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ADMINISTRATIVE TRIBUNAL OF THE AFRICAN DEVELOPMENT BANK

QUORUM:

Judge Mathias EPULI ALOH	President
Judge Cécile ISIDORO	Vice-President
Judge Leona Valérie THERON	Member
Judge Abdul Gadire KOROMA	Member

APPLICATION No. 2023/01

R.A., Applicant
African Development Bank, Respondent

Judgment No 173 of the Administrative Tribunal, delivered on 27 October 2023

I. THE FACTS

1. On 15 May 2020, the applicant was offered appointment by the Bank as the Chief Economist and Vice President, Economic Governance and Knowledge Management Complex (ECVP) on a three-year renewable contract at level EL3. On 29 May 2020, he accepted the appointment effective from 1 October 2020. The contract was subject to a 12 month-probationary period.

2. On 7 October 2020, the applicant met with the Human Resources Business Partner (HRBP) of the Complex, to discuss a reorganization plan within his Complex including right-sizing, which would include no automatic renewal of Directors' contracts, non- automatic renewal recruitments, and staff rotation. The HRBP enquired whether he had discussed the proposals with the President and Vice President of Human Resource and Corporate Services (CHVP).

3. On 9 October 2020, the HRBP reported an incident in writing to his senior managers alleging harassment during the meeting on 7 October 2020. The applicant responded to the HRBP and copied the Acting Director of Human Resource and Management (CHHR), indicating that the HRBP will no longer oversee his Complex.

4. On 12 October 2020, the applicant held a brief meeting with all six Directors of the Complex and announced that their contracts would not be automatically renewed at the end of their current employment contract. He intended to advertise their positions and allow them to reapply for their positions. He also announced that all major work program activities would be put on hold. The Directors immediately reported the matter to Senior Management. On the same day, following CHVP reporting the incident with the HRBP to the President of the Bank, the latter an email to the applicant, expressing his (the President) disapproval of the applicant's conduct and directed and him (the applicant) to cancel his plan and meet with him (the President).

5. On 9 November 2020, the applicant received written official notification from the then Director of Office of Integrity and Anti-corruption (PIAC) that they had started a preliminary inquiry of harassment and abuse of authority allegations levelled against him by Ms. H.M. a Director of ECVP at the time.

6. On 26 November 2020, the applicant filed a complaint with PIAC against Ms. H.M for insubordination and harassment. In parallel, he had to handle several complaints filed by staff members within his

Complex. For instance, Mr. G filed a complaint of harassment against Ms. H.M and reported her behavior to the ECVP. Similarly, Mr. E filed a complaint against Mr. U, Director of the African Development Institute (ECAD) at the time of the incident and accused him of creating a toxic and intimidating work environment in ECAD. On 25 January 2021, in response to the complaint of ECAD staff, CHHR Director ordered that a thorough investigation be conducted and suspended all staff in that Department as a result of many dysfunctionalities and many anonymous complaints sent directly to the President of the Bank.

7. On 04 March 2021, PIAC released its final Investigation Report into Ms. H.M.'s allegations and concluded that she was a victim of harassment and abuse of authority from the applicant.

8. On 30 July 2021, the Senior Vice President on behalf of the President notified the applicant that his appointment would not be confirmed at the end of his probationary period on 30 September 2021 and that the effective date of his separation would be 1 October 2021. In support of the non-confirmation decision, the Senior Vice President stated that based on numerous incidents, the applicant's leadership style and management approach did not meet the Bank's expectations. She further stated that the applicant failed to display appropriate team spirit, strong leadership skills and a willingness to abide by the Bank's policies, rules, and procedures. She also stated that during the probation period, despite the President's clear undertaking and the steps taken by Management to support him, he failed to demonstrate that he was fit for the role and level of responsibility expected of a Vice President. She concluded that given the large number of incidents recorded in less than 10 months of service, even without taking into account the allegations of harassment, upon consultation with the Board of Directors, the President had decided that his appointment should not be confirmed.

9. On 6 August 2021, the applicant received notification of charges against him, namely, alleged workplace harassment, abuse of authority and failure to respect confidential requirements of staff bills of rights. He was invited to provide written response to these charges.

10. On 30 August 2021, the Acting Director CHHR determined that the applicant had a case to answer, and transmitted the applicant's case for consideration by the Disciplinary Committee.

11. On 30 September 2021, the applicant filed an application before the Tribunal challenging the respondent's non-confirmation decision.

12. On 4 November 2021, the respondent filed a motion of inadmissibility in accordance with Rule XIV (1) of the Tribunal's Rules of Procedure.

13. On 4 July 2022, the Tribunal deferred the case to the subsequent hearing session in December 2022. In its Judgment No. 158 dated 02 December 2022, the Tribunal found that the applicant's application was inadmissible for non-exhaustion of internal remedies and remanded it to Staff Grievance Committee (STAGRICO) as the competent recourse body.

14. On 8 February 2023, STAGRICO concluded the applicant's appeal. On 10 March 2023, the Acting Director of CHHR notified the applicant its recommendations as approved by the President to the effect that:
    a) The applicant be reimbursed house rental subject to proof of payment.
    b) An amount of UAC14,557.05 will be paid to applicant in respect of the children's education grant.

c) The applicant should provide proof of payment and evidence of termination of the tenancy in order for reimbursement of the house rent to be made.

15. On 15 March 2023, the applicant filed an application before the Tribunal challenging the respondent's non-confirmation decision.

II. ARGUMENTS FOR THE PARTIES.

The Applicant

16. The applicant submits that the Bank mismanaged and sabotaged his career. In support of his claim, the applicant relies on rules and policies applicable to his case.

17. Firstly, relying on the Presidential Directive 05/2021 on Staff Performance Management System, the applicant asserts that the Bank gave him no formal performance management of any kind thereunder; and (ii) the President inexplicably refused to give him even a one-on-one meeting throughout his tenure so there was never an opportunity for him even to discuss and set performance objectives either in 2020 or 2021. The applicant further states that he was wrongfully denied a mid-year review under both the Directive and the preceding regime. He asserts that because the President never met one-on-one with him, and set no performance objectives, no Performance Improvement Plan (PIP) could validly have been undertaken to justify his non-confirmation. He further states that indeed, no PIP, or even any final appraisal, was ever undertaken in his case as required under the Directive 04/2009 regime as well as the Directive.

18. Secondly, the applicant asserts that the Bank abused its discretion as applied to a high-level staff. The applicant asserts that the "abuse of discretion" standard of international civil-service law includes a duty to manage a staff member's career in an appropriate manner. In support of his claim, the applicant relies on S.A., Judgment No. 104 of 26 January 2018, paragraph 62, where the Tribunal provided that: *"The Tribunal acknowledges that that the President of the Bank needs to have confidence in his senior advisors, and it is not for the Tribunal to second-guess the wisdom of his decision to terminate the employment of the Applicant or that of the other senior officers of the Bank. That said, having elected to terminate the Applicant's employment early, the President of the Bank was required to do so in a humane manner, in conformity with the rules governing the employees of the Bank. As will be explained below the Tribunal is not persuaded that this occurred in this case, and that the Applicant is entitled to damages as a result."* The applicant avers that when a staff member's career is mismanaged, the staff member suffers a deep, actionable injury. He asserts that career mismanagement is not a mere "bad experience" or a vague "lost opportunity." He asserts that the harm done is instead an avoidable derailment of a person's career by managers who put the staff member on a wrong track through one or more *détournements de pouvoir ou de procédure* (i.e., misuse of power or procedure) which is a concept common to all international administrative law and organizational systems.

19. The applicant asserts that the President wholly failed to fulfil the applicable rules' requirements for him.

20. Firstly, the applicant states that the President's email of 12 October 2020 was a grave violation of the Directive. The applicant asserts that the email of 12 October 2020 was: (1) written without getting his side of the story, even though he was the President's direct subordinate; (2) copied to his accusers as well as to other staff; and (3) sent on the very same day that the Directors filed the

"incident report," and without an investigation – let alone any finding – by any Bank body set up to resolve staff disputes and complaints. In support of his argument, the applicant relies on the case of *I v. Global Fund to Fight AIDS, Tuberculosis and Malaria*, Judgment No. 3866 of ILOAT under paragraphs 10-11, ECL158, which provides: *"A warning [of jeopardized employment] that would be given at a meeting at which other colleagues were present would constitute a serious breach of the obligation to treat an employee with dignity and respect. … Seeking the views of colleagues undermines the objectivity of the assessment. It also shows a lack of respect for the concerned employee, and it is humiliating for her or him to know that colleagues are being asked to assess her or his performance and behaviour."*

21. Secondly, the applicant asserts that the President's later treatment of him followed the same pattern of neglect. He asserts that following the President's public diatribe of 12 October 2020, he dutifully kept working, but could not get so much as a one-on-one meeting with the President, who continued to ignore his duty under the Directive to provide performance management to him.

22. Thirdly, the applicant asserts that the tainted PIAC process gravely abused him. The applicant asserts that PIAC unlawfully withheld transcripts of witness interviews from him and may not even have interviewed at least some of his witnesses. The applicant further states that PIAC held that his use of legal counsel to prepare a response to the draft investigation report constituted a separate count of misconduct. The applicant also asserts that he was prevented from appearing before a Disciplinary Panel because of his extended sick leave, which was due to: (i) malaria; (ii) two (2) back surgeries involving complications; and (iii) the PTSD-inducing harassment he suffered at the President's hands, and which filled him with debilitating anxiety about his situation and that of his family. In his Reply, the applicant states that the Bank does not answer his exposure of PIAC's unlawful Acts. The applicant avers that the respondent does not answer – or even acknowledge – the Application's thorough legal and factual showings against PIAC, including that: (1) PIAC showed bias by finding guilt based solely on Ms. H.M.'s subjective feelings, after receiving clear direction from the President's 12 October 2020 email; (2) PIAC withheld material exculpatory and mitigating evidence from him; (3) PIAC withheld witness transcripts from him, with the result that he could not respond to them; (4) PIAC may have surreptitiously refused to hear at least some of his witnesses; (5) PIAC found misconduct in his use of legal counsel to defend himself (as he could do in any rule-of-law system); and (6) the Disciplinary Panel pressed an ill Mr. R.A. to appear before them to answer for the supposedly already proven charges, and for his use of legal counsel.

23. Fourthly, the applicant asserts that the President's decision not to confirm him was unfounded and abusive. The applicant states that especially given the absolute lack of private meetings, performance management, or even constructive feedback and guidance that the President was legally required to provide to him, the President's belated set of criticisms did not constitute valid grounds for a failure of probation.

24. Fifthly the applicant states that the President wrongfully skirted his solemn duty to consult with the Board. The applicant states that because he was a Vice President, the President had a duty under Article 37(2) of the Agreement establishing the Bank to consult with the Board and receive their comments before declining to confirm his appointment. The President failed to do this. Instead, the President wrote the Board forty-seven (47) minutes before he conveyed the non-confirmation decision to him.

25. In his reply, the applicant asserts that the respondent misrepresents the role of Discipline in this case. The applicant states that in fact, he is contesting an administrative decision – i.e., the non-

confirmation decision – as even the Bank concedes. The applicant states that he can hardly seek rescission of the administrative non-confirmation decision since he is not seeking reinstatement. Nonetheless, the applicant asserts that he takes the strongest exception to the President's rationale for the non-confirmation decision since, inter alia, it is infused with disciplinary elements that the Answer itself claims were "confirmed" by PIAC. He states that indeed, even the allegedly non-disciplinary criticisms in the President's written rationale repeat or reference elements of what the President himself called his "reprimand" of 12 October 2020, so that they take on the cast of a "reprimand" – i.e., discipline. The applicant therefore seeks to have the President's decision and its rationale, as well as all of PIAC's investigative findings, removed entirely from his file, and be replaced by the Tribunal Judgment. He states that it is assumed that the Tribunal Judgment will note the non-confirmation decision as a mere fact, while finding it wrongful and abusive as having been taken contrary to Bank law. In other words, the Judgment will stand in for the President's tainted decision, and the Tribunal will replace the decision's reasoning and impact with its corrective cure.

26. In his reply, the applicant asserts that the answer does not rebut his showing of "disciplinary" abuse.

27. In support of his claim in reply, first, the applicant asserts that the Bank's claim of PIAC confirmation confirms that abuse occurred. The applicant states that the Roman legal maxim of *nulla poena sine culpa* – "no punishment without fault" – means that fault must be established before a sanction is inflicted. The applicant states that thus precisely what failed to happen in this case. He states that the President in his 12 October 2020 email publicly issued what he himself called a "reprimand" because he had allegedly "us[ed] language and tone which I [i.e., President] consider inappropriate, disrespectful and unacceptable." The President issued this denunciation after hearing about it second-hand, just five (5) days after Mr. E incident, and without even hearing his side of the story. The applicant further states that PIAC issued its final report on 4 March 2021, almost five (5) months after the President in his own words publicly "reprimanded" him. In other words, the investigation had to catch up to the public punishment. He states that in itself is a clear violation of *nulla poena sine culpa*, and a contravention of Bank law and procedure.

28. Secondly, in his reply, the applicant asserts that the answer endorses the political misuse of discipline against him. The applicant avers that the President's "reprimand" of 12 October 2020 was in reality a public declaration by the President that he was taking sides in a political dispute within the Complex, and intentionally declaring his side to be misconduct. This was a clear *détournement de pouvoir*. The applicant avers that the Answer – like PIAC – wrongfully ignores his well-supported formal response, even though the Bank has the response on file, and he confirmed its availability.

29. Thirdly, in his reply, the applicant asserts that the answer intentionally misrepresents his work environment. The applicant asserts that against all evidence and recent Tribunal case law – that the "ECVP Complex … has never been dysfunctional," that it "was fully functional and duly executing its mandate … [and that it was] rather Economist, C.L., testified in detail about the Complex's many troubles predating his arrival.

30. Fourthly, in his reply, the applicant asserts that the Bank's misuse of disciplinary procedure inflicted compensable harms. The applicant avers that the Tribunal must in good conscience disregard the Answer's attacks, and indeed view the Bank's disciplinary actions against him as a series of compensable due process violations.

The Respondent

31. The respondent rejects the applicant's claim based on the following issues for determination: (a) Whether the decision not to confirm the applicant's appointment was lawful and justified; (b) Whether the respondent's decisions and conduct towards the applicant amounted to harassment and abuse of authority; (c) Whether the PIAC investigations against the applicant were justified and followed due process; and (d) Whether the applicant is entitled to the reliefs sought.

(1) Whether the decision not to confirm the applicant's appointment was lawful and justified

32. The respondent submits that the decision not to confirm the applicant's appointment was not only lawful, fair, and justified, but was also in the best interests of the Bank.

33. First, the respondent states that the applicant's letter of appointment clearly reads in paragraph 4 that, *"The appointment will be for a period of three (3) years in the first instance and may be renewed for further periods thereafter. You will be under a period of probation for twelve (12) months."* The respondent avers that the applicant therefore knew that he was required to behave suitably and to perform satisfactorily if he wished his appointment to be confirmed. The respondent asserts that however, he did not meet the threshold required by the Bank for confirmation at the end of his probation, resulting in the termination of his appointment. Besides, the respondent states that paragraph 5 of the applicant's appointment letter provided that, *"The appointment may be terminated by either party by giving a one (1) month notice in writing or the payment of one (1) month salary in lieu of notice."* The respondent asserts that the applicant was therefore aware that his appointment during the probation period was provisional and could be terminated by himself or the Bank anytime, if either of the parties wished to do so, provided a one (1) month notice was given or payment in lieu of notice.

34. Secondly, the respondent relies on Staff Regulation 2.0.8, which provides that:

> *"2.0.8.1 Two (2) months before the end of each probationary period, Management shall notify the staff member concerned in writing of the decision:*
> *(i) to confirm the appointment.*
> *(ii) to terminate the appointment; or*
> *(iii) as an exceptional measure, to extend the probationary period for an additional non-renewable period not exceeding six (6) months.*
>
> *2.0.8.2 In cases of termination or extension of the probationary period, the written notice will set forth the effective date of, and the reasons for termination or the extension of the probationary period. In case of termination, the effective date will be sixty (60) calendar days after the date of notification."*

35. The respondent asserts that at the close of the applicant's probationary period, due to his unsatisfactory performance, a decision was made not to confirm his appointment and to terminate his employment in accordance with Staff Regulation 2.0.8.1(ii) as outlined above.

36. Thirdly, the respondent relies on the applicant's unsatisfactory performance during the probation period. In support of its assertion, the respondent relies on case of *FN v. International Bank for*

Reconstruction and Development, Decision No. 632 of WBAT, which provides that "*when reviewing non-confirmation decisions, the problem is not so much whether the probationer has performed satisfactorily as whether he has proven his suitability to the specific requirements of the Bank […]. The Tribunal also recalls that the concept of unsatisfactory performance as applied in the case of probation is broader than that of confirmed staff members"*; Staff Rule 64.03, which provided that before confirmation of a probationary staff member, the respondent must be satisfied about his/her ability to carry out the demands of his/her role; and *K-G v. European Organization for Nuclear Research,* Judgment No. 4212 of ILOAT, which provides that *"the purpose of probation is to permit an organization to assess the probationer's suitability for a position"*. The respondent submits that the applicant did not demonstrate his suitability for his role. The respondent further states that the non-confirmation of the applicant's appointment was due to the fact that, throughout his tenure, he had exhibited unsatisfactory behavioral and technical performance. The respondent further asserts that the reality is that at the time the applicant joined the ECVP Complex, it was fully functional and duly executing its mandate. It states that it is rather the applicant, who in a remarkable short time, by his unsatisfactory performance and alienating behaviour as the Complex's head, managed to drive it towards becoming dysfunctional.

37. Fourthly, the respondent relies on the applicant's refusal and failure to participate in the respondent's performance Management system and evaluation process. The respondent submits that from the onset, the applicant refused to enter his performance objectives in the said online system, which is the first step towards the performance evaluation process. The respondent further submits that the Director CHHR made routine reminders to all staff members, including the applicant, during the objective setting, mid-term review, and final evaluation phases. It states that the applicant ignored these reminders and took no action at all. In support of its assertion, the respondent relies on the case of *C.A.W v African Development Bank*, Judgment No. 50 of 11 May 2006, which under paragraph 55 provides as follows: *"…A comparison of the different instances of termination of appointment as provided for by Staff Regulation 6.11 makes clear that only in case of a confirmed appointment does the Bank have to establish such defective performance (Staff Regulation 6.11.1 (ii)). No similar specification can be found in Staff Regulation 6.11.1 (viii) which deals with the termination of appointment subject to a probationary period. Quite obviously, the intention behind this differentiation is to grant the President of the Bank a large measure of discretion with regard to an employee on probation. Any staff member must not only fit into the structure of the Bank in a technical sense as a competent professional but must also be compatible with its general human environment."* The respondent avers that the routine conversations and guidance provided to the applicant by the President as his supervisor, and his peers and other members of Senior Management were part of the performance evaluation process.

38. Fifthly, the respondent states that there was no basis or justification for extending the applicant's probation and/or placing him on a Performance Improvement Plan. The respondent submits that considering the extent of the applicant's unsatisfactory performance and especially the hostile work environment created by his adversarial attitude and actions, the respondent exercised its discretion by taking the administrative decision to not extend the probationary period of the applicant or to place him on a PIP, and to not confirm his appointment at the end of his twelve (12) months' probationary period, as this was considered as being in the best interests of the Bank in the circumstances. The respondent asserts that it is not mandatory that every staff member who fails probation should have the same extended and that he he/she must be placed on a PIP, as the applicant wants the Tribunal to believe.

39. Sixthly, the respondent relies on Board consultation. The respondent avers that consultation of the Board is provided for under Article 37(2) of the Agreement establishing the Bank, which provides as follows: *"The President shall be chief of the staff of the Bank and shall conduct, under the direction of the Board of Directors, the current business of the Bank. He shall be responsible for the organization of the officers and staff of the Bank, including Vice-Presidents, whom he shall appoint, fix their terms of employment, and release in accordance with the rules and regulations adopted by the Bank, provided that he shall act in consultation with the Board of Directors in the exercise of his powers of appointment and release of Vice- Presidents*." It avers that the evidence undoubtedly show that the consultation did take place, two months before the termination of the applicant's employment took effect and was meaningful. It asserts that the applicant does not cite any Rules or Regulations providing timelines or notice periods which the President violated, and further does not provide any evidence to show that the Board rejected the President's proposals or action.

40. Finally, the respondent states that its actions and position is supported by the jurisprudence of International Administrative Tribunals which provides sufficient guidelines as to how the fairness of the non-confirmation of a probationary staff member may be established. In support of its position, the respondent relies on *A (No. 2) V. CTA*, Judgment No. 3481 of ILOAT, which under consideration 5 provides that:*"…According to the case law, there is no general principle of law that requires an international organization to retain a staff member in its service throughout that person's trial period if, before that period expires, the competent authority has come to the final conclusion that the staff member concerned is unsuitable for the post to which he or she was assigned (see, also Judgment 197, first paragraph)"*; case of *S. v. OPCW,* Judgment No. 3913 of ILOAT, under consideration 18, the Tribunal provides that: "*Essentially, a supervisor's decision whether to recommend the extension of a staff member's probationary period lies within the supervisor's discretion, which is to be exercised for the specified reasons. Paragraph 12 of the Directive also confers discretion on the Director-General to decide whether to extend a probationary period, which discretion is to be exercised solely in the best interest of the OPCW. The Tribunal finds nothing unlawful in the fact that neither the supervisor nor the Director-General considered it appropriate to extend the complainant's probationary period. Accordingly, ground 5 of the complaint is unfounded.''* (Consideration 18, emphasis added; *Manuel Conthe v. IBRD* Decision No.7 of WBAT, under paragraph 57, the Tribunal provides that: *"Probation has as its purpose the determination whether the employee concerned satisfies the conditions required for confirmation. These conditions may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members"*

41. The respondent reiterates that the decision not to confirm the appointment of the applicant at the end of an unsuccessful probation period was not tainted by any procedural flaw. In this regard, the respondent refers to *Stefan Bauer v. the United Nations Industrial Development Organization (UNIDO)*, Judgment No. 1906 of ILOAT, under consideration 4 and 5, the Tribunal provide that: *"The Tribunal is satisfied that the absence of a performance evaluation report was due entirely to the complainant's own failure to participate and cooperate in the preparation of such a report. With respect to the complainant's performance of the duties of his position, the Administration has presented convincing evidence that he exceeded his authority and entered into improper and unauthorized [actions], failing to keep his supervisor properly informed and to comply with the latter's directions. […] "*The respondent requests the Tribunal to come to the same conclusion as above and dismiss this claim and all prayers for relief arising therefrom.

(2) Whether the respondent's decisions and conduct towards the applicant amounted to harassment and abuse of authority

42. The respondent rejects applicant's assertion that its conduct towards the applicant amounted to harassment and abuse of authority. The respondent submits that the application does not reveal any action or omission that has any ingredient of harassment or abuse of authority as defined under Section 5.1of Presidential Directive No. 02/2021, which provides that: *"Harassment is one or a series of objectionable, intimidating, hostile, offensive and/or degrading comments (verbal, non- verbal or written), gestures or actions directed towards a specific person or group of persons that serve no legitimate work-related purpose and is sufficiently severe or pervasive that it has the effect of creating a work environment that a reasonable person would find intimidating, hostile and/or offensive. a person in a position of power to influence career or employment conditions (including hiring, assignment, contract renewal, performance evaluation or promotion) of another, engages in such behaviour towards the other person, such harassment also constitutes an abuse of authority."*

43. The respondent rejects the applicant's assertion that the President intentionally and publicly undermined him. The respondent submits that the President justifiably sent the said email in issue to the applicant in his capacity as his supervisor to guide him on how best to handle ECVP Complex matters. The respondent further states that examination of this email does not show any ingredient of the applicant being allegedly undermined by the President.

44. The respondent rejects applicant's allegations that his career was mismanaged and that he was made a scapegoat for alleged ills in ECVP Complex. With regard to the applicant alleging that he was being blamed for alleged long standing dysfunction of the ECVP Complex, the respondent argues that it is a fallacy. Firstly, the respondent states that the ECVP Complex has never been dysfunctional. Secondly, it avers that the applicant has never been blamed for any institutional challenges. It states that rather his accountability, and upon which he was evaluated, is only in respect of the performance of his roles and his actions and omissions during his tenure as the Chief Economist and Vice President ECVP. The respondent further states that it is false and without basis for the applicant to allege that the President and other members of senior management did not guide him.

45. Finally, the respondent therefore submits that the decisions and actions leading to the non-confirmation of the applicant's appointment and the resulting termination of his employment were not a result of harassment or abuse of authority against the applicant, rather it was simply the respondent exercising its rights as an employer.

(3) Whether the PIAC investigations against the applicant were justified and followed due process

46. The respondent submits that the investigations by PIAC against the applicant were justified and were conducted in accordance with due process. In support of its claim, the respondent asserts that in line with the Bill of Rights, the applicant was accorded the opportunity to comment on the draft investigation report before its finalization, which he did. The respondent further states that PIAC concluded that there was sufficient evidence to prove on the balance of probabilities, the complaint of harassment lodged by H. M. against the applicant, as the actions complained about were objectionable and had no legitimate work-related purpose. It also states that PIAC recommended that *"Management should consider convening a disciplinary hearing on the matter*

for appropriate action to be taken". The respondent states that based on the recommendation by PIAC, the Director CHHR took appropriate action, notified the applicant about the charges against him, requested his explanation, and not being satisfied, referred the matter to the Disciplinary Committee for hearing. The respondent states that however, the process could not be concluded by the time of the applicant's non-confirmation and termination, because of his unavailability. The respondent also clarifies that these harassment investigations were not the basis of the decision not to confirm the applicant's appointment.

(4) Whether the applicant is entitled to the reliefs sought

47. The respondent rejects applicant's reliefs sought for being unsubstantiated and lacking legal basis.

48. The respondent rejects the applicant's request to rescind disciplinary decision, removal of its record (and of the PIAC investigation records) from his file, and replacement by the Tribunal's Judgment. The respondent avers that there was no disciplinary decision in the applicant's case as already held by this Tribunal in its Judgment No. 158. It states that therefore there is no disciplinary decision to rescind or remove from the record. It states that the only decision taken by itself is the decision not to confirm the applicant's appointment and to accordingly terminate his employment with the Bank, which was a lawful, fair, and justified administrative decision.

49. The respondent rejects the applicant's claim of two (2) years' salary, plus all benefits (education grants, health coverage, leave reimbursement) as compensation for the remainder of his lost contract, which he was wrongfully prevented from fulfilling. In support of its claim, the respondent states that non-confirmation of the applicant's appointment was lawful, fair, and justified.

50. The respondent rejects the applicant's compensation for the lack of proper notice prior to termination, in the amount of six (6) months' salary. The respondent states that the applicant was given the requisite notice of two (2) months and the reasons for his non-confirmation in accordance with the applicable Staff Regulations and Rules.

51. The respondent rejects applicant's compensation for all actual costs and losses due to his premature departure, (shipping of household goods, rental cancellation), and medical costs beyond the scope of coverage, reduced to a lump sum of one (1) year's salary. The respondent states that it is a general principle of law that for a claim for damages to succeed, the claimant must provide evidence of (I) an unlawful act by the party against whom damages are being claimed; (ii) actual damages suffered; and (iii) a link between the unlawful act and damages suffered. The respondent submits that the applicant has not proved that he has suffered any damages caused by the respondent. It therefore argues that there is no basis for payment of any form of damages to the applicant as claimed.

52. The respondent rejects the applicant's moral damages in a lump sum amount of three (3) years' salary. The respondent avers that the main claim of the applicant is either unfounded or moot. It is the respondent's view that this subsidiary claim should also fail, as a consequence.

53. The respondent rejects the applicant's reimbursement of all of his attorneys' fees and costs. The respondent submits that Article IX, paragraph 4, of the Tribunal's Statute clearly provides that each party should bear its own costs. Article IX Paragraph 4 indeed states that, *"The Bank or, as the case may be, the respondent institution and the applicant may be assisted in the proceedings by counsel of their choice and each party shall bear its own costs. Notwithstanding the foregoing, if the*

Tribunal determines that an application is well founded in whole or in part, it may order that the reasonable costs incurred by the applicant, including legal fees and expenses of the applicant, be totally or partially borne by the Bank or, as the case may be by the respondent institution". In the instant case, the respondent submits that this claim is not well founded and lacks merit and there is therefore no basis whatsoever for it to pay any legal costs.

III. RELIEF SOUGHT

54. The applicant requests the Tribunal:
    a) rescission of the disciplinary decision, removal of its record (and of the PIAC investigation records) from his file, and their replacement by the Judgment;
    b) Two (2) years' salary, plus all benefits (e.g., education grants, health coverage, leave reimbursement) as compensation for the remainder of his lost contract, which he was wrongfully prevented from fulfilling;
    c) Compensation for the lack of proper notice prior to termination, in the amount of six (6) months' salary;
    d) Compensation for his suffering of extraordinary moral and intangible damage, including severe damage to his personal health and family life, as well as grave reputational damage and lost career prospects in a small but elite executive field working worldwide, and in which he had formerly operated at the very top of his profession, this discrete compensation being made in the lamp sum in the amount of three (3) years' salary;
    e) Reimbursement of all of his attorneys' fees and costs;
    f) All other relief that the Tribunal deems just and appropriate.

55. The respondent requests the Tribunal to dismiss the application and all the reliefs sought by the applicant.

IV. THE LAW

56. On the 6 October 2023, the President of the Tribunal accepted the applicant as a witness. During the hearing, the Tribunal heard his testimony.

57. This application raises the following issues for determination:

    a) Whether the respondent's decision of non-confirmation was lawful and justified.
    b) Whether PIAC investigations against the applicant were justified and followed due process.
    c) Whether the applicant is entitled to the relief sought.

58. The scope of the Tribunal's review of decisions relating to non-confirmation of employment following probation is well established. The non-confirmation decision is subject to limited review. The Tribunal may only determine whether the decision is based on errors of fact or law, or whether incorrect conclusions have been drawn from the facts or whether there has been an abuse of authority (See *N.A.F v the African Development Bank*, Judgment No.143 of 16 July 2021, under paragraph 23).

a) Whether the respondent's decision of non-confirmation was lawful and justified.

59. Under paragraph 65 of *N.A.F. v the African Development Bank*, Judgment No.143 of 16 July 2021, the Tribunal provided as follows:

> *"Even though the discretion on the part of the Bank whether to confirm or terminate during probation is broad, it must be exercised in accordance with its Staff Rules and Regulations…"*

60. Accordingly, the Tribunal will examine the Staff Rules and Regulations of the Bank to determine whether the respondent's decision of non-confirmation during probationary period was lawful and justified.

61. The Tribunal notes that the Bank notified the applicant that his appointment will not be confirmed at the end of his probationary period and further stated that effective date of his separation will be 1 October 2021. Therefore, the Staff Regulation of 2021 and Staff Rules of 2000 were applicable to the applicant's case. However, Staff Rule of 2021 was not applicable to the applicant because it came into force on 1 November 2021, when the applicant's contract had already ended.

62. Staff Regulation 2.0.8(2021) provides that:

> *"2.0.8.1. Two (2) months before the end of each probationary period, Management shall notify the staff member concerned in writing of the decision: (i) to confirm the appointment. (ii) to terminate the appointment; or (iii) as an exceptional measure, to extend the probationary period for an additional non-renewable period not exceeding six (6) months.*
>
> *2.0.8.2. In cases of termination or extension of the probationary period, the written notice will set forth the effective date of, and the reasons for termination or the extension of the probationary period. In case of termination, the effective date will be sixty (60) calendar days after the date of notification."*

63. Staff Rule 64.03 (2000) provides that:

> *"(a) All temporary appointments shall be subject to an initial probationary period of twelve (12) months which can be extended for a further six (6) months.*
> *(b) Within a reasonable period before the end of the probationary period, the Head of Department shall submit to the Director a report on the performance of the staff member and a recommendation for confirmation, termination, or extension of the probationary period.*
> *(c) Confirmation of an appointment after successful completion of probation shall be in writing."*

64. Article 37(2) of the Agreement establishing the Bank provides that:

> *"The President shall be chief of the staff of the Bank and shall conduct, under the direction of the Board of Directors, the current business of the Bank. He shall be responsible for the organization of the officers and staff of the Bank, including Vice-Presidents, whom he shall appoint, fix their terms of employment, and release in accordance with the rules and regulations*

> *adopted by the Bank, provided that he shall act in consultation with the Board of Directors in the exercise of his powers of appointment and release of Vice-Presidents."*

65. In *N.A.F v the African Development Bank*, Judgment No.143 of 16 July 2021, under paragraphs 59 the Tribunal provides as follows:

> *"59. Confirmation or termination of appointment during probationary period requires that the Head of Department submit a report of the staff member's performance to the Director of CHHR recommending either confirmation, extension of probation or termination of appointment. This should be done following a performance evaluation at the end of probation and not during mid-year review as happened in this instance."*

66. In light of the provision cited above and *N.A.F v the African Development Bank*, Judgment No.143 of 16 July 2021, for Confirmation or termination of appointment during probationary period requires that: (i) the Head of Department submits a report of the staff member's performance to the Director of CHHR recommending either confirmation, extension of probation or termination of appointment. (ii) Performance Report should be done following a performance evaluation at the end of probation. (iii) The President should consult the Board of Directors in the exercise of his powers of termination of employment for the Vice- President. (iv) A written notice for termination should include an effective date of termination and the reasons for non-confirmation of the probationary period.

67. To determine whether non-confirmation decision was in accordance with Bank's internal laws, the Tribunal will examine (a) Performance Management process during probation and Performance Report deciding non-confirmation, (b) Consultation with the Board of Directors and (c) Notice for termination and reasons for termination.

I. Performance Management process and Performance Management Report

68. Paragraph 12 of Presidential Directive 05/2021 provides that*: "This Directive shall enter into force upon its signature and shall become applicable to the performance evaluation period beginning from 1 January 2021"*. The applicant commenced his duty on 1 October 2020 and the probationary period came to an end on 30 September 2021. The Tribunal will consider Presidential Directives 04/2009 and No 01/2015 on Performance Management which were applicable to the applicant during the period of October to December 2020 and Presidential Directive 05/2021 on performance Management, which was applicable from January 2021 to September 2021.

Setting of Objectives

69. Paragraph 5 of the Performance Management Presidential Directive 04/2009 sets out a 6-stage performance management and evaluation process. This includes objective setting at the beginning of the year (stage 1):

> *"At the beginning of each year (January-February) supervisors and their staff shall agree on individual objectives for that year and the weight to be given to each objective."*

70. Paragraphs 3.3 and 3.4 of the Staff Performance Handbook (2009) provide that:

> *"3.3. You and your manager have the joint responsibility of setting your performance objectives. Your manager must therefore discuss and agree with you what your objectives will be for the review period.*
> *3.4. Without objectives, there can be no effective performance management. Objective setting is, therefore, an important component of the performance management process."*

71. It is clear from paragraph 5 of the Performance Management Presidential Directive 04/2009 and paragraphs 3.3 and 3.4 of the Staff Performance Handbook that at the beginning of each year, managers (supervisors)and their staff must agree on individual objectives for that year and the weight to be given to each objective. It is the joint responsibility of both the manager and the staff member concerned to set performance objectives for staff members. It is common cause that no objectives were set between the applicant and the President as his supervisor.

Mid-year review

72. Paragraph 7.2 of the Presidential Directive 05/2021 provides that:

> *"Mid-year Review (July-August): There shall be a formal feedback discussion held between the Manager and the staff member under his/her supervision, to assess the individual ' s progress during the first half of the period under review, against each objective. These performance discussions should be held between the Staff, the Manager and, where applicable, the Contributing Assessor for consistency of message. Upon the request of either the staff member, the Manager or the Contributing Assessor, the Human Resources Business Partner should be present to ensure adherence to the principles of transparency, objectivity, and due process."*

73. It is clear from paragraph 7.2 of the Presidential Directive 05/2021 that during mid-year review, there is to be a formal feedback discussion between the supervisor and each of the staff member under their supervision, to assess the individual's progress during the first half of the year, against each objective (key responsibility) and key performance driver, noting areas in which performance is not satisfactory and agreeing on remedial action where performance is below the required standard. The mid-year review provides Managers the opportunity to review objectives and provide feedback to staff in order to ensure there are no surprises during evaluation at the end of the year. It is a common cause that since there were no objectives set then there was no mid-year review.

End of Year Evaluations

74. Paragraph 7.3 of the Presidential Directive 05/2021 provides that there should be performance evaluation at the end of year. The applicant's performance evaluation form was blank. There was no objective setting and no mid-year review was conducted. It follows that the end of year evaluation during the probationary period did not take place.

Performance Report

75. Staff Rule 64.03(b) (2000) provides that, *"Within a reasonable period before the end of the probationary period, the Head of Department shall submit to the Director a report on the*

performance of the staff member and a recommendation for confirmation, termination, or extension of the probationary period." In the absence of specific procedure concerning performance evaluation of vice-presidents, the rules governing performance evaluation of staff members following performance evaluation at the end of probation period should apply. The Tribunal finds that there was no performance report for the applicant during the probationary period since there was no objective setting, mid-year review and end of year review.

76. The Tribunal finds that the Bank did not comply with paragraph 5 of the Performance Management Presidential Directive 04/2009 and paragraphs 3.3 and 3.4 of the Staff Performance Handbook (2009); and paragraph 7.3 of the Presidential Directive 05/2021.

II. Consultation with the Board of Directors

77. The issue is whether there was consultation with the Board of Directors in accordance with article 37(2) of the Agreement establishing the African Development Bank.

78. According to the General Counsel of the Bank, opinion in the interpretation of the Article 37(2) of the Agreement establishing the African Development Bank. the term "consultation", , entails elements of seeking the advice and opinion of Executive Directors by the President prior to the appointment and removal of a Vice President. According to the opinion, this involves a discussion between the President and Executive Directors (either individually or collectively) to seek their views on a proposal by the President to appoint or remove a person as Vice- President.

79. Article 37(2) of the Agreement Establishing the African Development Bank provides that the President of the Bank is responsible for the hiring and release of the Bank's Vice Presidents *"… in accordance with the rules and regulations adopted by the Bank, provided that he shall act in consultation with the Board of Directors in the exercise of his powers of appointment and release of Vice Presidents".*

80. The Tribunal considers that proper consultation entails that it must be undertaken in good faith at a time when a proposal is still at a formative stage. The Board of Directors must be given reasonable time and information to consider the proposal. It must include sufficient reasons for particular proposals to allow the Executive Directors to give proper consideration and response. For this purpose, there must be an exchange of views and the product of consultation must be conscientiously taken into account when the ultimate decision is made. Therefore, consultation is more than sharing of information.

81. The record shows that on 30 July 2021, the Senior Vice President, on behalf of the President, sent an email to the Executive Directors of the Board as part of consultation for the non-confirmation decision by the President. In that email Senior Vice President wrote as follows, *"…My apologies for the short notice: the consultations with the Board would have taken place much earlier, but the absence of Vice President R.A. on prolonged sick leave, made this impossible. He has however resumed duty about two weeks ago and has attended the recent SMCC meetings. Given his resumption of duty, I have held discussions with the Dean and a number of the Executive Directors, I was able to reach at short notice and I am now writing to provide further details on the issues that have led Senior Management to the conclusion that it is not in the interest of the*

Bank to confirm the appointment of Vice President R.A.". On the same date, the Senior Vice President, on behalf of the President, notified the applicant that his appointment would not be confirmed at the end of his probationary period on 30 September 2021 and that the effective date of his separation would be 1 October 2021.

82. The Tribunal notes that the President's obligation to consult the Board of Directors when considering the appointment or dismissal of a Vice-President derives from Article 37(2) of the Agreement Establishing the African Development Bank, which is the fundamental legal instrument of the Bank and takes precedence over its other internal legal instruments.

83. The consultation that occurred, was carried out by the Senior Vice President on the instructions of the President. Section 37(2) of the Agreement does not provide for the delegation of this prerogative to consult the Board of Directors to any other member of staff. The duty to consult rests on the President alone. The evidence demonstrates that the President did not carry out this duty. In the circumstances, the Tribunal finds that there was no consultation by the President as envisaged in section 37(2). This procedural irregularity is fatal.

III. Notification and reasons for non-confirmation during probation.

84. Once the Tribunal has found that the decision to not confirm the applicant's employment is tainted with the procedural irregularities as mentioned above, it is no longer necessary to enter into the merit of this case.

b) Whether PIAC investigations against the applicant were justified and followed due process.

85. In applicant's non-confirmation decision of 20 July 2021, allegations of harassment were not considered. The applicant's claim of PIAC abuse regarding harassment has no direct link with the decision being challenged at the Tribunal. The Tribunal therefore finds that such a claim lacks merit.

c) Whether the applicant is entitled to the relief sought.

86. The Tribunal notes that the probationary period is, by its very nature, a 'test period' for both parties before the employment relationship becomes permanent. It allows the employer to assess if the employee is fit for the organization. During this probationary period, both the employee and the employer are free to terminate the employment relationship without excessive formality.

87. In this case, it is undisputed that the applicant is an internationally renowned economist and that his technical skills are not in question. However, the assessment of a member of staff's abilities necessarily includes his technical skills, behaviour and his ability to integrate into his new professional environment. In accordance with Staff Performance Handbook (2009), performance assessment of objectives can be technical and behavioral. The behavioral and managerial dimension of the post of Vice-President entrusted to the applicant was of particular importance, given that his Complex had been subject to serious disturbances. However, the record shows that, within a relatively short period after his appointment, the applicant's dealings with his colleagues and with partner departments revealed serious behavioral issues that further disrupted the

functioning of his department. The applicant did not demonstrate an ability to efficiently manage the Complex or to integrate into the organization.

88. The record also shows that the President of the Bank disapproved the applicant's management style and expressed his concerns that he should find appropriate solutions to manage the Complex. The Tribunal notes that the applicant unsuccessfully tried to meet with the President to discuss these concerns. The President also introduced specific measures to assist the applicant in dealing with challenges that existed within the ECVP Complex by setting up an hoc working group under the Vice-President, CHVP. The record shows that the applicant did not take advantage of the opportunities offered to him, and he interpreted them as a sign of mistrust in his authority and ability.

89. The applicant has requested rescission of the disciplinary decision and the payment of two years' salary plus all benefits as compensation for the remainder of his lost contract. Having found that non-confirmation was unlawful on the basis of procedural irregularities, is the applicant entitled to be paid 2 years' salary for the remainder of his contract? The record shows that (a) in July 2020 prior to assumption of duty, he requested freezing of all recruitments at ECVP Complex; (b) there was meeting held on 12 October 2020 in which it is alleged that he informed all the Directors in the Complex that their contracts would not be renewed; (c) several interactions with colleagues and senior management in which it is alleged that he used abusive and disrespectful tone; (d) interaction with the office of the Secretary General on protocol, privileges and immunities (PSEG) in which it is alleged that he was rude and raised his voice; (e) during interaction with the budget department, in which it is alleged that he wrote an email to the Budget Coordinator that he would be moved. Considering these allegations and circumstances, the prospect of the applicant's probation being confirmed, based on his behavior, would be low. The Tribunal therefore rejects his request for 2 years' salary for the remainder of his contract.

90. The Tribunal considers that the applicant, by his conduct, bears a non-negligible share of responsibility for the development of his relations with his direct subordinates and with his colleagues in other departments and, ultimately, with the respondent. In offering the applicant the important position of Chief Economist and Vice President, ECVP, the respondent legitimately expected him, in view of his experience, to provide solutions to the serious problem and not to compromise his service by behaving in a manner incompatible with the culture of the Bank and the difficulties it was facing. The Tribunal considers that, in those circumstances and in the light of the numerous and serious incidents which had occurred since his arrival at the Bank, the applicant could not reasonably be expected to obtain confirmation of his employment at the end of the probationary period.

91. The Tribunal is of the opinion that if the respondent had dealt with the issue of non-confirmation in accordance with its rules and regulations, it would most likely have been justified on merits.
92. The applicant requests compensation of six (6) months' salary for lack of proper notice prior to termination. The Tribunal recalls that Staff Regulation 2.0.8 (2021) provides that written notice for termination during probationary period will be 60 days before the end of probationary period. The respondent sent the notice to the applicant on 30 July 2021. The effective date of 1 October 2021 was his last working day. The respondent complied with Staff Regulation 2.0.8. The Tribunal therefore finds that applicant's request for compensation on this ground lacks merit since he was given proper notice in accordance with the Rules of Bank.

93. The applicants request for the removal of its record (PIAC investigation records) from his file lacks merits since his non-confirmation decision had nothing to do with harassment claims.

94. Considering the legal Costs submitted by the Applicant, the Tribunal orders that the Applicant be paid a sum of USD10,000 as a contribution towards the costs of these proceedings.

95. The Tribunal notes that the President endorsed the Staff Grievance Committee recommendations as of 10 March 2023. The applicant needs to be paid relief endorsed by the President if these have not yet been paid to him.

V. DECISION

96. For the foregoing reasons, the Tribunal declares that the non-confirmation decision was unlawful. The Tribunal directs the respondent to pay to the applicant:
    (1) The equivalent of 9 months' salary for procedural irregularities on non-confirmation.
    (2) A contribution of USD10,000 towards the Applicant's costs in this Tribunal.
    (3) All other claims are rejected.

Mathias EPULI ALOH	President
Abdoulkader DILEITA	Executive Secretary

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