

Decision No. 158

Thomas Daniel Smith,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R. A. Gorman and F. Orrego Vicuña, Vice Presidents and P. Weil, A.K. Abul Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on February 8, 1996, by Thomas Daniel Smith, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on December 13, 1996.

THE RELEVANT FACTS

2. The Applicant joined the Bank on October 10, 1978 as a Mover in the Administrative Services Department. His appointment was regular. The following years the Applicant was reassigned and promoted. From 1991 until the termination of his appointment the Applicant held the position of Web Pressman in the General Services Department.

3. By notice, dated November 10, 1985, entitled "Notice of Levy on Wages, Salary and Other Income," the U.S. Internal Revenue Service (IRS) informed the Bank that the Applicant had not paid his income taxes for the years 1983 and 1984 in the amount of \$7,398.83 and sought to collect this sum from the Bank. By letter to the IRS, dated November 22, 1985, the Tax Specialist, Administrative Expense Division, Accounting Department, informed the IRS that the Bank was an international organization and, as such, tax liens could not be levied against the salaries of its staff members.

4. By memorandum, dated September 15, 1986, to the Applicant, the Ethics Officer informed him that because the taxes overdue by him were the result of Bank tax allowances not being used to pay the taxes, the Bank tax allowance system had been misused. The Ethics Officer also informed the Applicant that this memorandum would be considered a reprimand for misuse of the Bank tax allowances and that it would also serve as a warning that any future lapses in any benefit or allowance would be grounds for immediate termination of employment.

5. On February 3, 1992 and January 19, 1993, the Applicant filed his Tax Allowance Certificate Forms for the years 1992 and 1993, respectively, confirming that he had made all tax payments due so far in the current year on the Bank Group compensation and would make, when they were due, any remaining payments required.

6. By memorandum to the Applicant's wife, dated September 23, 1993, and by memoranda to the Applicant, dated November 29, 1993 and December 3, 1993, officers of the Personnel Services and Compensation Department, Benefit Services Division, and of the Accounting Department, Accounts Receivable Section, discussed arrangements for collection of a sum of \$7,040 which had been erroneously deposited to the Applicant's Credit Union account.

7. On April 15, 1994, the Applicant filed an Installment Agreement Request with the IRS to pay his outstanding tax obligations for 1992 and 1993. On May 4, 1994, the Applicant filed his 1994 Tax Allowance Certificate Form certifying that he had made all tax payments due so far in the current year on Bank Group compensation and that he would make any remaining payments required when they were due.

8. By notice to the Bank, entitled "Notice of Levy on Wages, Salary and Other Income," dated May 13, 1994, the IRS informed the Bank that the Applicant owed \$7,145.72 in income taxes, interest and penalties for 1992. By letter, dated June 13, 1994, to the IRS, the Chief, Tax Section, for the Bank responded that the World Bank as a public international organization was endowed with certain privileges and immunities under its Articles of Agreement and that, therefore, no tax liens could be levied against the salaries of its staff members. He added, however, that the Applicant had informed him that he was making payments on the claim. By memorandum to the Applicant, dated June 16, 1994, the Ethics Officer requested, among other things, a written explanation of the circumstances surrounding this levy, including whether tax allowances were paid to the tax authorities, what steps the Applicant might have taken to settle the claim, any other years in which taxes might be outstanding and any other clarification.

9. By memorandum, dated June 22, 1994, to the Ethics Officer, the Applicant responded that several extenuating circumstances had led to his present tax liability. He admitted that he owed the IRS \$7,140 for 1992 and approximately \$14,000 for 1993 and that he owed Virginia Tax for 1991, 1992 and 1993, but added that he had already made certain arrangements for installment payments with the Virginia tax authorities and had submitted an application to the IRS to do the same. The reasons leading to this delinquency problem, he explained, were, among other things, the erroneous deposit of funds to his account while he and his family were on vacation; his inability to secure a part-time job due to the inflexibility with regard to his hours of work in the Bank; the fact that he had not been promoted and that overtime had been cut back; the fact that salary increases had not been commensurate with cost of living increases; the reduction in the family income as a result of his wife's changing of jobs; and his financial support to members of his extended family.

10. By letter, dated August 26, 1994, to the Applicant and his wife, the IRS confirmed their agreement to make monthly payments on their delinquent tax liability.

11. By memorandum, dated September 15, 1994, to the Applicant, the Ethics Officer informed him that after reviewing the Applicant's memorandum, dated June 22, 1994, it appeared that misconduct on the Applicant's part might have occurred. He indicated to the Applicant the specific allegations of misconduct, which consisted of failing to pay taxes as due and certifying to the Bank that taxes were up to date when they were not. The Ethics Officer further informed the Applicant that if a misconduct determination on his part were made, discipline would be imposed in accordance with Staff Rule 8.01; and that if the allegations of misconduct were substantiated, his appointment with the Bank could be terminated. He asked the Applicant to provide further information regarding, among other things, the funds erroneously deposited to the Applicant's Credit Union account and his signing of the Tax Allowance Certificate Forms.

12. By memorandum, dated November 21, 1994, the Applicant responded to the Ethics Officer's request for additional information. He stated that his response was delayed because of serious health reasons. He explained that he had spent money when he was out of the country because he erroneously believed that the money had been deposited to his account as a result of a salary increase and overtime payments. He explained that, after finding out the error, he had worked out a repayment schedule with the Accounting staff and that the debt had almost been repaid. He further stated that, although he had paid a portion of the 1992 taxes, applications for further loans were declined. The Applicant also indicated that, although he did not initially sign the Tax Allowance Certificate Forms, he was pressured into doing so from the Tax Office and then sent them back with every intent of paying his tax obligations. He added that he was making his tax payments, in compliance with an agreement with the IRS. He stated that he took seriously the warning he had received in 1986 and had met his tax obligations for the next six years, but noted that his financial circumstances had changed. Finally, he mentioned the possibility of entering into a mutually agreed separation arrangement, as he had discussed with his Personnel Officer, once the investigation was completed.

13. By memorandum to the Director, Personnel Management Department (PMD), dated January 13, 1995, the Ethics Officer recommended that the Applicant be terminated from the services of the World Bank for failing to pay his taxes to the IRS and the State of Virginia for 1992 and 1993 and for certifying to the Bank that the taxes had been paid when they had not. He added that, as a result of this recommendation, the Applicant

would not be eligible for any redundancy monies. He explained that this was a second offense and that the Applicant had been given a written warning in the first offense; that this was fraud in that certifications were knowingly made that taxes were up to date when they were not; that the total amount owing was substantial; and that the combined income for the Applicant and his wife was substantial. The Director, PMD, concurred with the recommendation.

14. By memorandum to the Applicant, dated February 10, 1995, the Ethics Officer informed him that the Director, PMD, had concluded that he should be terminated from the Bank for failing to pay his tax obligations to the IRS and the State of Virginia for 1992 and 1993, for failing to appropriately use his tax allowances to pay his tax obligations, and for certifying to the Bank that the taxes had been paid when they had not.

15. In a Personnel Action Form, dated February 10, 1995, the Applicant was informed that termination of his appointment would be effective immediately and that he would be provided with one month's severance payment in addition to a separation grant and payment for unused annual leave.

16. By memorandum to the Director, PMD, dated March 22, 1995, the Applicant requested administrative review of the Director's decision to terminate his employment on February 10, 1995 for misconduct. The Applicant explained in detail the personal circumstances that prevented him from honoring his tax obligations. The Applicant argued that there was nothing in the decision for the termination of his employment showing that the particular circumstances in his case had been weighed, and he asserted that the action taken in his case was inconsistent with the treatment of other staff who had experienced difficulties with their tax payments. By letter to the Applicant, dated April 26, 1995, the Director, Personnel Services and Compensation Department, to whom the Applicant's request for administrative review had been referred, responded that he had found that, despite the Applicant's difficult personal exigencies, the decision of the Director, PMD, was made properly and was appropriate to the significance of the situation.

17. The Applicant filed an appeal with the Appeals Committee on May 26, 1995. The Appeals Committee in its report, dated November 8, 1995, recommended that the Applicant's claim be denied. The Committee concluded that Staff Rule 8.01 had been consistently applied in cases involving failure by a staff member to pay his or her U.S. taxes, as and when they become due, and that the disciplinary measures inflicted on the Applicant were identical to those inflicted on Bank staff who had committed misconduct identical to that committed by the Applicant. The Committee, however, noted that the disciplinary measure imposed on the Applicant appeared to be quite disproportionate to the offense committed by him, particularly in light of the recent decisions of the World Bank Administrative Tribunal on the issue of proportionality. By letter to the Applicant, dated November 9, 1995, the Senior Vice President, Management and Personnel Services, accepted the Committee's recommendation that the Applicant's claims be denied.

THE APPLICANT'S MAIN CONTENTIONS

18. The Applicant's use of the tax allowance failed to constitute misconduct and, therefore, his termination by the Bank was wrongful.

19. A nexus must exist between the employee's alleged misconduct and the injury to the Bank's reputation. In this case no such nexus exists since the Applicant's failure to pay his taxes is off-premises and involves a third party (the IRS), not the employer (the World Bank Group).

20. The Applicant's tax allowance constitutes his earnings and the Bank cannot determine the propriety of a Bank employee's use of his own monies; therefore, the Applicant's failure to use all his tax allowances to pay his taxes does not violate Staff Rule 6.04, paragraph 3.02.

21. The Bank violated U.S. public policy by discharging the Applicant upon its receipt of the attempted IRS lien because the Bank ensured that the Applicant would be unable to pay his taxes, thereby depriving the IRS of those monies and threatening the "special relationship" with the U.S. that the Bank seeks to protect.

22. The Bank imposed a significantly disproportionate discipline to the Applicant's alleged misconduct and failed to consider the factors delineated in Staff Rule 8.01, paragraph 4.01, on a "case-by-case" basis.

23. Much of the delinquency from 1993 stemmed from the Bank's error, not the Applicant's, because the Bank improperly placed money in his bank account in September 1993, then, after the Applicant had spent the money, insisted he pay it back when it realized the error.

24. The Applicant was coerced into signing the tax allowance certificates, because he faced an improper warning of discharge if he acknowledged in writing that he was behind in his back taxes, and because he had not been warned that signing the certificates when he was behind in taxes, even though he had so signed them in 1984 and 1985, was a dischargeable offense.

25. The Applicant made the following pleas:

(i) rescission of the Respondent's decision to terminate the Applicant's employment;

(ii) reinstatement of the Applicant to his former position with all within-grade and structural increases he would have received had his employment not been wrongfully terminated;

(iii) back pay with interest, from the date of the Respondent's wrongful termination of the Applicant's employment to the date he is reinstated;

(iv) restoration of all employment benefits to the level they would have been, had his employment not been wrongfully terminated;

(v) alternatively, payment of compensation in the form of back pay and employment benefits from February 10, 1995 to the Tribunal's decision and benefits equivalent to a redundancy package to include: (a) one and one-quarter month's net pay for each complete year of his 16 years continuous service; (b) six months' administrative leave with an option for training not to exceed a cost of three months' net pay equivalent; and (c) a two-month termination period;

(vi) attorney's fees in the amount of U.S.\$4,000 and other costs and expenses; and

(vii) any other relief the Tribunal deems appropriate and just.

THE RESPONDENT'S MAIN CONTENTIONS

26. The nature of the Applicant's misconduct included a misrepresentation regarding such serious matters as his tax obligations and the use to which he had put his tax allowance payments; the misrepresentation was made knowingly so that the Applicant would continue to receive these cash payments from the Respondent. This constituted fraud committed on the Respondent, which the Respondent took, justifiably, very seriously.

27. Payment of taxes on Bank income is not an "off-duty conduct" or "off-premises," as the Applicant is trying to make it appear, but an obligation which is expressly imposed on all staff members receiving tax allowances, such as the Applicant, under Staff Rule 6.04, paragraph 2.01, and constitutes these staff members' terms of appointment and conditions of employment by the Bank.

28. The Respondent has fully complied with the requirements of Staff Rule 8.01, paragraph 4.01, to decide on appropriate disciplinary measures on a case-by-case basis, by taking into account the various factors set forth in that paragraph.

29. The Applicant's misconduct was a second offense and this second offense extended over a period of at least three different calendar years.

30. When the Applicant again used his tax allowances for purposes other than payment of his tax obligations in 1992 and 1993 and informed the Respondent that he had paid all his taxes during those years, he had been fully warned of the likely consequence of these actions and statements.

31. If, at the time an erroneous deposit had been made to the Applicant's bank account, he had exercised ordinary caution and not spent the deposit before ascertaining where the money had come from, he would not have incurred any debt obligation in respect of this deposit.

32. Any failure by the Respondent's staff members to pay their taxes to the relevant tax authorities could have a seriously negative impact on the Respondent's relations with the countries where these tax authorities are located as well as its relations with other member countries and would otherwise reflect adversely on the reputation or integrity of the Respondent.

CONSIDERATIONS

33. The essential facts in the present case are not in dispute. The Applicant, a United States national entitled to tax reimbursement, on three occasions falsely completed Tax Allowance Certificate forms applying for such reimbursement and consequently received from the Bank sums which he should have used to pay his taxes, but did not. The Applicant also fell into arrears with the payment of both his Federal and his State income taxes, a situation which led the IRS in 1994 to request the Bank to attach part of the Applicant's salary to meet his obligations. Having regard to its immunity, the Bank declined to comply with this request. The Applicant had committed a similar violation of the Bank's Rules in 1985 and had at that time been warned in writing that a further occurrence of the same kind could lead to the termination of his employment. On the second occasion, the Bank terminated the Applicant's employment.

34. Staff Rule 6.04 on "Tax Allowance" provides that "all staff members who are citizens of the United States... may apply for a tax allowance." The same Rule provides in paragraph 2.01 that "[a] staff member is required by the Bank Group to pay timely all income and social security taxes due from time to time.... The payment of such taxes is a condition of the staff member's receiving a payment of tax allowance or social security tax reimbursement." It is evident that the Applicant acted in breach of this condition by diverting to his own use sums paid to him by the Bank for the sole purpose of meeting his tax obligations.

35. The Applicant presents two principal arguments. The first disputes the Respondent's view that the Applicant's conduct constituted serious misconduct under Staff Rule 8.01. The second contends that the severity of the penalty imposed by the Bank was disproportionate to the offense committed.

36. As to the first of these contentions, the Tribunal cannot in any way lend its support to the view that behavior of the kind admitted by the Applicant is other than serious misconduct. The Tribunal entirely shares the Bank's concern that staff members entitled to tax reimbursement should honestly fulfil their duties to the tax authorities in the United States. This is a matter in which the Bank has a legitimate interest and is not a matter exclusively between the staff member and the tax authorities. Nor, as the Applicant has argued, is the reimbursement of tax made by the Bank to the staff member to be regarded simply as part of the staff member's income. It is a payment directly related to the staff member's United States tax obligations and its payment is clearly absolutely conditional upon the amount being used by the staff member for the payment of tax and for no other purpose. It is, therefore, appropriate for the Bank to regard as serious misconduct the Applicant's misuse of the payments made to him for the purpose of tax reimbursement as well as the making by the Applicant of false statements to the effect that the payments had been or would be used for the purpose of paying tax.

37. As to the argument that the disciplinary measure imposed by the Bank is disproportionate to the wrong done, the Tribunal first recalls Staff Rule 8.01, paragraph 4.01, of the Staff Rules. This provides that:

Disciplinary measures imposed by the Bank Group on a staff member shall be determined on a case-by-case basis, taking into account the seriousness of the matter, extenuating circumstances, the situation of the staff member, the interests of the Bank Group and the frequency of conduct for which disciplinary

measures may be imposed....

This provision is reflected in the concept of “proportionality” which is well established in the case-law of this and other administrative tribunals.

38. In *Gregorio*, Decision No. 14 [1983], the Applicant was dismissed because of unsatisfactory performance, particularly in failing to respond to the Bank’s effort to secure a trial reassignment. In applying the test of proportionality, the Tribunal found that there was in that case “some reasonable relationship between the staff member’s delinquency and the severity of the discipline imposed by the Bank.” (para. 47). Likewise, in *Georgiev* the Tribunal held that the Bank’s decision to terminate the Applicant’s appointment, on the ground that her “performance in the evaluation period has fallen far short of the requirements of the division and of the stated performance improvement objectives... was not significantly disproportionate to her offence.” (*Georgiev*, Decision No. 96 [1990], para. 40).

39. In *Carew*, Decision No. 142 [1995], the Applicant was dismissed on the ground that he had falsely obtained payments for overtime claimed but not worked. After having considered not only the factors enumerated in Staff Rule 8.01, paragraph 4.01, but also the long service of the Applicant, his diligent performance and the fact that the Applicant’s employment did not involve higher management responsibilities, the Tribunal concluded that the termination of employment was not proportionate to the Applicant’s misconduct. The same conclusion was reached in *Planthara*, notwithstanding the fact that the Tribunal found that “intent to defraud the Bank and knowledge of falsity were present in the overtime claims submitted by the Applicant” (*Planthara*, Decision No. 143 [1995], para. 30). The Tribunal took into consideration the same factors as were mentioned in *Carew*.

40. The record shows that the Bank did indeed give consideration to some factors relevant to the assessment of the proportionality of the punishment to the offense. The recommendation made by the Ethics Officer to the Director, PMD, on January 26, 1995 stated that account had been taken in particular of the fact that this was a second offense, that fraud was involved, that the total amount owing was substantial and that the combined income of the Applicant and his wife (also employed in the Bank Group) was substantial. But at that stage no indication was given that other relevant personal circumstances of the Applicant had been considered. Subsequently, the Applicant, in requesting administrative review of the Bank’s decision, set out these circumstances in great detail including such matters as his loss of overtime income; the payroll error that had led to the deposit of a substantial sum of money to his account with the Bank which had to be repaid, notwithstanding the fact that the Applicant had in the meantime spent it; the Applicant’s heart ailment and attendant expenses; and his onerous family obligations. When eventually the decision to terminate was confirmed, the Bank stated that it had taken into account the personal circumstances of the Applicant in the light of Bank policy and past practice.

41. This determination by the Bank is, however, not conclusive and the Tribunal is entitled to review that determination and assess whether the conclusion that the Applicant’s employment be terminated was reasonably related to the nature and severity of the offense. In this respect the Tribunal, taking into account its own past practice as shown in cases such as *Carew* and *Planthara*, finds itself obliged to reach a conclusion differing from that of the Bank.

42. The Tribunal has set out earlier in this decision its agreement with the Bank’s view that the Applicant was guilty of serious misconduct. To conclude, however, as the Bank did, that the appropriate sanction for the Applicant’s actions should be his dismissal appears, in the circumstances, to be going too far. The Tribunal notes in particular three factors to which the Bank does not appear to have given sufficient weight. One was the Applicant’s seventeen years of service in the Bank. The second was that the Applicant, without prompting from the Bank, and before his misconduct was brought to the attention of the Bank had entered into agreements with the U.S. IRS and the State of Virginia tax authorities for a schedule of deferred payments of tax--a fact which indicates that the Applicant was making a genuine effort to cope with his tax payments. The third was that the initial decision on the part of the Bank to dismiss the Applicant was taken at the same time as the Bank was seeking to reduce the number of staff employed in its printing services and that, if the Bank had adopted any

other sanction than dismissal, the Applicant would in November 1994 have been able to obtain a separation package involving some element (not detailed in the record) of redundancy payment additional to the separation allowance actually paid to him, which could, presumably, have helped the Applicant to meet his outstanding tax obligations. Moreover, it has to be remembered that, despite the disciplinary measure imposed upon the Applicant by the Bank, he was still obliged to find the funds necessary to meet his undischarged tax obligations.

43. The Tribunal has not overlooked the fact that the misconduct of the Applicant occurred in total four times. On the first occasion, in 1985, he was reprimanded and warned. That was some six years before the earliest of the last three occasions. These latter may reasonably be regarded as a single continuous offense arising out of a snowballing of tax obligations. The Applicant should have told the Bank of his predicament and was at fault in not doing so. Nonetheless, when the Tribunal compares the facts in the present case with those in *Carew* and *Planthara* it sees sufficient similarities between them (though acknowledging also that there are some differences) to make it difficult, on balance, to reach a conclusion different in this case from those in those two earlier cases. The Tribunal emphasizes the importance of a staff member in a tax difficulty informing the Bank of his problem rather than seeking to conceal the problem by signing fraudulent Tax Allowance Certificate forms. Such concealment only enhances the culpability of such conduct.

44. The Tribunal recalls the range of other sanctions listed in Staff Rule 8.01, paragraph 4.02, that were available to the Bank and could have been used consistently with allowing the Applicant to take early retirement. The Tribunal sees in the Bank's selection of the most extreme of these measures an excessive harshness which the circumstances, looked at as a whole, did not warrant. The Tribunal's conclusion is, therefore, that in respect of the question of proportionality, the present application is well-founded. Article XII (1) of the Tribunal's Statute accordingly requires the Tribunal to order rescission of the decision contested or the specific performance of the obligation invoked. At the same time, the Tribunal is required to fix the amount of compensation to be paid to the Applicant for the injury sustained should the President of the Bank decide that the Applicant should be compensated without further action being taken in the case.

45. The rescission of the Respondent's decision to terminate the Applicant's employment entails certain logical consequences including his reinstatement in his former position and the restoration of his employment benefits to the level they would have been had his employment not been terminated. But if this is done it carries with it the obligation of the Applicant to repay to the Bank the sums received by him from the Bank in connection with his separation as well as the revival of the Bank's right to impose upon the Applicant a disciplinary measure proportionate to the Applicant's established misconduct.

46. Should the President of the Bank decide that the Applicant shall be compensated without further action being taken in the case, the Tribunal fixes the amount of compensation to be paid to the Applicant at \$25,000 additional to the payments already made to him at the time of his separation.

DECISION

For the above reasons, the Tribunal unanimously decides:

- (i) to order the rescission of the decision of the Respondent terminating the employment of the Applicant, with the consequences described in paragraph 45 above;
- (ii) should the President of the Bank decide within thirty days of the notification of the judgment that the Applicant shall be compensated without further action being taken in the case, to fix the amount of compensation to be paid to the Applicant at \$25,000;
- (iii) that costs in the amount of \$3,000 are to be paid to the Applicant; and
- (iv) that all other pleas be dismissed.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At Washington, D.C., April 11, 1997