

Decision No. 356**N,
Applicant****v.****International Bank for Reconstruction
and Development,
Respondent**

1. The present judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Jan Paulsson, President, Robert A. Gorman and Francisco Orrego Vicuña, Judges. The application in this case was received on 19 May 2006. The Applicant's request for anonymity was granted on 28 July 2006 on the basis that the publication of his name was likely to be seriously prejudicial to him. The Bank has raised a jurisdictional objection. This judgment disposes of that objection.

2. This case concerns an allegation that administrative negligence and incompetence resulted in moral damage suffered by the Applicant in consequence of a travel management audit and a subsequent investigation into alleged misconduct. The investigation was ultimately discontinued.

Factual Background

3. The Applicant joined the Bank in 1994 as a Consultant, and in 1999 became a Regular staff member. On 1 April 2003, he was appointed as a Country Manager in Africa, a position in which he had to travel frequently to the Bank's Headquarters in Washington and also to certain African countries for official meetings. As it sometimes happens with flights originating from Africa, some of his trips had to be routed via Europe. Because of an illness in his family in Germany, the Applicant preferred to travel whenever possible through Munich or other conveniently located cities, such as Frankfurt. The appropriate information on such travel arrangements was made available by the Applicant to both his supervisor and the Resource Management staff in the Country Office where the Applicant worked.

4. In 2004, the Internal Audit Department (IAD) conducted an audit of travel expense-related administrative transactions throughout the Bank for the period from January 2003 to March 2004. Upon completion of the audit, nineteen cases, one of which involved the Applicant, were identified as containing substantial irregularities and were referred to the Department of Institutional Integrity (INT) for further review to determine whether an investigation was warranted under the Staff Rules for possible fraud or abuse. The Applicant asserts that he was never contacted by IAD prior to the decision to refer his case to INT.

5. On 31 May 2005, the Applicant was informed by an INT Officer that a preliminary review of his Statements of Expenses (SOEs) and supporting documents relating to trips he had taken during 2003 and 2004 had been completed, and that a formal meeting was necessary to ascertain more fully the facts and circumstances of his case. The Applicant asserts that he was not contacted by INT before the preliminary review was concluded.

6. INT issued a Notice of Alleged Misconduct to the Applicant on 17 June 2005, concerning allegations that his SOEs appeared to indicate a pattern of abuse of the Bank's travel policies in connection with personal days and associated leave, rest stops, connection stops and other related expenses. On the same day, the Applicant and a Resource Management Analyst from his Country Office formally met with two INT Officers by videoconference.

7. The Applicant submitted a written response to the Notice of Alleged Misconduct on 1 July 2005, providing pertinent information and clarifications and requesting that the case be dismissed.

8. Shortly thereafter, on 22 July 2005, a Lead INT Officer wrote to the Applicant explaining that INT could not dismiss a case once an investigation had been initiated, and that the process had to culminate in a written report to the Vice President of Human Resources Services (HRSVP). In the same communication, however, the Lead INT Officer informed the Applicant that in the light of the information and clarifications which he had provided in his written response, there was a sufficiently reasonable basis for INT to conclude that no abuse had been committed by the Applicant and that no further investigation was necessary. The report to the HRSVP would then be completed in draft form, explained the Lead INT Officer, and would be made available to the Applicant for his review and comments before being finalized.

9. The Applicant explains that throughout this process, it became evident to him that neither IAD nor INT had carried out a careful examination of the facts, and that the supporting documentation for the transactions under investigation had not been properly examined, indeed perhaps not even looked at. According to the Applicant, most of this documentation was available at the Country Office, but was never requested. Furthermore, asserts the Applicant, the IAD audit was based mostly on a system-generated search which did not provide any details, and which produced results that only in appearance seemed to establish a pattern of abuse by confusing travel itineraries, dates and connections.

10. The Applicant also asserts that he had to spend a considerable amount of personal time to complete a proper search for all the relevant information. This caused him stress, anxiety and humiliation, and strained both his family life and office work, potentially affecting his career at the Bank.

11. Because of the above, the Applicant on 14 October 2005 filed an appeal with the Appeals Committee, challenging both the decision by IAD to refer his case to INT and the latter's decision to conclude its preliminary inquiry and issue a Notice of Alleged Misconduct.

12. Shortly thereafter, on 19 October 2005, INT informed the Applicant by e-mail that it had decided to close his case without submitting a report to the HRSVP for decision, as there was clearly no evidence of misconduct by the Applicant and thus no further action was necessary. Most of the alleged exceptions to the Bank's travel policies identified in the IAD audit, as explained in the e-mail, were found to be attributable to errors in the categorization of data in the Bank's Systems, Applications and Products (SAP) Travel Module. A few alleged exceptions were innocuous data entry errors or miscalculations by the Applicant, and one alleged exception concerning an indirect routing during a mission had in fact been pre-approved by the Bank. Another alleged travel exception referred to a trip taken by another staff member. Lastly, none of the Munich routings had generated additional costs to the Bank. In the end, only one excess per diem reimbursement for \$119 was identified, but was considered negligible.

13. The Appeals Committee, faced with a jurisdictional challenge raised by the Bank, concluded on 19 January 2006 that the Applicant's appeal was timely but that the Committee did not have jurisdiction to examine a claim that did not concern an administrative decision and did not alter or breach the Applicant's terms of appointment or conditions of employment.

14. The Applicant then brought his complaint to the Tribunal, challenging the above-noted IAD and INT decisions, as well as the Appeals Committee's conclusion. The Respondent objected to the Tribunal's jurisdiction and this is the only question the Tribunal must now decide.

Analysis and Conclusions

15. The Respondent's first ground for challenging the Tribunal's jurisdiction is that the complaint does not concern administrative decisions. The Respondent's central argument in this respect is that the Tribunal lacks jurisdiction because the claims do not relate to a non-observance of the Applicant's contract of employment or terms of appointment as required under Article II, para. 1, of the Tribunal's Statute. The decisions taken were, in the Respondent's view, only part of a broader process of investigation that did not culminate in a finding of misconduct or in any decision adversely affecting the Applicant's contract of employment or terms of

appointment.

16. The Respondent relies in support of this contention on *Prescott*, Decision No. 234 [2000], wherein the Tribunal held that the administrative decision challenged must directly affect employment rights in an adverse manner. The Respondent further relies on *Briscoe*, Decision No. 118 [1992], wherein the Tribunal held that the challenge must be directed not against the promulgation of some general rule or policy, but rather against the application of that rule or policy so as directly to affect the staff member's employment rights in an adverse manner.

17. The Applicant disagrees. In his view, each disputed decision affected his terms and conditions of employment as they involved administrative negligence and incompetence that would not have happened had a careful review of the facts and available information been carried out and accepted standards for conducting an audit been observed. The Applicant acknowledges that he is not challenging a decision to impose disciplinary measures, because none was taken. He is, however, challenging the administration's failure to perform its duties properly, which in turn allegedly resulted in unfair treatment of him in breach of Principles of Staff Employment 2.1 and 9.1. The Applicant concludes that the Tribunal has jurisdiction so to rule.

18. The Tribunal finds no difficulty in addressing the question of whether the decisions being challenged are properly administrative decisions. The Tribunal is first mindful of the fact that Article II, para. 1, of its Statute defines the words "contract of employment" and "terms of appointment" as including all pertinent regulations and rules in force at the time of the alleged non-observance.

19. The cardinal rules governing staff rights and duties are those contained in the Principles of Staff Employment, which establish the constitutional foundations on which the Staff Rules and other regulatory elements are based. One such foundational Principle provides that "[t]he Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members. ..." (Principle 2.1 ("General Obligations of The World Bank and IFC") of the Principles of Staff Employment.) While on occasion overlooked by the Bank, such Principles form part of the "contract of employment or terms of appointment," as was held in *de Merode*, Decision No. 1 [1981], the Tribunal's first judgment.

20. The discussion whether there has been a breach of fairness and impartiality in this case pertains to the merits. For jurisdictional purposes, as the Tribunal held in *McKinney*, Decision No. 183 [1997], paras. 13, 16-17, it is enough that the Applicant has "alleged" a plausible claim of contract violation and that it is tenable that "there are circumstances that warrant an examination of the merits of his allegations." It was there held by the Tribunal that "[i]t would be premature and improper for the Tribunal, by declaring this application inadmissible on the ground of jurisdiction *ratione materiae*, to deprive the Applicant of an opportunity to make his case."

21. Moreover, in *I*, Decision No. 343 [2005], the Tribunal again vindicated the right of staff members to have a case concerning the alleged breach of their terms and conditions of employment heard. This was in spite of the fact that there had been a jurisdictional objection brought in that case, based on the argument that no administrative decision had been made. Carelessness in carrying out an INT inquiry was the cause of action in that case as well. (See *I*, paras. 17-18.)

22. While there was no jurisdictional objection in *G*, Decision No. 340 [2005], the Tribunal nonetheless made clear that it could review a claim concerning an allegation of abuse arising from decisions taken during an investigation that did not culminate in the imposition of sanctions. (See *G*, para. 2.) So too in *D*, Decision No. 304 [2003], a case that did involve a finding of misconduct, the Tribunal reviewed allegations of unfairness occurring from the very outset of the preliminary inquiry and at other stages of the investigatory process. (See *D*, paras. 57-58, 61, 65.)

23. The Bank has stated its concern that a finding of jurisdiction in a situation that relates not to a finding of misconduct but simply to the investigation undertaken could have a disruptive effect on the operations of the Bank. The Tribunal addressed this question in *McKinney* (No. 2), Decision No. 194 [1998], para. 13, considering then that the issue before the Tribunal was related to the question of observance of due process,

and that a review to this effect “is appropriate and can properly take account of the needs of the investigating officer for flexibility, confidentiality and the like.” As the Tribunal concluded in that case, and now reiterates, “[t]here is no reason to believe that allowing such review will seriously impede the operations of the Bank.” (*Id.*) That is certainly the case in a situation such as this, in which the INT proceeding has run its course and will thus not be interrupted or impeded by allowing the staff member to challenge the procedures and findings there. The relevance of such conclusions to the present case will be examined further below.

24. The Bank has also expressed the view that IAD’s referral of the Applicant’s case to INT is not a decision that is ripe for the Tribunal’s review, and observes that neither this decision nor INT’s decision to conclude its preliminary inquiry and launch an investigation resulted in a finding of misconduct that could attract disciplinary measures, a matter that was not even considered by INT. It follows, in the Bank’s view, that there was no administrative decision that could have affected the Applicant’s terms and conditions of employment.

25. The Bank asserts, moreover, that INT’s closing of a preliminary inquiry and issuance of a Notice of Alleged Misconduct, with which a formal investigation begins, are only parts of a process to enable the Bank to determine the facts and circumstances of a case. The Bank finds this to be confirmed by Staff Rule 8.01 (“Disciplinary Proceedings”), para. 4.01 (“Initiating the Investigative Process”), and also by the Tribunal’s judgment in *Rendall-Speranza*, Decision No. 197 [1998], para. 57. The Bank further recalls that in *G*, the Tribunal stated that it has “no authority to micromanage the activity of INT.” (*G*, para. 73.)

26. As noted above, the Applicant asserts that he is not challenging disciplinary measures but instead an alleged failure of the Bank to properly perform its duties under the Principles of Staff Employment, which resulted in damages having been done to him. In the Applicant’s view, the argument that a decision is not ripe for challenge and review until the very end of the investigative process would mean that claims against IAD could never be ripe, regardless of the harm inflicted on staff members. If such were the case, that department, and for that matter other departments or units, could escape from any review of their actions and inactions.

27. The Applicant further argues that even if an investigation is a process, the Tribunal has jurisdiction to consider a claim arising from such a process, as the Tribunal held in *I*, Decision No. 343 [2005], para. 14, where the issue discussed was a claim criticizing “the process as unfair and prejudicial.” The Applicant further invokes the Tribunal’s decision in *G* to the effect that even interim decisions taken during the investigative process can be challenged. (See *G*, Decision No. 340 [2005], paras. 2, 23.)

28. The Bank, as noted above in para. 16, has relied on *Prescott*, Decision No. 234 [2000], and *Briscoe*, Decision No. 118 [1992], in support of its view that only decisions specifically and directly affecting the employment rights of a staff member can be the subject of review by the Tribunal; in the Bank’s view, the Applicant fails to identify any such decision. The Tribunal observes, however, that both of those cases were concerned with whether the Tribunal could review a policy decision by the Bank expressed in terms of rules and regulations or some other measure of general application.

29. The Applicant in the instant case does not challenge a rule or regulation of general application. Instead, he challenges the manner in which an existing rule, and a rather important one embodied in a Principle of Staff Employment, has been applied in his case and whether this in some way might entail a violation of due process or some other guarantee.

30. The Applicant specifically complains that the decisions taken by IAD and INT were failures of the Bank to perform its duties and constituted unfair treatment contrary to Principles 2.1 and 9.1 of the Principles of Staff Employment. The Tribunal is persuaded by the Applicant’s argument that in considering a challenge to a decision taken by the Bank in the course of an investigation that has come to an end, the Tribunal is not interfering with the investigative process, let alone “micromanaging” the work of Bank departments or units. It is instead thereby simply reviewing a plausible complaint that a staff member’s due process rights may have been compromised in that process.

31. Although the parties have devoted much energy to debating the question of whether the Tribunal has

jurisdiction to rule upon errors of nonfeasance on the part of the Bank, as was the situation in *Robinson* (Decision No. 78 [1989]) and *Kehyaian (No. 3)* (Decision No. 204 [1998]), the Tribunal does not regard this as a case of nonfeasance or failure to decide. Rather, the Applicant's claim is that at each stage of the INT process, there was an affirmative decision that was flawed by careless and incompetent behavior. These are "decisions" that are and must be well within the jurisdiction of the Tribunal to address.

32. The Applicant's argument that decisions were actually taken in this case, albeit not a final decision on misconduct, is persuasive. At least at first sight, the decision of IAD to refer the case to INT was an administrative decision, as was the closing of the investigation by INT.

33. The Tribunal has repeatedly emphasized that it does not sit as a court of appeals in respect of the proceedings, findings and recommendations of the Appeals Committee. (See, e.g., *de Raet*, Decision No. 85 [1989], para. 54; *Lewin*, Decision No. 152 [1996], para. 44; *Peprah*, Decision No. 275 [2002], paras. 19-20.) It will accordingly not address the Applicant's complaint in this regard.

34. Given that the Applicant has prevailed at this jurisdictional stage, the Tribunal awards his full costs as claimed.

Decision

For the reasons stated above, the Tribunal hereby orders that:

- (i) the Bank's request to declare the application inadmissible for lack of jurisdiction is denied;
- (ii) the Applicant is awarded costs in connection with the jurisdictional phase of these proceedings in the amount of \$6,795.64; and
- (iii) the dates for the filing of pleadings on the merits will be determined by the President of the Tribunal and communicated to the parties.

/S/ Jan Paulsson
Jan Paulsson
President

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

At Paris, France, 28 September 2006