

Decision No. 368

**R,
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 19 December 2006. The Applicant's request for anonymity was granted on 8 January 2007.

2. The Applicant's primary claim is that the Bank failed to protect his confidential personnel information. The Bank objects that the Tribunal lacks jurisdiction over the Applicant's claims. This judgment disposes of that objection.

Background Facts and Procedural History

3. The Applicant worked at the Bank from 1986 to 2005. His last position was that of a Senior Financial Analyst, Level G, in the Africa Region.

4. This application arises from events relating to an investigation of the Applicant by the Bank's Department of Institutional Integrity (INT). In 1999, while working at the Bank, the Applicant rendered consulting services to a U.S. corporation (hereinafter "X Corporation") which was an investor in his home country in Africa. The consulting services apparently consisted of the review of proposed documentation and assistance in setting up a cellular phone company in joint venture with local investors. The X Corporation paid the Applicant \$15,000 for his services and \$2,000 for his expenses. Under cover of a letter dated 12 January 2000 addressed to the X Corporation, the Applicant returned the \$15,000 since he considered that he could only partially fulfill his undertaking. The Applicant states in his application that he "bowed out" of the project and had no further relations with its promoters.

5. In 2005, the U.S. Government filed criminal charges under the U.S. Foreign Corrupt Practices Act against the X Corporation for engaging in, among other things, bribery of foreign government officials with respect to certain investments in the Applicant's home country. The bribery allegedly consisted of remittance of large sums of money for use in the re-election campaign of the incumbent President of the country. The U.S. Securities and Exchange Commission also filed a civil suit in March 2005 against the X Corporation alleging, *inter alia*, that

[o]n or about November 22, 1999, [the X Corporation] ... entered [into] a consulting agreement with a Senior Financial Analyst of the International Bank for Reconstruction and Development ... under which [the X Corporation] paid the consultant \$15,000, plus expenses, to assist in obtaining local investors for the ... project. ... The \$15,000 payment was wired to an account held not in the consultant's name, but in his wife's name. In addition to the \$15,000 payment, [the X Corporation] paid the consultant over \$2,000 in travel-related expenses. A former senior [of the X Corporation] Africa executive made these payments in cash because the World Bank official expressly asked [the X Corporation] not to document payment of his expenses.

6. In July 2005, INT commenced an investigation of the Applicant alleging that, while a staff member of the Bank, he had "engaged in a conflict of interest by entering into a business relationship with an outside entity

[the X Corporation] without the approval of the Outside Interest Committee.” The Applicant resigned from the Bank effective October 2005, while the INT investigation was still under way. After the completion of the INT’s investigation, the Vice President of Human Resources determined on 24 July 2006 that the Applicant was guilty of misconduct. In view of the fact that the Applicant had resigned approximately nine months earlier, the Vice President decided to impose a permanent bar on future employment of the Applicant with the Bank. The Applicant was so informed in writing. His application mentions that this decision is “currently being challenged in the Appeals Committee” and could be the subject of another application to the Tribunal.

7. During the course of the INT investigation, the Applicant’s counsel wrote to the Director of INT on 17 February 2006, complaining in the following terms about an alleged breach of confidentiality during a seminar on “Governance and Anti-Corruption” organized by and held in the Bank in February 2006:

[The Applicant] has requested that I write to you about a breach of confidentiality in an investigation by your department. Information has reached [the Applicant] that he was identified in a seminar organized [by the Bank] as a staff member investigated for corruption in a case involving the [U.S.] Foreign Corrupt Practices Act and that the investigation was completed.

[The Applicant] was apparently not referred to by name, but was clearly identified to participants by reference to his current activities. That was an irreparable breach of the confidentiality that INT is obliged to maintain during and for that matter after an investigation. ...

It appears that World Bank staff are being given confidential information, are being misinformed about the status of the investigation and are being given information that is false as well.

I am requesting that any misuse of confidential information in his case be stopped immediately and that statements made in the seminar be retracted with the retraction circulated to all staff who organized or participated in the seminar, which includes outside presenters.

I note that the Bank is using [a former Senior Institutional Integrity Officer], who was several years in INT as a presenter. [That Officer] was recently engaged in forming a company ... and for him to use information obtained in his service with the Bank is an ethical breach and should be sanctioned.

8. Responding on behalf of INT, a Senior Counsel from the Bank’s Legal Department wrote on 26 April 2006 to the Applicant’s counsel that “[i]n order to respond more effectively to your letter I would ask that you identify with specificity the confidential case information to which you allude. Please note in this respect that information extracted from public records is not confidential.” On 8 May 2006, the Applicant’s counsel replied that “[w]e would welcome the opportunity to review the materials provided to the seminar participants as well as the notes and materials used by the facilitator so that we might identify the improper disclosures with even more specificity.” According to the Bank, the Applicant did not furnish more concrete information and therefore INT did not pursue the matter any further. In the Applicant’s view, INT improperly refused to commence a formal investigation into the matter.

9. On 17 May 2006, the Applicant filed a Statement of Appeal with the Appeals Committee challenging:

(i) the decision to release to participants of a World Bank workshop information about him that was gathered during a misconduct investigation; [and]

(ii) the decision to release to ... U.S. News and World Report information that [the Applicant] was under investigation for misconduct and certain other information that was gathered during the investigation.

The Bank raised a jurisdictional objection before the Appeals Committee on the ground that none of the Applicant’s claims constituted a challenge to administrative decisions that had breached his terms of appointment or contract of employment.

10. On 24 August 2006, the Appeals Committee concluded that it did not have jurisdiction to review the Applicant’s Appeal. The Committee found that the Applicant had failed to identify and challenge a written

administrative decision of the Bank that had altered or breached his terms of appointment or conditions of employment, as required under Staff Rule 9.03. The Committee dismissed the Appeal.

11. The present application articulates the following claims: (i) the Bank failed in its duty to protect the Applicant's confidential personnel information; (ii) the Bank improperly disclosed confidential information about his investigation by INT to participants of a seminar organized by the Bank, and also to a *U.S. News & World Report* reporter; (iii) although he had complained to the Bank about the disclosure, the Bank failed to commence an investigation or take proper action; and (iv) he has been irreparably harmed and should be compensated. The Applicant invokes Principle 2 of the Bank's Principles of Staff Employment, in particular:

(i) The Bank shall at all times act with fairness and impartiality and shall follow a proper process in its relations with staff members; [and]

(ii) The Bank shall establish and maintain appropriate safeguards to respect the personal privacy of staff members and protect the confidentiality of personal information about them.

The Bank's Jurisdictional Challenge

12. According to the Bank, the application should be dismissed for lack of jurisdiction because under Article II(1) of the Tribunal's Statute, the Tribunal is authorized only to "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 Bank asserts that there is no evidence that it took any action which could be construed as a breach of the terms or conditions of the Applicant's employment.

13. In the Bank's view, the Applicant has provided no evidence to show that the Bank made a decision to disclose confidential information about his misconduct during the seminar conducted at the Bank in February 2006, or to the *U.S. News & World Report* reporter. Nor did he provide evidence that the Bank otherwise breached his terms and conditions of employment. To support his claim, the Applicant has provided the Tribunal with two e-mails which, he says, suggest that a Bank colleague of the Applicant's wife attended the February 2006 Bank seminar and heard about the investigation of the Applicant. These e-mails do not, in fact, indicate precisely who had said what at the seminar. They are therefore, the Bank contends, inherently unreliable and have no evidentiary value. The Bank urges that staff members should, before being allowed to proceed before the Tribunal on the merits, be required to show at least some minimal evidence that their claims are credible and would, if proven true, establish a breach of their terms and conditions of employment. The Bank contends that the Applicant has not met this minimum evidentiary threshold.

14. The Bank insists that INT did not make any decision or take any action susceptible of review by the Tribunal. The February 2006 letter from the Applicant's counsel did not specifically ask for an investigation. Moreover, in response to the letter, INT sought more information from the Applicant but did not receive anything concrete. The former INT Officer, who was said by the Applicant to have disclosed the information, had not been assigned to investigate the Applicant's case, and did not have access to the relevant Bank investigative records. He moreover informed the Bank that the information which he had used in his presentation at the seminar did not come from the Bank but from outside public records.

15. Under these circumstances, there was, in the Bank's view, no basis for INT to take any action. In any event, the Bank asserted, it did not have any authority to sanction the speaker because he was, at the time of the seminar, no longer a Bank staff member but rather an employee of an outside firm. The Bank has no authority or ability to investigate or discipline employees of outside organizations. Finally, the Bank argues that the Applicant has "unclean hands" because his employment in the Bank had been terminated for misconduct, and his credibility has been undermined by his wrongdoing.

16. In sum, the Bank argues that the Applicant's claims are entirely speculative. There is no record for the Tribunal to review, nor is there any evidence that the Bank took any action that could be construed as a breach of the terms or conditions of the Applicant's employment. The application should therefore, in the Bank's view,

be dismissed for lack of jurisdiction.

The Applicant's Response to the Bank's Jurisdictional Challenge

17. The Applicant asserts that he has presented a plausible claim of contract violation falling within the ambit of the Tribunal's jurisdiction under Article II(1) of its Statute. The Tribunal has in the past confirmed that the Principles of Staff Employment are part of a staff member's "contract of employment or terms of appointment." Here, the Applicant avers that the Bank violated those Principles by disclosing confidential information and by failing to take appropriate remedial action afterwards. His application seeks to establish that: (i) in a seminar held in February 2006 at the Bank, he was identified to participants as someone who was involved in a corruption case and who was under investigation; (ii) a former INT Officer was involved in the disclosure; (iii) the disclosure took place while INT was investigating the case, thus indicating that the Bank failed to maintain the strictest possible confidentiality; and (iv) during the course of the investigation, a journalist exhibited knowledge of both the investigation and the Applicant's name as a subject of the investigation.

18. The Applicant notes that the Tribunal in *N*, Decision No. 356 [2006], para. 20, held that "[t]he discussion whether there has been a breach of fairness and impartiality in this case pertains to the merits. For jurisdictional purposes ... it is enough that the Applicant has 'alleged' a plausible claim of contract violation and that it is tenable that 'there are circumstances that warrant an examination of the merits of his allegations.'" Based on the Tribunal's jurisprudence and the evidence attached to his application, the Applicant has met the "plausibility threshold." In addition, he has made requests for additional documents, and expects to present evidence from such sources at the merits stage of the proceedings.

19. Not only INT's actions but also its inaction in the present case are subject to review by the Tribunal. In the Applicant's view, the Tribunal should reject the Bank's argument that he "did not furnish anything more concrete" for INT to investigate his complaint. In May 2006, the Applicant outlined once again what he knew at that point, and asked for an opportunity to review the seminar materials in order to identify the improper disclosures with more specificity. The Bank continued to refuse to provide the requested information, or to investigate the matter further, claiming that any pertinent statements about the Applicant had been made public previously.

20. The Applicant believes he has presented evidence that the former INT Officer maintained a close relationship with INT while working for the outside firm. It could therefore be inferred that he used his connections to gain confidential information about the investigation for the February 2006 seminar. In addition, at the time of the disclosure, the former INT Officer worked as a Consultant to the Bank. He has also now rejoined INT as a Regular Bank staff member. Had the Bank taken proper action at the time, he could have been sanctioned as an outside consultant for misusing confidential information. In any event, as a present staff member, he is subject to the Bank's disciplinary jurisdiction.

21. Finally, the Applicant maintains that the arguments advanced by the Bank in support of its objection to the jurisdiction of the Tribunal – that is, (i) the Applicant has not presented enough evidence in support of his claims; (ii) the Applicant is not credible; and (iii) the Bank did not authorize any disclosure – while relevant to the merits phase of the proceedings, are not determinative of whether the Tribunal has jurisdiction over the application. The Applicant prays that the Tribunal dismiss the Bank's jurisdictional objection and award him costs in the amount of \$9,855.55 for this stage of the proceedings.

Considerations

22. Article II(1) of the Tribunal's Statute provides:

The Tribunal shall 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 words "contract of employment" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement

Plan. (Emphasis added.)

The first question to be addressed is whether the application alleges non-observance of the Applicant's "contract of employment" or "terms of appointment." The Applicant's claims in his application have been noted earlier (see para. 11, *supra*). The Applicant maintains that the Bank's actions and failure to act are inconsistent with its obligations to staff members under the Principles of Staff Employment.

23. Under Article II(1) of the Tribunal's Statute, the Applicant's "contract of employment" and "terms of appointment" include the Principles of Staff Employment. In *N*, para. 19, the Tribunal stressed:

The cardinal rules governing staff rights and duties are those contained in the Principles of Staff Employment, which establish the constitutional foundations on which the Staff Rules and other regulatory elements are based. ... While on occasion overlooked by the Bank, such Principles form part of the "contract of employment or terms of appointment," as was held in *de Merode*, Decision No. 1 [1981], the Tribunal's first judgment.

24. In *N*, the applicant, invoking Principles of Staff Employment 2.1 and 9.1, alleged that "administrative negligence and incompetence resulted in moral damage suffered by the Applicant in consequence of a travel management audit and a subsequent investigation into alleged misconduct." *Id.* at para. 2. The Bank objected to the Tribunal's jurisdiction on the ground that the applicant's "claims do not relate to a non-observance of the Applicant's contract of employment or terms of appointment as required under Article II, para. 1, of the Tribunal's Statute." *Id.* at para. 15. Rejecting the Bank's argument, the Tribunal held that it had jurisdiction, noting *inter alia* that the application concerned "an alleged failure of the Bank to properly perform its duties under the Principles of Staff Employment, which resulted in damages having been done to him." *Id.* at para. 26. In the present case, the Applicant alleges that the Bank's actions and failures to act violated his rights under the Principles of Staff Employment. Reading the words of Article II(1) of the Tribunal's Statute in their ordinary meaning, and in the light of the object and purpose of the Statute and the Principles of Staff Employment and its interpretive jurisprudence, the Tribunal concludes that it has jurisdiction *ratione materiae* with respect to the current application.

25. The Bank insists that before the Applicant is allowed to proceed on the merits, he should be required to show that the evidence he has adduced satisfies the requirements of a "minimum evidentiary threshold." In the Bank's view, the Applicant has not satisfied that standard. The Tribunal's jurisprudence does not, however, require that an applicant pass a "minimum evidentiary threshold" before he or she is allowed to proceed on the merits. In *McKinney*, Decision No. 183 [1997], the applicant challenged the non-renewal of his contract. The Bank raised a jurisdictional objection, contending that "the Applicant is alleging that he has rights to continue in employment after the stipulated termination date of his fixed-term temporary contract and that, because there is no such right in his contract of employment, there can be no violation of such contract, which is a prerequisite to the Tribunal's jurisdiction." *Id.* at para. 12. Dismissing the Bank's objection, the Tribunal stated, at paras. 16-17:

It need not be considered at this time whether the non-renewal of a staff member's temporary appointment because of retaliation for his complaint against his supervisor, or with pretextual reasons, would be a violation of his conditions of employment as contemplated in the *Carter* decision. Nor need it be considered – particularly after an exchange of pleadings that have been limited to jurisdictional matters – whether there is factual support for the allegations made by the Applicant as to the real motives of his supervisors. It is sufficient for the Tribunal to exercise jurisdiction that the Applicant has tenably "alleged" that there are circumstances that warrant an examination of the merits of his allegations.

Whether the Applicant can sustain his case is a matter to be determined at the next stage, at which the merits are addressed through the conventional exchange of pleadings. *It would be premature and improper for the Tribunal, by declaring this application inadmissible on the ground of jurisdiction ratione materiae, to deprive the Applicant of an opportunity to make his case.* The Respondent's request to do so is therefore rejected. (Emphasis added.)

Confirming its ruling in *McKinney*, the Tribunal stated in *N*, para. 20, that

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

26. After reviewing the pleadings, the Tribunal concludes that the Applicant has “tenably” alleged that there are circumstances warranting an examination of the merits of his allegations. The Applicant has stressed that he “will use his best efforts to, at the merits stage of this case, provide the Tribunal with additional testimony of at least one or two seminar participants about the content of the comments pertaining to Applicant.” In addition, the Applicant in his application has requested documents that the Tribunal may examine, consistent with its general practice, after resolution of the jurisdiction issue. In the present circumstances, the Tribunal concludes that it would be premature and improper to declare a lack of jurisdiction *ratione materiae*, and thereby deprive the Applicant of any opportunity to make his case. In *I*, Decision No. 343 [2005], para. 18, the Tribunal noted that it “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.”

27. This does not mean that the Tribunal allows all cases to proceed to the merits stage whenever a staff member simply alleges non-observance of a “contract of employment” or “terms of appointment.” If an application appears on its face to be devoid of all merit or frivolous, the Tribunal may summarily dismiss it under Rule 7(11) of the Tribunal’s Rules.

28. The Tribunal finally turns to the Bank’s submission that INT did not make any decision for the Tribunal to review, and that under the circumstances of the case it was a reasonable course of action for INT not to formally pursue the Applicant’s complaint about the alleged disclosure of confidential information. In *Kehyaian* (No. 3), Decision No. 204 [1998], para. 16, the Tribunal stated:

The administrative decision challenged could be either in the form of an affirmative decision or in the form of a failure to act. As the Tribunal has ruled in the past, “claims of nonfeasance are as much within the Tribunal’s jurisdiction as claims of improper affirmative decisions. Indeed, it is frequently illusory to make such a distinction, as the Bank’s action ... can be viewed either as an affirmative decision or as a failure to decide.”

In the present case, both INT’s alleged failure to act and the alleged resulting violation of the Applicant’s rights are subject to review by the Tribunal. Whether under the circumstances of the case the alleged failure of INT to act was reasonable is a matter for the merits stage.

Decision

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

- (i) the Bank’s objection to jurisdiction is dismissed;
- (ii) the Applicant is awarded costs in connection with the jurisdictional phase of these proceedings in the amount of \$5,500; and
- (iii) the dates for the filing of pleadings on the merits will be determined by the President of the Tribunal and communicated to the parties.

/S/ Jan Paulsson
Jan Paulsson
President

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

At Paris, France, 24 May 2007