

Decision No. 206

James McKinney (No. 2),
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on October 27, 1997, by James McKinney against the International Bank for Reconstruction and Development. The Tribunal granted the Respondent's request to separate jurisdictional issues from the merits, and pleadings were filed with respect to those issues. In McKinney (No. 2), Decision No. 194 [1998], the Tribunal denied the Bank's request to declare the application inadmissible for lack of jurisdiction. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of Robert A. Gorman (President of the Tribunal) as President, Thio Su Mien (a Vice President of the Tribunal), A. Kamal Abul-Magd and Jan Paulsson, Judges. The usual exchange of pleadings took place. The case was listed on February 17, 1999.

2. The Applicant is requesting the Tribunal to order the rescission of the Respondent's decision dated July 14, 1997 to accept the recommendations of the Appeals Committee denying his request for relief for alleged misconduct and sexual harassment by his former supervisor. He is also claiming compensation in the amount of one million U.S. dollars (U.S. \$1,000,000) in addition to 149,400 French francs for attorney's fees.

3. The Applicant joined the Bank on April 18, 1994 as a full-time temporary employee. His contract was to expire on April 17, 1995, but was extended to April 30, 1996. On his recruitment, he was assigned to the Office of the Vice President, Environmentally Sustainable Development ("ESDVP") as a Staff Assistant. His supervisor was Ms. X, Special Assistant to the Vice President, ESD.

4. Some months after his recruitment, the Applicant started complaining about the attitude of Ms. X and the way she treated him. On November 14, 1994, he sent a memorandum to the Assistant to the Vice President, ESD, specifying certain complaints he had concerning Ms. X, including her complaining to him that he did not do enough for her. He stated that on October 13, 1994, he had informed the Senior Adviser of ESDVP of the difficulty and challenge he was facing as a result of working with Ms. X. He accused Ms. X of using verbal abuse and threats with phrases such as "do it now or you won't be working here for long."

5. On January 9, 1995, the Applicant sent a memorandum to the Vice President, ESD, seeking his assistance in resolving a previous discussion they had had regarding Ms. X. He stated that as a result of the way she treated him he had become "a nervous, mental wreck from the harassment and verbal abuse [he had] taken in the last few days and over the past ten months."

6. On July 17, 1995, the Applicant sent a written complaint to the Senior Adviser of ESDVP as his "final plea for help in resolving this ongoing personnel" problem. In his complaint, he accused Ms. X of keeping him at work after his scheduled time of departure causing him to miss a flight he intended to take the same day, thus losing some three-hundred-and-fifty U.S. dollars (U.S. \$350.00).

7. On September 27, 1995, the Human Resources Counselor spoke with the Applicant at the request of the Ombudsman. The Applicant indicated to her that on September 26, 1995, Ms. X had physically clenched him, had threatened him and had used obscene and offensive language towards him. The Human Resources Counselor immediately related the Applicant's allegations to the Ethics Office and the Applicant was placed on paid administrative leave from September 27 to October 31, 1995.

8. On September 29, 1995, the Applicant sent a formal complaint to the Ethics Office against Ms. X, the subject of which he described as "Sexual Harassment and Verbal Abuse Complaint." In the complaint, the Applicant gave a detailed account of certain incidents with respect to his previous allegations relating to the abusive treatment he received from Ms. X. The most serious of such incidents took place, according to the Applicant, on September 26, 1995. He alleged that on that day Ms. X abused him verbally, to which he reacted by suggesting that he and Ms. X should discuss the matter with the Vice President, ESD. The Applicant alleged that Ms. X's reaction to his meeting with the Vice President was another round of anger and verbal abuse followed by physical assault of a sexual nature.

9. On October 10, 1995, the Ethics Officers met with Ms. X, presented to her in writing the Applicant's allegations and requested that she provide a written response by October 24, 1995. They informed her that an investigation would be undertaken under Staff Rule 8.01 to determine whether any actions on her part amounted to misconduct.

10. By a written statement dated October 23, 1995, Ms. X responded to the Applicant's allegations. She categorically denied the allegations of sexual, verbal and physical abuse, and characterized the allegation of physical assault as a "malicious fabrication of the gravest kind." She further indicated that stress was "the norm" in ESDVP and that the Applicant had been under a lot of personal stress due to the poor health of his roommate and due to a severe and painful case of psoriasis, for which he needed frequent treatment. She portrayed the Applicant as moody, manipulative, angry, discontented and frustrated. She confirmed, however, that she had taken the Applicant out to lunch "two or three times," occasionally with other people, that she and the Applicant had exchanged birthday and Christmas gifts, that she had brought flowers to him for Secretary's Day in 1995, and that she bought him a present whenever she traveled, as she had done for former secretaries.

11. The Applicant returned from administrative leave on November 1, 1995 and was temporarily reassigned to the Consultative Group on International Agricultural Research.

12. On November 7, 1995, the Applicant and Ms. X together met with the Ethics Officers, at which time the parties were interviewed. During the Applicant's interview, he first presented a prepared statement. In the statement, the Applicant indicated that during the past year and a half, he had been "mentally, verbally, physically, and sexually abused by [Ms. X], and allowed to be taken advantage of due to her power and her position." He gave a detailed account of the various forms of abuse to which he claimed he was subjected.

13. In his statement, the Applicant also reiterated an earlier allegation that Ms. X had committed fraud with a Statement of Expenses. The Applicant further contended: (i) that Ms. X's husband called 6 to 8 times a day and that this was disruptive (the Applicant asserted that he had "verified" and "confirmed" the calls "through the World Bank phone records for incoming and outgoing calls"); (ii) that Ms. X had claimed one-hundred-and-sixty-two U.S. dollars (U.S. \$162.00) in taxi fares for a trip she had not taken; (iii) that he was required to work overtime almost nightly, but usually left the office at around 6:15 p.m.; and (iv) that he had never referred to Ms. X as "sweetie." In response to a question from one of the Ethics Officers as to what additional witnesses should be interviewed, the Applicant stated: "You can interview everyone in the front office."

14. During her interview, in response to the Applicant's specific allegations, Ms. X stated: (i) neither the Vice President, ESD, nor the Senior Adviser in ESDVP had ever spoken to her about her working relationship with the Applicant; (ii) she welcomed a full office investigation as well as a review of her entire professional history; (iii) she never requested in advance that the Applicant work overtime, and he was properly paid whenever he did work it; (iv) she and the Applicant had on occasion harmlessly referred to each other as "sweetie" but she stopped when she found out that it bothered the Applicant; (v) it was not unusual for people in the office to occasionally use the words "dear" or "sweetie" or to put their hands on a colleague's shoulder or back, or to give hugs; (vi) she did impulsively rub the Applicant's shoulders one evening at work because the Applicant had a headache; (vii) she did on occasion touch the Applicant lightly on the shoulder in a collegial way; and (viii) she did swear on occasion, but never directed it at anybody.

15. On November 9, 1995, the Applicant contacted the Arlington, Virginia, Police Department to report that he had received the previous night four threatening phone calls seeking to intimidate him with reference to his complaints at the Bank. In a memorandum dated November 10, 1995, the Applicant informed one of the Ethics Officers and the Ombudsman about the alleged telephone calls. Three days later, the Applicant provided to the Ethics Officers the police case number and the name and badge number of the police officer who was handling his complaint. The Applicant indicated that, according to the officer handling the case, "no reports that are filed are released or anyone given a copy."

16. On December 8, 1995, the Ethics Officers interviewed the Applicant again for the purpose of clarifying some questions. In the course of that interview, the Applicant raised a new allegation that Ms. X had a practice of paying him "every two or three weeks" in cash or by check (U.S. \$20-40 at a time) "so that she could touch" him. On questioning from one of the Ethics Officers, the Applicant said that his lawyer and his bank had both told him that there was "absolutely no way" that he could get the checks. The Applicant further stated that he had not raised this allegation previously because he knew it would be "useless."

17. By a memorandum dated March 7, 1996, the Applicant was informed of the outcome of the investigation which had taken five (5) months and had involved interviews of twenty-three (23) staff members. The Ethics Office presented to the Applicant the following findings:

(a) there was some evidence that Ms. [X] had on a number of occasions been demanding and rude towards you and other staff. Those we interviewed said that this behavior was most prevalent during her first year in the Bank and that since then it has improved significantly. No one we spoke to characterized your relationship with Ms. [X] as being as bad as you had described. Witnesses did not support the allegation you made of verbal abuse and threats, nor did they report observing the tension and hostility you described existing throughout your working relationship with Ms. [X];

(b) some witnesses had heard Ms. [X] use mild swearing, and one reported hearing Ms. [X] use strong language, although the witness would not repeat the words themselves. Most witnesses said they had not heard Ms. [X] swear at all. There was also evidence that affectionate terms such as 'sweetie', 'dear' or 'honey' were used by both Ms. [X] and you, and that Ms. [X]'s use of these words was not aimed solely at you but was widely used by her. No one had witnessed use of the words 'cupcake' or 'honeybuns' by Ms. [X];

(c) there is no evidence that Ms. [X] was arbitrary in requiring your presence at work after normal working hours. Our understanding is that there is a system in place with staff available to undertake overtime work upon request and that no one is required to stay after hours;

(d) with regard to improper touching, Ms. [X] acknowledged that she occasionally touched people on the shoulder in a collegial manner and, as you know, Ms. [X] also acknowledged that she once massaged your neck and shoulders at your desk. Most witnesses had not observed touching by Ms. [X] and those who had, agreed that the touching was of a collegial nature. No supporting evidence has been found of Ms. [X] grabbing you by the arm on any occasion, or touching you aggressively; nor was there any supporting evidence of Ms. [X] improperly touching you by passing her hand over your crotch or patting your butt;

(e) none of the witnesses saw or heard anything with regard to the alleged incident of physical grabbing on September 26th, 1995;

(f) our investigation of the two alleged improper expense claims ... found that in both cases these had been handled within Bank policy and that no misconduct occurred.

18. The Ethics Office stated that, based on the investigation, the Manager of Human Resources had determined that there was "insufficient evidence to justify a finding of misconduct." It was added that the "conclusions were drawn only after careful consideration of all the information obtained during the

investigation.”

19. On April 12, 1996, the Vice President, ESD, informed the Applicant that it was not possible to extend his contract beyond April 30, 1996.

20. On June 3, 1996, the Applicant requested an administrative review of the decision that there was “insufficient evidence to justify a finding of misconduct.” By a letter dated June 6, 1996, the Vice President of Human Resources informed the Applicant that he had no right to an administrative review on the basis that staff members making allegations of misconduct against other staff members do not have standing to challenge the outcome of the Bank’s investigation.

21. On July 11, 1996, the Applicant filed an appeal with the Appeals Committee against the decision of the Vice President of Human Resources of June 6, 1996. The Appeals Committee issued its Report on July 9, 1997. In the Report, the Committee concluded that the “investigation conducted by the Ethics Office into Appellant’s allegations was thorough, fair and objective.” It noted that the “one lapse” in the investigation involved the Ethics Office’s failure to request that Ms. X produce evidence with respect to the checks that the Applicant alleged to have received for allowing Ms. X to touch him. However, the Committee found out that “this ‘one lapse’ did not render what was otherwise a very painstaking and thorough investigation insufficient or unfair.” It therefore recommended that the Applicant’s requests for relief be denied. The Vice President of Human Resources accepted this recommendation and communicated her decision to the Applicant on July 14, 1997.

22. The Applicant submitted his application to the Tribunal on October 27, 1997, challenging the “decision not to grant [his] request for relief for the Sexual Harassment he has been subjected to, as notified on July 14, 1997, by the Vice President Human Resources.” On November 19, 1997, the Respondent filed a request to separate jurisdictional issues from the merits, which request was granted.

23. In a decision rendered on May 15, 1998, the Tribunal rejected the Respondent’s argument that the application should be dismissed on jurisdictional grounds. The Tribunal held that the Bank has a “duty to an accusing staff member to refrain from acting arbitrarily, capriciously or discriminatorily, or without due process of law, when considering his or her accusations against another staff member, in any event when in the setting of a formal investigation carried out by the Office of Professional Ethics.” The Tribunal further held:

Just as an accused is entitled to an investigation that does not amount to an abuse of discretion, the same is true for an accuser. It would make a mockery of the requirements set forth in Staff Rule 8.01 if the Bank were allowed to discharge [the investigation] without affording due process to both the accuser and the accused and without requiring that an investigatory outcome be supported by evidence.

The Respondent’s request to dismiss the application for lack of jurisdiction was therefore denied, with costs awarded to the Applicant.

24. In dealing with the Applicant’s contentions and the Respondent’s responses thereto, the Tribunal must address the following issues:

(a) Should the application be dismissed, as requested by the Respondent, for failure to state a claim that is cognizable by the Tribunal?

(b) Did the Respondent react properly to the Applicant’s complaint before initiating the investigation by the Ethics Office?

(c) Was the investigation carried out in the proper and objective manner prescribed by Staff Rule 8.01 and in accordance with the general requirements of due process?

(d) Did the Respondent abuse its discretion by accepting the recommendations of the Appeals Committee to reject the Applicant’s allegations of sexual harassment and verbal and physical abuse by Ms. X?

25. The Respondent argues that the application must be dismissed because in contesting the decision of the Vice President of Human Resources dated July 14, 1997, the Applicant is in effect challenging the findings and recommendations of the Appeals Committee. Such a challenge, so argues the Respondent, is beyond the jurisdiction of the Tribunal because it does not sit as a court of appeal reviewing recommendations of the Appeals Committee. The Tribunal does not subscribe to the Respondent's reasoning. The situation regarding the challenged decision in this case is typical of the situation in all cases where the management of the Respondent decides to accept the recommendations of the Appeals Committee denying the relief requested by the Applicant. What the Applicant is contesting here is in fact the administrative decision taken by the Vice President of Human Resources denying him the relief he had requested since the beginning of the proceedings related to his complaint. The interposing of the Appeals Committee's recommendations cannot deprive complaining staff members of the right to take to the Tribunal claims of breach of their contract of employment and to enjoy the benefits of judicial review provided for in the Bank's laws.

26. The dismissal of the application requested by the Respondent would have been acceptable had the Applicant directed his criticism both procedurally and substantively to the proceedings before the Appeals Committee. In the present case, however, the Applicant directs his criticism to the manner in which the Respondent reacted to his complaints, and the manner in which the investigation by the Ethics Office was carried out.

27. The Tribunal notes that the Applicant had sent his formal written complaint against Ms. X to the Ethics Office on September 29, 1995. Said formal complaint was, in fact, preceded by several oral and written complaints that started some months after his recruitment and assignment to work with Ms. X. Although the record shows that the Applicant's managers had listened to his complaints, no concrete measures were taken to improve the relationship between the Applicant and his supervisor. The Applicant complained that the Respondent took his complaints lightly and failed to provide him with necessary protection to which he is entitled under the Bank's laws. The Tribunal notes, however, that the early complaints of the Applicant did not refer to the more serious allegations brought up during the later phase of the investigation. Moreover, Ms. X herself expressed her readiness at an early stage to participate in personal counseling sessions together with the Applicant, an offer he turned down. In light of the above, the Tribunal does not find the mere failure of the Respondent to find an effective solution to the Applicant's problems prior to his submission of the formal complaint to the Ethics Office to constitute by itself a failure to observe the Applicant's terms of appointment under Article II(1) of the Statute of the Tribunal.

28. As to the Applicant's contention that the manner in which the investigation was carried out by the Ethics Office fell short of fulfilling the requirements of due process, Staff Rule 8.01, paragraph 5.02, in effect at the time, provided in relevant part:

Where a staff member is alleged to have engaged in conduct for which disciplinary measures may be imposed or where an incident of possible misconduct is discovered, a preliminary inquiry will be undertaken to determine the substance and circumstances of the matter When the inquiry leads to an allegation of misconduct against a staff member, the staff member shall be notified in writing of the allegation and the staff member shall provide an explanation of the possible misconduct. The person conducting the inquiry may, in the course of such inquiry:

(a) Call upon any staff member for the production of documents believed to have probative value;

(b) Interview any staff member who is believed to have knowledge of the events in question;

(c) Consult other persons believed to have, or materials believed to contain, information of probative value in the inquiry.

29. During the course of the investigation that extended over a period of five (5) months, the Ethics Officers interviewed the parties and interviewed twenty-three (23) persons familiar with the parties including the ESDVP front office staff. The Ethics Officers accepted written and verbal statements from Ms. X. The investigators had before them all of the written documents and memoranda that the Applicant had submitted over the previous

year.

30. The record does not substantiate the Applicant's allegation that the essential part of the interviews of the Applicant and Ms. X was made up of inquisitorial questions put to the Applicant, with only a very few put to Ms. X. The fact that more questions were addressed to the Applicant does not reflect any bias on the part of the investigating officers of the Bank. It is easily explainable by the fact that it was the Applicant who made the allegations against Ms. X, and it was his responsibility to clarify and substantiate such allegations. Moreover, the Applicant had made new serious allegations during the investigation to which there was no reference in any of his previous complaints. It became necessary, therefore, that the Ethics Officers discuss said new allegations at length with the Applicant before proceeding further. That was in part the reason why the Ethics Officers had to meet a second time with the Applicant on December 8, 1995.

31. The Tribunal has had a chance to review in camera the forty-one (41) page report of the Ethics Office dated February 27, 1996 and conveyed to the Manager, Human Resources Group. Examination of the report confirms the finding of the Tribunal that the investigation in the instant case was conducted in full compliance with Staff Rule 8.01. The investigation and the interviews by the Ethics Officers of both parties and of the twenty-three (23) witnesses were carried out in a proper, objective and unbiased manner. The Tribunal finds no discrepancy or inconsistency between the findings in that report and the evidence drawn from the testimony of the two parties and the other witnesses.

32. The Applicant contends that the way the investigation of his complaints was carried out fell short of fulfilling the requirements of due process. To substantiate this contention, the Applicant refers to the decisions of the Tribunal in Salle, Decision No. 10 [1982]; Broemser, Decision No. 27 [1985]; and Gyamfi, Decision No. 28 [1986]. The Tribunal agrees with the Applicant's statement to the effect that the "Administration should respect due process of law even in investigating whether he, the accuser, have [sic] been fairly treated or not." The Tribunal notes, however, that the elements of due process may not necessarily be the same in the case of the accused staff member as in the case of the accuser. In the case of the accused staff member, the investigation may possibly lead to the imposition of disciplinary measures based on proof of misconduct. In such cases, the requirements of due process should be strictly observed by management in order to justify the establishment of culpability as against the initial presumption of innocence. The accuser on the other hand is entitled to a fair procedure, providing him with ample opportunity to be heard and to substantiate his accusations directed against another staff member. Therefore, the above decisions of the Tribunal must be distinguished from the present case. Gyamfi related to the procedural guarantees of accused staff members. In Salle, the issue was whether the decision not to confirm or extend the applicant's probationary appointment was an abuse of discretion and was reached in accordance with the appropriate standards of justice. In Broemser, the underlying question was whether the decision to terminate the applicant's employment for unsatisfactory performance was an abuse of discretion.

33. In Rendall-Speranza, Decision No. 197 [1998], paras. 57 and 60-62, the Tribunal concluded:

In order to assess whether the investigation was carried out fairly, it is necessary to appreciate the nature of the investigation and its role within the context of disciplinary proceedings. After a complaint of misconduct is filed, an investigation is to be undertaken in order to develop a factual record on which the Bank might choose to implement disciplinary measures. The investigation is of an administrative, and not an adjudicatory, nature. It is part of the grievance system internal to the Bank. The purpose is to gather information, and to establish and find facts, so that the Bank can decide whether to impose disciplinary measures or to take any other action pursuant to the Staff Rules. The concerns for due process in such a context relate to the development of a fair and full record of facts, and to the conduct of the investigation in a fair and impartial manner. They do not necessarily require conformity to all the technicalities of judicial proceedings.

Staff Rule 8.01 ('Disciplinary Measures') does not obligate the Bank to provide staff members with [the] transcripts [of witnesses]. It was partly on this basis, and in order to maintain the confidentiality of the testimonies provided by the Bank, that the Tribunal, on May 15, 1998, denied the Applicant's request for the transcripts of the witnesses.

The Tribunal, therefore, concludes that denying the Applicant her request to be provided with the transcripts of the testimony of all the witnesses interviewed by the investigator did not deprive her of a fair opportunity to put forward her evidence and her arguments and to have them properly considered.

For similar reasons, the fact that the independent investigator did not allow either party to be present when the witnesses were interviewed, and to examine and cross-examine them, does not, in the Tribunal's view, violate any basic right of the parties, nor does it justify the contention that the conclusions drawn from such testimonies were necessarily procedurally defective.

34. The Applicant also criticizes the investigation report for having failed to address and examine some of the serious allegations the Applicant has made against Ms. X. He refers specifically to his allegation that Ms. X had, on several occasions, given him certain amounts of money, sometimes in cash but six or eight times by checks, for allowing her to touch him. The Tribunal notes, however, that although the letter dated March 7, 1996, by which the Ethics Office conveyed to the Applicant the conclusion of the investigation, did not make reference to that allegation introduced at a late stage of the investigation, the forty-one (41) page Ethics Office report dated February 27, 1996, sent to the Manager, Human Resources Group, did refer to said allegation. Since none of the twenty-three (23) witnesses had made reference to this allegation, and the only evidence the Applicant gave was his own word, the investigators' failure to look further into said allegation does not in itself render their findings and conclusions defective as contended by the Applicant. This is particularly so in light of the reasonable doubt in the investigators' minds as to the credibility of the Applicant in making this and other serious allegations only at a late stage of the investigation. It was only on December 8, 1995, that he made the allegation that Ms. X had paid him to allow her to touch him. The investigators seem to have found it equally strange considering how shocking the alleged incident of September 26, 1995 was that the Applicant neglected to include the allegation of touching when he made several summary statements about Ms. X's alleged offences. Similar doubts seem to have been shared by many of the witnesses interviewed, including the Vice President, ESD, himself when he stated that at no point had the Applicant, prior to his September 29, 1995 memorandum to the Ethics Office, mentioned sexual harassment as one of his complaints and accusations addressed against Ms. X.

35. As to the Applicant's contention that the Respondent abused its discretion in accepting the findings of the Ethics Office, the Tribunal has held on several occasions that a decision of the Bank in the exercise of its managerial discretion "is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure." (Saberi, Decision No. 5 [1981], para. 24.)

36. The record, however, does not support the Applicant's contention. The findings of the Ethics Officers investigating the Applicant's allegations were reached after a thorough and lengthy examination of all the documents submitted by the Applicant and after obtaining testimony from twenty-three (23) witnesses. It was on the basis of such a thorough investigation that the Ethics Officers concluded that the Applicant could not substantiate his allegation of sexual harassment.

37. It is the conclusion of the Tribunal that there was clearly sufficient evidence to substantiate the findings of the Ethics Officers. Indeed, there was hardly any evidence to substantiate the very serious accusations made by the Applicant against his supervisor. It was, therefore, not an abuse of discretion for the Bank to endorse those findings and to refrain from disciplining the accused staff member for misconduct.

Decision

For the above reasons, the Tribunal unanimously decides to dismiss the application.

Robert A. Gorman

President

Nassib G. Ziadé

Executive Secretary

At London, England, May 14, 1999