

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 101
(31 January 2013)

Hua Du
v.
Asian Development Bank

Arnold Zack, President
Yuji Iwasawa, Vice-President
Lakshmi Swaminathan
Roy Lewis
Gillian Triggs

1. The Applicant had been charged as follows: *“Your involvement and knowledge of the writing and sending of the three emails that were sent in a malicious attempt to damage the reputation of ADB and several staff [amounting to] misconduct under para. 2.1(c) of AO 2.04, as these actions were detrimental to ADB and harmed ADB’s reputation. Furthermore, as a senior ADB staff member enjoying the trust and confidence of the President, your actions did not conform to the standard of conduct required in paras. 2.13 4.3(i) of AO 2.02, and reflected adversely on ADB and compromised ADB’s operations.”* The Applicant seeks to quash her dismissal for misconduct arising from her alleged involvement in those emails.

I. THE FACTS

Background

2. On 14 July 2009, an email was sent to the President of the Asian Development Bank (“ADB” or “the Bank”) criticizing the Respondent’s handling of the Country Partnership Strategy for India, claiming that members of the ADB’s senior management were not competent, and alleging that senior management had covered up cases of corruption by other senior ADB staff. This email was also sent to senior ADB Staff, the ADB Board of Directors and organizations outside the Bank including the Government of India, Transparency International, media organizations and other institutions in China and India. It was signed and ostensibly sent by Manoj Kumar of a “Delhi Based INGO” from delingo80@rediffmail.com.

3. On 9 August 2009 another email was sent from Manoj Kumar to the same recipients alleging, among other things, seven incidents of impropriety by senior staff. The email cited earlier allegations made by Mr. Ashok Sharma and the Applicant that the Deputy Director General (“DDG”) of South Asia Regional Department (“SARD”), now retired, had violated integrity rules by recruiting a cousin. The Respondent attempted to contact “Mr. Kumar” for further information, but the matter was closed since there was no response.

4. On 2 August 2011, a third email from smail43khusi@gmail.com, a gmail account in the name of Rajesh Kumar, containing allegations similar to those in the 9 August 2009 email and expressing disappointment over the promotion of the earlier mentioned DDG of SARD, was sent to the President with copies to several senior staff members. Attached to this email was a word document entitled ‘Mail3.doc’ which contained the name Manoj Kumar. After examination of the metadata and the text of the email, it became clear that the author of the attached word document was a “HUA DU” and that the entry was last modified by a person with the identity of “Hua”.

OAI Investigation

5. On 10 August 2011, Budget, Personnel and Management Services Department (BPMSD) requested the Office of Anticorruption and Integrity (OAI) to investigate the three emails. OAI concluded that the same person or group of persons wrote the emails and that the author was likely to be an ADB staff member.

6. The OAI obtained authorization to access the ADB emails and office computers of the Applicant and Mr. Sharma and found documents on both with the same identifiers as those of ‘Mail3.doc’: “Hua” and “HUA DU”. OAI found that the metadata for ‘Mail3.doc’ indicated that the document was originally created on or prior to 8 July 2009 by “HUA DU” (shortly before the first email of 14 July 2009). OAI also found that at 3:44 pm on Sunday, 9 August 2009, Mr. Sharma had sent Director General (DG), SARD an email emphasizing his skills for the position of DDG, SARD, the occupant of which was due to retire, and that at 3:45 pm, he had forwarded that email to the Applicant. OAI noted that the second email of 9 August 2009 from Kumar was sent shortly thereafter at 4:06pm.

7. On 26 September 2011, the Head of OAI sent a memo to the Applicant advising her that she was under investigation due to her alleged involvement with or knowledge of the sending of the Kumar emails. The Applicant received this memo the next morning.

Background of the Applicant

8. The Applicant joined ADB as a Young Professional on 26 April 1994. In the years from 2002 to 2008, she worked in the Bangladesh Resident Mission (BRM) within the SARD, first as a Principal Country Programs Specialist and then for 3 years in the senior management level of Country Director (Level 7). In July 2008 at the end of her posting to BRM, the Applicant was assigned as an Advisor in the Office of Administrative Services (OAS) (Level 7). After objecting to this assignment in December 2008 the Applicant was transferred to the Central and West Asia Regional Department (CWRD) as an Advisor (Level 7). In July 2010, she was promoted to the position of Director, Office of Co-financing Operations (OCO) (Level 8). While working in BRM, the Applicant began a long distance personal relationship with Mr. Sharma, then the Director of Governance, Finance and Trade Division of SARD. When the Applicant's posting to BRM ended she returned with her son to Manila in July 2008 where they began living with Mr. Sharma.

9. In late 2006, the Applicant had brought to the attention of her supervisor, DG SARD, the allegation, that was later referred to in the 9 August 2009 email, that the then DDG of SARD had promoted and recruited his first cousin as a consultant on a project administered by BRM. DG, SARD reported the allegation to the then Senior Director, Human Resources Division (BPHR), who referred the matter to the OAI for investigation under Administrative Order ("A.O.") 2.04.

10. In early June 2008, OAI investigated the Applicant and Mr. Sharma for alleged manipulation of ADB funds for mission travel to enable them to meet each other for holidays. This investigation was closed in July 2008 with no finding of misconduct or other impropriety. During that 2008 investigation, Mr. Sharma sent the Applicant an *sms* message citing Mr. Sharma's suspicion that the DDG of SARD was the source of the mission-travel allegation to OAI. This message was later found during the 2011 investigation on the Applicant's Toshiba Satellite computer.

The Applicant's conduct during the 2011 OAI Investigation

11. On the afternoon of 27 September 2011, the Applicant was interviewed and told of the three emails. She responded, *"I have zero idea who sent these emails. Actually I myself is so puzzled.... I don't do this sort of thing."* When shown a copy of the 2 August 2011 email she denied ever having seen it, and added *"I don't even understand some of the words, ... I don't know who wrote it, someone who must be very good at English... I cannot even recognize the meaning. Like ... something like 'behest of a cohort' I don't even know what it meant."* She denied having seen word attachment 'Mail3.doc' and said that when requested to come to the investigation, she was *"trying to figure out who's trying to frame me, who's trying to get me."* When shown her name in the properties of the 'Mail3.doc', she said *"It's just not me... I couldn't be so stupid, you know...use my computer to write an email to complain"*. When shown the other two emails, she acknowledged that one of them had been shown to her by her then supervisor, Head of OCO about three months earlier. She repeated her earlier allegation of nepotism, which had elicited the response in which she was accused of abuse of mission travel, and noted that seeing the email made her feel *"victimized because somebody must be, like thinking big and doing big and just utilizing me."* She acknowledged that, based on the forensic evidence, the 'Mail3.doc' document had probably been written on one of her personal computers. Those computers were also used by Mr. Sharma and others and had no password protection.

12. When informed by the OAI investigators that they wished to go to the Applicant's apartment to take custody of her personal computers, she replied, *"Well, those computers, they are joined property. But I need to ask Ashok if I can send it to you... I need to give him a telephone call."* When asked which of the computers were hers, she responded: *"[E]verything I bought but he's using it. He's owning it, even the car."* *"I would telephone him and immediately and get back to you."* When asked why as a cooperating staff member it was necessary for her to call Mr. Sharma, she responded *"[H]e's the one who's using the computers, all of the computers and his relatives and friends, everything. ... and he would say how dare you to do all of this."* When assured that the computers would be returned thereafter, she said *"I will let you do that. I will just immediately call Ashok Sharma."* The interviewers said they would go with her to retrieve the computers. She objected *"Well if you ... if... if all of you come into my house and... what is shown to my you know, to my son, and I become a criminal or what... [y]ou know you cannot just go and do a house search."* When the investigators offered to have only one person from OAI accompany her, the Applicant insisted on talking to Mr. Sharma before releasing the

computers. The interviewers offered to let her use a phone from OAI for the call to which she declined. The Applicant agreed to bring in the computers and after repeated denials of writing or sending the emails added: *"I'm not going to do anything to damage whatever you want to investigate."*

13. The next morning the Applicant produced three of her personal computers (a Toshiba Portégé, a Toshiba Satellitè, and a Macbook) and was again interviewed. The Applicant told the investigators that she had called Mr. Sharma who had *"basically confessed...and he's part of the thing."* She stated that he asked her to delete the 2 August email with the attached 'Mail3.doc', but that she refused because she didn't want to be *"part of it."*

14. On 5 October 2011, the OAI investigation noted in its Report that both the Applicant and Mr. Sharma had denied any knowledge of the writing or sending of the emails but they had conceded that the 'Mail3.doc' was written on the Applicant's personal computer. Although they claimed that one of their many visitors must have written it, neither of them had been able to identify which of their visitors would have had the knowledge and motivation to write and send the emails, or why they would use the Applicant's computer to do so. The OAI Report concluded that, *"on the balance of probabilities, the e-mail [of 2 August 2011] was written by Mr. Sharma and... that [the Applicant], on whose computer the e-mail was written, would have had knowledge of the same. As this last e-mail has been linked to the earlier e-mails, OAI further finds that, on the balance of probabilities, both parties have knowledge of the writing and sending of all three e-mails."*

Disciplinary Proceedings

15. After reviewing OAI's findings, on 7 October 2011, BPMSD served charge memos on both the Applicant and Mr. Sharma. The memo to the Applicant charged her with misconduct for her *"involvement and knowledge of the writing and sending of [the Kumar] emails ... [amounting to] misconduct under para. 2.1 (c) of AO 2.04"* and actions that breached *"paras. 2.13, 4.3 (1) of AO 2.02."* The Applicant and Mr. Sharma were both placed on administrative leave pending completion of the proceedings.

16. In response to her charge memo, the Applicant sent emails on 7 and 19 October to DG, BPMSD and Director, BPMSD respectively, where she again denied writing, sending, or any

knowledge of the emails and argued that she had “*no reason or motivation to write the emails.*” She stated that she and Mr. Sharma were living together “*for matter of convenience.*” She added that Mr. Sharma was planning to move to India to live after retirement, but that she would not follow him and that she did not have “*any motivation to complain about anybody.*” She also stated that she did not delete any document in the Toshiba Portégé. On 26 October 2011, Senior Director, BPHR, acting on behalf of DG, BPMSD, met with the Applicant to discuss her reply to the charge memo pursuant to A.O. 2.04, para. 9.2(d).

17. On 27 October 2011, OAI reported to DG, BPMSD the findings of a “Digital Forensic Report” dated 26 October made by an independent computer forensic expert. The Report found that, following the Applicant’s first interview with OAI and prior to the surrender of the Toshiba Portégé, a Power Point file entitled the “Louvre presentation” (the ‘Louvre file’), a sales presentation for a high rise apartment tower in Delhi, had been deleted. This was despite the Applicant having stated at the initial investigation that she would not “*do anything to damage whatever you want to investigate*” and having later stated that she did not delete anything from her computer. OAI concluded from the computer analysis “*that [the Applicant] deleted the ‘Louvre file prior to her closing the computer down*” . The Report also found additional emails and *sms* messages which indicated that Mr. Sharma had purchased one of the ‘Louvre’ apartments, that the Applicant had had input into that decision, and that there were recent photos of them on holiday. There were also emails and an *sms* showing that the Applicant and Mr. Sharma had suspicions as to the whistle-blower in the 2008 investigation against them for misuse of ADB funds. OAI concluded that “*it is highly improbable that unidentified friends of Mr. Sharma’s could have had access to the computers and an e-mail account over a two-year period...and the other forensic evidence...form sufficient basis to conclude that Mr. Sharma and [the Applicant] must have been involved in the writing and/or sending of the emails.*”

The Applicant is dismissed for misconduct

18. Separate memos dated 7 November 2011 were sent by DG, BPMSD to the President recommending dismissal of the Applicant and Mr. Sharma. The President implemented both these recommendations on 8 November 2011.

19. In recommending dismissal, DG, BPMSD found that the Applicant’s “*failure to cooperate fully and to reply fully and truthfully*” in the investigation undermined that

investigation and constituted a serious breach of an employee's standard of conduct. It also "revealed her lack of integrity and loyalty to ADB in her position as a senior ADB staff member...such that her continued employment with ADB poses a serious risk to ADB." DG, BPMSD found that the Applicant had clearly engaged in serious misconduct that did not conform to the standard of conduct of A.O. 2.02 paragraphs 2.13 and 4.3(i); the disciplinary measure of dismissal was appropriate; and the breach of trust involved was so serious as to conclude that continuation of her services was not in the interest of ADB.

Appeals Committee

20. On 8 December 2011, the Applicant appealed her dismissal for misconduct to the Appeals Committee. On 18 May 2012, the Appeals Committee recommended that the President reject the Applicant's claims as being without merit. The President made the decision in accordance with the recommendation.

Application to the Administrative Tribunal

21. This Application, filed with the Administrative Tribunal on 2 August 2012, contests the President's disciplinary measure of her dismissal for her involvement in the three Kumar emails sent to the President, members of the ADB Board of Directors, and others including external parties, alleging corruption, nepotism, and impropriety.

22. The Applicant seeks the following remedies:

- "(a) Rescission of the disciplinary measure of dismissal for serious misconduct imposed on me;*
- (b) Reinstatement to my former position in ADB, or to a comparable position level with back wages and without loss of seniority rights;*
- (c) Expurgation of the baseless and unfounded allegations and improper inferences and conclusions made in the OAI Report and the BPMSD Disciplinary Memo from all relevant records of ADB;*
- (d) Payment of reasonable compensation for the injury sustained and damage suffered by me as a result of the unlawful disciplinary measure;*

- (e) *Costs attributable to the resources that had to be expended to prepare this Application; and*
- (f) *Provision of other reasonable reliefs and remedies as this Honourable Tribunal may determine.”*

23. In relation to preliminary measures, the Applicant requests:

- 1) the case to be decided *en banc* since the issues involved and the conduct of ADB are “*so unprecedented in the annals of ADB*”.
- 2) the production of the following documents:
 - i) a copy of the Office of Information Systems and Technology (OIST) initial computer analysis and a copy of the final independent computer forensic report commissioned by OAI;
 - ii) a copy of the two memos from DG BPMSD to Mr. Sharma – the charge memo and memo imposing the disciplinary measure of dismissal; and
 - iii) a copy of Mr. Sharma’s non-business travel request and liquidation of his travel to India in October 2011; and
- 3) An oral hearing at which Mr. Sharma and former Head of OCO would provide testimony.

Summary of Contentions

Applicant’s Plea

24. The Applicant asserts that she had no knowledge of, or participation in, the creation of any of the three emails, and that the discovery of the emails on her home computers was readily explainable by the fact that the person with whom she lived had full access thereto as did others who frequented their apartment. She asserts that she fully cooperated throughout the investigation providing the computers as requested. She denies any motive for collusion with Mr. Sharma on the Kumar emails and denies any impropriety or involvement in deleting the computer material referring to the Louvre apartments. She asserts the entire dismissal episode constitutes gender, culture, and nationality discrimination reflecting, she maintains, the “ancient Asian

culture of misogyny". She asserts that in breach of due process key points of the investigation were not presented to her with an opportunity to explain her conduct. She asserts that there is no reasonable relationship between her conduct and the severity of the discipline imposed on her.

25. In summary, she argues that her dismissal for misconduct was "flawed" because: 1) there was no evidence to support the charge of misconduct as contemplated by A.O. 2.04; 2) the decision was discriminatory; 3) proper procedures were not followed; and 4) the penalty was not proportionate to the misconduct.

Respondent's Response

26. The Respondent argues that the evidence has provided a sufficient basis to conclude that the Applicant had committed misconduct warranting the disciplinary action of dismissal and that proper procedures were followed at every stage of the disciplinary proceedings. The Respondent also argues that the Applicant has the burden of showing that the challenged decision was unsupported by evidence, procedurally defective or biased and that her claim as to the impropriety of her dismissal was without basis. The Respondent requests that the Tribunal dismiss the Application as without merit.

II. FINDINGS

Preliminary Measures

Request for en banc

27. The Tribunal has reviewed the parties' positions on this issue and agrees that an *en banc* consideration is in order. Accordingly, this case is being considered by the full Tribunal.

Request for Documentation

28. The Tribunal finds that the documentation requested by the Applicant 1) does not exist, or 2) is irrelevant to these proceedings, or 3) the substance thereof has already been provided in the extensive documentation of this case. With respect to the charges against the Applicant, the

Tribunal finds that the requested documentation of the actions taken in the case of Mr. Sharma would be immaterial. Accordingly, the Applicant's request for further documentation is denied.

Request for an Oral Hearing

29. According to Rule 14 paragraph 1 of the Rules of Procedure of the Tribunal, "Oral proceedings ... may be held only if the Tribunal so decides". The Tribunal held in *Haider (No.2) Decision No 48 (2000)*, paragraph 9:

"The Applicant has requested to hold oral proceedings under Rule 14 of the Rules of the Tribunal. Noting that the decision to accord oral proceedings rests with the discretion of the Tribunal and that it may be held only when it finds such proceedings are necessary, the Tribunal decides that there is no such necessity in this case, and accordingly, that the request be denied."

In this case, both parties have submitted extensive, written evidence and the Tribunal finds that this documentation is sufficient to determine the issues before it. Therefore, the Tribunal decides that there is no necessity for an oral hearing in this case, and accordingly the request for an oral hearing must be denied.

30. Given our conclusion that oral testimony is not necessary in this case, we find that the record is closed on the basis of the existing submissions. A document submitted on 17 January, 2013 by the Applicant is rejected as being out of time.

The Merits

31. The issue before the Tribunal is to determine the appropriateness of the President's decision to dismiss the Applicant. In *Zaidi*, Decision No.17 [1996] II ADBAT Reports 92, para 10, the ADB Administrative Tribunal decided:

"In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v)

whether the requirements of due process were observed". (Zaidi, para.10 quoting from *Carew*, WBAT Decision No. 142 (19 May 1995), para. 32)

Whether there was misconduct.

32. The Respondent asserts that the evidence justifies the finding that the Applicant had knowledge of and was involved in the Kumar emails, and that the text of the Kumar emails came from her Toshiba Portégé and Toshiba Satellite computers. It argues that the Applicant's conduct during the investigation was suspect in that she immediately denied the language fluency required for writing such an email, even before she had been asked if it had been written on her computer or even if it had been written by her. The Respondent asserts that the Applicant's behavior has not been the conduct expected of someone who had not been involved, that she was not forthright in her responses to investigators and BPMSD, and that she failed to cooperate fully with the investigation by tampering with the computer evidence. The Respondent argues that 1) the Applicant's refusal to grant the investigators immediate access to her home computers, and 2) her activity on them later during the evening of 27 September 2011 constitute damning evidence of her complicity.

33. The Respondent points out that the examination of the Applicant's use of her Toshiba Portégé on the evening of 27 September 2011, shows that she opened the computer at 6:54 pm, reviewed 11 documents and then at 7:48 pm opened the 'Mail3.doc' which she had earlier said she had never seen and had no idea was on her computer. Additionally, the Respondent asserts that the Applicant deleted the 'Louvre file' at 10:28 pm before closing the computer. The Respondent challenges the Applicant's assertion that Mr. Sharma had told her that "*he didn't want (her) to be part of it*". To the contrary, the Respondent relies on her testimony in the second interview on 28 September 2011 that he had asked her the night before to delete 'Mail3.doc'. This, along with her asserted refusal to do so, argues the Respondent, was merely a ploy to mislead the Bank and shows that she was not cooperating with the investigation.

34. The Respondent also challenges the Applicant's claim that she was not close to Mr. Sharma and would never follow him to India on his retirement. It notes the email exchanges between them over their choice of future apartment. The Respondent cites the Applicant's deletion of the 'Louvre file' as an attempt to cover the fact that she and Mr. Sharma were close

and had future plans, while claiming to the investigators that they were not close and that she had tried to break up with him on several occasions.

35. The Respondent contends that the Applicant was highly motivated to make the attacks on senior staff contained in the Kumar emails. This was evidenced by her referring to a series of slights and grievances. She thus saw her dismissal as punishment for her earlier whistle-blowing, and still felt humiliated by her assignment to OAS. She believed that the natural trajectory for her career should have been another director-level position in an operations department based in Manila. The Respondent notes that the Application is replete with accusations against the OAI, a principal target of the Kumar emails, that mirror her earlier whistle-blowing. The Respondent concludes that her attitude tellingly illustrates the Applicant's distorted way of thinking and demonstrates her motivation to make the allegations against OAI. The Respondent argues that on the balance of probabilities, the Applicant had knowledge of and was involved in the Kumar emails and that the evidence provides sufficient basis for the Respondent to conclude that the Applicant had committed sufficiently serious misconduct to warrant the disciplinary action of dismissal.

36. The Applicant argues that her dismissal for misconduct was flawed, claiming that it was not within the scope of the misconduct contemplated by A.O. 2.04.

37. The Applicant dismisses the allegation that she knew of the emails as pure speculation. She argues that her alleged complicity in preparing and sending the emails is not demonstrated by the fact that the emails were found on, and sent from, the computer at her home. She notes that the last time she accessed the Toshiba Portégé five months before 'Mail3.doc' was introduced into it, that Mr. Sharma had accepted responsibility for writing the emails, and that she did not know of them and had no motivation to write them. Since Mr. Sharma was "*a part of the house*" and since she feared breaking up with him, she argues that she was reluctant to have the investigators come to their home only because she felt she could not, without his permission, surrender the computers on which he worked and because the intrusion would make her look like a criminal in her son's eyes. She explains the deletion of the 'Louvre file' as happening accidentally when her son, on Mr. Sharma's telephonic instructions sought to find and delete the 'Mail4.doc'. She denies that she made the deletion. The Applicant claims her relationship with Mr. Sharma was not close and that she had tried to break up with him on a number of occasions.

38. The Applicant asserts that the Respondent's action is a punishment and retaliation for her having been a whistle-blower in 2007 when she brought allegations of integrity violations and nepotism against the then DDG to the attention of the DG, SARD. She argues that since her career was presently going well, and she was friendly with the staff targeted in the Kumar emails, she had no motivation to be part of the Kumar emails.

Standard of Proof

39. This Tribunal is governed by the standard for disciplinary proceedings set out in A.O. 2.04. A.O. 2.04, para. 8.1 stipulates that "*allegations of misconduct shall be investigated...in accordance with Appendix 2 of this AO.*" Appendix 2, paragraph 6 provides "*[t]he standard of proof for the investigation is a Preponderance of Evidence.*" A.O. 2.04, para. 9.2 authorizes the initiation of disciplinary proceedings where there is "*a preponderance of evidence*" that a staff member has engaged in misconduct. Appendix 1 of A.O. 2.04 defines "*a preponderance of evidence*" as

"Evidence which is more credible and convincing than that presented by the other party. In cases of misconduct, it is a standard of proof requiring that the Evidence as a whole shows that it is more probable than not that the staff member committed the misconduct."

Conclusions of the Tribunal

40. Applying that standard to the case before the Tribunal, the evidence as a whole shows that it is more probable than not that the Applicant had knowledge of and was involved in the Kumar emails and committed the misconduct with which she was charged. Regardless of whether the Applicant herself wrote the emails, her declarations, that she was unaware of them and innocent of any knowledge of their having been written or sent, lack credibility. Any doubt as to her culpability is resolved by examination of her behavior once the existence of the emails was revealed to her.

41. The Applicant's responses during her initial interview were not what one would have expected from an innocent party. Her testimony was that her line manager had shown her one of the emails some three months earlier, but that she could barely remember its contents. Given her

previous whistle-blowing, and her seniority and prominent position within the Bank, the haziness of her recollection was not credible. Nonetheless she continued to claim that she was unaware of the existence of the full sequence of the emails, their content and even the possibility that it might have been linked to her or produced on her computer. She reacted by saying that she *“was trying to figure out what is the reason, who’s trying to frame me, who’s trying to get me”*. The Applicant’s reaction was, however, consistent with someone who already knew of the emails and their content and source and realized they had been discovered.

42. Likewise the Applicant’s marked reluctance to provide immediate access to her computers is hardly the response one would expect from someone cooperating in such an investigation. Her statement that she had to have Mr. Sharma’s permission to provide the computers was at variance with her statement that the computers were hers. When offered the opportunity to contact Mr. Sharma for permission to provide them to the investigators she demurred. Instead she evidently felt the need to examine the computers in private before surrendering them to the investigators the following day.

43. When she returned home she *“to (her) horror discovered the Mail3.doc”*. The evidence established that while she opened the computer at 6:54pm, she opened eleven other documents before, nearly one hour or less later, at 7:48pm she opened the ‘Mail3.doc’. The Tribunal finds that it was probable that she failed to open ‘Mail3.doc’ earlier because she already knew it was there and didn’t need to confirm what it contained.

44. The evidence shows that the ‘Louvre file’ was opened at 10:28 pm. The Applicant’s claim that the file had been *“accidentally deleted”* by her son rather than by her is improbable on at least two grounds: 1) the Recycle folder contained solely the potentially damaging ‘Louvre file’ and was not one of several other deleted files as contended; and 2) the explanation changed from the claim of an accident whilst *“creating/editing some files and then deleting them”* to the claim of trying to delete the ‘Mail4.doc’ at Mr. Sharma’s telephoned request, to a further claim of trying to delete a photo from a vacation in France. More likely is that the Applicant deleted the ‘Louvre file’ in an effort to avoid it coming into the hands of the investigators where it would show the continuing closeness of the relationship between the Applicant and Mr. Sharma and their shared future plans. Strikingly, this was a deletion which ran contrary to her earlier assertion that she would not *“damage whatever you want to investigate”* and her later denial that she deleted any document before handing over the computers as OAI requested.

45. The Applicant claims ignorance of the emails and their content. This is not credible. The language of her Application to the Tribunal is replete with her repeated grievances against the Bank going back to 2007. These include protests of punishment and retaliation for having brought allegations of integrity violation against the then DDG of her department, and her humiliation for being assigned to OAS. When initially shown the email she made comparable complaints about her earlier experience. These complaints closely tracked those set forth in the emails themselves, heightening the belief that she was already aware of them, if not their author or coauthor. Moreover, the Applicant and Mr. Sharma lived together for several years, they shared a joint history of whistle-blowing, and they were both senior officials. Against that background, the Tribunal is of the view that, despite her assertions, it is unlikely that Mr. Sharma acted alone in preparing and sending the emails.

46. In view of the foregoing the Tribunal finds that: 1) the Applicant's claims are not credible on the evidence available; 2) the Applicant's behavior is indicative of close knowledge and participation in the preparation and sending of the emails; and 3) the emails were a deliberate attempt to malign the Bank and its senior officials. The Tribunal concludes that the actions of the Applicant constitute misconduct.

Whether the decision was discriminatory

47. On her claim of discriminatory treatment, the Applicant alleges that the Bank treated her as "an appendage of a man" without recognizing her independence and separate identity. She also alleges that the Bank treats women as though they "cannot be trusted" and that "their evidence is of no value".

48. The Tribunal notes that although the Applicant challenges the Bank's dismissal action as discriminatory, the investigation was instituted as the result of an investigation of a suspicious email and with results that were endorsed by an independent forensic investigator. We find no basis for concluding that the Respondent's decision was discriminatory on the basis of gender, culture, or nationality. Dismissal of the Applicant by the Bank is amply supported by the evidence establishing her complicity in the emails.

49. The penalty of dismissal imposed on the Applicant was the same as for Mr. Sharma. The Applicant claims that the effect of her dismissal was different from that of Mr. Sharma's dismissal because of his receipt of "instant pension payments." We find no nexus between the employer-created pension scheme and the sanction of dismissal imposed. The Tribunal notes that any question as to disparate consequences arising from the dismissal are attributable solely to Mr. Sharma's greater age and his eligibility under the pension scheme at the time of his dismissal. This difference in the effect of the penalty had nothing to do with gender, culture, or nationality.

Whether the decision followed due process

50. The Applicant claims she has been denied due process. The bases of this claim are the following: the disciplinary process was initiated before the investigation was completed; she was not given the full evidence at the outset or adequate opportunity to explain; the Bank let Mr. Sharma leave without establishing exactly what happened; she was not given an opportunity to respond to the final investigative report; and the Bank participated in a "shifting stance", in "connivance" with the OAI constituting "malfeasance" to justify a predetermined decision in her case.

51. The Tribunal finds that the Applicant was afforded requisite due process. The Tribunal finds that the Bank was under no obligation to continue its questioning of Mr. Sharma or his alleged associates, and that Mr. Sharma was not "permitted to leave" but rather was dismissed. The Tribunal notes that the Bank could have mentioned the deletion of the 'Louvre file' prior to the President's decision to dismiss, but the evidence was introduced tardily only as a rebuttal to her assertions that she had not deleted the file. We find that the Bank's late introduction of the alleged deletion of the 'Louvre file' was insufficient to diminish the weight of other evidence that established the misconduct. The Applicant was given an opportunity to explain her conduct and present evidence on her behalf. The Tribunal finds that the requirements of A.O. 2.04 on Disciplinary Measures and Procedures were met.

Whether the sanction was proportionate to the offence

52. The Applicant argues that the sanction of dismissal was unfair relative to that imposed on Mr. Sharma. The Applicant does not contest the misconduct charged is serious, but argues that her involvement therein was not proven and that the dismissal is unwarranted. She asserts that she

is being singled out for her earlier role in 2007 as a whistle-blower raising the risk of similar treatment against future whistle-blowers.

53. The Respondent argues that the President's decision to dismiss the Applicant was fully justified, supported by the evidence on the record, and justified by the conclusion that the Applicant had knowledge of and was involved in the Kumar emails. The Kumar emails, it continues, were detrimental to the ADB and harmed its reputation. They were not good faith whistle-blowing efforts raising issues of corruption calling for investigation. Rather they were sent to the media and other external organizations in order to damage the reputation of the ADB and to compromise its operations. The Respondent argues that when the lack of cooperation and false statements during the disciplinary proceedings, as well as tampering with the computer forensic evidence, are considered, the Applicant's behavior raises serious concerns that her loyalty is not to ADB, that senior officials can no longer trust her, and that it was clearly not in the interest of ADB to continue to employ her.

54. The role of this Tribunal in assessing the appropriateness of the discipline imposed by the President of the ADB is governed by the language of A.O. No. 2.04 para 6.1. As this Tribunal held in *Abat*, Decision No. 78 (7 March 2007), para. 43:

"A.O. No 2.04 para 6.1 provides that '[t]he disciplinary measure should be proportionate to the seriousness of the unsatisfactory conduct. As the President has discretion to determine the sanction in disciplinary proceedings, the test to be adopted by this Tribunal before it can interfere with the President's discretion is whether that sanction is disproportionate to the staff member's offense. (see Zaidi, Decision No. 17 (1996) II ADBAT Reports 89). The International Labor Organization Administrative Tribunal similarly ruled that 'the Tribunal can not substitute its assessment for that of the Director General, unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty.' (see Khelifati, ILOAT Judgment No 207 (14 May 1973))"

55. A.O. 2.04 para 6.3 further provides that *"dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member's service is not in the interest of the Bank."*

56. In this case the Tribunal finds that the disciplinary penalty imposed by the President of the ADB was not disproportionate to the staff member's offence. The determination by the President that the Applicant's claims of innocence were unsupported, and that she was a collaborator in the Kumar emails, are amply supported by the evidence. The evidence also supports the determination that the widely circulated emails, with their allegations of impropriety and irresponsibility, were detrimental to the ADB and had the potential for damaging its reputation. The Applicant's lack of full cooperation, her tampering with evidence, and her false statements during the disciplinary process raised serious questions as to whether the Bank could trust her in the future. The evidence demonstrated that she failed to meet the standards of integrity expected of a senior official and that her continued service was not in the interest of the Bank. Accordingly, the Tribunal finds that the sanction was not disproportionate to the offence of misconduct.

DECISION

For these reasons, the Tribunal unanimously decides to dismiss the Application.

