Decision No. 366

P,
Applicant

v.

International Bank for Reconstruction
and Development,
Respondent

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, Sarah Christie and Florentino P. Feliciano, Judges. The application was received on 28 September 2006. The Applicant's request for anonymity was granted on 22 January 2007.

2. The Applicant joined the Bank on 11 August 2003 on a two-year Term appointment as a Senior Specialist, Level GG. During his tenure at the Bank he resided in Washington D.C., but his wife and children lived in their home country. He was investigated for the alleged sexual harassment of a female colleague (the Complainant).

3. The Complainant began her career with the Bank in November 2001. She worked between February 2002 and December 2003 as a Short-Term Consultant in the Applicant's Unit, and came under his supervision when he arrived in August 2003.

4. On 19 December 2003, the Complainant reported to the Department of Institutional Integrity (INT) that the Applicant had sexually harassed her between August and December of 2003. On 22 March 2004, INT communicated to the Applicant a Notice of Alleged Misconduct, informing him of an investigation under Staff Rule 8.01 into the following allegations:

> (i) That on multiple occasions between August 2003 and October 2003, you sexually harassed [the Complainant] while she served under your supervision, and that your harassment of [the Complainant] included both physical and verbal conduct of a sexual nature, which created a hostile and offensive work environment for [the Complainant]. Specifically, it is alleged that you:
>
> > repeatedly invited [the Complainant] to engage in social activities with you outside of work;
> >
> > touched [the Complainant] in an unwelcome manner;
> >
> > made unwelcome comments and requests of a sexual nature to [the Complainant].
>
> (ii) That on multiple occasions between October 2003 and December 2003, you sexually harassed [the Complainant] while she served under your supervision, and that your harassment of [the Complainant] included both verbal conduct that created a hostile work environment for [the Complainant], as well as tangible changes to [the Complainant's] job conditions. Specifically, it is alleged that you treated [the Complainant] less favorably at work in terms of courteousness, performance feedback, work assignments, and authorization for work days, after she expressed an unwillingness to engage in a sexual relationship with you.

5. During the course of the investigation, INT interviewed the Complainant, the Applicant and 23 witnesses. The Applicant responded in writing to the allegations on 20 April 2004. On 7 October 2004, the Applicant received INT's draft report of the investigation. On 1 November 2004, he submitted written comments thereon.

6. After completing its investigation, INT submitted its Final Report on 2 December 2004 to the Vice President of Human Resources (HRSVP) for his determination as to whether misconduct had occurred and what disciplinary measures, if any, should be imposed on the Applicant. INT's 43-page, single-spaced Final Report

contained two final paragraphs under the heading “CONCLUSIONS.” These two paragraphs stand in contrast with each other, both as to their length and their content:

> 139. Based on the findings, the evidence is reasonably sufficient to show that [the Applicant] engaged in sexual harassment as defined under the Bank’s Harassment Policy, failed to conduct himself in a manner befitting his status as an employee of an international organization, and failed to observe the generally applicable norms of prudent professional conduct. Specifically, the evidence is reasonably sufficient to show that:
>
> - Between August and October 2003, [the Applicant] repeatedly invited [the Complainant], his subordinate, to socialize with him outside of work, touched, hugged, and massaged [the Complainant], and made comments and requests of a sexual nature to [the Complainant] … ;
> - [The Complainant] willingly socialized with [the Applicant], but did not welcome his sexually suggestive comments and requests or touching;
> - [The Complainant] reasonably found [the Applicant’s] social invitations, when coupled with his sexually suggestive comments and requests and touching, to be intimidating and offensive;
> - [The Applicant’s] conduct toward [the Complainant] reasonably caused her to question whether she would be professionally rewarded or punished for engaging or not engaging in a social and/or sexual relationship with him, resulting in significant personal and professional distress to [the Complainant];
> - [The Applicant] took advantage of his position at the Bank to sexually pursue [the Complainant], who was his subordinate; was single while he was married; was approximately 18 years younger than he; had not solicited his attention; and had expressed insecurity to him about her employment contract;
> - While [the Complainant] was increasingly troubled by [the Applicant’s] conduct, it was not until early October 2003 that she began communicating to [the Applicant] in an unequivocal fashion that she did not welcome his sexual attention. After [the Complainant] let [the Applicant] know his attentions were unwelcome, he issued no further social invitations, did not touch her any further (except for a handshake), and made no further sexually suggestive remarks or invitations (although it is not clear whether this was out of respect for [the Complainant’s] wishes or simply due to lack of opportunity);
> - By sexually pursuing [the Complainant] under the circumstances described above, [the Applicant] failed to conduct himself in a manner befitting his status as an employee of an international organization and failed to observe generally applicable norms of prudent professional conduct;
> - Moreover, [the Applicant] then refused to authorize five of ten work days requested by [the Complainant] in December 2003 because he was angry that she had let him know that she was not interested in a sexual relationship and enforced that position by keeping her whereabouts unknown to him during her vacation;
> - By refusing to authorize five of the ten work days requested by [the Complainant] under the circumstances described above, [the Applicant] engaged in sexual harassment as defined under the Bank’s Harassment Policy. He also failed to conduct himself in a manner befitting his status as an employee of an international organization and failed to observe generally applicable norms of prudent professional conduct; and
> - [The Applicant’s] actions reasonably led [the Complainant] to seek assistance and counsel from several co-workers, an AHA [Anti-Harassment Advisor], management, and ultimately to file a complaint with INT, resulting in significant disruption to the workplace for [the Unit].
>
> 140. Based on the findings, the evidence shows that [the Applicant] *did not* treat [the Complainant] less favorably in terms of courteousness, performance feedback, and work assignments because she expressed an unwillingness to engage in a sexual relationship with him. [Emphasis in original.]

7. The Bank explains that INT’s findings with respect to sexual harassment comprise two distinct elements. The first relates to the “allegations of social invitations, sexually suggestive comments, requests and touching.” According to the Bank, “INT found that Applicant engaged in inappropriate physical and verbal conduct of sexual nature with Complainant, but that the conduct ceased once Complainant made it clear to Applicant that it was unwelcome. It, therefore, concluded that the social invitations, sexually suggestive comments, requests and touching by Applicant did not constitute sexual harassment under the Bank’s Harassment Policy.”

According to INT, the Complainant communicated to the Applicant in early October 2003 that she did not welcome his sexual attention.

8. The second element relates to the allegations of adverse professional treatment once the Complainant communicated to the Applicant that she was not interested in a sexual relationship with him. According to the Bank, "INT found that Applicant did speak to Complainant in an angry tone and criticized her performance during October and November 2003. However, it concluded that Applicant did not do so because she rejected his sexual advances, but because he believed that she had performed poorly on a work-related matter." Nevertheless, according to the Bank, INT "found that Applicant refused to authorize five of ten work days for Complainant once she communicated to Applicant that she was not interested in [a] sexual relationship with him." Under these circumstances, so the Bank states, INT concluded that the Applicant had engaged in *quid pro quo* sexual harassment.

9. After reviewing INT's Final Report, the HRSVP informed the Applicant by a memorandum dated 1 February 2005 that he had concluded that the Applicant had committed misconduct and that the appropriate disciplinary measure would be termination of his appointment. The memorandum included the following passages:

> The INT report has been thoroughly reviewed and based on the evidence, I have determined that misconduct occurred. There is substantial evidence to demonstrate that you engaged in sexual harassment as defined under the Bank's Harassment Policy by repeatedly engaging in inappropriate behavior towards [the Complainant] even after she had made it clear to you that your behavior was unwelcomed.
>
> I have concluded that your actions represent serious misconduct that is unsuitable, unacceptable and incompatible with the ethical behavior that the World Bank Group (WBG) expects from its staff. Your failure to conduct yourself in a manner befitting your status as an employee of an international organization represents serious misconduct and has no place in the work environment and in the interest of the Bank Group. The World Bank Group's Harassment Policy on Sexual Harassment prohibits sexual harassment, including invitations to social activities if they persist after the recipient has made clear that they are not welcome; offensive sexual remarks; unwanted physical contact; and unsolicited request for sexual favors. The policy also prohibits "quid pro quo" sexual harassment where requests for sexual favors are linked to career prospects.
>
> Therefore, I have decided, pursuant to Staff Rule 8.01, section 4, that the appropriate disciplinary measure is to terminate your appointment effective close of business Friday February 11, 2005.

10. The Applicant filed a Statement of Appeal with the Appeals Committee on 29 April 2005, challenging the decision of the HRSVP. After a full hearing, the Appeals Committee issued its Report on 11 July 2006. The majority of the Panel concluded that neither the finding that misconduct had occurred, nor the resulting decision to terminate the Applicant's employment, was an abuse of discretion, and therefore recommended that the Applicant's requests for relief be denied. This recommendation was accepted by the Bank, and the Applicant was so informed by a letter from the Managing Director dated 28 July 2006. One Panel member dissented, taking the view that the Applicant's conduct did not constitute sexual harassment, that the HRSVP's conclusion to the contrary was arbitrary, and that in any event a disciplinary sanction lesser than termination was more appropriate.

11. On 28 September 2006, the Applicant petitioned the Tribunal challenging the Bank's decision to terminate his employment for misconduct. He requests the following relief: (i) rescission of the HRSVP's decision; (ii) reinstatement with full back pay from the date of the allegedly wrongful termination; (iii) removal from the Applicant's personnel file of INT's Final Report and its related documents; (iv) inclusion of the Tribunal's judgment in his personnel file; (v) appropriate compensation for the alleged damage to his reputation and for his health injuries; and (vi) costs.

Contentions of the Parties

Applicant's Contention No. 1: No Substantial Evidence Supported the

Findings of Facts Alleged to Constitute Misconduct

12. The Applicant relies on *Arefeen*, Decision No. 244 [2001], para. 42, where the Tribunal stated that:

> The standard of evidence in disciplinary decisions leading … to dismissal must be higher than a mere balance of probabilities. In several decisions, the Tribunal has emphasized that there must be substantial evidence to support the finding of facts which amount to misconduct.

13. The Applicant argues that INT failed to apply this "substantial evidence" standard because its Final Report relied only on "reasonably sufficient evidence" to support the allegations of misconduct.

14. In particular, he states that no substantial evidence supports INT's conclusion that "[b]etween August and October 2003, [the Applicant] repeatedly invited [the Complainant], his subordinate, to socialize with him outside of work, touched, hugged, and massaged [the Complainant], and made comments and requests of a sexual nature to [the Complainant]." This conclusion, he urges, is based on presumptions rather than on established facts. INT itself acknowledged that there were few facts upon which the parties agreed, and no direct evidence was discovered during the investigation to support either party's position. Lacking any direct evidence, INT tipped the balance of probabilities in favor of the Complainant and against the Applicant. Although INT found that the Complainant had contradicted herself in a number of respects, it accepted her version of the alleged events. A careful review of INT's Final Report shows that there was no substantial evidence that the Applicant had involved the Complainant in any inappropriate social invitations, sexually suggestive comments, requests and touching.

15. The Applicant also insists that none of his actions, remarks or social invitations amounted to misconduct or was impermissible under any of the Bank's rules. The Complainant herself acknowledged to INT that she had gone to the Applicant's apartment on four occasions on her own volition in order to gain favors from him because she was "very worried" about her contract. INT found that on the last occasion, 9 October 2003, the Complainant went to a restaurant with the Applicant and "made her feelings clear to him" by telling him that she did not want a social relationship with him. According to the Complainant, she believed his attitude towards her changed from this point on. The Applicant stresses the implications of an incident a few days later, when the Complainant and another female colleague attended a speech that he gave at a local university. The Complainant stated to INT that after the speech everyone "paid attention to [the Applicant] and [the female colleague] and not to her" and that when they departed "[the Applicant] hugged [the other female colleague] but shook [the Complainant's] hand." Later that evening, according to the Complainant's own narrative, she telephoned the Applicant at his apartment "crying" because "she felt jealous" of the other female colleague. Such behavior, motives and feelings of jealousy are simply not those of a woman who can credibly claim that she was sexually harassed or subject to "any unwelcome sexual advance" after she had "made clear" to the Applicant that his social activities with her were not welcome.

16. Furthermore, the Applicant observes that the HRSVP's determination is inconsistent with INT's findings. The HRSVP determined that "[t]here is substantial evidence to demonstrate that you engaged in sexual harassment as defined under the Bank's Harassment Policy by repeatedly engaging in inappropriate behavior towards [the Complainant] even after she had made it clear to you that your behavior was unwelcomed." This conclusion is contrary to INT's findings. The HRSVP failed to cite any evidence to support his conclusion, which contradicts INT. The Tribunal should therefore set aside this determination because it was not supported by substantial evidence.

17. Finally, with respect to the *quid pro quo* aspect of the alleged sexual harassment, INT erroneously concluded that the Applicant refused to authorize "five of ten work days requested by [the Complainant] in December 2003." The Complainant herself acknowledged to INT that she did not discuss her plan in this regard with the Applicant. Although the Applicant did decline to sign a payment invoice submitted by the Complainant for ten days of work, this was because it was not accompanied by deliverables and a time sheet template, and because it appeared to be for an advance payment. This was not a case of refusing to authorize the payment to the Complainant for work she had actually done; the refusal sought to ensure financial accountability in the

payment of consultants. INT failed to take into account that there had been some irregularities with respect to payments of consultants in the Applicant's Unit, and that the Applicant took actions to prevent any irregular payments.

Bank's Answer to Applicant's Contention No. 1

18. The Bank states that the use of the term "reasonably sufficient evidence" in INT's Final Report is not at variance with the "substantial evidence" standard endorsed by the Tribunal. The HRSVP employed the substantial evidence standard when determining whether the Applicant had engaged in sexual harassment. Contrary to the Applicant's assertion, the Bank did not apply the evidentiary standard of balance of probabilities. It should be emphasized, however, that in sexual harassment cases direct evidence or eyewitnesses are not always necessary because harassment often occurs behind closed doors. Sexual harassment cases may be difficult to prove and often depend on the credibility of the parties, especially when their testimonies conflict. Here, the INT investigators found the Complainant's version of the events to be more credible. The Tribunal should give weight to the findings of the investigators who had interviewed the relevant parties and witnesses, as suggested by *Arefeen*, Decision No. 244 [2001], para. 43.

19. The Bank goes on to argue that the HRSVP rightly concluded that the Applicant had sexually harassed the Complainant by engaging in inappropriate social invitations, sexually suggestive comments, requests and touching. This form of sexual harassment comes under the notion of "hostile work environment," in which the sexual conduct interferes with a staff member's work, or is so serious or pervasive that it creates an intimidating, hostile or offensive work environment. The HRSVP was right in disagreeing with INT when it concluded that the Applicant's conduct (inappropriate social invitations, sexually suggestive comments, requests and touching) did not constitute sexual harassment because the element of unwelcomeness was not satisfied. The HRSVP does not merely rubber-stamp the findings and conclusions of INT. Here, he was convinced that the Applicant engaged in sexual harassment of the hostile work environment variety because the harassing conduct was a continuum that did not end when the Complainant communicated to the Applicant in October 2003 that she was not interested in a sexual relationship with him. In this respect, the HRSVP took into account the "power relation" aspect between the Applicant and the Complainant.

20. The gravamen of sexual harassment is whether the sexual conduct was unwelcome. In this regard, the Supreme Court of the Untied States reasoned in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) that conduct is unwelcome if it is not solicited or incited by the victim, and is regarded by the victim as undesirable or offensive. Voluntary submission to sexual advances or acquiescence in or tolerance of a hostile environment does not prove that the challenged conduct was welcome; but evidence that the victim solicited, invited or encouraged the conduct may be introduced to support the defense that conduct was welcome. The fact that the Complainant might have given the Applicant a gift or might have willingly or voluntarily socialized with the Applicant does not negate the findings that the sexual conduct was unwelcome. The Tribunal in *Rendall-Speranza*, Decision No. 197 [1998], para. 75, observed that "delay in reporting instances of harassment may be explainable for reasons other than that the victim has welcomed the sexual advances."

21. With respect to the *quid pro quo* aspect of the sexual harassment, there was substantive evidence to conclude that the Applicant refused to authorize five of ten work days for the Complainant once she communicated to the Applicant that she was not interested in a sexual relationship with him. The Final Report shows that the Applicant denied requested work days in retaliation because the Complainant told him that she was not interested in a sexual relationship and she kept her personal whereabouts while on vacation unknown to him, thereby denying him personal access to her. This constitutes *quid pro quo* sexual harassment.

22. The Tribunal should in any event uphold the Bank's determination that the Applicant failed to conduct himself in a manner befitting his status as an employee of an international organization, and failed to observe generally applicable norms of prudent professional conduct.

Applicant's Contention No. 2: The Disciplinary Measures Imposed Were Disproportionate

23. The Applicant asks the Tribunal to find that the termination decision was disproportionate to the alleged misconduct. Termination is the most severe form of discipline that the Bank can impose; it is tantamount to a death sentence for a medical doctor and scientist like the Applicant in his professional career. The Bank's Staff Rule 8.01 does not mandate termination for the alleged sexual harassment. There was no substantial evidence to support the finding of facts amounting to misconduct. INT reached its conclusion on the basis of a mere balance of probabilities; thus termination was not appropriate. This is particularly so given that INT found that the Applicant's social invitations ceased once the Complainant made it clear that they were unwanted, and given that INT also found that the Applicant did not treat her less favorably because she expressed an unwillingness to have a relationship with him.

Bank's Answer to Applicant's Contention No. 2

24. The termination was appropriate, in the Bank's submission, because the prevention and eradication of sexual harassment is a vital part of the Bank's personnel policies. In *Mustafa*, Decision No. 207 [1999], para. 29, the Tribunal stated:

> There is no doubt that the Bank treats the eradication of sexual harassment with utmost importance and seriousness. It has been made clear to staff members that sexual harassment will not be tolerated because it constitutes a serious violation of the standards of conduct that all staff members are required to follow.

25. In reaching its decision, the Bank considered that the Applicant: (i) held a position of power over the Complainant; (ii) tapped into her vulnerability in an effort to serve his personal interests, and (iii) took advantage of his position in the Bank to do so. The Bank has zero tolerance for sexual harassment and has consistently terminated any staff member found to have engaged in sexual harassment. The Tribunal should reject the Applicant's argument that the disciplinary measure should have been mitigated by INT's finding that his social invitations ceased once the Complainant made it clear to him that they were unwelcome. Any mitigating factor is likely to perpetuate the problem of sexual harassment; an expectation that the harasser could be rehabilitated could also send a counter-productive message that sexual harassment would be tolerated.

Applicant's Contention No. 3: The Bank Has Violated the Applicant's Due Process Rights

26. The Applicant has a series of arguments in this respect. First, he states that INT failed to provide him with the Notice of Alleged Misconduct in a timely manner. INT first interviewed the Applicant on 22 March 2004. Although the interview commenced at 3:00 p.m., the Notice was not provided to the Applicant until after 4:00 p.m. This delay is inconsistent with Staff Rule 8.01.

27. Second, under INT's Standards and Procedures for Inquiries and Investigations (INT Manual) two investigators should conduct interviews, and one of them should have the same gender as the subject. In this case, both investigators were female. Compliance with this standard practice is particularly important when allegations involve sexual harassment.

28. Third, INT Manual states that "[i]n accordance with internationally recognized investigative protocols and standards, complainants and witnesses generally will be interviewed (and other evidence, especially documentary evidence will be reviewed) before the subject is interviewed in order to give him/her an effective opportunity to respond to all the allegations." INT failed to follow its standard practice here because only the Complainant and another colleague in the Applicant's Unit were interviewed before the Applicant was interviewed.

29. Fourth, the HRSVP did not limit himself to the evidence presented in INT's Final Report; he inappropriately relied on other evidence. Before making his determination, the HRSVP relied upon a memo from the Global Employment Policy & HR Services Unit (HRSPO), which assessed INT's Final Report, made a recommendation as to the rationale, and assessed the "fallout" which could occur from termination. In addition, the HRSVP

discussed with and received statements from the Legal Department. However, the Applicant was not allowed to review either the memo from HRSPO or the statements from the Legal Department, because these documents were not shared with him. This was a violation of the Applicant's due process rights.

30. Finally, the Applicant insists that the HRSVP's decision is questionable because the memorandum conveying his decision to the Applicant contains date errors. The first and third pages of the memorandum are dated 1 February 2005, while the second page is dated 3 February 2005. This creates the appearance that the decision was altered or "doctored" to support a preconceived decision to terminate the Applicant.

Bank's Answer to Applicant's Contention No. 3

31. The Bank has respected the Applicant's due process rights. First, it gave the Applicant the Notice of Alleged Misconduct at the onset of his first interview with INT. Second, the Applicant's insinuation of gender bias in the investigation is deplorable. It is not mandatory that one of the investigators have the same gender as the subject. What is critical is that the investigation was full and fair. In addition, the two female investigators are very experienced in investigating allegations of sexual harassment, and the Final Report underwent a detailed and thorough quality review by the Lead Institutional Integrity Officer, who has over thirty years of investigation experience. In addition, the HRSVP's review of the memo from HRSPO and his consultation with the Legal Department were consistent with Staff Rule 8.01. Finally, the HRSVP explained before the Appeals Committee that the date error in his memorandum was simply a typographical error and does not detract from the overall consistency and credibility of the memorandum.

The Tribunal's Analysis with Respect to Sexual Harassment

32. The Tribunal's authority in disciplinary cases is not limited to determining whether there has been an abuse of discretion. In *Mustafa*, Decision No. 207 [1999], para. 17, the Tribunal made clear that:

> When reviewing disciplinary cases, the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offense, and (v) whether the requirements of due process have been observed.

33. With respect to the standard of proof in disciplinary cases, the Tribunal in *Arefeen*, Decision No. 244 [2001], para. 42, observed that:

> The standard of evidence in disciplinary decisions leading … to dismissal must be higher than a mere balance of probabilities. In several decisions, the Tribunal has emphasized that there must be substantial evidence to support the finding of facts which amount to misconduct. (*See*, *e.g*., *Carew*, Decision No. 142 [1995], para. 32; *Planthara*, Decision No. 143 [1995], para. 25; and *Mustafa*, Decision No. 207 [1999], para. 17.)

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

35. The lengthy recitation of findings in paragraphs 139 and 140 of INT's Final Report, quoted in paragraph 6 above, is filled with cross-currents; some put the Applicant in a poor light, while others seem exculpatory. Moreover, the list of findings constitutes a rather disorganized mixture of factual determinations, inferences, and subjective opinions. It is important to discern some basic elements of INT's conclusions.

36. First, INT accepted that "by her own account, [the Complainant] did not behave in a manner that would indicate that she found [the Applicant's] attentions unwelcome." Moreover, she "willingly socialized with [him] at the outset and expected that she might gain a better position with the Bank by doing so."

37. Secondly, INT also acknowledged that "it was not until early October 2003 that she began communicating to [the Applicant] in an unequivocal fashion that she did not welcome his sexual attention."

38. Thirdly, from the time the Complainant let the Applicant know his attentions were unwelcome, the Applicant ceased pursuing her. The Complainant herself identifies her last meeting with the Applicant "outside of work" as having occurred on 9 October 2003. During the following months, as the Bank acknowledges, INT found that the Applicant spoke harshly to the Complainant and was critical of her work, not "because she rejected his sexual advances, but because he believed that she had performed poorly on a work-related matter."

39. Fourthly, although INT concluded – against the Applicant's protestations – that he had engaged in "sexual pursuit" of the Complainant, it concluded that his "sexual pursuit … by itself, did not rise to the level of sexual harassment." These words are immediately followed by this critical passage:

> Rather, it was the adverse action that [the Applicant] took against [the Complainant] – refusing to authorize five of ten work days that she requested – and the fact that he took that action *because* he was angry at [the Complainant] for rebuffing his sexual advances, that provided the basis for INT's conclusion that sufficient evidence exists to show that [the Applicant] engaged in sexual harassment. INT, however, concluded that on *both* accounts – [the Applicant's] sexual pursuit of [the Complainant], and the adverse action he took against her for rebuffing his advances, sufficient evidence exists to show that [the Applicant] failed to conduct himself in a manner befitting his status as an employee of an international organization and failed to observe the generally applicable norms of prudent professional conduct. [Emphasis in original.]

40. This passage is regrettably opaque, considering that it is at the heart of a report which motivated the Bank to seek to terminate the Applicant's employment. The words "by itself" suggest that sexual pursuit which did not constitute sexual harassment was retrospectively transformed by an adverse administrative decision taken in mid-December 2005, many weeks after the putative "pursuit" ceased.

41. It therefore becomes essential to determine whether INT had a sufficient basis to conclude that the administrative decision was *mala fides*, or, as the Report puts it: "he took that action *because* he was angry at [the Complainant] for rebuffing his sexual advances." If such a motivation is not supported by sufficient evidence, it becomes unnecessary to determine whether the finding of "sexual pursuit" had an adequate basis, since by its own terms the INT Report concludes that the alleged "sexual pursuit" in and of itself was not harassment.

42. The administrative decision in question was the Applicant's refusal to authorize ten days of paid consulting work as requested by the Complainant, reducing the amount to five days. In so doing, it should be noted, he was limiting outlays by the Bank without procuring any tangible benefit for himself.

43. The Guidelines for Implementation of the World Bank Group Policy on Eradicating Harassment, issued on 1 March 2000, state that:

> It is important to note that supervisors may make negative decisions (e.g. about performance or work assignments), which do not, in themselves, constitute harassment. Supervisors have a responsibility to give frank and constructive feedback, and to take appropriate corrective action.

The same necessarily holds true with respect to supervisors' "negative decisions" regarding the handling of financial matters such as the authorization of fees and expenses.

44. The Complainant told INT that after she let the Applicant know his attentions were unwelcome, the latter retaliated by:

> (i) recounting to her the mistakes she had made in her work over the past months;

(ii) speaking to her in an angry tone over the telephone while he was on mission;

(iii) harshly criticizing her work in a manner that he had not done before;

(iv) requiring her to report to work one day at 6:00 a.m.;

(v) giving her a photocopying assignment although he had never asked her to do so before; and

(vi) authorizing only five days of work when she had requested ten.

45. INT rejected the first five complaints, concluding that the Applicant did not "treat [the Complainant] less favorably in terms of courteousness, performance feedback, and work assignments because she expressed an unwillingness to engage in a sexual relationship with him." On the other hand, INT found against the Applicant with respect to the sixth complaint. This finding was based on a single event for which no documentary evidence exists. It is supported only by the Complainant and Ms. X, a WBIHD Program Assistant against whom the Applicant had previously complained with respect to alleged accounting irregularities.

46. Yet the INT Report turned this reduced approval for five days into the essential element in its finding that the Applicant had committed sexual misconduct. It rejected his explanations of why he reduced the ten days to five on the grounds that:

(i) he "offered multiple reasons";

(ii) they were "somewhat inconsistent with each other";

(iii) they "did not make sense"; and

(iv) they were contradicted by Ms. X ("a disinterested third party") and by the Complainant.

47. The background is that the Complainant, who divided her time between two teams in WBIHD, namely HIV/AIDS and HNP, found in December that HNP had little work for her and that the days allocated for her work with the HIV/AIDS team had been used up. In fact her contract called for 190 days split evenly between the two teams, but due to budget restrictions Ms. X was able to allocate only 30 days to the Complainant's HIV/AIDS work. This happened at the beginning of the fiscal year, well before the Applicant's arrival at the Bank. And so the Complainant sought authorization for the additional ten days, for the period 8-31 December 2003, upon her return from leave. She discussed this with Ms. X during the second week in December, when the Applicant was on mission. The matter was brought to him for consideration upon his return, on Monday 15 December. Ms. X sought authorization for the ten days, but the Applicant granted only five. According to the INT Report, he explained his decision to the investigators as follows:

> Variously, he asserted that: there were not ten working days left in December 2003 when [the Complainant] made her request; [the Complainant] was actually requesting to be paid in advance for days she had not yet worked; [the Complainant] did not provide him with deliverables evidencing her completion of the work; and, [the Complainant] told him she was not available to work more than five days for his team because of her workload with HNP.

48. The INT Report notes that this is "significantly at odds" with the Complainant's and Ms. X's accounts. The alleged inconsistencies were that the Applicant had erroneously stated that Ms. X presented the Complainant's *invoices* to him, when it was merely a request for *authorization*; that he asked for "deliverables" which would only be appropriate if the Complainant was asking for payment (as opposed to authorization for future work); and that both Ms. X and the Complainant had told him that the Complainant "needed the money" – which both denied saying to him.

49. The INT Report speculates that the Applicant retaliated against the Complainant because she had not informed him that she had been back from leave since 8 December. The Complainant told INT that she had

misinformed the Applicant about her intentions to go abroad because she "believed" the Applicant would have called her to suggest a social meeting if he thought she was in Washington, but she also acknowledged that he said he could have used her help in the office, and that the HIV/AIDS team had in fact been understaffed in her absence. The INT Report does not explain why it did not accept that the Applicant was expressing regret (or even irritation) that the Complainant had not made her availability known when (a) she was looking for work and (b) the team needed it. This failure of explanation is troubling, since that inference would have been plainly consistent with INT's finding that he stopped seeking contact with her outside work once she had made it known that his initiatives were unwelcome.

50. The Applicant told INT that he had also denied work days to two other persons in December 2003. One of them was precisely Ms. X, who as a Regular staff member needs no such approval. The other person was initially denied payment for prior work and expenses (not authorization for *future* work allocation) because the Applicant insisted on proof. The fact that this other person resented the Applicant's attitude in causing a delay in payment ("displaying his power") is irrelevant for present purposes since it was not invoked as a ground for the disciplinary measure.

51. During the same week of 15 December, the Complainant was told that at her request she could henceforth work exclusively for HNP, and filed her complaint against the Applicant.

52. INT's criticism of the Applicant's account of his denial of the full ten days notably focuses on:

(i) his claim that there were not ten working days left in 2003 when she made her request (whereas the period 16-31 December in 2003 in fact did include ten working days);

(ii) his account of conversations with Ms. X conflicted "dramatically and materially" with hers; and

(iii) the Complainant's credibility during the course of the investigation was "substantially less impaired" than his.

53. With respect to the legitimacy of the Applicant's denial of the full ten days, the Applicant insists that this is borne out by records which show that irregular payments were in fact made to the Complainant with the approval of Ms. X (and which have never been refuted by the Bank). Indeed, the Applicant complains that INT did not trouble itself to retrieve the Complainant's ultimate invoice for ten days, which he believes would have been irregular and thus proof of the appropriateness of his reluctance to give approval. The Tribunal cannot fail to observe that while the Applicant has repeatedly insisted on this point (and understandably so, given its role as the essential basis for his termination), the Bank has broadly avoided it, apart from conclusionary affirmations, e.g.: "Applicant's newfound 'agenda … to implement fiscal accountability' is betrayed by the findings and conclusions in the INT Final Report." But the "findings" of INT are sufficient only if they are justified by the evidence, and the "conclusions" are unpersuasive if they are nothing more than the sum of inferences or subjective impressions. The Tribunal fails to see how one can fault a supervisor from demurring when asked to approve a ten-day work program for the rest of the year on the 15th of December, when he was apparently uninformed of its substance and purpose.

54. As for the "dramatic and material conflicts" between the Applicant's and Ms. X's accounts, they seem quite exaggerated. Responding to questions some months after the event, the Applicant, who was new to the Bank, may not have distinguished between "invoice" and "request for authorization." It is not clear what he meant by "deliverables." But the true situation was that the Complainant was asking for a ten-day additional assignment, and it was the Applicant's duty to evaluate that request. There is no proof that the Unit needed ten days of her time at that point. If, as INT concluded, his criticism of her work in October was on account of his view that it required improvement – and not because she had rebuffed his personal interest in her – it is difficult to understand why INT did not accept that two months later he was, in this respect too, carrying out legitimate managerial responsibility.

55. INT's four concluding paragraphs on this topic do not provide an adequate foundation for the termination of the Applicant's employment with the Bank.

56. Para. 114 asserts that the evidence shows that in December 2003 the Applicant did not refuse to authorize work days to two other persons, with the implication that he was particularly harsh on the Complainant. As seen above, that is a distorted conclusion. In one case, he did refuse a request for payment for *past work* – which is *more adverse* than deciding not to authorize future work.

57. Para. 115 asserts that the Applicant's stated reasons for limiting his approval "appear" to be false, and that therefore his "true motivations" must be explored.

58. Para. 116 contains a number of "possibilities" that "occurred" to INT which would have been legitimate: (i) past irregularities involving allocation of fees between the Complainant's work for her two teams; (ii) an insufficiency of work to give to the Complainant; and (iii) the Applicant's inexperience of the Bank's approvals and accounting procedures.

59. Para. 117 then asserts that these three "possible" answers should be rejected because they were not the ones he had given in the course of his interview; those he gave were implausible, and therefore:

> The logical explanation for [the Applicant's] providing pretextual reasons for his conduct is that he believed his conduct was, in some fashion, improper. The only potential improper motivation suggested by the facts is that [the Applicant] denied [the Complainant's] requested work days in retaliation for her keeping her personal whereabouts on her vacation unknown to him, thereby denying him personal access to her. Under the facts of this case, this would constitute an act of "quid pro quo" sexual harassment, which is prohibited under the Bank's Harassment Policy.

This does not strike the Tribunal as either fair or convincing. As "logic" goes, it is thin, and there is a leap from the inference that his poor explanations mean that he *believed* he had done something improper to the conclusion that the only impropriety *suggested* by the facts was retaliation for her "denying him personal access to her." First of all, the Applicant's unfamiliarity with Bank procedures may explain his inability to give a cogent answer to the queries. Second, on the necessary assumption that an accused is presumed innocent, some allowance must be made for the fact that innocent persons often are defensive when accused of serious misconduct, and may have a natural tendency to ramble. Given the many hours INT spent on this investigation over the course of nearly one year, it is incomprehensible that on this crucial issue its investigators did not verify whether the team did indeed have need for ten days of the Complainant's work between the 15th of December and the New Year, and whether as things turned out Ms. X accommodated her in an irregular fashion.

60. It may well be that the Applicant's answers to the investigators were unimpressive, but based on the record the Tribunal has no difficulty accepting that a manager in the Applicant's position, on this date, and given the Complainant's modest prior workload, would *not* have given approval without a demonstration of need. The Tribunal observes that the Complainant's own statement to the INT investigators was that she "ordinarily worked four days per week – two for HIV/AIDS and two for HNP." Given that she had just been on leave for one month, it seems quite natural that the Applicant would question that she now proposed to work every business day in the second half of December for his team. And notes from an interview with the Applicant himself record his recollection that he had asked Ms. X whether there were "enough days" for the Complainant, and Ms. X had responded that she did not know. Once again, this obviously merited investigation.

61. The HRSVP's memorandum of 1 February 2005 was ill-advised. Its substance is wholly unsustainable, starting with the premise that the HRSVP's determinations were based on a "thorough review" of the INT Report and on "the evidence." Since evidence unseen by the Applicant could not, without violating the most basic principle of due process, have been used against him, the HRSVP could not have gone outside the INT record. And that consideration is fatal, because the HRSVP's determinations were starkly contradictory with the INT findings. In fact, in his testimony before the Appeals Committee, the HRSVP revealed that he had had no "substantive conversations" with INT when drawing his conclusions in this case. Above all, when he wrote that there is "substantial evidence" that the Applicant had "repeatedly [engaged] in inappropriate behavior towards

[the Complainant] even after she had made it clear to you that your behavior was unwelcomed," he was simply asserting the very opposite of what INT had found. Surely a "thorough review" which could legitimately serve as the basis of the severe disciplinary measures would have baulked at the notion that INT misunderstood its own report.

62. The HRSVP sought to explain his decision in testimony before the Appeals Committee. The Tribunal has carefully reviewed the transcript, and must conclude that these explanations did not come close to justifying his decision. Essentially, his *Leitmotif* was that he viewed the narrative of the Applicant's and the Complainant's interactions as a "process" – a nebulous word insistently repeated in his testimony, indeed five times in a single sentence – and suggested that in consequence the Complainant must have expressed her disapproval of the Applicant's advances "from the beginning" although perhaps "in a very confused way, if you wish, and not a very absolutely clear way." In other words, the HRSVP was not only substituting his evaluation of the facts for that of INT, but contradicting it. If he did so on the basis of his "feelings" (and indeed he testified that "I *felt* that the *process* began … from the beginning"), his decision was arbitrary. If he did so on the basis of some undisclosed evidence, his decision was contrary to due process; there is no point in holding INT to the requirements of due process if its findings can be overturned by a type of investigation or deliberation by the HRSVP in the context of which the accused are neither confronted with the evidence nor given the opportunity to state their case. Either way, his decision does not have a legitimate basis and cannot stand.

63. This conclusion might have led to a simple declaration of the nullity of the decision, and a reinstatement of the Applicant. But the Applicant had been hired for a two-year term which would in any event have ended in August 2005. Therefore the invalidation of the Bank's decision properly gives rise to the remedy of restitution of the income lost over the remaining term of the Applicant's contract.

The Tribunal's Analysis with Respect to Lesser Misconduct and Disproportionality

64. Given that the Applicant's termination on the grounds of sexual harassment was unjustified, the question arises whether two other types of misconduct which the INT Report found to have been established, namely failure of conduct befitting the Applicant's "status as an employee of an international organization" and failure "to observe generally applicable norms of prudent professional conduct" (then Staff Rule 8.01, paragraphs 3.01(a) and (b), respectively), may be invoked.

65. The HRSVP took an all-or-nothing approach, acting on the premise that the two aforementioned factual findings, sufficient to justify termination, were adequately established. In acting erroneously on this basis, the HRSVP ignored the INT Report insofar as concerns its findings of lesser offenses, although they may well have sufficed as grounds for some sanction of the Applicant.

66. True, the lengthy INT Report does not inspire admiration in all respects. Its subjective evaluations of the Applicant and the Complainant seem consistently to favor the latter for unstated reasons entitled to no weight, precisely because they are unstated. Its ratiocinations with respect to deductions from what it calls "indirect evidence" frequently verge on the farfetched, and also appear to stretch toward conclusions that disfavor the Applicant. Its curious refusal to take account of the absence of improper e-mail communications suggests an unwillingness to give any credit to the Applicant. The statement is literally correct, and could hardly be otherwise. Yet checking for improper e-mail communications is surely an immediate and relevant inquiry, and its absence a relevant factor which, albeit non-decisive, can only favor the accused. The point here is the absence not so much of e-mail messages that might in and of themselves be objectionable, since a careful offender would avoid leaving such traces, but of e-mails which are innocuous in isolation but when read in conjunction with other evidence take on material significance.

67. One gets the sense that the INT investigators had little sympathy for the Applicant. Such lack of sympathy may be acceptable or not, but for it to be acceptable it must be *justified*, in order that the Tribunal as a third party intervening after the event can evaluate the Applicant's complaints. For example, the concrete manifestations of an uncooperative or dissembling attitude can be described; the Tribunal will not read between

the lines. Looking at the record of this case, one cannot fail to be struck by the impressionistic nature of the evidence which the Bank says was sufficient to merit the Applicant's dismissal. "Touching" in and of itself, even "repeated touching," cannot be a decisive criterion. The ordinary courtesy of helping to put on a coat can be transformed into an intimate act, and be met with enthusiasm or a shudder. In some cultures, on the other hand, a social kiss – somewhere in the open space at the side of the face – can be so perfunctory as to be devoid of the slightest personal interest.

68. Nor can one leave the matter to be decided on the basis of mere assertions that there was conduct which the Complainant *perceived* as harassment. And of course disputed evidence is rendered even more difficult to assess in the context of normal social contact leading to consensual intimacy. As the Tribunal noted in *Rendall-Speranza*, Decision No. 197 [1998], para. 80, "[i]t is not, by any means, the intention of the Tribunal to inhibit healthy personal and professional relationships among staff members and the promotion of a congenial atmosphere in the workplace." The Bank has no authority to edict rules of private moral conduct which has no implications for the workplace.

69. That is precisely why the misconduct is defined in terms of sexual *harassment*. The issue is not one of private morality, but of unacceptable behavior relating to the workplace. Once that is understood, the circumstances become somewhat easier to evaluate. For example, the relationship between a staff member and his or her supervisor is an objective fact which in and of itself should cause managers to understand that attempts to extend a professional relationship into a personal one must be viewed with great caution. Likewise, the corroboration of third parties present in the same workplace, even if subjective, may be entitled to cumulative weight in circumstances where there is no discernible motivation for such persons to take sides.

70. This leads to an important and commendable aspect of the INT Report. When it comes to the apparent thoroughness, reliability, and fairness of its exposition of the evidence gathered from the 23 witnesses heard by the INT investigators (not counting the Applicant and the Complainant), the Report is impressive. It goes to very great lengths in recording what was said, and in this respect there is no shadow of bias. Inconsistencies in the Complainant's narrative are recorded, and she is criticized for having sought to "remind" a witness of what she expected him to remember of a conversation she had with him about the Applicant's alleged initiative to see her socially, even though he had no such recollection. Similarly – to take but another of several examples – her statement that the Applicant proposed weekend driving trips with her is undercut by his observation, explicitly recorded, that he did not possess a driving license.

71. Although as seen above the INT Report contradicts the HRSVP's conclusion that the Applicant engaged in unwelcome and repeated sexual pursuit, continued even after the Complainant made clear that she objected to such advances, the record does provide evidence of poor judgment on the part of a senior official, newly arrived in an unfamiliar and unique working environment, yet immediately taking initiatives to develop one-on-one personal relations with staff members. Senior staff members may be expected to appreciate that one-on-one relations can easily be misinterpreted as evidence of favoritism on non-professional grounds. When such contacts occur outside the office, in private homes, and between persons of opposite gender having a supervisor/subordinate relationship, the likelihood of misinterpretation multiplies. All of these considerations take on increased sensitivity in a multi-cultural environment where one should expect of a senior professional like the Applicant that he would place less emphasis on projecting on others his version of the habits of his own culture (in the manner which seemed to characterize his responses in this case), and more sensitivity to the cultural attitudes of his subordinates. There is nothing *per se* wrong with a staff member whose family lives far away seeking to create a social network, but that can be done in a group setting. Private meetings with subordinate members of the opposite sex may lead to trouble or misunderstandings; and an experienced professional should know and not have to be told that this is so.

72. In the present case, five other women who had worked with the Applicant told the INT investigators that he had on occasions interacted with them in what they deemed annoying and inappropriate ways. For example, Ms. X stated that the Applicant had massaged her twice, telling her that she looked stressed. Another staff member stated that the Applicant had offered to read her palm. A Consultant said that the Applicant had told her that his family lived away and had suggested that the two of them get together socially outside of work. A

temporary staff recounted that the Applicant had given her a close, tight hug that she found “odd,” given that she hardly knew him. And another Consultant stated that the Applicant had told her once that he wanted to cook dinner for her; and had invited her to come to his apartment one day when they were walking home from work, which she found inappropriate.

73. These incidents cannot be deemed to have constituted sexual harassment, and resulted in no complaints to that effect, but their cumulative effect could very well have justified the conclusion that the Applicant conducted himself in a manner unbefitting a manager in an international organization. A particularly important factor in this case is that the Complainant was a Short-Term Consultant. This means that it does not matter whether the Complainant expressed feelings of professional insecurity to the Applicant; a Short-Term Consultant inherently lacks job security. A manager in the Applicant’s position should have understood that engaging in private relations with the Complainant, irrespective of who initiated them, was likely to be inconsistent with proper professional behavior. Taken together, all of these features of the case made it unlikely that the Applicant’s employment would have been extended. This is a factor in considering the prejudice caused by his unjustified termination.

74. Given the fact that the INT Final Report is thus given some weight, the Tribunal feels it appropriate to deal very briefly with the Applicant’s allegations of due process violations. First, the Tribunal is satisfied that the Applicant was given timely notice of the charges. Secondly, the Applicant did not have a *right* to insist that one of his interviewers be male. Consideration of gender may be a matter of good practice; it is not a legal *entitlement*. As observed in *G*, Decision No. 340 [2005], para. 73, the Tribunal “has no authority to micromanage the activity of INT.” For the same reason, the Applicant has no basis to complain that he should have been interviewed after the other witnesses. And while the HRSVP’s decision was unsustainable in substance, the fact that his consideration of the matter was informed by internal advice did not *per se* violate the Applicant’s rights.

75. In addition to his foregone salary, the Applicant is awarded a further amount, equal to three months’ salary, for damages to his professional and personal life on account of the unjustified termination of his contract. Moreover, the Tribunal orders the Bank to make a further payment equal to three months’ salary on account of the wrongful use of the INT Report as an ostensible foundation for the HRSVP’s decision. Finally, given the very professional manner in which the Applicant’s case was presented, the Tribunal sees no reason not to award the full attorney’s costs requested by the Applicant for the proceedings before the Tribunal.

Decision

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

(i) the Respondent shall pay the Applicant compensation in the amount equivalent to six months’ salary foregone, roughly from February 2005 to August 2005, as a result of the premature and wrongful termination of his contract;

(ii) the Respondent shall pay the Applicant further compensation in the amount equivalent to three months’ salary, for damages to his personal and professional life;

(iii) the Respondent shall pay the Applicant another amount, equivalent to three months’ salary, on account of the wrongful use of the INT Report by the HRSVP;

(iv) the Respondent shall pay the Applicant’s costs, in the amount of $12,989.38;

(v) all records relating to the allegations of sexual misconduct shall be removed from the Applicant’s personnel file, the order of ineligibility for rehiring by the World Bank Group rescinded, and this judgment included in his file; and

(vi) all other pleas are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

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

At Paris, France, 24 May 2007