

**Decision No. 370**

**Q,  
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, and Judges Sarah Christie, Florentino P. Feliciano and Stephen M. Schwebel. The application was received on 5 December 2006. The Applicant's request for anonymity was granted on 22 January 2007.

*Relevant Facts*

2. On 28 March 2002, the Applicant, an education specialist, was offered a 40-day Short-Term Consultancy at the Bank's Headquarters with the East Asia Human Development Department ("EASHD"), running from 1 April 2002 to 30 May 2002. The Applicant's contract was extended through a series of short extensions, including a 190-day contract that did not meet the Applicant's expectations since his services were not used every day of the contracted term (nor in the view of the Bank did the terms of the contract require the use of those services every day of the contractual period). The Applicant's work appears to have received mixed reviews, and concerns were raised with respect to his handling of expenses.

3. In December 2002, the Applicant was informed at a meeting with the Acting Sector Manager and the Director of EASHD that he would be needed for only six further working days. He sought to obtain further work through his Unit, but his effort was unsuccessful. It appears that the Task Team Leader assigned to supervise the Applicant's final projects was dissatisfied with the Applicant's work, and their relations became strained.

4. Beginning in late January 2003, the Sector Director and others highly placed in EASHD made efforts to identify employment possibilities for the Applicant. Then, starting in early February 2003, the Applicant began to write to the Sector Director and to the Regional Vice President, accusing the Bank of failing to provide him with paid work while his contract remained in force. The Applicant also complained that someone had been sending him disturbing e-mails using the account of a certain Program Assistant, and he wrote to one of his supervisors accusing him of being the true author.

5. The Applicant's behavior is alleged to have deteriorated during this time, including accusations that he threw items in his office and sat alone in a dark office. The Applicant acknowledges the latter act, explaining that he found his work environment hostile and that such quietude provided him with solace.

6. Starting on 6 March 2003, the Sector Director discussed the possibility of the Applicant working for a short time on a private-education project with the Acting Manager for Education. The Applicant questioned why this new project would not fall under a 190-day contract, but the Sector Director maintained that the Applicant would not be needed for a full 190 days because work program priorities had changed. Although the Applicant thereafter made some arrangements to work with the Acting Manager for Education, he also wrote to the Acting Manager to request payment for every day of his original 190-day contract and to state that he had no more time left under this contract to work with him for the remainder of the fiscal year.

7. Nevertheless, the Applicant on 4 April 2003 accepted a new, 25-day contract for the project. He alleges that

his payment terms were changed afterwards by the Acting Manager for Education, and on 12 April 2003 he requested a partial, up-front payment on his new contract from the Sector Director. The Sector Director agreed to this request. Despite this concession, the Applicant wrote to the Sector Director that he found his office a “torture chamber” and that he may be “mentally and psychologically incapable of working” for the Acting Manager for Education. On 16 April 2003, the Sector Director agreed to release the Applicant from his contract. The Applicant left the Bank’s service the following day.

8. Prior to this time, the Applicant had approached the offices of Social Protection and of the Vice President of Human Resources (the “HRSVP”) about his perceived problems and his failure to obtain a position with another group. The Applicant had also initiated an attempt to arrange a move to another unit, but this effort was thwarted by the Applicant’s management. According to a Human Resources (“HR”) Manager closely involved in the Applicant’s case, the Applicant around this time began to send “provocative” e-mails to other staff.

9. On 17 April 2003, the same day that he left the Bank’s service, the Applicant left a voice-mail message for the HR Manager that she described as “horrible.” In the transcript presented to the Tribunal, the Applicant is recorded as saying that he did not believe “a word” the Sector Director said, and that the Sector Director and the Acting Sector Manager were “worse than slippery slugs.” The HR Manager described this event as “very serious.” In the Tribunal’s view, it may indeed raise questions about the Applicant’s state of mind at the time; but equally, it can hardly be described as a threatening statement.

10. The same day, the Applicant called the office of the HRSVP to ask about the procedure for removing his “manager’s” immunity. The HR Manager also reported that she had received complaints from the offices of the HRSVP and the Managing Director concerning the Applicant’s “angry and inappropriate behavior” when he visited those offices. The HR Manager reported that she had suggested that staff go to security to ask that the Applicant be barred from entering the Bank’s premises, and that she had herself approached the HRSVP about having the Applicant barred, only to be told this could not be done without according due process to the Applicant. The HR Manager meanwhile advised the Sector Director and the Acting Sector Manager to write down their concerns and record any further contacts they had with the Applicant.

11. While the record contains no evidence of a physical threat on the part of the Applicant, his repeated irrational accusations could have given rise to such an apprehension. One of the Applicant’s Task Team Leaders reported that there was no indication of his displaying “physically provocative behavior.” The HR Manager reported that there was special concern for the safety of a certain Program Assistant given her late working hours and her having been the target of the Applicant’s “most provocative e-mails,” but the Program Assistant herself reported that apart from the Applicant’s “hostile e-mails,” she had “never got any harassing phone calls and never had any face to face confrontations” with the Applicant.

12. On 18 April 2003, a day after the Applicant left the Bank’s service, the Acting Sector Manager requested of Security that the Applicant be prohibited from entering the Bank’s premises. An HR Officer implemented this request the same day, and a “no-hire” flag was placed in the Applicant’s PeopleSoft record along with the requested “no-access” flag. Separately, the HR Manager and others successfully requested of another unit that it not put the Applicant on contract. Also on the same day, the Sector Director placed on file with the HR Manager a statement that he had informed the Applicant in March 2003 that his services would no longer be required. (This statement was made at the start of the Sector Director’s effort to have the Applicant work with the Acting Manager for Education.) The Acting Sector Manager asked the Sector Director whether “other staff” should be alerted so that they could notify the Sector Director or Security if they saw the Applicant.

13. While these actions by the Applicant and the Bank were taking place, a meeting concerning the handling of flags was held between several Bank staff on 17 April 2003. This meeting was characterized by one of the participants as being one of “parallel tracks,” with the Applicant’s case serving as a “springboard” to looking more generally at procedures for the placement of flags in staff records. It was determined that a designated HR official rather than the Ethics Office would serve as a flagged staff member’s point of contact with the Bank. It was also agreed at the meeting that the current process for handling flags was antiquated, “disconnected” and not serving the Bank or its current and former staff well. It was recognized in light of the Tribunal’s

jurisprudence that written prior notice to the affected staff member was required before a flag was entered in the staff member's PeopleSoft record. The Employee Relations and Global Employment Policy ("HRSP0") office eventually took over flag-handling processes.

14. The Bank explains that flags are entered against a current or former staff member when there are security concerns about the person, the person is delinquent in paying money owed to the Bank, or the person has been terminated for misconduct. Flags are apparently not placed in a staff member's personnel file, but only in a confidential PeopleSoft system that is maintained and updated exclusively by the Office of the Manager of HRSP0. The Manager of HRSP0 described the flag-placement system at the relevant time as a "policy in evolution."

15. It appears that in late April 2003, the Applicant left the U.S. for Asia. Around the same time, concerns were expressed between the HRSVP's office and the Legal Department's Corporate Administration Unit that no-hire flags were being entered without consultations with HR, without notifying the affected staff members, and without a uniform procedure. A Bank attorney was tasked to follow up with each unit to determine what criteria they had in place for such decisions. It was also separately noted by another official that formal notification of a flag placement to the affected staff member was required. This official suggested that "clear guidelines/criteria" be established for clearing such actions. The Manager of HRSP0 cautioned, however, that the procedure should be simple rather than complex, and should not require "all sorts of clearances and approvals," as he "would rather bar the person [presenting security issues] from the building and deal with the repercussions after the fact."

16. On 8 May 2003, after HR was informed by a Bank attorney that care was needed with respect to the automatic placement of no-hire flags so that due process was respected in line with the Tribunal's jurisprudence, all flags were removed from the Applicant's PeopleSoft record. Still, however, the Applicant was not contacted.

17. On 17 June 2003, the HR Manager requested from the Bank's Department of Institutional Integrity ("INT") a due-process review and a recommendation concerning the flagging of the Applicant. The HR Manager included with her request a binder of documentation compiled by the Sector Director and the Acting Sector Manager. The HR Manager characterized the Applicant as, *inter alia*, having used inappropriate and fear-inducing speech, and acting in a threatening way. The HR Manager also stated that the Applicant's behavior had led to a serious question as to whether he should be employed by the Bank at all.

18. INT assessed the situation to determine whether a "harassment case" existed, the "ultimate concern" of the requestors being perceived as being to determine whether the Applicant, now no longer a staff member, could be barred from access and rehire. While INT ultimately determined that the Applicant's behavior constituted harassment, a fuller investigation for misconduct was deemed to be precluded because the Applicant was no longer a staff member when he committed certain of the alleged acts.

19. On 3 July 2003, the Manager of HRSP0 announced in a widely distributed e-mail that his office had taken responsibility for the management of the new "restricted access/no hire" flag database. All inquiries or updates concerning flags were thereafter to be forwarded to him or his assistant.

20. On 23 August 2003, the Applicant (who was still apparently in Asia) seems to have sent an e-mail to a top Bank official asking for assistance with his "complaint" against the Sector Director and the Acting Sector Manager.

21. On 27 August 2003, the Applicant apparently wrote to several persons, including one of his former Task Team Leaders, to revive his claim that someone had used the aforementioned Program Assistant's e-mail account to "make things very difficult" for him. He also sent an e-mail to the Managing Director of the Bank and the HRSVP, stating that it had been "brought to [his] notice" that the wife of then Bank President Wolfensohn had "played a pivotal role in destroying [his] career within and without the Bank in the field of Education." (Mrs. Wolfensohn was not a Bank staff member.) The Applicant stated that he was "investigating this matter," and

that “[i]f it is true I will hold her responsible for her actions.” He further stated that he “need[ed] to know whether the World Bank extends any immunities to the President’s wife.” It seems that the Applicant had gotten the impression from overhearing what he perceived to be mocking exchanges about him at the Bank that Mrs. Wolfensohn, a leading figure in education circles, had been involved in negative discussions about him.

22. A meeting of several Bank officials was held the same day, and it was decided that the Manager of HRSP0 would serve as the Bank’s contact person with regard to the Applicant. It was further decided to reinstate the two flags in the Applicant’s PeopleSoft record, with the no-hire flag being entered on the ground that rehire would not make sense if the Applicant could not access the Bank’s premises. It was also decided to inform the Applicant about the flags, but there was debate as to how this was to be done given a concern that the Applicant would perceive the flag placement as retaliation.

23. Although the no-access flag placement was of indefinite duration, the no-hire flag placement was limited in duration to one year, apparently because INT’s report was still pending. This report was produced on 10 September 2003. Among its findings, the report deemed the Applicant’s behavior to have been “disturbing and troubling, and ... arguably [could] be interpreted as harassment.” The report noted, however, that the question of whether to move ahead with misconduct proceedings was probably moot since the Applicant’s “most troubling behavior” had occurred when he was no longer a staff member. Nevertheless, the report found that an issue remained as to whether the Applicant posed a “genuine concern” for safety and order that should be considered in hiring and staff safety decisions. The Applicant was not contacted by INT when it prepared the report.

24. On 25 September 2003, the Manager of HRSP0 informed the Applicant by e-mail about the placement of the no-access flag, and suggested that the Applicant direct any future communications with the Bank to him. The Manager of HRSP0 did not solicit a response from the Applicant, nor did he mention the no-hire flag. He did state, however, that he had reviewed the Applicant’s “2001 consulting contract” with EASHD, and that the Bank would not reconsider the Applicant’s allegations in that regard. On 7 May 2004, after a phone conversation on 1 March 2004 that had been sought by the Applicant, the Manager of HRSP0 confirmed to the Applicant by e-mail that the “restrictions currently in place” would remain in force. On 27 August 2004, the no-hire flag in the Applicant’s PeopleSoft record expired at the end of its set term. The Bank characterizes this expiration as an oversight.

25. At the end of November 2004, the Applicant returned to Washington. On 27 January 2005, the Applicant’s counsel unsuccessfully demanded of the Manager of HRSP0 that the no-access flag be removed. Efforts to mediate the dispute failed on 28 February 2005, when the Manager of HRSP0 stated that he was in no position to reconsider the contested decisions.

26. On 1 March 2005, the Applicant filed an Appeal with the Appeals Committee seeking pay for his contract term in 2002-03 and challenging the no-access flag and alleged bad references by the Bank. The Appeals Committee dismissed this Appeal for untimeliness.

27. On 11 April 2005, the Applicant entered the Bank’s premises, checked his personnel file with an Information Technician, found no flags or other restrictions therein, and was allegedly assured by the technician that he could seek re-employment with the Bank. Although this information was correct because the no-hire flag had expired, it appears that the technician did not realize that flags were placed in the PeopleSoft system rather than in personnel files. On 21 April 2005, the Applicant came to the Bank’s premises again and filed there a new Appeal that again challenged the non-payment of sums allegedly owed to him under his 2002-03 contract. This Appeal was likewise rejected on jurisdictional grounds.

28. At the beginning of May 2005, the Applicant applied for an Open-Ended position in EASHD. On 3 June 2005, the Applicant had difficulty gaining entry to the Bank when he attempted to meet with a former manager, but three days later he entered the Bank without difficulty to visit the Staff Association. Immediately following this visit, a Staff Association officer asked the Manager of HRSP0 to confirm that there were no flags in the Applicant’s record. The same day, 6 June 2005, the Manager of HRSP0 informed her that there was indeed a

flag on the Applicant's record, and that he was not eligible for access or rehire. (The no-hire flag had actually expired, however, although the no-access flag remained.) The Applicant claims that the Staff Association officer had earlier assured him of his eligibility for rehire, and that he learned of the no-hire flag's placement only when she presented him with the HRSPO Manager's e-mail to her.

29. On 6 July 2005, the Applicant filed an Appeal with the Appeals Committee challenging the Bank's decision to place the no-access and no-hire flags in his "personnel record." On 11 January 2006, during the pendency of these proceedings, the no-hire flag was re-entered in the Applicant's PeopleSoft record. The Applicant claims that he was not alerted when this new entry was made.

30. On 7 February 2006, the Appeals Committee dismissed the Applicant's challenge to the no-access flag on the ground of untimeliness, but did assume jurisdiction over the no-hire flag challenge on the ground that the Bank did not reveal that flag's presence until the Manager of HRSPO so informed the Staff Association officer by his e-mail of 6 June 2005. On 25 July 2006, the Appeals Committee recommended the removal of the no-hire flag and the awarding of costs to the Applicant in the amount of \$5,000. The rationale of the Appeals Committee was that in light of the Tribunal's judgment in *Dambita*, Decision No. 243 [2001], the Bank had violated due process by not providing to the Applicant the fundamental safeguards of written notification and an opportunity to reply, to the prejudice of the Applicant. The Appeals Committee also recommended that the Bank consider paying the remainder of the Applicant's costs in the amount of \$3,781.45. On 4 August 2006, the Bank accepted the Appeals Committee's first two recommendations, and granted the Applicant \$5,000 in costs.

### *Contentions of the Parties*

31. The Applicant filed his application with the Tribunal on 5 December 2006. He makes the following primary contentions: (i) the Bank wrongfully failed to notify him in writing about the no-hire flag; (ii) the Bank wrongfully disciplined him on the basis of a secret report, following a secret investigation; and (iii) he has never posed a legitimate security concern to Bank staff. He requests as relief, first, the removal of all restriction flags and related remarks from his PeopleSoft record and from Bank files generally; second, \$300,000 plus costs, including compensation for "moral injuries"; third, an Open-Ended position as a Regular staff member, or a "fair opportunity" to compete for such a position; and fourth, any other relief deemed by the Tribunal to be fair and just.

32. The Bank in its answer makes the following primary contentions: (i) the Applicant's challenge to the no-access flag placement is not properly before the Tribunal; (ii) the Applicant suffered no harm in not being promptly notified in writing of the no-hire restriction; (iii) the Applicant was neither disciplined nor the subject of a full misconduct investigation; and (iv) the Bank was reasonable in barring the Applicant from re-employment. The Bank requests that all of the Applicant's pleas be denied.

### *Considerations*

33. The no-hire flag placed in the Applicant's PeopleSoft record is the subject of two primary contentions by the Applicant. First, he complains that the Bank violated his due-process right to written notification about emplacement of the flag. Second, he characterizes his behavior as innocuous and the placement of the flag as a disciplinary action based on a secret investigation and secret report.

34. With respect to the first complaint, the Tribunal has emphasized in the past 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." (*Dambita*, Decision No. 243 [2001], para. 26. See also *D*, Decision No. 304 [2003], para. 55.) The Applicant did not lose these rights when he left the Bank, even though he committed certain of the acts in question thereafter. If such rights were lost upon termination, this could leave a staff member vulnerable and without recourse in the face of arbitrary exclusion actions having a severe impact on his or her career.

35. The Tribunal "does not accept a narrow conception of its jurisdiction which leaves a former staff member



incapable of bringing a case based on an alleged violation of his rights.” (*I*, Decision No. 343 [2005], para. 18.) The Tribunal has also made it clear that “[i]t is sufficient to provide jurisdiction *ratione personae* that the Applicant was a former staff member, because Article II(1) of the Statute gives the Tribunal power to ‘hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member.’ The expression ‘member of the staff’ is defined in Article II(3) to mean ‘any current or former member of the staff.’ This obviously includes the Applicant.” (*Mwake*, Decision No. 318 [2004], para. 32.)

36. At the same time, a challenge to a flag placement must invoke the Tribunal’s jurisdiction *ratione materiae* as well as *ratione personae*. For a present or former staff member to have standing to bring such a claim, the requested removal of the flag in question must relate significantly to the staff member’s contract of employment or terms of appointment, for example with respect to the performance of the staff member’s current duties, or to the staff member’s enjoyment of the rights provided under the Principles of Staff Employment. (*Mwake*, Decision No. 318 [2004], paras. 33-35; *R*, Decision No. 368 [2007], paras. 24-26, citing *inter alia N*, Decision No. 356 [2006]. See also *Azhar*, Decision No. 104 [1991], para. 15.) Jurisdiction *ratione materiae* is found in cases where a flag has been entered as a disciplinary measure. (*Dambita*, Decision No. 243 [2001], paras. 18-27.) Consultation with the Bank’s conflict-resolution bodies may also, under appropriate circumstances, constitute a justification for demanding access to the Bank. (*Mwake*, Decision No. 318 [2004], para. 35.)

37. However, 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.)

38. In the instant case, the Bank’s decision to exclude the Applicant from future Bank employment was partly based on acts allegedly committed by the Applicant while a staff member. Moreover, action was taken around the time of the Applicant’s departure to prevent his moving to another Bank unit in light of his management’s concerns about him. The timing of and reasons for these decisions, which culminated in the placement of a no-hire flag in the Applicant’s PeopleSoft record, indicate the reactive and disciplinary nature of the Bank’s actions, which negated the Applicant’s ability to pursue further employment with the Bank. In these circumstances, the Applicant has personal standing to bring, and the Tribunal has jurisdiction to hear, a challenge to the placement of the no-hire flag. (See *Dambita*, Decision No. 243 [2001], paras. 18-21; *I*, Decision No. 343 [2005], paras. 18-19.)

39. The Applicant contends that he never posed a security risk to the Bank, and that the no-hire flag was therefore unjustified. The Bank counters that its exclusion of the Applicant from further Bank employment was a reasonable and necessary precaution. In reviewing this matter, the Tribunal 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.

40. Insofar as the reasonableness of the exclusion decision is concerned, the record of the case provides instances of questionable – indeed, unacceptable – behavior by the Applicant. It includes offensive communications and the leveling of bizarre accusations alleging both the impersonation of a Bank staff member by unknown others and the personal effort of the wife of a former Bank President to destroy the Applicant’s career. In view of the tenor of these communications, it was reasonable for the Bank to conclude that the Applicant lacked the balance and judgment required to serve as a staff member. Although it does not appear that the Applicant raised or constituted a physical threat to other persons, given the circumstances it was not

unreasonable, arbitrary or improperly motivated for the Bank at that time to exclude the Applicant from the Bank's premises and from future employment in order to ensure the safety of Bank staff and others.

41. The Bank's obligations are not limited to its staff as a whole, however, but also extend to the staff member who has been excluded. The Bank must adhere to the relevant staff rules and principles of due process in this area as in others. A failure to respect such standards amounts to an abuse of discretion. (*See Hitch*, Decision No. 344 [2005], para. 66, citing *K. Singh*, Decision No. 188 [1998], para. 21.) In the specific context of a flag placement, the requirements of written notification and facilitation of the staff member's right to reply were clearly laid down by the Tribunal in *Dambita*, Decision No. 243 [2001], at para. 26. This obligation extends to each flag placed, no matter the flag's purpose. (*Id.*) The Bank does not have discretion to withhold information concerning flags from a current or former staff member, as doing so denies the staff member the right to contest the flag placement.

42. The Bank informed the Applicant in September 2003 of the no-access flag placed in his record in August 2003. The Bank argues that the Applicant thereby received constructive notice of the simultaneously entered no-hire flag, which had a similar meaning for the Applicant's prospects for future Bank work. This is a substantial contention on the part of the Bank. Nevertheless, constructive notice is not written notice. The Bank was obliged to make expressly clear to the Applicant the nature, duration and rationale of each flag placed in Bank records.

43. As it turns out, the no-hire flag placed in the Applicant's record in August 2003 was limited in time to one year, while the no-access flag was of indefinite duration. When the Manager of HRSP0 finally informed the Applicant about the no-hire flag in 2005, this flag had already expired, although the Manager of HRSP0 did not seem to realize it. The no-hire flag was then replaced in 2006, during the Appeals Committee proceedings in this case, and again apparently without notice to the Applicant. This erratic course of action by the Bank over several years constitutes an abuse of the Bank's discretion. This failing is striking since the Bank became aware of its obligations in this sphere no later than the issuance of the *Dambita* judgment in 2001, before the earliest events in question.

44. Equally troubling are the flaws in the internal Bank procedures that led up to the placement of flags in the Applicant's PeopleSoft record. The first flags were entered in April 2003, without notice to the Applicant, just after the Applicant's departure from the Bank. These flags were shortly thereafter removed out of concern for the Applicant's due-process rights, but the straightforward actions of notifying the Applicant and allowing him to reply were not then taken by the Bank. Instead, the Bank engaged in a long internal debate about what procedures should be applied in flag placements. None of this process, undertaken in tandem with consideration of the Applicant's individual case, afforded the Applicant due process. When the Applicant sent another accusatory communication to the Bank in August 2003, the flags were reinstated and, as discussed above, the Applicant was informed about only one of the flags nearly a month later. In that communication, the Applicant was not invited to reply to the allegations leveled against him.

45. As part of the Bank's internal discussion about how to handle the Applicant's case, INT was asked to investigate *inter alia* whether the Applicant had committed harassment, and to provide a factual report that would aid the Bank in determining whether a proper basis existed for the flags earlier placed in his PeopleSoft record. Thus began what INT has characterized as a "hybrid" investigation that ultimately determined that while the Applicant had arguably committed acts constituting harassment, most of these acts had occurred after he had left the Bank's service, and so did not appear susceptible to further misconduct proceedings. INT also suggested that the Applicant had created a "genuine concern" for staff safety, and that this factor could be considered in access and hiring decisions in order to avoid possible disruptions.

46. The Tribunal does not seek to substitute its own interpretation of the Applicant's actions for that of the Bank. At the same time, while the selection of INT to determine the facts of the situation was reasonable (see *E*, Decision No. 325 [2004], para. 47), it must be concluded that the INT investigation was defective because of its failure to give the Applicant notice and an opportunity to present his side of the story. In light of *Dambita*, it cannot be questioned that the Applicant had these rights.

47. It is disturbing that the Bank did not charge INT with seeking out the Applicant and obtaining his version of events. It is also surprising that INT did not undertake to do so on its own initiative when it discovered that at least certain of the acts ultimately determined to be harassing in nature occurred while the Applicant was a staff member. (See *Dambita*, Decision No. 243 [2001], para. 20.) As the Tribunal stated years ago, the “cardinal consideration” in any investigation is that “if disciplinary action is to be taken against a staff member he must know what he is being charged with and must have an opportunity properly to respond specifically to that charge and to deal with the evidence adduced against him.” (*King*, Decision No. 131 [1993], paras. 53-56. See also *Dambita*, Decision No. 243 [2001], paras. 18, 26.)

48. Given that a wide range of Bank staff were interviewed by INT, including supervisors puzzled by elements of the Applicant’s behavior, and further given that INT reviewed a binder of materials collected by the HR Manager who had earlier proposed the Applicant’s exclusion, it cannot be reasonably maintained that the investigation was not a “full” one and instead one of a merely preliminary character. Even if the investigation were of the latter type, the “staff member who is the subject of a preliminary inquiry should be informed of that fact at the earliest reasonable moment, taking into account when justified ... concerns regarding tampering, collusion, and the like. Early notice – short of a formal Notification of Misconduct – can provide an opportunity to the subject to respond to the charges, to explain his suspect behavior, to inform the investigators, and so better to focus and expedite (and perhaps conclude) the preliminary inquiry.” (*D*, Decision No. 304 [2003], para. 65. See also *N*, Decision No. 362 [2007], para. 23.)

49. It is not the task of INT merely to confirm an existing decision or predisposition of management, nor is it proper for the Bank to expect INT to adopt such a passive posture. (See *G*, Decision No. 340 [2005], para. 72.) Due process requires a robust and fair procedure that may well lead to investigatory findings that are contrary to what is initially expected. (See *P*, Decision No. 366 [2007], paras. 33-34, 53, 67-68.) It is for this reason that a staff member is given the right to reply to charges leading to a flag placement. (See *id.*, para. 62.) In the Applicant’s case, the Tribunal is concerned that evidence detracting from the conclusion that the Applicant posed a physical threat may not have been adequately reflected in the INT report.

50. In identifying such due-process failures, the Tribunal is not engaging in a *post hoc* security review. (See *K*, Decision No. 352 [2006], para. 20.) 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. 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. (See *N*, Decision No. 356 [2006], para. 19, citing Principle 2.1 of the Principles of Staff Employment, which requires fairness, impartiality and proper process by the Bank. See also *G* (No. 2), Decision No. 361 [2007], para. 26, citing *Rendall-Speranza*, Decision No. 197 [1998], para. 57.)

51. Turning to remedies, the Tribunal holds 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 PeopleSoft record, be removed subject to reinstatement through proper process. (*Id.*) In imposing this obligation, the Tribunal notes that in May 2003, the Bank on its own initiative removed the flags imposed for the Applicant’s allegedly harassing behavior while he was still a staff member and immediately thereafter. The no-access flag now in the Applicant’s PeopleSoft record dates to the Applicant’s extraordinary communication concerning the immunities of the wife of then President Wolfensohn. Mrs. Wolfensohn not having been a staff member at the time, and her husband no longer being President of the Bank, the flag’s presence is no longer reasonably justified on this basis, however disturbing Bank staff understandably found the Applicant’s accusations to have been at the time.



52. As regards compensation, the Applicant was made aware of the no-access flag in September 2003, did not then 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. At the same time, the Applicant suffered substantial due-process violations that the Bank could have easily avoided through simple implementation of the terms of *Dambita*. He is therefore eligible to receive compensation for this intangible injury. (*Dambita*, Decision No. 243 [2001], para. 23.)

53. The moral injury inflicted on the Applicant beyond the Bank's technical violations of due process was likewise significant. The use of the Applicant's case as a discussion point in a protracted policy development process left the Applicant's status in limbo for several years, subject to successive inconsistent decisions as well as to the aforementioned failures of due process. That such a situation should have occurred in what seems to be a foreseeable if not routine matter, namely that of excluding current or former personnel perceived to be threatening, is troubling. The Applicant is for these reasons deserving of compensation on this separate ground. (See *Lopez*, Decision No. 147 [1996], para. 57; *N*, Decision No. 362 [2007], paras. 34-36.)

54. It bears noting that while the Tribunal does not award punitive damages (*McNeill*, Decision No. 157 [1997], para. 62), the amount of compensation granted is intended to ensure, in the interests of all staff members and the Bank, that the handling of flag-placement decisions meets at least minimum standards of due process. (See *N*, Decision No. 362 [2007], para. 38.)

### **Decision**

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

- (i) all flags shall be removed from the Applicant's PeopleSoft record;
- (ii) no flag may be entered into the Applicant's PeopleSoft record absent due process as set out by the terms of this judgment;
- (iii) the Bank shall pay the Applicant \$50,000 in compensation for his intangible and moral injuries;
- (iv) the Bank shall pay the Applicant costs in the amount of \$21,990.21; and
- (v) all other pleas are dismissed.

/S/ Jan Paulsson  
Jan Paulsson  
President

/S/ Zakir Hafez  
Zakir Hafez  
Counsel

At Washington, DC, 14 December 2007

### **LETTER RELATING TO DECISION NO. 370**

The following letter was addressed by the Executive Secretary of the Tribunal to the parties on 24 July 2008:

On 22 January 2008, subsequent to the Tribunal's judgment in *Q*, Decision No. 370 [2007], the Bank informed the Applicant by letter that:

Consistent with the Tribunal's judgment, all flags have been removed from [the Applicant]'s PeopleSoft record. Also consistent with the Tribunal's judgment, a temporary security flag has been placed in [the Applicant]'s PeopleSoft record as a preliminary safeguard pending a full review as to whether there continues to exist a justification to bar [the Applicant] from Bank premises and to bar him from seeking Bank employment. The temporary flag is being placed in [the Applicant]'s record in light of concerns previously expressed by staff for their personal safety. Following the full review, Applicant will be provided an opportunity to respond to the information gathered. A decision will then be made by the Bank whether there is a basis to continue maintaining flags in Applicant's record and, if so, for how long.

On 26 February 2008 the Tribunal received a letter from the Applicant regarding the placing of the temporary security flag on his PeopleSoft record allegedly in violation of the Tribunal's Decision No. 370. The Applicant sought the Tribunal's intervention in this matter.

On 5 March 2008 the Tribunal received the Bank's comments on the Applicant's letter in which it stated, *inter alia*, that the Applicant must exhaust internal remedies before seeking the Tribunal's intervention because his letter complained about how the Bank had exercised its managerial discretion in complying with a Tribunal order. The Bank also stated that its action in any event was consistent with the terms of the Tribunal's Decision No. 370. The Bank added that it was preparing a report that would enable the decision-maker in the Bank to assess objectively the issue of reflagging.

On 1 April 2008 the Tribunal received another letter from the Applicant stating that he should not be required to exhaust internal remedies because the Bank had clearly violated the directives of the Tribunal's Decision No. 370.

On 17 April 2008 the Tribunal made an order stating that:

- (i) the Tribunal does not accept that [the Applicant] is obliged to exhaust internal remedies of the Bank in respect of the reflagging;
- (ii) the Bank shall complete its consideration of the question of reflagging insofar as it relates to [the Applicant] by 2 May 2008 and report its position by that date to the Tribunal; and
- (iii) the Tribunal may then decide to share that report with [the Applicant] and invite his comments thereon.

On 2 May 2008 the Bank submitted to the Tribunal a memorandum (with annexes) from Mr. Fons Marcelis, Lead Specialist, Human Resources, to Mr. Hasan Tuluy, Vice President of Human Resources ("HRSVP"), in which Mr. Marcelis recommended that the Applicant's "past behaviors should preclude him indefinitely from Bank employment and from accessing Bank Group facilities."

On 23 May 2008 the Tribunal sent a letter to the Bank providing clarification to the Tribunal's order of 17 April 2008 stating:

- (i) the Bank shall provide the memorandum of 2 May 2008 from the Lead Specialist, Human Resources, and the attachments thereto, to [the Applicant], without delay;
- (ii) the Bank shall afford [the Applicant] the full opportunity to comment on the memorandum of the Lead Specialist, Human Resources;
- (iii) the Bank shall send [the Applicant]'s comments along with the memorandum of the Lead Specialist together with the annexes, to the HRSVP for a final decision, which should be completed within one week of receiving [the Applicant]'s comments; and
- (iv) the Bank shall report the position of the HRSVP and submit the related documents to the Tribunal without delay.

On 27 June 2008 the Bank informed the Tribunal by a letter that the HRSVP had made his determination following the process as set out in the Tribunal's letter of 23 May 2008. The HRSVP informed the Applicant about his determination in a letter to him dated 27 June 2008, in which he 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 [of Mr. Marcelis] to reinstate no-hire, limited-access flags with indefinite duration.

On 7 July 2008 the Applicant provided to the Tribunal his comments on the HRSVP's determination of 27 June 2008. A copy of his comments is enclosed for the Bank.

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.

Yours truly,

/S/ Olufemi Elias  
Olufemi Elias  
Executive Secretary