

Decision No. 294

Bernard Berka Njovens,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal, composed of Francisco Orrego Vicuña, President, Bola A. Ajibola and Elizabeth Evatt, Vice Presidents, Robert A. Gorman, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges, has been seized of an application, received on September 30, 2002, by Bernard Berka Njovens against the International Bank for Reconstruction and Development. A request by the Bank for documents was granted by the Tribunal and a request by the Applicant for oral proceedings was denied. The usual exchange of pleadings took place and the case was listed on April 17, 2003.

2. Two procedural matters are noteworthy in this case. First, the Applicant requested the Bank's consent to proceed directly to the Tribunal and the Bank agreed, on September 18, 2002, to this request. Second, on November 22, 2002, the President of the Tribunal granted the Respondent's request to stay the proceedings pending the outcome of proposed settlement discussions between the parties. When these discussions proved unsuccessful, the Tribunal proceedings resumed on January 13, 2003.

3. This case concerns a complaint by the Applicant about the Bank's decision to abolish his position and to declare his employment redundant under Staff Rule 7.01, paragraph 8.02(b). In the Applicant's view, this decision was not based on the interests of efficient administration, but rather was taken with the intention of terminating him because, among other reasons, of racial discrimination based on his sub-Saharan origin.

4. The Applicant began his employment with the Bank in 1991 as a Consultant. On January 1, 2000, the Applicant joined the Bank's then Office of Business Ethics and Integrity (BEI) as a Program Coordinator on an Open-Ended contract subject to confirmation after a two-year probationary period. In January 1999, BEI had been reorganized, and was later, in April 2001, consolidated into a new unit called the Department of Institutional Integrity (INT). During his employment with BEI and later INT, the Applicant was in charge of outreach functions together with, and under the supervision of, the Ethics Office Manager, Ms. Anita Baker. The above is uncontroversial, but there are fundamental disagreements between the Applicant and the Respondent with respect to other central facts of this case.

5. In the Applicant's version of events, in mid-2000, Ms. Baker came under pressure from management to terminate him. The Applicant claims that management invoked budget considerations in order to lay him off, but Ms. Baker adjusted the Office's budget so that his layoff became unnecessary. He further claims that when Mr. Maarten De Jong took over in April 2001 as the new Director of INT, various meetings were convened to discuss the Applicant's performance, and it was finally decided to delay the Applicant's confirmation until his two-year probationary period had been completed, in spite of the fact that Ms. Baker favored his immediate confirmation. The Applicant believes that certain staff members were inappropriately called in to provide feedback and give their opinion about the Applicant's performance.

6. The Applicant asserts moreover that Mr. De Jong applied added pressure on Ms. Baker to lower the performance ratings she had given the Applicant, and to inform the Applicant about areas where his performance needed improvement. In the Applicant's version of events, there was never any clarity about the period that should have been covered by his Overall Performance Evaluation (OPE); however, he was finally given a positive OPE evaluation for his tenure in BEI which was signed by both Ms. Baker and the Managing Director on June 22, 2001 and October 1, 2001 respectively.

7. The Applicant explains that Mr. De Jong sought on October 12, 2001 the approval of a request for severance payment for the Applicant, and informed the Applicant on October 23, 2001 that his position was being declared redundant. A reorganization of INT was announced on October 24, 2001. The aim of this reorganization was to separate the Ethics Office functions from investigative functions. The Applicant received formal notice of his redundancy on December 6, 2001, with termination of his employment to take place on June 30, 2002.

8. The Applicant claims that the decision on redundancy under Staff Rule 7.01, paragraph 8.02(b), was a pretext to terminate his employment and was therefore arbitrary and improperly motivated. The Applicant further argues that this decision was based on the fact that he was the only senior-level staff of African descent in the Ethics Office, and that the decision was inspired by the intention to discriminate against him.

9. Moreover, the Applicant asserts that the decisions on redundancy and termination were taken without his knowledge and, therefore, he was not afforded the opportunity to defend himself. If poor performance were the true motive underlying these decisions, as the Applicant believes, a work program should have been defined, written assessments should have been given periodically and technical qualifications and professional behavior should have been taken into account prior to any determination, as provided for under Staff Rule 4.02, paragraphs 2.02 and 3.02.

10. The Applicant believes that because Ms. Baker was in favor of the Applicant's confirmation, non-confirmation was no longer pursued as a means of terminating his employment, and Mr. De Jong resorted to termination by redundancy. The Applicant further believes that the decision was also not consistent with the rationale for the reorganization of INT.

11. The Applicant alleges that the abuse of discretion is confirmed by the fact that the work attached to his position did not disappear. He claims that although Mr. De Jong stated that the Applicant's work would be distributed among other staff members, it was not. After his redundancy, the Respondent assigned functions that were identical to his to a temporary research analyst. The Applicant also claims that after his redundancy, the Respondent issued a new job description which included outreach functions that were identical to those that he had previously performed.

12. The Respondent disagrees with the Applicant's contentions and conclusions. The Respondent asserts that there was a reorganization of INT exclusively aimed at improving its effectiveness, and that the Applicant's position as Program Coordinator had to be abolished as there was not enough work to justify that senior-level position.

13. The reorganization, the Respondent explains, sought to develop the investigative functions of the Department and to perfect its outreach activities. A new Lead Ethics Specialist position would be established to deal with some outreach functions, mainly counseling staff members on ethical questions and training on ethics and misconduct procedures. A number of activities that the Applicant had previously carried out in connection with new staff and integrity awareness seminars would be absorbed into the new position's work program, as they were rather occasional in nature and the Conflict Resolution System would also be involved in some of these activities. Moreover, Bank investigators in Country Offices and the Regions would handle the training on fraud and corruption, areas in which the Applicant in any event allegedly was not qualified as a trainer.

14. The Respondent further explains that all these reorganization efforts were entirely unrelated to the Applicant's performance and were not a pretext to terminate him, as the Applicant believes. There were indeed questions regarding his suitability for employment in that particular position with the Bank, but precisely because views on this aspect were not uniform, it was decided to defer the Applicant's confirmation. The Respondent asserts that there were no budget considerations involved, no budget cuts made, and no pressures exerted in connection with the Applicant's performance; even less so was there any racial discrimination.

15. The Respondent asserts further that there was no inconsistency in its reorganization and that the Applicant's functions were assigned to a temporary staff member only for a short period following the Applicant's redundancy, so as to allow the Applicant to search for a new position within the Bank. This temporary staff member left the Bank in March 2002 and the functions of the Applicant became as of June 2002 a portion of the job of the new manager of the Office of Ethics and Business Conduct (EBC). The functions assigned to different staff and units after the Applicant's redundancy were not identical.

### **Considerations**

16. The first issue to be discussed by the Tribunal is the Applicant's allegation that racial discrimination was involved in the decisions affecting him. Just as the Tribunal is prepared to be firm on any question of racial discrimination supported by the evidence, so too it is prepared to dismiss outright any unfounded allegation in this context.

17. The Applicant brought to the attention of the Tribunal a report prepared in 1997 by the law firm of Dewey Ballantine to substantiate his claim of discrimination based on race. That report does indeed conclude that there has been a measure of systemic discrimination among classes of staff members within the Bank. But it is necessary for an applicant to introduce facts supporting a claim of individualized wrongdoing which amount to a violation of his or her own terms of employment. (*Nunberg*, Decision No. 245 [2001], paras. 43-44.) The Tribunal's careful review of the record does not disclose any evidence that the decisions affecting the Applicant were in any way tainted by illicit motivation. The allegation is accordingly dismissed.

18. The next question to be addressed by the Tribunal is whether the reorganization of INT was a genuine exercise of managerial discretion, or a pretext to terminate the Applicant. The Tribunal is satisfied that the reorganization was properly motivated, as evidenced, for example, by the memorandum addressed by Mr. De Jong to the Managing Director on October 22, 2001 explaining in detail the reorganization envisaged.

19. This memorandum proposed a complete reorganization of that Department and its restructuring in connection with the Ethics Office and the investigative functions. In respect of mainstream training and outreach functions, it was expressly stated that "while this function will continue to be coordinated by the new Lead Ethics Specialist ... outreach programs (including outreach in the fraud and anti-corruption arena) will also be delivered by the investigative teams in structured environments as well as in day to day dealings with clients." This change, it was explained, specifically affected the Applicant and dictated the abolition of his position, as "there will ... not be enough work in this area for a dedicated Coordinator." The resources resulting from this change were to be reallocated to an Ethics Investigator position.

20. The emphasis of the reorganization was quite clearly to concentrate the previous ethics functions in fewer staff members and to strengthen investigative functions, including some aspects of training and outreach. This reorganization has indeed been implemented. There is no basis for a finding that the Bank undertook a major reorganization just to terminate the Applicant, who could in any event have been terminated through non-confirmation had performance been the problem.

21. The Applicant believes that the reorganization was improperly motivated because he always had ample work and demand for his services. The Bank holds the opposite view.

22. The Tribunal is persuaded that the Applicant's functions required only a limited dedication of time and effort. First, most of the Applicant's work was done in association with other staff members or organizations. This was the case, for example, with regard to the revision of the Code of Professional Ethics which was led by Ms. Baker with outside assistance, to his participation in activities of the Conflict Resolution System which were led by the Executive Secretary of the Appeals Committee, and to the organization of seminars for the International Finance Corporation which was also performed with outside assistance.

23. Next, it is relevant to note that Ms. Baker, the Applicant's supervisor, reported on more than one occasion that the Applicant had ample time available to do other work. This was the case, for example, in the month of

April 2001 in respect of a brochure that the Conflict Resolution Network needed, or still more significantly when Ms. Baker reported that for the month of May 2001 the Applicant had only “8 hours of scheduled work” and that he had “20-plus hours a week available to assist [the Conflict Resolution Network].”

24. Another ground put forward by the Applicant to support his claim that the redundancy was a pretext for termination is that the actual reorganization was inconsistent with the Bank’s stated reorganization policy. This policy, explained by the Vice President of Human Resources to the Staff Association on December 12, 2001, was aimed at separating the ethics functions of the Department from its investigative functions. The Applicant claims, however, that, after the reorganization, both divisions were performing outreach functions.

25. The Bank has explained in this respect that the statement of Ms. Sierra is correct in that the aim of the reorganization was precisely the separation of functions. Outreach activities were carried out by both divisions but related to different matters in each, thus requiring different specializations. There is no support for the view that this is inconsistent with the policy of separating the main functions.

26. Another contention of the Applicant is that the abolition of his position was apparent and not real. The line was clearly drawn by the Tribunal in *Brannigan*, Decision No. 165 [1997], para. 23:

[T]he question still remains whether [the position] has been truly abolished .... This is a matter of comparing the “old” position with any relevant “new” position. To demonstrate the abolition of a position it is not enough that there may be some differences between the old and new positions; the differences must be ones of substance. The Tribunal has emphasized in this respect the need for the Bank to show a clear material difference between the new position and the position that was made redundant (*Fabara-Núñez*, Decision No. 101 [1991], para. 44; *Arellano*, Decision No. 161 [1997], para. 33).

27. In *Brannigan*, the Tribunal concluded that the position in question was not truly abolished and quashed the decision on abolition. With this same concern in mind, the Tribunal has here examined the job descriptions and other information concerning outreach functions in INT. The record discloses that the same functions continued to be performed after the reorganization. But there is also a material difference: in the new positions, these are only a portion and not necessarily even a major portion of the functions that the incumbent has to perform.

28. The Applicant’s job description, dated November 4, 1999, relates exclusively to outreach, communications and the provision of information. In the job description for the Ethics Officer issued on January 25, 2002, communications, training and outreach are just a part of much broader and intricate functions, including support and guidance for management and staff, leading the establishment of policy recommendations and guidelines, participating as a full member of the Conflict Resolution System, and acting as the spokesperson on ethics issues. None of these latter functions was part of the Applicant’s work. Therefore, the line drawn in *Brannigan* was not transgressed.

29. The Applicant complains about the assignment of his functions to a temporary analyst of the Department. As explained above, however, this assignment lasted only until March 2002 when the analyst left the Bank, and this assignment was in any event intended to enable the Applicant to search for a new position in the Bank. Here again, the line marking out a spurious from a genuine redundancy has not been transgressed.

30. The next issue is whether, by proceeding with the reorganization and the redundancy, the Bank failed to afford the Applicant the due process to which he was entitled. This issue brings into consideration the Applicant’s performance in the probationary position and the way this was dealt with by the Bank.

31. There were conflicting opinions about the Applicant’s performance. Ms. Baker herself had a critical view of the Applicant’s performance during 2000 and part of 2001, but later changed her opinion and recommended his confirmation. It is not for the Tribunal to speculate about the reasons for such a change, but there is no question that when Mr. De Jong requested additional feedback from his colleagues with a view to reaching a final determination as to the Applicant’s continued employment by the Bank, the views expressed were divergent. While the feedback included positive views, there was also criticism of the Applicant’s performance.

32. The OPE referred to at paragraph 6 above, while generally positive about the Applicant's performance, did not appear to have dissipated the concerns of some of his managers. The additional feedback requested, and management's decision to postpone its determination whether to confirm the Applicant's employment until the end of his probationary period, are clear indications of these concerns. Advising the Applicant about areas where he needed improvement was also a stage in the process of evaluating the Applicant's performance. It does not matter, as the Applicant alleges, that this advisory was contained in a short electronic message rather than in a long memorandum. The Tribunal finds that the contemporaneous discussions between the Applicant's direct manager and the latter's own manager, Mr. De Jong, were directed toward improving the effectiveness of the Ethics Office. They do not support the Applicant's allegation that management exerted pressure on Ms. Baker to terminate him.

33. The fact that there were performance problems is not the end of the matter, as any conclusion with respect to the grievance must be examined for compliance with due process.

34. In the present case, one of the Ombudsmen, in an e-mail to Mr. De Jong dated August 14, 2001, cautioned management that, in order to ensure due process in relation to the final decision on the Applicant's performance evaluation at the end of the two-year probationary period, the Applicant must be given, in anticipation, "a note specifying the expectations, deliveries, timetable and standards to be met (a looking forward memo) between now and then." These requirements were met, to some extent, by the memorandum addressed by Ms. Baker to the Applicant on August 13, 2001, referring to some areas of improvement. No mention was made, however, of the expectations about the Applicant's performance, a specific timetable or the standards to be met.

35. The Tribunal in *Garcia-Mujica*, Decision No. 192 [1998], para. 18, held:

In spite of the fact that there was a genuine reorganization taking place and that the Applicant's skills were evaluated in a lawful context of managerial discretion, a number of irregularities and defects have tainted the handling of the matter .... Had performance been the ground chosen for termination the procedure to have been followed under Staff Rule 7.01, Section 11, would have been entirely different and indeed longer since there would have been a need for a monitored work program and other steps before a decision could actually have been adopted. Since reorganization was also first discussed ... at the same time as the discussion of the Applicant's performance took place, there was in fact the alternative choice of considering his situation in the context of the reorganization, which is the route that was followed .... While the approach followed does not invalidate the reorganization or the objective evaluation of the Applicant's skills, it resulted in a situation where he was deprived of an adequate opportunity to defend himself against the managers' complaints because no information was provided to him on a timely basis.

36. The Tribunal also considered in *Garcia-Mujica* that although there is no specific advance warning required for a notice of redundancy, "a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work. In this case, such guarantee was not complied with in a satisfactory manner" (*Garcia-Mujica*, Decision No. 192 [1998], para. 19).

37. In this connection, the Tribunal notes that there is no specific rule providing for a given period of advance warning in respect of decisions that might affect a staff member in a redundancy process. However, fairness and reasonableness dictate that, as stated in *Garcia-Mujica*, adequate information should be provided to the concerned staff member with "all possible anticipation." This is particularly so when the Bank is aware of the likelihood of redundancy substantially in advance of it being decided upon and implemented.

38. In cases where the staff member is being evaluated with respect to performance problems and then is suddenly made redundant under paragraph 8.02(b), the requirements of fairness and reasonableness become even more stringent, as the possible confusion between one alternative and the other is likely to raise doubts in the staff member's mind and justifies a heightened level of scrutiny on the part of the Tribunal in assessing the validity of the redundancy.



39. In this case, as noted in paragraph 34 above, the Bank did not fully live up to its obligations toward the Applicant with respect to his performance evaluation as a probationer. This failure of due process was compounded by the complete absence of advance warning with respect to the Applicant's redundancy. While this last aspect does not affect the genuineness of the reorganization, it inflicted compensable damage on the Applicant.

40. The Tribunal must address one last issue. The Respondent has mentioned, rather in passing, that insofar as the application to the Tribunal pertained to confirmation, it was out of time and should be declared inadmissible. It is clear to the Tribunal, however, that the incidents cited by the Applicant in connection with the performance issues raised by the Bank in the course of his probationary period are not the basis for his claim. The Applicant's claim is concerned with the validity of the Bank's decision to declare him redundant and was indisputably brought to the Tribunal in a timely manner. The Applicant's references to the earlier evaluation of his performance in 2000 and early 2001 are intended to shed light upon issues of motivation and fair process with respect to the redundancy, and are thus properly a matter of record in this proceeding.

41. The Applicant has petitioned the Tribunal for rescission of the redundancy decision, compensation on various counts, restoration of pension credits, and costs. Considering that, as noted above, the nature of the irregularities involved does not affect the genuineness of the reorganization undertaken and the fact that there is no evidence of discrimination, ill motive or other improper motivation, the Tribunal will award compensation and costs only in the amounts specified below.

### **Decision**

For the above reasons, the Tribunal decides that:

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

/S/ Francisco Orrego Vicuña  
Francisco Orrego Vicuña  
President

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

At London, England, May 20, 2003