

Decision No. 157

Hector McNeill,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R. A. Gorman and F. Orrego Vicuña, Vice Presidents and P. Weil, A.K. Abul Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on November 15, 1995, by Hector McNeill, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on December 6, 1996.

2. In essence, the Applicant contests the decision of the Bank not to confirm his appointment at the end of his probationary period and to place him on administrative leave several weeks before the date on which this period was to end. He requests various reliefs, in particular compensation in the amount of six times his net salary.

THE MAIN FACTS

3. The pleadings of the parties differ on many of the rather complex facts which have led to the contested decisions, and the Tribunal will revert to some of these facts later on. It is sufficient, at this stage, to highlight the undisputed factual milestones of the case.

4. The Applicant was appointed as from September 7, 1993 as a level 23 environmental economist in the Latin American and Caribbean Region's Country Department I (LA1), Environment and Agriculture Division, under the Rain Forest Trust Fund. This appointment was for three years but it was stated in the letter of appointment that, in accordance with the Bank's policy, it "will be probationary for the first year and will normally be subject to confirmation on the first anniversary of your reporting for duty." He was assigned to work in the Rain Forest Trust Fund unit, consisting of a small number of high level staff members. According to the job description attached to his letter of appointment, this unit was to work on the Pilot Program to Conserve the Brazilian Rain Forest, "a coordinated effort of several donor countries and the Brazilian Government to reduce the rate of deforestation of Brazil's rain forests in a manner consistent with the aspirations of the inhabitants of the rain forests for an improved standard of living."

5. From September to December 1993 the Applicant was assigned by the Division Chief in charge of the unit, Ms. X, to work under the supervision of Mr. K, a level 23 officer in the same unit, who was at that time the coordinator of the Pilot Program. The Applicant was asked to prepare three so-called IEPS (Initial Executive Project Summaries), i.e., documents describing the objectives and actions of a proposed project. In January 1994, Ms. X reorganized the Division into separate work groups. Mr. K was not part of the team to which the Applicant was assigned but he continued to be the coordinator of the Pilot Program.

6. In March 1994, Ms. X assigned the Applicant to work on a procurement issue concerning some Bank-financed operations in Brazil.

7. On April 20, 1994, Ms. X met with the Applicant for an interim performance review. In the memorandum which she sent to him on May 24, 1994 to summarize this meeting, Ms. X noted a number of shortcomings in the Applicant's work: delays in preparing the IEPS; "lack of effective teamwork and credibility;" "written and oral

communication... very unclear;" "speaking... very hard to follow;" "analyses... complex and diffuse, not focused on key issues or results;" etc. She advised the Applicant that if his work and communication skills did not improve significantly she would not recommend confirmation of his appointment.

8. On June 6, 1994, the Applicant filed a request for administrative review of Ms. X's decision not to confirm his appointment if he did not improve significantly. The review concluded that the interim evaluation had been properly carried out.

9. On June 9, 1994, Ms. X sent to the Department Director a memorandum recommending "to terminate the appointment of Mr. Hector McNeill on the ground of non-confirmation of appointment." She reiterated the shortcomings noted in her memorandum to Mr. McNeill on May 24 and stated that "[t]here has been no significant improvement in any of these areas since the time of my last review." She added that "[a] new and major problem" had arisen which prompted her to request approval of Mr. McNeill's separation, namely, "a strong concern raised by the Brazilian Government concerning disruption within the pilot program being caused by Mr. McNeill's repeated, unauthorized and premature transmission of information to members of the government about ostensible Bank positions which, in fact, were thoughts in progress rather than fully developed positions." The "twisted" information conveyed by Mr. McNeill to the Brazilian authorities, she added, harmed the relationship between the Bank and the Brazilian Government.

10. On June 17, 1994, Ms. X met with the Applicant and the Personnel Officer of LA1. According to the record of this meeting sent to files by the Personnel Officer, the "purpose of the meeting" was, inter alia, "to apprise Mr. McNeill of Ms. [X]'s very serious concerns regarding the deterioration in relations with our Brazilian counterparts and the parallel undermining of the Bank's credibility" and "to request a full review of Mr. McNeill's performance... at the earliest given opportunity,... since she had to seriously consider recommending that Mr. McNeill be separated from the Division and possibly from the institution at this point."

11. A few days later, on June 23, Ms. X met again with the Applicant and the Personnel Officer with a view to preparing the performance review record covering the whole period from September 5, 1993 through June 17, 1994; at the Applicant's request, the meeting was also attended by the Ombudsman. As Part I of the evaluation, the Applicant had provided a list of 52 "significant items" of his achievements. In her draft of Part II, "Supervisor's Assessment," Ms. X referred to a "procurement issue" stemming from the Applicant's having "raised the specter of irregularities" which, she said, had never existed. Mr. McNeill's behavior, she wrote, had further created "a serious country relations problem vis-à-vis Brazil." She listed, furthermore, a number of deficiencies in the Applicant's performance. The Applicant, she wrote, had been "generally ineffective" in various fields. He had not "presented what the Bank requires for a cogent project design; analyses complex and diffuse, not focused on key issues or results..., he has difficulty succinctly identifying major issues and clarifying how they are to be addressed...." His communication skills, she noted, have been poor, both in writing and orally: "ideas... not clear and succinct..., lack of conciseness.... Does not clarify what he thinks are most important points. Abstract, with frequent digressions and run-on sentences.... Tendency to inappropriately complicate issues..., etc. Mr. McNeill, she wrote, "has not adapted well to working with the World Bank." Consequently, Ms. X recommended "that Mr. McNeill be separated from World Bank employment as soon as feasible, prior to the expiration of his probationary period."

12. The meeting of June 23 had, however, to be broken up before completion of the process. For reasons on which the parties differ, the meeting was never resumed and the performance review record remained without the signature of the Applicant.

13. On June 25, 1994, the Applicant requested administrative review of Ms. X's decision to submit him to a full performance review covering the period September 5, 1993 to June 17, 1994 only a few days after having completed an interim review for the period September 5, 1993 to May 24, 1994. This request was not resolved to the Applicant's satisfaction.

14. On July 18, 1994, a management review group composed of Ms. X, the Personnel Officer and the Acting Director of LA1 added to the performance review record, not signed by the Applicant, a recommendation "to

terminate the appointment of Mr. Hector McNeill on the ground of non-confirmation of appointment, pursuant to paragraph 6.02 of Staff Rule 7.01, 'Ending Employment.'"

15. On July 22, 1994, the Acting Director of LA1 wrote to the Director, Personnel and Management Department, to seek his concurrence in this recommendation, and stressed the urgency of the matter "due to the extremely serious nature of the country relations issue."

16. On July 28, 1994, the Applicant was notified by the Acting Director, LA1, that his appointment to the staff of the Bank "will be terminated effective close of business on September 30, 1994, due to non-confirmation of appointment in accordance with Staff Rule 7.01/6.03."

17. A few days later, on August 3, 1994, the Vice President, Management and Personnel Services (MPS), informed the Applicant that, "after consultation with [his] managers and Personnel Officer," he had decided to place the Applicant on administrative leave under provisions of Staff Rule 6.06, paragraph 9.07 "with effect from tomorrow, August 4, 1994 through September 30, 1994, the last day of your Bank service." The Vice President further indicated that he had been informed by the Applicant's managers that the Applicant had "made representations relating to the Bank policies and operations that have resulted in a serious erosion of the Bank's relations with one of its largest client countries, Brazil" and "as a consequence," Ms. X "had to order (him) to cease all work- related contact with Brazilian officials." This situation, the Vice President added, "clearly has led to a serious deterioration in the relationship of trust that needs to exist between the Bank and its staff." The Vice President concluded as follows:

"Under these circumstances, it has become impossible to entrust you with a substantive work program. It is, therefore, my judgment that it is not only in the institution's, but also in your own, best interest that you be placed on leave which will enable you to explore other options."

18. On August 30, 1994, the Applicant filed an appeal against this decision with the Appeals Committee. He also requested provisional relief consisting of the extension of his, and his family's, G-IV visa status and the suspension of the action of termination pending the final decision. Subsequently, on September 20, he requested that in accordance with Staff Rule 9.03, paragraph 7.01, the Vice President, MPS, recuse himself from making any decision on his request "because of a direct, personal and professional involvement in the subject of this appeal."

19. On October 4, 1994, the Appeals Committee made its recommendations on the request for provisional relief. The Committee "found that the medical treatment needed for the Applicant's wife..., the interruption of his daughter's schooling and the difficulties surrounding resettlement would impose undue hardship for the Appellant." The Committee recommended that all termination action be suspended until a final decision on the appeal. In notifying this recommendation to the Vice President, MPS, the Secretary of the Appeals Committee informed him that because Mr. McNeill "was employed in your Vice Presidency at some point during the period in dispute" the Committee was of the view that the matter should be reviewed by another senior manager appointed by the President of the Bank.

20. On October 7, 1994, the Acting Vice President, MPS, rejected the Appeals Committee's recommendation that the termination be suspended. He indicated that the Vice President was away and that in his capacity as Acting Vice President having had no connection with the Appellant's case he saw no necessity to recuse himself. He added that there had been no communication between himself and the Vice President on this issue and that he had arrived at this decision independently.

21. The Appeals Committee issued its report on July 19, 1995. It found "no evidence of abuse of discretion" in the Bank's determination that "it was unwise to let the Appellant continue to work on Brazil." It noted the Bank's view that the "performance of the Appellant had been so poor that it was unlikely to improve to a level that would be acceptable to the Bank, especially given his incapacity to learn from feedback and to acknowledge his shortcomings." It concluded that the Bank's decision to terminate the Applicant "was reasonable in the circumstances" and denied all requests for relief made by him. It noted that despite his being placed on

administrative leave the Applicant had been paid for the full probationary period.

22. The Vice President, MPS, having decided to recuse himself from the case, the final decision on the Appeals Committee's recommendation was made by another senior Vice President, the Vice President for the Middle East and North Africa Region, who accepted the Committee's recommendation on August 4, 1995. This decision was notified to the Applicant by the Vice President, MPS, on August 7, 1995.

23. In November 1994, the Respondent made to the Applicant an *ex gratia* payment of \$15,000 for his wife's continuing medical care.

THE DECISIONS CONTESTED

24. In his application the Applicant contests:

- (i) the decision of June 9, 1994 not to confirm his appointment at the end of his probationary period; and
- (ii) the decision of the Vice President, MPS, not to recuse himself from the decision on the Appeals Committee's recommendation to provide the Applicant with the provisional relief he had requested.

25. Before proceeding further, it is necessary to observe here that the application appears to be misdirected. The memorandum of Ms. X dated June 9, 1994 was actually no more than a recommendation to the Director, LA1, that he decide not to confirm the Applicant at the end of his probation; it was not a decision by itself. As to the plea directed against the decision of the Vice President, MPS, not to recuse himself on the Appeals Committee's recommendation to provide the Applicant with provisional relief, it is without object because the decision was not made by the Vice President, who was away, but by the Acting Vice President independently.

26. The Tribunal, however, considers that it is its duty, as it is the duty of every international tribunal, "to isolate the real issue in the case and to identify the object of the claim...; this is one of the attributes of its judicial functions" (*Nuclear Tests (Australia v. France)*, Judgment of December 20, 1974, I.C.J. Reports 1974, p. 262). It is clear from the Applicant's briefs that his application is actually directed against the final decision made by the Respondent after exhaustion of all internal remedies available, that is to say, against the decision of August 4, 1995 to accept the recommendation of the Appeals Committee, thus confirming the two critical decisions made against him one year earlier, namely the decision of July 28, 1994 not to confirm him at the end of his probation on September 30, 1994, and the decision of August 3, 1994 to place him on administrative leave from the next day to the end of his probationary period.

27. The Applicant does not request the rescission of any of the decisions made by the Respondent in the case but only damages and some other reliefs.

THE ADDITIONAL DOCUMENTS REQUESTED

28. In his application the Applicant requested a number of additional documents. These documents have all been provided to him by the Respondent with the exception of the annexes to a confidential audit report on some aspects of the Bank's policy regarding the Pilot Program to Conserve the Brazilian Rain Forest. In light of the Tribunal's finding, set out later in this judgment, that the Bank's management of the Pilot Program is irrelevant to the case before the Tribunal, there would be no purpose in requesting the Bank to provide the Applicant with these annexes.

THE FLAWS ALLEGED BY THE APPLICANT

29. According to Staff Rule 4.02, paragraph 2.01, the probationary period, which is in principle one year, "may be shortened for purposes of early confirmation or ending employment...." Paragraph 3 provides that "[d]uring or at the end of the probationary period," the manager may, if the staff member "is considered not suitable for continued employment with the Bank Group," recommend "that the staff member's appointment not be

confirmed and his employment be ended.”

30. The scope and extent of the review by the Tribunal of the Bank’s decisions concerning confirmation or non-confirmation of appointment during or at the end of the probationary period rest on the basic idea that the purpose of probation is “the determination whether the employee concerned satisfies the conditions required for confirmation” (*Buranavanichkit*, Decision No. 7 [1982], para. 26), that is to say, in the language of Staff Rule 4.02, the determination whether the probationer is “suitable for continued employment with the Bank Group.” 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.

31. The same holds true regarding the Bank’s decision to place a staff member on administrative leave. Administrative leave is defined by Staff Rule 6.06, paragraph 9.01, as “absence from duty with pay.” According to Staff Rule 6.06, paragraph 9.07, as it was in force in 1994, placement on administrative leave is possible either as a disciplinary measure under Staff Rule 8.01 or otherwise “for reasons which he [the Vice President, Personnel and Administration, or the Director, Personnel Management Department] determines are sufficient after consulting with the staff member’s manager.” Here again, the Tribunal will not review the Respondent’s decision unless it constitutes, either substantively or procedurally, an abuse of discretion.

32. The criticisms leveled by the Applicant at the Bank’s decision and actions are numerous and have been spelled out at great length in his briefs. The Respondent’s response, on the other hand, has been rather general and undocumented. So much so that on more than one issue the Tribunal is at a loss to find its way in the factual maze of the case. To put it in a nutshell, a close examination of the record leads the Tribunal to conclude that:

(a) on the substantive level: however disquieting certain aspects of the Bank’s decisions regarding the non-confirmation of the Applicant and his placement on administrative leave for the last two months of his probationary period may appear, these decisions remained within a proper exercise of managerial discretion;

(b) on the procedural level: these decisions have been arrived at without the probationer’s right to a fair treatment having been respected and the standards of justice met.

The Substantive Flaws

33. As regards the substance of the contested decisions, the Tribunal observes that the first of these decisions, namely the decision not to confirm his appointment, was based on two different grounds. One was the Applicant's unsatisfactory performance, in particular his poor communication skills both in writing and orally, his reluctance to listen to advice and feedback, and his propensity to go it alone. The other was the Applicant's behavior on the procurement issue and his role in the deterioration of the Bank's relations with Brazil. The second of these decisions, namely the decision to place him on administrative leave from August 1994 to the end of his probationary period, was based exclusively on his alleged role in the relations with Brazil.

34. As the Tribunal has noted in *Buranavanichkit*, (Decision No. 7 [1982], para. 27), the concept of unsatisfactory performance as used in respect of probation is wider than the same concept used with respect to a confirmed staff member. Staff Rule 7.01, "Ending Employment," clearly distinguishes these two aspects. Regarding 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.

35. The Tribunal must further keep in mind that the decision not to confirm a probationer, whether made during or at the end of his probationary period, is a purely administrative measure taken in the interest of the organization and not a disciplinary measure under Staff Rule 8.01, that is to say, a measure "imposed when personal or professional misconduct occurs... or when a staff member fails to observe the duties of employment." Its purpose is not to punish the staff member for any "misconduct," but to ensure the best possible recruitment of staff. The requirements of due process are, therefore, not as stringent in probationary matters as they are regarding disciplinary measures. Therefore, while disciplinary measures are never discretionary and, hence, are strictly reviewed by the Tribunal, the decision not to confirm a probationer is a discretionary one, and the Tribunal "will not substitute its own judgment for that of the Respondent on the staff member's suitability for permanent employment" (*Salle*, Decision No. 10 [1983], para. 30).

36. Neither of the two grounds on which the Respondent's decisions are based is improper, and it is not for the Tribunal to pass judgment upon the assessment made by the Respondent of the Applicant's suitability for Bank employment and the danger his further participation in the Bank's activity might have presented for the Bank's relations with the Brazilian authorities. It is, however, for the Tribunal to review whether these decisions constituted an abuse of discretion because, even if resting on proper motives, they nevertheless were based on facts which did not exist, or were based on a manifestly erroneous appreciation of the facts, or were tainted by *détournement de pouvoir*.

37. No such problem arises regarding the evaluation of the Applicant's service as unsatisfactory because of deficiencies in his work and his poor communication skills. There is sufficient evidence in the record for the Tribunal to be satisfied that this assessment was based on actual facts, did not rest on a manifest error of appreciation and was not inspired by any bias, prejudice or otherwise inappropriate purpose. The member of the unit who supervised the Applicant during the first months of his appointment wrote in a memorandum of June 14, 1994 as follows:

On many occasions since Mr. McNeill began work at the World Bank, I have given him feedback about his written and oral communication skills, which I have found lacking. Specifically, I have suggested that he try to state his points concisely, and without excessive qualifications and digressions. In his written work, I have called his attention to awkward syntax, careless text editing, and fragmentary or run-on sentences.

The Appeals Committee's report referred to a number of testimonies by the Applicant's colleagues which "specifically pointed out his inability to communicate effectively or to focus," his "incapacity to learn from feedback," his inability to listen, and his propensity to ignore instructions. In so far as the evaluations of the Applicant and the decisions made by the Respondent were based on unsuitability for Bank employment, the Tribunal concludes that there has been no abuse of discretion by the Respondent.

38. The situation is different regarding the second ground on which the Respondent based its action, namely the alleged responsibility of the Applicant in the deterioration of the Bank's relations with Brazil and the fear that

his continued participation in the Bank's work might further jeopardize these relations. The Applicant alleges that the Respondent's assessments in this regard were based on non-existent facts and were actually motivated by Ms. X's wish to punish him for having revealed certain aspects of her own mismanagement on procurement matters and to get rid of him as early as possible.

39. Regarding, first, the very existence of the facts invoked by the Respondent as a basis for its assessment, the Applicant maintains that he was not involved in the difficulties which have arisen in the relations of the Bank with Brazil and that Ms. X's accusations against him were fabrication. With regard to the procurement irregularities, the Applicant refers, in particular, to a report on the Brazilian crisis made at the Bank's request by the Regional Procurement Adviser, dated August 19, 1994, in which the following is said regarding the Applicant:

Mr. McNeill should not be blamed individually for procurement mishandling... [I]t was the team which collectively discussed, agreed and took most procurement decisions.... The records show that Mr. McNeill proceeded with professional zeal and diligence... [T]he documents I reviewed do not show any procurement wrongdoing by Mr. McNeill.... I did not find any basis for the charge that Mr. McNeill 'introduced confusion..., ' as the entire issue is confusing....

40. To support their grievances against the Applicant relating to the deterioration of the Bank's relations with Brazil, both Ms. X in 1994 and the Respondent in its briefs before the Tribunal rely heavily on two letters dated, respectively, May 20 and June 15, 1994 from the Brazilian coordinator of the Pilot Program. In these letters, the Brazilian official complained of the Applicant's professional conduct, in particular his propensity to leak unofficial, premature and often distorted information to the Brazilian authorities about the Bank's policy and intentions. This behavior, the Brazilian official wrote, created an atmosphere of distrust and made the implementation of the Pilot Program very difficult. Immediate steps should be taken, the official concluded. The Applicant questions the authenticity of these documents which, he alleges, are not on official Brazilian letterhead, have been backdated, are typed in the same type face as the documents from Ms. X's unit, etc. He also casts doubts on the qualification of these documents as "letters from the Brazilian Government."

41. The Applicant contends, further, that Ms. X's accusations against him were motivated by her wish to punish him for having revealed certain Bank irregularities and he points to Ms. X's mismanagement of the issue; that is why, he alleges, she wanted him separated from her unit, and possibly from the Bank, at the earliest date possible. He notes that "he was the only member of the team to be individually criticized" by Ms. X, so much so that her attitude towards him was clearly discriminatory. He also notes that even though Ms. X had been reassigned on July 15, 1994 from LA1 to another unit and thereafter had no further responsibility for the Pilot Program or for himself she continued to act as if she still was his supervisor. Thus, on July 18, she attended a meeting of the management review group which recommended his non-confirmation. On July 21, she wrote to the Acting Director, LA1, on the "finalization of Mr. McNeill's PMP (Personnel Management Process)." On August 3, she wrote to various officials about the "mental problem" of "the individual noted above." And when on the same August 3, the Vice President, MPS, informed the Applicant of his decision to place him on administrative leave until the end of his probationary period, he referred to the order given to him by Ms. X, "your former line manager," to cease all work-related contact with Brazilian officials. All this, he maintains, points to "the extremes Ms. X was prepared to go to harm the Applicant."

42. The Respondent acknowledges in a footnote of its Answer that the first of the "two letters from the Brazilian Government" was in fact dictated by the Brazilian official in the Bank's offices in Washington and typed by a member of Ms. X's unit. It does not otherwise respond in detail to the Applicant's allegations.

43. As already noted, the contested decisions were not based only on the Applicant's misconduct in the procurement issue and his responsibility in the deterioration of the Bank's relations with Brazil but were based also on the Applicant's unsuitability for future Bank employment. Even in the absence of any grievance on the procurement and the country relations grounds, the Applicant could lawfully have been denied confirmation of his appointment during or at the end of his probation on the ground of his otherwise poor performance. The Tribunal does not deem it necessary, therefore, to go into the Applicant's complaints regarding either the

existence of the facts relating to the procurement issue and the issue of the deterioration of relations with Brazil invoked by the Respondent or the *détournement de pouvoir* alleged by him.

The lack of due process and fair treatment

44. Probation creates rights and obligations for both parties, and the widely discretionary power of the institution to determine whether the probationer should, or should not, be confirmed is balanced by its duty to meet what the Tribunal has called “the appropriate standards of justice” (*Buranavanichkit*, Decision No. 7 [1982], para. 30). While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met. As the Tribunal has stated in *Salle* (Decision No. 10 [1983], para. 50):

The Tribunal deems it necessary to emphasize the importance of the requirements sometimes subsumed under the general phrase ‘due process of law’. The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected....

45. (1) The Applicant alleges, first, non-compliance with the requirement of Staff Rule 4.02, paragraph 2.01, according to which:

During the probationary period, a manager shall:

(a) meet with the newly appointed staff member as soon as possible after the staff member’s entry on duty to discuss the staff member’s work program or to develop an initial individual performance plan....

Ms. X, he asserts, never met with him and instead placed him under the supervision of another member of the team, Mr. K, who was fairly new to the Bank, who was at the same level as the Applicant was and who should not have been given such authority. The Applicant also maintains that he was never provided with any work plan and never received any coaching, training or feedback. He was “left for himself,” he says. Nor did he receive any warnings, he adds, which could have enabled him to improve his performance, until the written interim review of May 24, 1994. Even during the oral interim review of April 20, he says, Ms. X did not go beyond a “broad statement which was mildly critical but not focused.” Thus, he concludes, when Ms. X recommended on June 9, 1994 that he be not confirmed, no possibility was left to him either to defend himself or to improve his performance.

46. In a previous decision, the Tribunal has singled out “two basic guarantees” as “essential to the observance of due process” in connection with probation:

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; cf. *Rossini*, Decision No. 31 [1987], paras. 25 and 28; *Lopez*, Decision No. 147 [1996] para. 43).

47. The record shows that the Respondent has complied with its obligations in the instant case. In placing the Applicant under the supervision of a highly qualified member of the team, Ms. X exercised managerial discretion. A probationer aged 49, with 25 years of professional experience, a good academic background and a good knowledge of Brazil and of the Portuguese language was not expected to require the same degree of training and guidance as an inexperienced newcomer. There is, moreover, evidence in the record that the Applicant met with his supervisors and colleagues, received guidance and was given a work plan, the main element of which was to prepare three IEPS. Mr. K, who was his direct supervisor from September to December 1993, wrote in the memorandum of June 14, 1994 referred to earlier that

[u]pon Mr. McNeill’s arrival in Washington, I discussed his assignment and specific initial tasks with him. I

also provided him with background materials in order to orient him in his assignment, including work done until that time on the projects, background papers on other Pilot Program projects..., relevant World Bank reports....

The record also shows that the Applicant was advised very early of the deficiencies in his communication skills. In the same memorandum, Mr. K stated that after having seen the Applicant's first drafts in late September or early October 1993, he had drawn his attention to several deficiencies in his presentation, including "lack of clarity of the objectives" and "unclear writing style" and that he had suggested that he try to state his points more concisely. Another member of the unit, from whom the Applicant had solicited advice in January 1994 at the request of his direct supervisor, stated in a memorandum of June 14, 1994 that he

had had difficulties reading some of the documents he had produced, as they often did not clearly convey what he meant to say, and suggested to him to go over his documents repeatedly simplifying the language and working on more clarity of the key messages he wants to convey.

The Tribunal cannot accept, therefore, the Applicant's view that the warnings given to him by Ms. X on the occasion of his interim evaluation came, so to speak, out of the blue and that his attention had previously never been drawn to any shortcoming or deficiency.

48. (2) The Applicant further complains that after having worked, in accordance with the job description attached to his letter of appointment, on the Pilot Program during the first three months of his probation he was assigned more and more, and against his will, to other work. From March 15, 1994, he was assigned to work most of the time, and from April 12, 1994, all of the time, on specialized procurement work unrelated to the Pilot Program.

49. This complaint is indeed substantiated in the record. The position description attached to the Applicant's letter of appointment specified that the team to which he was going to be assigned "will work full-time on the Pilot Program." Procurement work, quite to the contrary, was new for him, and he should not have been assigned to such work without prior training. In his report on procurement practice referred to earlier, the Regional Procurement Adviser, while emphasizing that he could not blame Mr. McNeill for any procurement wrongdoing or mishandling, noted that

Mr. McNeill had little experience in Bank operations and no exposure to Bank procurement. I understand he had not had any procurement training. He should not have been given so soon the authority and autonomy to handle procurement, without appropriate procurement training and coaching.

Even allowing for the flexibility inherent in these matters, the Tribunal finds that, in assigning the Applicant more and more work for which he had not been recruited, was ill-prepared and did not receive adequate coaching, the Respondent did not provide him with a fair chance to prove his suitability for Bank employment. This is all the more so because the Applicant's alleged deficiencies in the procurement issue and his role in the deterioration of the Bank's relations with Brazil have assumed an increasing importance in the Bank's decisions regarding his non-confirmation and his placement on administrative leave.

50. (3) It is, however, the crucial sequence of events between April and August 1994 that raises the most serious doubts as to compliance with the appropriate standards of justice. A close examination of the record reveals a number of troubling facts which points to a breach of due process.

51. (a) Staff Rule 4.02, paragraph 2.02, provides that

During the probationary period, a manager shall:

...

at the end of the first six months of the staff member's employment, make a written progress report on the staff member's suitability, specifying any action necessary for the staff member to take that might improve the likelihood of his confirmation and review it with the staff member....

A written progress report should, consequently, have been made around mid-March 1994 at the latest. An oral interim review was in fact held only on April 20, that is to say, more than one month late; and the written evaluation, given on May 24, was more than two months late. In order to justify this delay, the Respondent maintains that Ms. X “gave Applicant the benefit of the doubt, and even waited an extra month past the six-month time, before holding the interim review with him, to give him more time to deliver, but he was unable to do so.” The Tribunal did not, however, find anything in the record which might substantiate such an explanation. While the rules on the periodic evaluations have to be applied with some flexibility depending on the circumstances, the Tribunal finds that the staff rule prescribing an interim review after the first six months, that is to say, half-way through the probation, does not allow for a delay of such magnitude. This is all the more so because in the present case the final evaluation was provided a short time after the interim review and because both evaluations pointed to the possible non-confirmation of the Applicant’s appointment.

52. (b) It is in her memorandum of June 9, 1994 to the Director of LA1 that Ms. X for the first time referred to the responsibility of the Applicant in the deterioration of the relations with Brazil. Nothing had been said about this in the interim review of May 24, even though, in the Respondent’s own presentation of the history of the case, Ms. X had been alerted to this problem already in early May when she traveled to Brazil and was fully aware of the problem at the latest on May 20 by the first of the two letters from the Brazilian official. To explain Ms. X’s silence on this matter in the May 24 review the Respondent contends that “[i]t was decided not to confront Applicant on the matter at that time out of concern that he would exacerbate an already troubled situation.” Whatever the reason behind Ms. X’s silence in her May 24 evaluation on a matter which was going to turn out to be one of the factors in Mr. McNeill’s non-confirmation and as the decisive factor in his placement on administrative leave two months before the end of his probationary period, this silence, in the Tribunal’s view, is not consistent with a fair and just treatment as required by law.

53. (c) Ms. X’s silence on the grievances against the Applicant before June 9, 1994 is compounded by the Respondent’s refusal--even after the Applicant had been advised of the grievances raised against him in respect of the Brazilian problem--to provide the Applicant with the text of the two Brazilian letters on which it relied. In a letter dated August 18, 1994, the Acting Director, LA1, explained to the Applicant that the two letters “were provided to us with the specific understanding that we will treat them as confidential” and that, accordingly, it was not appropriate to provide him with copies of these communications. It was only on the occasion of the filing of the application in the present case that the Respondent agreed to provide Mr. McNeill with copies of the letters in Portuguese and their translation into English. Even keeping in mind that the requirements of due process of law are less demanding with respect to non-confirmation of a probationer than those with respect to disciplinary matters, the Tribunal nevertheless finds that the Respondent’s refusal to provide the Applicant with copies of the letters invoked against him as decisive evidence of his alleged wrongdoing and misbehavior leading to the deterioration in the Bank’s relations with Brazil deprived him of the possibility to question their authenticity as he was going to do later before the Tribunal. In the circumstances, the Bank’s refusal to deliver copies of such documents to the Applicant was in breach of the Applicant’s rights as a probationer.

54. (d) Although the June 9 memorandum, in which Ms. X recommended, also for the first time, the termination of Mr. McNeill’s appointment was marked as copied to Mr. McNeill, the Applicant maintains that he never received it and that it was not placed in his personnel file. He discovered the existence of this memorandum, he asserts, only in late July 1994. As to Ms. X’s grievances against him regarding the erosion in relations with Brazil, he says, they were brought to his knowledge only at the meeting of June 17. The Respondent does not directly address this issue in its briefs. Two elements lend some credence to the Applicant’s version. First, in the record of the June 17 meeting which she sent to files, the Personnel Officer who attended the meeting stated that “[t]he purpose of the meeting was... (i) to apprise Mr. McNeill of (Ms. X)’s very serious concerns regarding the deterioration in relations with our Brazilian counterparts....” This seems to imply that before the June 17 meeting the Applicant was unaware of the Bank’s grievances against him on this ground. Secondly, in one of its briefs before the Tribunal, the Respondent acknowledges that it is “[a]t this meeting”--the meeting of June 17, 1994--that Ms. X “informed Applicant that she had received written complaints from the Brazilian Government about Applicant’s performance.” In other words, the Applicant appears to have been advised of

one of the main grievances against him a week after his division chief had already recommended the non-confirmation of his appointment. The Applicant was, thus, denied the opportunity to defend himself and to improve his performance.

55. (e) As already mentioned, in her June 9 memorandum Ms. X recommended the Applicant's separation for two reasons: first, because "[t]here has been no significant improvement in any of these areas since the time of my last review"— "these areas" referring to the so-called competency areas in which the Applicant's deficiencies were noted in the interim review of May 24; and, secondly, because of the "new and major problem" which had arisen on the Brazilian issue. The Tribunal is unable to regard so short a period as the two weeks between the May 24 review and the June 9 recommendation as providing a sufficient basis for a determination of non-improvement. Nor does the Tribunal regard as consistent with the requirements of due process a recommendation of non-confirmation of a probationer based on a problem on which the Applicant had not been warned--or even informed--prior to this recommendation and of which, therefore, no improvement could have been conceivable by any stretch of imagination.

56. (f) As stated in the record to files made by the Personnel Officer who attended the June 17 meeting, one of the purposes of this meeting was "... (iv) to request that a full review of Mr. McNeill's performance to date be undertaken at the earliest given opportunity" because Ms. X "had seriously to consider recommending that Mr. McNeill be separated from the Division and possibly from the institution at this point." The Tribunal finds it strange that a meeting was to be held on June 17, 1994 with a view to informing the Applicant that his supervisor was considering recommending his separation when in actual fact she had already made this recommendation a week before. It is difficult to regard this as a fair and reasonable treatment of a probationer.

57. (g) Another infringement of the Applicant's rights appears to have occurred at the stage of the final evaluation of June 23, 1994. First, it is somewhat unusual to make a final evaluation only two months after an interim review. Secondly, this final evaluation was in effect no more than to confirm a recommendation already made two weeks earlier. Thirdly, and more importantly, the way this evaluation was made was itself seriously flawed. As already noted, the meeting of June 23, 1994 was in fact aborted and, for reasons on which the parties differ, was never resumed, so much so that the so-called final evaluation was never signed by the Applicant. In a letter of August 2, 1994 to Mr. McNeill, the Ombudsman--who, at the Applicant's request, had attended the meeting of June 23--wrote: "It was clear when we broke up on the 23rd that the process was not complete" (this sentence being underlined in the letter). To describe this evaluation as a "full PMP," as Ms. X did in a letter to the Acting Director of LA1 on July 21, 1994, is clearly exaggerated.

THE RELIEFS REQUESTED

58. As noted earlier, the Applicant does not request rescission of any of the decisions made regarding his probation but requests damages in the amount of six years' net salary and other reliefs.

Damages

59. (a) The Applicant requests damages in the amount of three years' net salary

[i]n view of the gross violation of management discretion resulting from management's recording and using multiple misrepresentations of the facts in interim and performance reviews and other documents, which were relied upon by others who took unjustified decisions which brought extreme material harm upon the Applicant and his family.

60. (b) The Applicant also requests damages in the amount of two years' net salary for

[p]ain and suffering of family caused by need to remain in USA without adequate income under circumstances of the Applicant's wife... requiring... specialized treatment and a daughter severely affected by the domestic trauma causing a significant decline in her school work performance.

He also cites the disruption of domestic circumstances caused by the need to move to lower grade housing and to store furniture.

61. (c) The Applicant further requests “punitive damages” in the amount of one year’s net salary

[o]n the basis of evidence [Ms. X], the Applicant’s manager, has grossly misrepresented the acts and motivations of the Applicant and has questioned his mental state to Respondent staff in writing. This is unbecoming of a manager of the Respondent institution and is libelous.

62. Damages are designed to provide the Applicant with adequate reparation of injury actually suffered. Therefore the request of punitive damages is denied.

63. The damages to be awarded for the injury suffered by the Applicant because of the flawed procedure which led to the contested decisions must take into account the facts that: (a) there was no abuse of discretion in the Respondent’s decision not to confirm the Applicant’s appointment; (b) a flawless procedure could have led to the same decision; (c) there was no abuse of discretion in the Respondent’s decision to place the Applicant on administrative leave before the end of his probationary period; (d) the Applicant received full pay until the end of his probationary period, including during his administrative leave; and (e) the Applicant received from the Respondent an ex gratia payment in the amount of \$15,000 for his wife’s continuing medical care. While the Applicant has not suffered any specific material injury, the Tribunal finds, as it did in *Buranavanichkit* (Decision No. 7 [1982]), that his treatment fell short of the appropriate standards of justice and that this has caused him harm. It is difficult to place a value on such an intangible injury. Since in the circumstances neither rescission of the contested decision nor specific performance has been requested and both are anyway out of the question, the Tribunal will order the payment to the Applicant of damages which it equitably assesses as \$25,000.

Return of allegedly stolen goods and first class return air ticket Budapest/Washington

64. The Applicant requests the “return of stolen personal goods and effects which the Respondent institution has failed to return to the Applicant following their impounding them in his room which was locked to prevent his access.” He also requests “return airfare (first class) Budapest/Washington to enable the Applicant to identify, recover and remove his personal property without hindrance from the Respondent institution plus any air freight.”

65. In its Answer, dated July 1, 1996, the Respondent has confirmed that “personal effects, amounting to nine cartons, ... have been stored in the offices of the Latin American Region since Applicant’s departure, pending instruction from the Applicant as to their disposition.” The Respondent also committed itself to shipping these boxes at its expense to Budapest or to the United Kingdom, as the Applicant would request, after inventory of the boxes. In its Rejoinder, dated November 14, 1996, the Respondent stated, however,

[t]hese cartons have now been inventoried and the contents found to be Bank project-related documents and not personal effects belonging to Applicant. Respondent invites Applicant to advise it what personal effects he believes he has left on Bank premises.

66. It is to be regretted that the Respondent did not give the Applicant an opportunity to retrieve his personal belongings. It is also to be regretted that the Respondent opened and inventoried cartons that it acknowledges in its Answer before the Tribunal to be the Applicant’s personal property. The Tribunal urges both parties to try and find an amicable settlement of this rather ancillary issue, without the Applicant having to travel to Washington.

Costs

67. Finally, the Applicant requests costs in the amount of US\$8,000 for investigation, legal fees, dispatch and courier, materials and copying. The Applicant having not hired the services of a lawyer and having not documented any other expense, the Tribunal awards him costs in the amount of US\$1,000 for copying and

dispatching.

DECISION

For the above reasons, the Tribunal unanimously decides to award the Applicant:

(i) damages in the amount of \$25,000; and

(ii) costs in the amount of US\$1,000.

All other pleas are dismissed.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At Washington, D.C., April 11, 1997