



World Bank Administrative Tribunal

2010

No. 438

**Q (No. 2),
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

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Applicant**

v.

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1. This judgment is rendered by the Tribunal in plenary session with the participation of Stephen M. Schwebel, President, and Judges Jan Paulsson, Florentino P. Feliciano, Francis M. Ssekandi, Ahmed El-Kosheri and Mónica Pinto.
2. The Application was received on 30 November 2009. The Applicant was represented by Joshua N. Rose, Rose and Rose PC. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency.
3. The Applicant disputes the imposition of a bar from working for the Bank and accessing its premises, first on a temporary basis and, after further investigation, on a permanent basis.

FACTUAL BACKGROUND

4. The Applicant worked at the Bank between 1995 and 1998 and left after reporting certain alleged misconduct by his supervisor. He states that he challenged the termination of his employment and was given a payment of \$46,500. He was awarded several contracts thereafter as a Short Term Consultant, including one on 1 April 2002 which was extended several times, the last extension being for 190 days. That contract was ultimately ended as of December 2002, when he was informed that no new work would be assigned to him although several days were left on his contract. It seems that some of his supervisors were unhappy with his work and his relationship with some of

the staff had become strained. He also secured a 25-day contract beginning on 4 April 2003; that contract was also terminated before it ended, on 17 April 2003. There appears to have been disagreements between the Applicant and his supervisors around that period and his behavior is alleged to have deteriorated.

5. After certain events discussed in detail in *Q*, Decision No. 370 [2007], the Bank placed “no-hire” and “no-access” flags in the Applicant’s personnel file on 18 April 2003. They were removed on 8 May 2003 after a Bank attorney noted that due process was required for the placing of flags. The flags were reinstated around August 2008.

6. In 2007, the Applicant challenged before the Tribunal the Bank’s decision to reinstate the flags. The Tribunal found in *Q* that the Bank had abused its discretion by not affording the Applicant due process. The Tribunal noted in para. 50 that:

In identifying such due-process failures, [it] is not engaging in a *post hoc* security review. ... To avoid an abuse of discretion, the Bank need only engage in a good-faith effort to garner the staff member’s informed response to the allegations made against him or her, for the purpose of providing an objective decision-maker with sufficient evidence to be able to determine the true nature of the facts and reach a well-founded decision as to whether the flags are to be maintained or removed pursuant to Bank rules and policy.

7. The Bank removed the flags in January 2008, as ordered by the Tribunal. It also informed the Applicant that new temporary flags would be placed,

as a preliminary safeguard, pending a full review as to whether there continues to exist a justification to bar [him] from Bank premises and to bar him from seeking Bank employment. ... [F]ollowing the full review, [he] will be provided an opportunity to respond to the information gathered [and a] decision will then be made by the Bank whether there is a basis to continue maintaining flags ... and if so, for how long.

8. On 26 February 2008 the Applicant asked the Tribunal to intervene on the grounds that the Bank’s new flags were inconsistent with the Tribunal’s judgment. Several communications ensued between the parties and the Tribunal. In a letter to the

Tribunal, dated 5 March 2008, the Bank commented that the Applicant was required to exhaust internal remedies before seeking the Tribunal's intervention and added that it was preparing a report to enable the decision-maker in the Bank to assess objectively the issue of "deflagging." In a response dated 1 April 2008, the Applicant argued that the exhaustion of internal remedies was not required because the Bank had violated the Tribunal's order in Decision No. 370.

9. On 17 April 2008 the Tribunal sent a letter to the parties informing them that the Applicant was not required to exhaust internal remedies and providing guidance to the Bank on how to proceed with its report. The letter specifically asked the Bank to complete its consideration of the flags by 2 May 2008 and inform the Tribunal of the outcome.

10. The Bank completed its report and concluded that the Applicant's "past behaviors should preclude him indefinitely from Bank employment and from accessing Bank Group facilities." After receiving a copy of the report, the Tribunal provided the Bank with additional guidance regarding the process to follow, specifying that the Bank should seek comments about the report from the Applicant, send the comments together with the report to the Human Resources Vice President ("HRSVP") for a final decision and finally communicate its conclusions to the Tribunal.

11. The Applicant was provided a copy of the report and was invited to provide comments. The report and the Applicant's comments were submitted to HRSVP for a final determination. On 27 June 2008 HRSVP concluded that

in light of the material presented as regards your past behaviors which are incompatible with the expectation of the behavior of Bank staff, as well as given the basic precautionary obligation we have to the institution, I

concur with the recommendation to reinstate no-hire, limited-access flags with indefinite duration.

12. After receiving a copy of the Bank's report, the Applicant's comments and HRSVP's final determination barring the Applicant permanently, the Tribunal informed the Applicant on 24 July 2008 that:

Having considered the arguments advanced by the parties in support of their respective positions, the President of the Tribunal, in consultation with other members of the Tribunal, has concluded that the Bank's actions, including the reinstatement of the flags, are not inconsistent with the Tribunal's Decision No. 370.

13. The Applicant challenged HRSVP's decision before the Appeals Committee, which conducted a hearing and concluded on 7 May 2009 that the Bank "did not abuse its discretion by first reinstating temporary flags ... and maintaining the flags indefinitely." The Bank's Managing Director accepted the Appeals Committee's recommendation on 29 June 2009.

14. In the present Application the Applicant requests: (1) the removal of all no-hire and no-access flags insofar as they are based on conduct that occurred more than three years ago; (2) that no permanent flag be placed based on conduct prior to June 2005; (3) damages for the value of employment from which the Applicant was barred due to the flags being placed in January 2008; (4) damages for losses incurred as a result of ongoing retaliation from April 2003 forward; and (5) attorney's fees and costs. The Applicant also asks the Tribunal to declare that (1) the Bank did not accord him due process by imposing a permanent bar on the basis of "attitude" instead of "security"; (2) the Bank did not meet its burden of proof in placing a permanent bar on the basis that the Applicant posed a security threat; and (3) the record contains sufficient evidence to find

that the Bank's behavior was in retaliation against the Applicant's whistleblowing activity in 1998.

THE PARTIES' CONTENTIONS

The Applicant's first contention: The 27 July 2008 decision to reinstate the permanent flags is not consistent with the Tribunal's jurisprudence

15. The Applicant argues that the Bank did not find misconduct to justify the imposition of the permanent bar, contrary to the standard set out in *Dambita*, Decision No. 243 [2001], which requires proof of misconduct "sufficient to support the disciplinary decision under Staff Rule 8.01" in addition to due process. He states that the Tribunal's jurisprudence in disciplinary matters, such as the placing of flags, is well-established. Citing *Koudogbo*, Decision No. 246 [2001], para. 18, he contends the Tribunal examines (1) the existence of facts, (2) whether they legally amount to misconduct, (3) whether the sanction imposed is provided for in the law of the Bank, (4) whether the sanction is not disproportionate to the offense, and (5) whether the requirements of due process were observed. Under this standard, the Applicant argues, no one could reasonably conclude, on the basis of evidence dating back to 2003, that the Applicant posed a security threat in 2008.

16. He contends that the Bank did not show that his behavior constituted a threat in 2008 or thereafter; the Bank, he maintains, concluded in its report that "it is difficult to assess whether [the Applicant] at this point in time poses an 'acute security threat.'" He submits that HRSVP's decision was based on a review of a report prepared by the Department of Institutional Integrity in 2003 ("2003 INT Report") and the interview of three individuals. HRSVP also relied on the Tribunal's judgment in *Q*, which, he argues, does not support the indefinite no-hire bar. He argues that neither the Tribunal's

judgment in *Q* nor any witnesses interviewed found his behavior to be threatening or inappropriate in 2008 or thereafter; witnesses only described the Applicant as “erratic,” and testified to a few e-mail and a voice-mail messages sent by him accusing certain individuals of being “slimy slugs.” One individual, who often stayed late in the office, testified to feeling threatened. However, the Applicant also submits that other witnesses had testified that, when they met with him, they found him “cordial” and did not feel threatened. He concludes that these circumstances do not justify the Bank’s imposition of the flags.

17. The Applicant also argues that the standard applied by the Bank in its decision was legally incorrect. He contends that the notice informing him about the temporary flag indicated that the flag was placed “in light of concerns previously expressed by staff for their personal safety.” However, he claims, after he answered the Bank’s allegations, the standard for the permanent flag placed in June 2008 was changed from this “security” standard to an “attitude” standard; the Bank determined that “the skills and experience as well as the behavior and attitude” of the Applicant made him unsuitable for any job at the Bank. In addition, he argues that he was not provided with an opportunity to answer the charges that were the basis of the decision to place the permanent flag, in continued violation of his due process rights.

18. The Applicant concludes that the July 2008 decision should therefore be overruled and damages should be awarded.

The Bank’s answer

19. The Bank disagrees with the Applicant, maintaining that it reviewed the records, interviewed staff and provided the Applicant with opportunities to respond, therefore

affording the Applicant due process as required in *Dambita* and confirmed in *Q*. With respect to the temporary flags placed in January 2008, the Bank submits that the Tribunal in *Q* stated that

the Bank is not precluded from entering and maintaining flags as a preliminary safeguard pending due process, nor must it condition its decisions and actions on the responses of a potentially aggrieved, aggressive or unstable current or former staff member who has been excluded.

As to the permanent flags placed in July 2008, the Bank contends that after substantive review, it reached the conclusion that the Applicant's behavior was "troubling" and concluded that he should be barred. Furthermore, the Bank argues that it only referred to conduct that took place before 2003 because the Applicant has been barred from entering or working at the Bank since that time.

20. In response to the Applicant's contentions that his behavior was not viewed as constituting a threat, the Bank replies that there were concerns about the general atmosphere at the office and general discomfort, and that staff members familiar with his past behavior were still concerned about his presence on Bank premises. The Bank further maintained that past behavior may reasonably be taken as an indicator of future behavior.

The Applicant's second contention: The Bank's decision was contrary to the applicable Staff Rules

21. The Applicant argues that the Bank's 2008 decision to place a permanent flag in his personnel file was based on events that occurred more than three years prior to the decision (before April 2003), contrary to the standard established in Staff Rule 8.01, paragraph 3.03(k), which states that a disciplinary action consisting of loss of future employment and contractual opportunities with the Bank may be taken against a staff

member in a case of misconduct “provided the determination is made within three years from the date the misconduct is discovered, except that no limitation will apply to a determination for which a mandatory termination is to be imposed.” He asserts that the record does not suggest any behavior or offense on his part that would have resulted in mandatory termination of his employment under Staff Rule 8.01, paragraph 3.01.

22. Similarly, HRSVP’s 2008 decision according to the Applicant was also based on events that occurred in 2003 and not on any new information.

The Bank’s answer

23. The Bank counters that the Staff Rule does not prohibit it from placing flags in staff personnel files. Furthermore, it reached its decision in compliance with the Tribunal’s order in *Q* and the *Dambita* judgment, not pursuant to Staff Rule 8.01. The Bank asserts that *Q* provided it with guidance regarding due process and instructed it to follow the process established in *Dambita*, which it did.

24. As to the timeliness of the Bank’s action, the Bank argues that the Applicant was aware of the flag since 2005, and that the Bank conducted an investigation into the matter, but concluded that no disciplinary action would be taken because the Applicant was no longer employed at the Bank. Nonetheless, the Bank claims, it continued to be concerned about the Applicant’s behavior. The Bank disagrees with the Applicant’s assertions that it did not take any disciplinary actions prior to 2008, and believes that in any event that fact would be immaterial to the decision to permanently reinstitute the flags.

The Applicant's third contention: He lost several employment opportunities as a result of the flags

25. The Applicant also argues that he was not able to obtain employment outside the Bank due to the flags and lists a number of missed employment opportunities with national governments and other entities. He claims that because he is barred from being hired under the Bank's procurement rules, he cannot obtain any positions for Bank-related projects even with external entities.

The Bank's answer

26. The Bank disagrees that it is responsible for his inability to obtain employment outside the Bank as personnel files are confidential and not disclosed to third parties; furthermore, the Applicant has not submitted any evidence to substantiate his allegations.

27. The Bank further argues that the Tribunal has already addressed this question in *Q* in which it stated that:

As regards compensation, the Applicant was made aware of the no-access flag in September 2003, did not promptly challenge this decision, and could not reasonably have expected later reappointment in such circumstances. Any financial loss that the Applicant might have thereafter incurred in the hope of such employment is thus not eligible for compensation.

The Applicant, according to the Bank, was awarded compensation and costs in *Q* and has not submitted any evidence to justify any additional compensation.

The Applicant's fourth contention: the Bank's placing of permanent flags is in retaliation for his whistleblower activities in 1998

28. The Applicant claims that he has been subject to continued retaliation by his managers since 2000 due to his whistleblowing activities in 1998, following which he was fired just three days after he reported the misconduct. He adds that his managers supported the flag as retaliation for his present challenge to their action. He further

argues that the Department of Institutional Integrity admitted finding that he may have been retaliated against in 2000 due to his earlier whistleblowing activity, and that it is clear that the Bank's continued placing of flags in his personnel file constitutes retaliation that the Bank should have investigated. As proof of retaliation, he submits that the Bank told "procurement" that it could not enter into a contract with someone "in an ongoing adversarial position with the Bank."

The Bank's answer

29. The Bank responds that the Applicant's claim is outside the jurisdiction of the Tribunal because it was not timely addressed.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

30. The Tribunal will first address the Applicant's claim that the Bank placed the flags in his personnel file in retaliation for his whistleblower activities in 1998. The Tribunal finds that the Applicant has not provided sufficient evidence to substantiate this claim, which is based on events that occurred several years ago.

31. The remaining issue is whether the Bank applied the appropriate standard when placing flags in the Applicant's personnel file. The Tribunal decided in *Q* that "no flag may be entered into the Applicant's [personnel] record absent due process as set out by the terms of this judgment." However, with respect to the temporary flags placed in January 2008, the Tribunal stated at para. 50 that the "Bank is not precluded from entering and maintaining flags as a preliminary safeguard pending due process." The Tribunal has also indicated in a letter to the Applicant that the Bank's placing of temporary flags in the Applicant's personnel file was not inconsistent with the Tribunal's

order in *Q*. Thus the Tribunal concludes that the Bank's decision to place temporary flags in the Applicant's personnel file was not unreasonable.

32. With respect to permanent flags, as mentioned above, the Tribunal held in *Q* at para. 51 that

the defects in the process leading up to the no-hire flag's placement and later replacement debar the Bank from again reinstating this flag absent further due process undertaken in conformity with the terms of this judgment. (*Dambita*, Decision No. 243 [2001], para. 28.) So that this relief is effective, the Tribunal orders that the no-access flag, and any other flags that might be present in the Applicant's [personnel] record, be removed subject to reinstatement through proper process.

33. It is clear therefore that the Tribunal instructed the Bank to apply proper process as was set out in *Dambita*, where the Tribunal made clear at para. 26 that:

It wishes to emphasize that the placement of any flags, for whatever purpose, must follow the basic elements of due process, including, specifically, written notification and the right to reply. This applies to present and former staff.

34. Applying these standards to the circumstances of this case, in view of the fact that the Bank reviewed the September 2003 INT Report, interviewed additional witnesses and produced a report which it then submitted to the Applicant for comment, and in view of the fact that HRSVP was provided with a copy of the report and the Applicant's comments prior to its final determination, the Tribunal concludes that the Bank complied with the due process requirements set out in *Q* and *Dambita*.

35. However, even though the due process standards set out in *Dambita* and in *Q* are similar, the circumstances in those cases are significantly different. In *Dambita*, the central issue was misconduct. The Bank had concluded that the applicant had been involved in misconduct, and barred her from employment as a result. In contrast, in *Q*, the initial decision to place flags in the applicant's personnel files was based on issues

relating to Bank security, and a no-hire and no-access flag was placed in the applicant's file. There was no question of misconduct, and the decision to place flags was not the result of disciplinary action. While the Tribunal deemed the Bank's action in response to the applicant's behavior to have been punitive in nature, the question of misconduct under the Bank's Staff Rules did not arise. It will also be recalled that in *Dambita* (at para. 27) the Tribunal noted the distinction between the imposition of flags as disciplinary action and the imposition of flags for security purposes. Thus different considerations apply depending on whether the matter is one of misconduct or of security; in *Dambita* the Tribunal determined whether the disciplinary action was justified, whereas in *Q* it only decided whether the Bank abused its discretion in placing flags in the Applicant's personnel files as a matter of security.

36. In the present case, there is no question of misconduct; the imposition of the permanent flags by the Bank is stated to be based on security concerns. In that regard, having addressed the requirements of due process, the Tribunal recalls that it found in *Q*, at para. 37, that

a current staff member has no absolute right of access to the Bank's premises, and a former staff member is not presumed to enjoy even this limited level of access. Indeed, such a person "must ... have a legitimate justification to enter upon the Bank's premises," and lacks standing to seek a general and unhindered right to enter. (*Mwake*, Decision No. 318 [2004], paras. 34-36.) As the Tribunal has recognized in the past, common sense dictates that the Bank may take reasonable efforts to control or condition access to its premises, particularly by persons who are not currently members of the staff, and even where a ground may exist for the person's entry. (*Id.*, paras. 35-36, citing *B*, Decision No. 247 [2001], para. 30.) Maintaining security is a fundamental duty of the Bank to its staff, and to the integrity of the institution, and access to Bank premises is necessarily influenced by security considerations. (*B*, para. 30, citing *Dambita*, Decision No. 243 [2001], para. 27; Principle 2.1(b) of Staff Employment.)

37. The Tribunal continued, at para. 39, that it

will not substitute its assessment of the situation for that of the Bank, nor overturn the exclusion decision absent an abuse of discretion, meaning where the decision is “arbitrary or unreasonable, or is in violation of the staff rules.” (*Mwake*, Decision No. 318 [2004], para. 35.) *In matters involving Bank security, this discretion is broad indeed.* (Emphasis added.)

38. Applying these standards to the present case, the Tribunal defers to the Bank’s security assessment, and notes that while there is room for the view that a permanent bar on access is excessive in response to the Applicant’s behavior, some staff members (including witnesses interviewed before placing the permanent flags) have expressed reservations to according him access. In view of the Applicant’s behavior, staff members’ apprehensions and the broad discretion accorded to the Bank, the Tribunal does not find it unreasonable for the Bank to decide to place a flag in the Applicant’s file. The Bank’s review of the Applicant’s files in part reviewed the justification for the flags at the time they were initially placed. Some residual apprehension exists, and the timing of the events that led to the emplacement of the flags should not be determinative.

39. The Applicant complains not only of lack of access to the Bank’s premises but also to the maintenance of the “no-hire” element of the flag. However, it is for the Bank and not the Tribunal to determine whom to hire, as long as the decision is not arbitrary or unreasonable. The Tribunal finds nothing arbitrary or unreasonable in the Bank’s decision to debar the Applicant from being re-hired by the Bank. The Applicant’s behavior, while insofar as the record indicates not renewed, provides grounds for the Bank reasonably to conclude that the Applicant is not suitable for re-hiring.

DECISION

For the foregoing reasons, the Tribunal dismisses the Application.

/S/ Jan Paulsson

Jan Paulsson
President

/S/ Olufemi Elias

Olufemi Elias
Executive Secretary

At Paris, France, 29 October 2010