consultation with an attorney. Moreover, the interpretation put forward by the Respondent would have the practical consequence of systematically favoring staff members who work in or close to Washington, D.C. There is no implication whatever in the Statute that the Tribunal was meant to be less accessible to certain classes of Bank employees based upon their geographic assignments. The importance of access to the Tribunal by all staff members as a means of redressing possibly arbitrary and discriminatory action on the part of the Bank suggests that the time requirements should be interpreted not only precisely, as the Tribunal has often stated, but also fairly.

9. Because the application was indisputably dispatched, by registered mail with a signed receipt requested, within ninety days after the Applicant was informed of the adverse decision of the Vice President, Human Resources, it was “filed” in a timely manner, and the Bank’s contention to the contrary is rejected.

10. The Respondent also seeks dismissal on jurisdictional grounds because of an asserted failure on the part of the Applicant to allege non-observance of his “contract of employment or terms of appointment” as is required by Article II, paragraph 1, of the Statute of the Tribunal. The Bank contends that “a right to have the Tribunal review the outcome and the process of the OPE’s investigation has never formed part of a staff member’s contract of employment or terms of appointment where, as in the present case, the applicant was not the accused staff member and no disciplinary measure was imposed on the applicant Staff who bring allegations of misconduct against other staff members and who then disagree with the outcome of the Bank’s investigation do not have the right to challenge the manner in which the investigation was conducted or its outcome.” For the Respondent, then, while the accused staff member may come to the Tribunal to challenge disciplinary action based on adverse investigatory findings, an accusing staff member may not challenge an adverse investigatory outcome or the Bank’s resulting decision not to discipline the accused.

11. It is true that the imposition of discipline for misconduct on the part of a staff member will normally be subject to review by the Tribunal and that its consequences will have a most pointed impact upon the affected staff member. It does not follow, however, that the Bank does not have a duty to an accusing staff member to refrain from acting arbitrarily, capriciously or discriminatorily, or without due process of law, when considering his or her accusations against another staff member, in any event when in the setting of a formal investigation carried out by the Office of Professional Ethics.

12. In the Bank’s Principles of Staff Employment, it is stated that “The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members [T]he Organizations shall ... make all reasonable efforts to ensure appropriate protection and safety for staff members in the performance of their duties” In a Bank publication of September 1994, “Preventing and Stopping Sexual Harassment,” that latter term is defined as “any unwelcome sexual advance, request for sexual favor or other verbal, non-verbal or physical conduct of a sexual nature which unreasonably interferes with work, is made a condition of employment, or creates an intimidating, hostile or offensive environment.” In the Tribunal’s

decision in *Mendaro*, Decision No. 26 [1985], para. 22, it noted the Bank's concession that the Tribunal had the "power to deal with a timely complaint based on non-observance of the implicit duty not to practice such discrimination or harassment." The Applicant in that case was in the position of an alleged victim of discrimination and harassment rather than an alleged author of such misconduct. These rules form part of the "contract of employment or terms of appointment" of staff members (See *de Merode*, Decision No. 1 [1981]). Also part of those terms and conditions are the staff rules relating to disciplinary proceedings, in Staff Rule 8.01, Section 5. Among other things, those then provided for an inquiry by the Ethics Officer when "a staff member is alleged to have engaged in conduct for which disciplinary measures may be imposed" and when "supporting evidence of possible misconduct has been obtained" after a preliminary inquiry. Just as an accused is entitled to an investigation that does not amount to an abuse of discretion, the same is true for an accuser. It would make a mockery of the requirements set forth in Staff Rule 8.01 if the Bank were allowed to discharge it without affording due process to both the accuser and the accused and without requiring that an investigatory outcome be supported by evidence.

13. The Respondent has expressed its concern that allowing complaining staff members to secure administrative and Tribunal review of any investigation undertaken (or not undertaken) by the Bank would have a most disruptive impact upon the operations of the Bank and upon staff relations. The Respondent states that "[t]here is no obligation owed by the Bank to the complaining staff member ... to resolve his allegations in his favor or to otherwise conduct the investigation in a manner desired by that staff member." Of course, there is no such obligation for the Bank always to adopt the course of action urged by a complaining staff member. What the Applicant here seeks is not that, but rather review of the investigating official for conduct that is arbitrary or lacking in due process. Such review is appropriate and can properly take account of the needs of the investigating officer for flexibility, confidentiality and the like. There is no reason to believe that allowing such review will seriously impede the operations of the Bank.

14. For these reasons, the Respondent's request to dismiss the application as not founded upon an alleged breach of the contract of employment or terms of appointment is rejected. Whether the Applicant can substantiate his allegation that the investigation conducted by the OPE was unfairly conducted, and its conclusion unsubstantiated, remains to be determined at the next stage of the case, at which the merits are to be addressed through the usual exchange of pleadings.

DECISION

For the above reasons, the Tribunal unanimously decides that:

- (i) the Bank's request to declare the application inadmissible for lack of jurisdiction is denied; and
- (ii) the Applicant is awarded costs in connection with this jurisdictional phase of the proceeding in the amount of \$7,500.

Robert A. Gorman

/S/ Robert A. Gorman
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At London, England, May 15, 1998