Decision No. 272

C,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of Francisco Orrego Vicuña, President, Thio Su Mien and Bola A. Ajibola, Vice Presidents, and A. Kamal Abul-Magd, Robert A. Gorman, Elizabeth Evatt and Jan Paulsson, Judges, has been seized of an application, received on January 16, 2002, by C against the International Bank for Reconstruction and Development. The Applicant's request for anonymity was granted by the Tribunal, pursuant to an Order of February 8, 2002. In *C*, Decision No. 268 [2002], the Tribunal denied the Bank's request to declare the application inadmissible for lack of jurisdiction. The parties thereafter submitted their written pleadings on the merits. A request by the Applicant for depositions and for oral proceedings was denied by the Tribunal. The usual exchange of pleadings took place and the case was listed on September 20, 2002.

2. The application alleges that the Respondent transmitted information to certain public authorities in violation of Staff Rule 2.01, para. 5.01, and raises related questions of due process. A second complaint relates to monies allegedly due to the Applicant by the Bank, including unpaid benefits.

3. The Applicant's career in the Bank, the events leading up to his termination, the referral of documents to the United States Department of Justice (DOJ), the Applicant's complaints to the Appeals Committee, and the Committee's report on the matter, were all discussed by the Tribunal in the jurisdictional decision referred to above and will not be repeated here.

4. In his application to the Tribunal, the Applicant contests the following decisions of the Respondent: (i) to refer the case to the DOJ for prosecution without notifying him; (ii) to deny him an accounting of reimbursable monies and to withhold compensation; (iii) to deny him access to relevant documents and evidence necessary to his defense; and (iv) to withhold from him information in his personnel file while failing to inform him of its transfer to third parties.

5. The Tribunal must first turn to the applicable Rule. Staff Rule 2.01, para. 5.01, provides as follows:

> The following staff records and personnel information may be released to persons outside the Bank Group without the authorization of the staff member concerned:
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> (a) basic employment data such as name, employment status, employment dates, job title and department;
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> (b) compensation and pension information released to member governments for tax purposes;
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> (c) pension records made available to a consulting actuary;
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> (d) visa status of staff and dependents reported to governmental authorities;
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> (e) pension, benefits and salary records made available to external auditors and accountants;
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> (f) information necessary for processing medical, workers' compensation and other insurance claims;
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> (g) benefits information necessary to coordinate exchange or joint benefits programs, and information

necessary to coordinate benefit policies with other international organizations; and

(h) information on a staff member's salary, accrued separation grant, accrued pension benefits, and designated pension and insurance beneficiaries released consistent with a final court order or request from a judicial or civil authority in cases of divorce or family maintenance to which a staff member has not responded within 30 days of the Bank Group bringing the request or order to the staff member's attention.

The Bank Group will not release other personnel information to outside parties, including member governments and their representatives, without the staff member's knowledge, except in cases of emergency situations or upon advice from the Legal Department of the Bank to release information for legal proceedings or law enforcement efforts. In such cases, the staff member will be notified as soon as reasonably possible of what information is released and to whom. (Emphasis added.)

6. As indicated by the Tribunal in its decision on jurisdiction (*C*, Decision No. 268 [2002]), the merits phase of the case is in essence concerned with the interpretation of that Staff Rule, and particularly whether: (i) the information in question was validly withheld from the Applicant; (ii) this situation fell within the exceptions defined in the Rule; and, if so, (iii) it was "reasonably possible" to give the notification required by that Rule.

7. The Tribunal explained in its decision on jurisdiction that the disclosure requirement imposed upon the Bank by this Staff Rule covers both the fact of a referral and the content of what is being referred. It is clear from the record that the Applicant was aware of the fact of a referral being made to the DOJ. This was not the result of specific notification to him but transpired from the general context in which the Bank conducted its investigation and pursued its cooperation with United States and Swedish authorities. Because the Applicant was informed of this referral, his complaint in this connection cannot be sustained.

8. The content of the referral is a different matter. The Tribunal concluded in its decision on jurisdiction that the Applicant became only partially aware on May 14, 2001 of what information had been released to the DOJ. The Applicant's information emerged largely through communications between his attorney and the DOJ. In order to determine the precise content of the information released, the Tribunal, in its decision on jurisdiction, directed the Bank to provide a list and a comprehensive description of the documents concerned. Annex 5 of the Respondent's Answer on the Merits corresponded to this directive, albeit rather vaguely. The Respondent appears not to have understood that this list and description were to be made available to the Applicant. The Executive Secretary of the Tribunal effectively made the list and description available to the Applicant on July 30, 2002, when transmitting the Respondent's Answer on the Merits to the Applicant.

9. The Tribunal also directed the Respondent to provide to the Tribunal a copy of the full set of documents included in its referrals for the Tribunal's examination *in camera*. The Respondent complied with this request. The Tribunal has carefully examined the disclosed material, and determined that there are various types of documents referred by the Bank to the DOJ: personnel documents *stricto sensu*, such as appointments, salaries, and the like; operational documents, such as contracts made with consultants and suppliers, terms of reference for given projects and other documents concerning the administration of projects and grants; and personal documents, such as bank account statements, records of checking transactions, credit card debits and the like. There are also detailed notes of interviews with the Applicant and other staff members and related material. The Tribunal must now discuss the connection of each of these categories with the meaning and scope of the applicable Staff Rule 2.01.

10. Staff Rule 2.01 defines a category of documents exclusively concerned with personnel matters which may be referred by the Bank to outside parties without the authorization of the staff member concerned. The Applicant's personnel record falls mainly under paragraph (a) of this Rule. A copy of this very record was provided to the Applicant's attorney four days after its release to the DOJ. Even assuming that the personnel record contained elements not specifically included in paragraph (a) of the Staff Rule, notification of the release of these documents was made to the Applicant "as soon as reasonably possible" as required by the last paragraph of the Rule. The record examined by the Tribunal contains the normal elements of personnel

information. Nothing supports the Applicant's allegations that an incomplete file was referred to the DOJ, or that information in this file was withheld from him.

11. A different category of documents involves elements such as travel arrangements, hotels, expenses and similar records. Even if not expressly itemized in the Rule, such documents relate to the official business of the staff member, and therefore clearly qualify as "other personnel information." The Legal Department advised their release "for legal proceedings or law enforcement efforts" as envisaged in the Staff Rule. The only remaining question is whether the Applicant was informed "as soon as reasonably possible" of the release. Apparently he was not. This omission, however, could hardly jeopardize the Applicant's defense before either the Bank or the DOJ since a copy of this information must have been in the Applicant's possession as it originates in his own submissions to the Bank.

12. Yet another category of documents referred to the DOJ concerns operational records of the Bank. The Bank has rightly argued in this respect that Staff Rule 2.01, para. 5.01, does not apply to this type of records, as they are not "personnel" information. In examining the operational records before it, the Tribunal is satisfied that nothing in them relates to the accusations against the Applicant. It follows that such documents can be released, as in fact they were, without the knowledge of the staff member and without notifying him thereof.

13. The World Bank Policy on Disclosure of Information of March 1994, as revised effective 2002, establishes constraints as to the disclosure of documents that go materially beyond the "personnel" type of document envisaged under the Rule. In particular, the following constraints are relevant in the instant case: (i) documents and information provided to the Bank only "on the explicit or implied understanding that they will not be disclosed outside the Bank, or that they may not be disclosed without the consent of the source; or even, occasionally, that access within the Bank will be limited" must be treated accordingly by the Bank; (ii) documents and records that are subject to the attorney-client privilege, or whose disclosure might prejudice an investigation, shall not be made publicly available, this constraint reflecting a general principle of privileged information even though it was explicitly introduced only in 2002; and (iii) appropriate safeguards must be maintained in order to protect the personal privacy of staff members and the confidentiality of personal information about them, all in accordance with the Principles of Staff Employment.

14. The disclosure of "personal" information which is not part of a staff member's "personnel" information must accordingly be analyzed in the light of the disclosure policy just discussed. Various records containing personal information relating to the Applicant were referred to the DOJ. This is most notably the case with respect to bank and credit card statements, records of checking transactions and the like. All such information was made available to the Bank by commercial banks and other companies specifically named with the express authorization of the Applicant.

15. Staff Rules do not expressly allow for the disclosure of such "personal" information, nor do they forbid it. The authorization given by the Applicant to make this information available to the Bank was not expressly conditioned. Can it be understood that there was an implied understanding that it should not be disclosed outside the Bank pursuant to Bank policy? One factor in considering this question is that the disclosed information was fully available to the Applicant himself, as it originated in his own personal business, and his ability to defend himself was not jeopardized by the disclosure. Another is that the DOJ could in any event have subpoenaed the records in the ordinary process of discovery available in the United States legal system. An implied condition against disclosure could not prevent such discovery. In the light of the nature of these records, their release was thus not precluded by the terms of the Bank's policy in the context of this kind of investigation. True enough, it would have been possible to notify the Applicant of the disclosure sooner, but here again the omission has not caused specific injury to the Applicant.

16. The documents released to the DOJ included yet another category: summaries of various interviews conducted in the context of the Bank's investigations, including interviews with the Applicant and other persons (inside and outside the Bank) implicated in the relevant events. The documents released also included other materials that came out in the course of these interviews. This information referred specifically to the Applicant and to his alleged statements or admissions. The nature of these documents, all of which relate to the

investigation undertaken by the Bank's Anti-Corruption & Fraud Investigation Unit (ACFIU), was manifestly confidential within the Bank. Many of them were indeed marked, for example, "Privileged & Confidential, Attorney Client Privileged, Attorney Work Product." As noted above, the policy on disclosure as presently written (i.e. the 2002 version) expressly excludes this kind of information from public disclosure. Such express terms were not contained in the 1994 version of this policy of privilege, but the Tribunal notes that non-disclosure derives from a well-established rule of privilege, particularly in the legal system of the United States.

17. The documents concerned do not derive from a relationship between the Applicant and his private attorney (which would certainly be excluded from disclosure), but from a relationship between the Applicant and internal and external investigators. It is quite evident that the confidential status or marking of the documents does not preclude their release to a third party investigating the matter. That release, however, may well affect the Applicant's ability to defend himself, as shall be discussed next. This is a matter that essentially is governed by principles of due process and fair treatment (Principles of Staff Employment, Principle 2.1).

18. The question that the Tribunal must answer is whether these kinds of potentially incriminating documents can be referred to an outside party, given both the absence of a specific rule authorizing such disclosure and the presence of a policy (as of 2002) constraining such disclosure. Because the documents in question relate specifically to the investigation, and the constraint focuses more on public disclosure than on presumably confidential disclosure to national authorities, the Tribunal concludes that such release is permissible, despite the absence of a rule authorizing release, in the specific context of an investigation relating to potential criminal offenses and their prosecution. In this respect, the same criteria that Staff Rule 2.01, para. 5.01, applies to "other personnel information," which may be released upon the advice of the Legal Department for legal proceedings or law enforcement efforts, should also apply even if they are not related to "personnel" matters.

19. But that is not the end of the matter. The Tribunal must also consider whether principles of due process require that the Applicant have access to the privileged documents disclosed to the DOJ. The Tribunal has been able to determine that the report of the investigation, the records of conversations, and other materials may have a combined effect of implicating the Applicant in offenses of a serious criminal nature, and indeed record purported admissions made by him. While the other categories of documents discussed above were accessible to the Applicant, he could have had no knowledge of these privileged records, not even of the records of his own interviews.

20. In its rejoinder, the Bank raises the argument that the Applicant was aware by February 12, 2001, of the fact that a referral had been made to the DOJ and that he "must have known the general contents of the referral" by that time. The basis for this assertion is an admission by the Applicant's counsel that he reviewed an "investigation report" in February 2001. The Bank invokes this date in support of its contention that the Tribunal's decision on jurisdiction based on the May 14, 2001 date should be revised and the application dismissed. The Tribunal, however, finds that this is not a new fact that could justify changing its earlier decision on jurisdiction. The question was, and remains, not whether the Applicant was informed of general aspects of the referral, or when the Applicant was informed of the referral *per se*, but rather whether the Applicant was aware of the specific information transferred as part of such referral.

21. The need to provide an accused staff member with substantive notice of the information proffered against him or her is demonstrated by the facts of this case. The Respondent has stated that the transfer of documents to the DOJ was performed gradually in response to requests by DOJ officials. Presumably the Applicant's exposure to national authority grew along with the DOJ's investigation. The Respondent cannot under such circumstances properly claim that the Applicant was aware of his position (constructively or otherwise) by the date on which such transfers began. To the contrary, the Applicant could have been aware of his true position only by the date on which such transfers were completed, and then only if the Respondent had provided him with the evidence given against him.

22. The Tribunal notes that there appear to be at least several documents which could potentially be identified as the "investigation report." It is the Respondent's later document transfers to the DOJ which form the gravamen of the Applicant's objections. It is clear that the Applicant was not provided with copies or notice of

these latter documents in a timely manner.

23. The Tribunal set out detailed standards for the handling of misconduct under Staff Rule 8.01 in *King*, Decision No. 131 [1993]. The Tribunal assigned particular importance to the conduct of the investigation, to the right of the accused staff member to respond, and to questions of due process. In respect of the right to respond, the Tribunal specifically held that "the entitlement of the staff member to respond presupposes an exact knowledge of the charge made against him and extends to the right to give a properly considered answer to, or comment upon, every aspect of the case made against him." (*Id*. at para. 36.)

24. The Tribunal is not unsympathetic to the argument made by the Respondent that during investigations of a criminal nature there is on occasion a danger that the accused might attempt to destroy evidence, flee the jurisdiction, or harass and intimidate witnesses thus justifying withholding information or delaying notification to the staff member. In the instant case, the Applicant appears to have cooperated fully with both the Bank and the DOJ. Nor could the documents concerned be in any way destroyed or tampered with by the Applicant as they were already in the hands of the Bank and, later, of the Department of Justice. The unspecific arguments made by the Respondent in this respect to justify the withholding of documents and other evidence from the Applicant are unpersuasive in the circumstances of the case.

25. Had the Bank decided not to disclose any part of the investigation file, it might have had an argument that there was no reason to release it to anyone, including the Applicant. But once the Bank decided to refer this file to an outside party for possible prosecution, the Applicant became entitled to examine such documents since they contained specific accusations against him, particularly those that purport to summarize conversations with him. The Tribunal notes moreover that none of these documents bears the signature of the Applicant as evidence of his having admitted or accepted its conclusions. Confidentiality is one thing, violation of due process quite another. The ACFIU is not exempt from the strict observance of the Bank's rules, including principles of due process, particularly where they concern the rights of staff members. The Applicant has rightly argued that in criminal investigations, the standards applied must be construed more strictly than would be the case in matters that do not so seriously affect a staff member's reputation and employment prospects. The Tribunal will accordingly order that specific disclosed documents be made available to the Applicant.

26. As in the jurisdictional phase, the Bank has raised the question of the Tribunal's consideration of administrative matters internal to the Bank while law enforcement agencies are conducting a criminal investigation of the same matter. Observance of due process within the Bank does not necessarily prejudice national criminal investigations. To the contrary, the accused might be better able to address the questions put to him or her by national authorities if he or she has all relevant information concerning him or her, and does not thereby have to engage in guesswork – as has largely happened in this case. Strict enforcement of due process will also likely avoid accusations of a general nature unsupported by specific evidence that could mislead the national authorities. The Tribunal has reservations with respect to unnecessarily secretive procedures, which tend to result in unfair accusations and investigations.

27. The Tribunal decided in the jurisdictional phase that it could determine whether the claim for monies allegedly owed by the Bank to the Applicant should be governed by Staff Rule 11.01, which allows for a three-year time period for such claims, or by Staff Rule 8.01, which provides for deductions or forfeitures from pay imposed as disciplinary measures. In the Respondent's view, any claim under disciplinary measures should fall under Staff Rule 8.01 and thus the normal ninety-day period.

28. The Applicant errs in arguing that in order to reach a determination on this point, the Tribunal must first consider whether there was misconduct. This would be the equivalent of reopening the whole discussion on the issue of termination, which the Tribunal held previously to be time-barred. Whether the Applicant was rightly terminated or not, and whether the reasons for such action were sufficient, is not for the Tribunal to consider in this case. The question before the Tribunal is whether the monies allegedly owed to the Applicant are included within those forfeitures allowed under Staff Rule 8.01. If the answer is affirmative, Staff Rule 8.01 applies; if it is negative, Staff Rule 11.01 applies.

29. After having examined the nature of the monies claimed by the Applicant, the Tribunal comes to a mixed answer. There are first monies concerning the Applicant's travel for the Bank, and related expenses. These monies must be reimbursed by the Bank because they relate to work performed by the Applicant for the institution. Staff Rule 11.01 governs these claims. In the Applicant's estimate, these monies amount to US$1,600, a figure that has not been disputed as such. Although there has been disagreement about the existence of records concerning these alleged expenses, those submitted by the Applicant appear to be sufficient to establish that the alleged travel took place. In any event, either the Bank or the travel agency will have copies of the pertinent documents.

30. The next issue relates to accrued annual leave. As held by the Tribunal in *Moses (No. 2)*, Decision No. 138 [1994], annual leave is a part of the compensation of a staff member. If this compensation were deferred, as permitted under the Staff Rules, the Respondent must in due course pay it. Otherwise, the Respondent would retain part of the compensation to which the Applicant has a vested entitlement. Here again, Staff Rule 11.01 governs. This amount is estimated by the Applicant at US$25,200, a sum apparently not disputed by the Respondent.

31. Finally, as for the separation grant (in the amount of US$20,300), it is not a part of the Applicant's compensation or an amount related to operational expenses. It is an additional benefit which the Rules provide for staff members leaving the Bank. This is precisely the kind of separation benefit that the Bank can lawfully withhold from a staff member in case of termination under Staff Rule 8.01 ("Disciplinary Measures"). The claim for this benefit is thus governed by the ordinary ninety-day exhaustion rule rather than the three-year time period established by Staff Rule 11.01, and is therefore time-barred.

32. Having determined the issues of principle, the Tribunal turns to the question of remedies. There can be no doubt that the Bank's withholding of certain information from the Applicant, simultaneous with the referral of such information to the DOJ for prosecution, has impaired the Applicant's ability to defend himself. The process was contrary to the standards of due process applicable to accusations of misconduct against staff members as laid down in the Staff Rules and clarified by the Tribunal on more than one occasion. The Tribunal will accordingly award damages to the Applicant.

33. While the issue of proper termination is not before the Tribunal, there are a number of matters relating to the investigation which give rise to legitimate concerns on the part of the Applicant, including most prominently the accusations made against him before national prosecuting authorities. To allow the Applicant to address such concerns, as already indicated in paragraph 25 *supra*, the Tribunal will order the production of specific documents essential for a proper understanding of the accusations and for the preparation of the Applicant's defense.

34. The Tribunal will further order the reimbursement of certain monies due to the Applicant by the Bank as operational travel expenses, compensation for accrued annual leave, and damages.

35. Appropriate costs will also be awarded.

Decision

For the above reasons, the Tribunal decides that:

(i) the Respondent shall pay the Applicant compensation in the amount of US$150,000 net of taxes;

(ii) the Respondent shall make available to the Applicant the documents marked SWC 1 through 182, SWC 00183 through 00256, SWC 00274 through 00279, and SWC 2820 through 2868, for use only with regard to the current investigation and related proceedings;

(iii) the Respondent shall reimburse the Applicant the amounts of US$1,600 due for travel expenses and US$25,200 due as compensation for accrued annual leave;

(iv) the Respondent shall pay the Applicant costs and expenses in the amount of US$12,000; and

(v) all other pleas are dismissed.

/S/ Francisco Orrego Vicuña
Francisco Orrego Vicuña
President

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

At Washington, D.C., September 30, 2002