

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 108

(6 January 2017)

Mr. H

v.

Asian Development Bank

Lakshmi Swaminathan, President

Gillian Triggs, Vice-President

Shin-ichi Ago

Anne Trebilcock

Chris de Cooker

1. The Applicant joined the Asian Development Bank (“ADB” or the “Bank”) on 21 November 1994 and from 27 May 2014 served as a Level 8 Senior Advisor within the Office of the Director General, Central and West Asia Department.

2. On 5 January 2015, the Applicant applied for the Level 7/8/9 position in the Regional and Sustainable Development Department (RSDD) but was unsuccessful. He challenged the selection process before the Appeals Committee. The Appeals Committee found the selection decision procedurally flawed with “inaccurate statements about the [Applicant’s] professional experience” having been entered into the official record. Prior to the Appeals Committee Report becoming known, the Applicant filed a criminal complaint for “*libel*” and “*grave slander*” with the Philippine authorities against ten ADB officers involved in the selection process. He alleged that the Vice President (VP) Panel Notes prepared by the Screening Committee (SC) and “*circulated to various departments across ADB*” “*included highly defamatory language that maliciously maligned my reputation.*” He argued that in reporting the alleged crime he was pursuing criminal justice rather than an employment grievance and that the Philippine courts provided his only forum for access to justice. The President of the Bank (the “President”), on being informed of the Applicant’s filing of the criminal complaint and on the first service of the subpoena on a Bank official, summarily dismissed the Applicant. Three months after his dismissal, the Bank imposed the additional sanction of discontinuing participation in the Post-Retirement Group Medical Insurance Plan by the Applicant and his dependent family. This application relates to two matters: 1) his summary dismissal and 2) the discontinuation of the insurance.

I. THE FACTS

Background – The Non-Selection Decision

Non-Selection for Level 9 Technical Advisor Position

3. On 5 January 2015, the Applicant applied for the Level 7/8/9 position Technical Advisor (“TA”) Urban and Water in RSDD (now renamed the Sustainable Development and Climate Change Department). Applications closed on 14 January 2015.

4. On 30 January 2015, the SC did not shortlist the Applicant, but, finding the pool of applicants too small, agreed to add an additional candidate to the shortlist even though he had not applied. The shortlist with the additional candidate, but without the Applicant, was submitted to the VP Review Panel on 4 February.

5. On 5 February 2015, the Vice President, Operations Group 2 and member of the VP Review Panel met with the head of the hiring department who was also a member of both the SC and VP Panel Review, Director General, RSDD (DG, RSDD) to recommend that the Applicant be included given his “*training as an urban planner and [his] substantial work in the urban and water sectors in operations.*” After DG, RSDD discussed the matter with Director General, Budget, Personnel and Management Systems Department (DG, BPMSD), it was agreed to expand the shortlist to include the Applicant. Panel interviews were conducted by the SC between 9-13 February 2015.

Screening Committee’s Interview Report

6. The Applicant’s interview report of 11 February 2015 prepared by the SC, noted, amongst others, that the Applicant:

“...Understands water resources but has limited experience. ...”;

“Not familiar with knowledge areas ... away from the work for quite some time”;

“Has no recent participation in knowledge sharing activities nor has he kept up on his reading. Has media skills (film, writing, etc.) but has not used these skills in any key Bank projects in many years”;

“..... has been away from urban sector work for quite some time and has not kept his knowledge current.”

While there were a few positive remarks on the Applicant's competence such as his *“passionate and impactful”* communication skills and his *“[s]trong presence and relationship skills as well as his excellent speaking skills [which] make him a natural leader”*, the interview report's overall evaluation was: *“[The Applicant] has been away from urban sector work for quite some time and has not kept his knowledge current. He is therefore not viewed to be viable contender for this role.”*

VP Review Panel Notes and Recommendation

7. The Review Panel's 16 February 2015 assessment ranked first a candidate who had initially not applied, and ranked second another candidate. The Panel did not rank the Applicant at all. The overall assessment by the Panel was *“[the Applicant] has been away from urban sector work for quite some time and has not kept his knowledge current.”* The Panel then recommended the selection of the first ranked candidate for the TA position. This recommendation was signed by the President on 18 February 2015, and on 24 February 2015 the selection result was announced.

Appeal to the Appeals Committee of Non-Selection Decision

8. After unsuccessful attempts by the Applicant to seek relief, on 1 June 2015 he filed an appeal to the Appeals Committee against the President's decision for the alleged *“mishandling of the selection panel process and subsequent flawed decision for the position”*.

Delay in Forming Appeals Committee

9. On 14 July 2015, the Applicant wrote to the DG, BPMSD, noting that the Appeals Committee had not yet been constituted to consider his appeal and imploring BPMSD to *“promptly take steps to staff the Appeals Committee”*. The Applicant wrote to VP, Administration and Corporate Management on 30 July 2015, noting continued inaction on the part of BPMSD to staff the Appeals Committee and the passage of two months since the filing of his appeal. The Applicant categorized the delay as *“deliberate and willful”*, with the purpose of *“deny[ing] due process to staff”*. He warned that failure to staff the Appeals

Committee within five working days would “*force me to pursue redress via other legal avenues available to me.*”

10. The Appeals Committee Report indicates that the Applicant was notified on 11 August 2015 of the composition of the Appeals Committee that would review the Appeal. The Respondent’s Statement was submitted on 19 August 2015, the Applicant submitted his Counterstatement on 26 August 2015, and the Respondent’s Reply was submitted on 10 September 2015. On 13 October, the Appeals Committee invited the Applicant by e-mail to respond to new and previously undisclosed information related to the selection process that was included in the Respondent’s 10 September Reply. The Applicant responded to this on 15 October 2015. In the meantime he had filed a criminal complaint on 7 October 2015. (See paragraphs 13 and 14).

Appeals Committee Upholds the Applicant’s Challenge to the Selection Process

11. On 9 November 2015, the Appeals Committee finalized its report, noting various factors that led to “*(a) an ineligible candidate being shortlisted and (b) inaccurate statements about the Appellant’s professional experience being entered into the official record*”. It noted that “*there is no evidence of willful intent ... nevertheless not all procedures were followed correctly, and the basis of the decision was incomplete and in some cases, inaccurate.*” It recommended that the Appeal be upheld on the basis of a finding that “*ADB’s relevant policies and procedures were not correctly applied in the selection of the Technical Advisor*” and “*instances of abuse of discretion, abuse of process, and improper procedures during the selection process for this position*”. The Applicant’s argument that the delay was “deliberate” and led to an advantage to the Respondent was rejected by the Appeals Committee. The Appeals Committee found the delay had “*not created advantage or disadvantage for any party*”.

The President Accepts the Appeals Committee Recommendation

12. On 25 November 2015, the President accepted the Appeals Committee’s recommendation and directed that: (1) the appointment of the Technical Advisor (Urban and Water) be rescinded; the position be re-advertised; (2) staff involved in the flawed panel process be excluded from any role in the new selection process; (3) a review be undertaken to determine how and why such deviations occurred and to offer recommendations to avoid

recurrence; (4) a review be conducted to ascertain whether similar deviations had occurred in other appointments as alleged.

The Applicant Files a Criminal Complaint which Triggers the Disciplinary Action

13. Before the Appeals Committee finalized its Report, the Applicant filed a criminal complaint with the Mandaluyong City Prosecutor on 7 October 2015 against ten ADB personnel for having allegedly committed “*libel*” and “*grave slander*” against him. The ADB personnel listed were the members of the Screening Committee and the Chairperson of the VP Review Panel who had made statements about the Applicant in their reports. In the same criminal complaint, the Applicant claimed compensation for a total of approximately USD \$1 million: P25 million for moral damages and P25 million for exemplary damages “*as a reminder to ADB, to continue to operate at the highest levels of integrity*”.

14. In his criminal complaint, the Applicant shared all details of the selection process and the steps he had taken as part of the internal grievance process. He included in this statement allegations that the VP Panel Notes “*clearly demonstrated that the document, based on content provided by the SC, included highly defamatory language that maliciously maligned my reputation, untruthfully imputed upon me alleged defects in my credentials, and discredited my person and professional background. The VP Panel Notes were then circulated among the respondents, as well as various departments across ADB.*” He also noted that the “*summary profile concluded with a highly disparaging, grossly inaccurate and factually incorrect statement.*”

The President Summarily Dismisses the Applicant

15. On 16 November 2015, one of the ADB staff members named in the criminal complaint was served a subpoena to appear before the Mandaluyong City Prosecutor. On 17 November 2015, after being informed of this subpoena and criminal complaint, the President determined that this action constituted serious misconduct and took the decision under Administrative Order (“AO”) 2.04 summarily to dismiss the Applicant effective 18 November 2015.

16. On 18 November 2015, DG, BPMSD sent the Applicant a memo informing him of the President’s 17 November 2015 decision. The memo noted that “[t]he commencement of

litigation in national courts, against ADB and/or members of the ADB management team or staff, concerning a grievance that has not been resolved in ADB's internal justice system was a violation of a staff member's duties and responsibilities to ADB" (AO 2.02 para. 4.3(ii)) and the Applicant had "violated a crucially important duty and responsibility incumbent upon [him] as an ADB staff member". It noted his action "prima facie is construed as serious misconduct that does not warrant further investigation".

Parties Exchange Letters

17. On 24 November 2015, the Applicant's lawyers sent ADB a "letter before action" seeking, amongst others, that the Bank revoke the dismissal decision, and failing that, the Bank's agreement to submit the dispute directly to the ADB Administrative Tribunal (the "Tribunal" or "ADBAT").

18. On 26 November 2015, the Applicant received the President's decision endorsing the Appeals Committee which affirmed the appeal of the non-selection decision and recommended, amongst others, the re-advertising of the Technical Advisor position. On 28 November 2015, the Applicant's lawyers again wrote to the Bank asking for non-litigious resolution through reinstatement and requested that any recruitment process in relation to the position in question be put on hold until the Applicant's summary dismissal case could be resolved. Should he not be reinstated, the lawyers again sought a direct referral to the ADBAT on the basis of an exceptional case. On 30 November 2015, the Bank responded to the Applicant's lawyers, declining their request to reinstate the Applicant or place the re-advertising on hold. There is no evidence on record of the Bank having responded to the Applicant's request for direct referral to the ADBAT.

19. Between 1 December 2015 and 23 January 2016, several letters were exchanged between the Applicant's lawyers and the Bank concerning the Applicant's possibility of accessing the Bank premises. The Applicant expressed his disappointment that the Bank had retrieved his electronic equipment that contained files relating to his ongoing grievance process and personal information. The parties could not agree on a time for the Applicant to access the Bank so his personal effects were returned by messenger to his residence.

The Bank Takes Further Disciplinary Action Against the Applicant

20. Meanwhile, on 14 December 2015, DG, BPMSD informed the Applicant that he was being subjected to further disciplinary action for disclosing allegedly confidential information to the City Prosecutor in support of the criminal complaint.

21. On 17 December 2015, the Applicant responded to this letter by saying that it was *“ill-conceived and [amounted] to nothing less than continued retaliation and harassment on the part of the Bank...”*. The Applicant added that he did not accept the jurisdiction of the Bank to initiate further disciplinary proceedings given that he had been summarily dismissed effective 18 November 2015.

22. On 5 February 2016, the Bank responded by explaining that the initiation of disciplinary proceedings was in relation to acts (attaching confidential ADB documents to his 7 October 2015 complaint-affidavit without authorization) committed when the Applicant was still an ADB staff member and that it would continue to pursue disciplinary proceedings. On 11 February 2016, the Applicant responded by reasserting that he did not accept the jurisdiction of the ADB since he was no longer an employee.

23. On 29 February 2016, the Bank advised the Applicant that the President had decided to impose an additional disciplinary measure effective 60 days from the date of the President’s letter, or 30 April 2016. That measure was the discontinuation of the Applicant’s and his dependents’ eligibility “to participate in the Post-Retirement Group Medical Insurance Plan (PRGMIP) and all the other pertinent insurance benefits which would have applied to [him] as terminated staff.”

Applicant’s Appeal Against Summary Dismissal

24. Meanwhile, on 15 December 2015, the Applicant filed an appeal with the Appeals Committee against the summarily dismissal. The Respondent submitted its Statement on 22 January 2016. The Applicant submitted a Counterstatement on 8 February 2016. The Applicant in his Counterstatement noted that the Respondent in its statement had provided a transcript of a recorded conversation of 11 November 2015 between the Applicant and a Bank colleague. The Bank said the transcript was obtained from an ADB-supplied digital recording device, recovered from the Applicant’s office following his summary dismissal, which the

Applicant had used to record the conversation. The Applicant did not dispute the conversation as transcribed but argued that the Bank “*surreptitiously obtained*” it. The Applicant urged the Appeals Committee not to use it when reaching its decision as it is irrelevant to the decision of whether the summary dismissal was legal. The Respondent submitted a Reply to the Applicant’s Counterstatement on 23 February 2016. The Applicant submitted an Additional Statement on 4 March 2016.

Mandaluyong City Prosecutor’s Office Dismisses the Criminal Complaint

25. On 21 December 2015, the City Prosecutor’s Office signed a resolution dismissing the criminal complaint. The Prosecutor determined that the officers of the Bank were immune from the legal process as they were discharging their official duties as members of the Screening Committee. On 14 January 2016, the accused received copies of this resolution. On 29 January 2016, the Applicant appealed the Prosecutor’s determination.

Bank Queries Applicant’s Rental Subsidy

26. On 12 January 2016 the Bank queried the rental subsidy claimed by the Applicant given that his filed criminal complaint used a different address. The Applicant cleared up the matter in his 14 January 2016 reply and noted that “*even a basic level of due diligence undertaken by your team would have easily confirmed*” that he continued to reside at the residence for which he was entitled to claim rental subsidy. The Bank took no further action on this point.

Bank Demands the Applicant Pay All Expenses

27. On 2 March 2016, the Bank wrote to the Applicant to demand he reimburse within the next 60 days all expenses incurred by the Bank as a result of his criminal complaint (at that stage USD \$55,000 in legal fees and other expenses).

Appeals Committee Rejects Applicant’s Appeal Against Summary Dismissal

28. On 15 March 2016, the Appeals Committee rejected the appeal of his dismissal. It found that (i) ADB’s relevant policies and procedures were correctly applied, (ii) no instances of abuse of discretion, abuse of process, or improper procedures had occurred and (iii) the decision was proportionate. It did not rely on the transcript and explained that its admissibility

was not relevant. It further declined to consider the further disciplinary actions by the Bank on the grounds that they were distinct from the decision which was the subject of the appeal.

29. On 16 March 2016, the President confirmed the Appeals Committee's recommendation to reject the Applicant's appeal.

Application to the Administrative Tribunal

30. This Application, filed with the Administrative Tribunal on 3 May 2016, contests the 17 November 2015 decision of the President summarily to dismiss the Applicant on the grounds that:

- (1) the criminal complaint did not constitute "serious misconduct";
- (2) the summary dismissal decision was in breach of Applicant's due process rights as no investigation was undertaken;
- (3) the decision constituted an abuse of discretion as it was not authorized by the internal law of the ADB, pursued an improper purpose and was prejudicial; and
- (4) summary dismissal without due process or investigation is a manifestly disproportionate sanction.

31. The Respondent filed its Answer on 1 July 2016; the Applicant filed its Reply on 1 August 2016; the Applicant filed a Supplement to his Statement of Reply on 25 August 2016; the Respondent filed its Rejoinder on 2 September 2016 and then its response to the Applicant's supplement to its Reply on 9 September 2016.

32. The Applicant prays for the following relief:

- (a) Rescission of the summary dismissal decision;
- (b) Rescission of the further disciplinary sanctions imposed on the Applicant on 29 February 2016 in breach of the double jeopardy rule;

- (c) Reinstatement and restoration of the Applicant's employment at ADB and any other associated orders the ADBAT considers fit;
- (d) Legal costs (to be quantified and advanced to the ADBAT at the conclusion of pleadings);
- (e) A written, public apology by ADB to the Applicant for the breach of his dignity due to him under the basic principles of international administrative law.

Alternatively, should the Applicant not be reinstated:

- (a) Compensation equal to 3 years of the Applicant's basic salary;
- (b) Additional compensation of USD \$750,000 due to the exceptional circumstances, including that in addition to breach of dignity, reputational harm and moral injury, the Applicant has suffered significant loss of opportunity and future earning capacity, including loss of wages until the Applicant's retirement on 30 June 2021 had the unlawful summary dismissal not occurred;
- (c) An order that ADB is to pay the Applicant his entitlements, including the outstanding benefits and entitlements owing to the Applicant; and all applicable post-retirement entitlements in full where it has not already done so, and which would have been realized until the Applicant's normal retirement on 30 June 2021 had the unlawful summary dismissal not occurred (with further particulars forthcoming should ADB contest the applicable and outstanding amounts);
- (d) Legal costs; and
- (e) A written, public apology by ADB to the Applicant for the breach of his dignity due to him under the basic principles of international administrative law.

33. In its Answer, the Respondent:

- (1) requests the Tribunal dismiss the Application for lack of merit and maintains that the Applicant is not entitled to any form of relief;

- (2) “requests the Tribunal, in accordance with Article X section 6(b) of its Statute, to order Applicant to provide the Respondent with reasonable compensation for the costs of defending this case if it finds that Applicant intended to harass Respondent and/or the Colleagues as fully described in this Answer”. In doing so, the Respondent admits to withholding payment to the Applicant so as to deduct any amount awarded under Article X “from the final amounts owing to the Applicant”; and
- (3) submits that the Tribunal reject the Applicant’s request for rescission of the further disciplinary sanctions imposed on 29 February 2016. Applicant argues the double jeopardy rule but the Respondent argues the further disciplinary proceedings were not considered by the Appeals Committee and the Applicant has not filed a request for review of these proceedings in a timely manner as required by AO 2.06, “thus the Applicant’s request for review of this decision is out of time”.

34. In relation to preliminary measures, the Applicant requests an oral hearing for the following reasons: (1) “[the Applicant] was summarily dismissed without an opportunity to defend himself”, and “did not have the opportunity to put forward his case through an oral hearing before the [Appeals Committee]”, and (2) providing oral evidence would assist the conduct of the ADBAT proceedings “given the significant issues of fact and law at stake”.

35. The Applicant filed a Supplement to his Statement of Reply requesting a Case Management Conference (“CMC”) to determine: a) the question of an oral hearing; b) the admissibility of certain documents (those being the transcript and a confidential e-mail from the Applicant to an Executive Director of the Bank); and c) that a member of the Tribunal exercise recusal from the case or the application be heard *en banc*.

36. In the Respondent’s Response to Applicant’s Supplement to Reply, the Respondent notes that it considers such CMC or hearing unnecessary as the matters before the Tribunal are of an entirely legal (rather than factual) nature. It argues that: a) an oral hearing would add no relevant information or prove or clarify any essential facts; b) the transcript is not legally privileged or confidential; c) the email to the ADB Executive Director was sent in the Applicant’s official capacity and is therefore admissible; and d) expresses no view on the composition of the Tribunal’s panel or on the question of an *en banc* hearing.

II. SUMMARY OF PARTIES' CONTENTIONS

Applicant's Position

37. The Applicant argues that his summary dismissal is unlawful on the following grounds:

(1) his actions in filing the criminal complaint do not constitute "serious misconduct" as defined in the applicable AOs, thus the summary dismissal decision is without basis as he has merely exercised his rights as a victim;

(2) the summary dismissal decision was taken in breach of the Applicant's due process rights as he did not get an opportunity to defend himself, no investigation was undertaken in accordance with ADB law, and the Bank was warned that the Applicant would pursue other legal avenues but did not respond to such notice;

(3) the decision constitutes an abuse of discretion because it is not authorized by the internal law of the ADB, it pursues an improper purpose, is retaliatory and victimizes the Applicant;

(4) summary dismissal without due process or investigation is a manifestly disproportionate sanction; and

(5) the attempts to further sanction the Applicant on 29 February 2016 are retaliatory and otherwise unlawful.

The Respondent's Position

38. The Respondent argues that there is no merit in the Applicant's claims on the following grounds:

(1) the Applicant's misconduct was "serious";

(2) the requirements of due process for summary dismissal were observed;

(3) the Respondent's legal framework provides the President with the authority to summarily dismiss the Applicant (i.e. where the gravity of the misconduct warrants the dismissal with immediate effect);

(4) the sanction was not disproportionate to the offence as summary dismissal was warranted given the grave consequences for the Respondent following Applicant's instigation of the criminal complaint; and

(5) there was no abuse of discretion, nor was the decision discriminatory or an abuse of process.

III. FINDINGS

Preliminary Matters

39. Under Article VIII of the Tribunal's Statute, oral proceedings, including the presentation and examination of witnesses or experts, may be held only if the Tribunal so decides. The Tribunal has been furnished with more than ample documentation satisfactorily illustrating the facts, and both the Applicant and the Respondent have been able to support their positions fully. There does not seem to be any need for further clarification. The facts so presented are not disputed and the issue is one for legal interpretation of the rules and the arguments of both parties. In these circumstances, the Tribunal does not find it necessary to order an oral hearing in this case.

40. The Applicant in his Supplement to his Statement of Reply requests a CMC to determine, *inter alia*, the admission of certain documents, and *en banc* deliberation of the Tribunal.

41. The Statute and Rules of the Tribunal do not provide for a CMC and the Tribunal rejects this request.

42. The question of admissibility of documents is for the Tribunal to determine as part of its decision.

43. Articles IV para. 4 of the Statute of the Tribunal states: “[a]ny member who has an actual or potential conflict of interest in a case shall recuse himself or herself.” The request for the recusal has been considered and rejected.

44. In light of the complexity of the legal issues raised, the Tribunal has decided in accordance with Article V(5) of the Tribunal Statute and Rule 5A to hear the decision *en banc*.

45. Although not requested, the Tribunal grants confidentiality in light of the particulars of the case.

Additional document out of time

46. On 13 December 2016, after the 27 October notice of listing this case for decision, the Respondent submitted a document to the Tribunal asking for it to be included in support of its application for costs. As this was out of time and not copied to the Applicant it has not been taken into consideration.

The Merits

47. The Tribunal has set out its scope of review with respect to disciplinary measures in the following terms:

“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.” (*Hua Du*, Decision No. 101 [2013] IX ADBAT Reports 82, para. 31).

48. In the case before the Tribunal we have the following issues to decide:

(1) Did the conduct amount to misconduct within the scope of AO 2.04?

(2) Did the Respondent follow proper procedures in taking the decision of summary dismissal?

- (3) Was the decision to summarily dismiss discriminatory or an abuse of discretion?
- (4) Was the disciplinary measure of summary dismissal proportionate to the misconduct?
- (5) Is the further disciplinary measure properly before the Tribunal and, if so, was the measure justified?

Issue (1) Misconduct within the Scope of AO 2.04

Applicant's Contention

49. The Applicant argues that filing a criminal complaint does not constitute “misconduct” let alone “serious misconduct” and accordingly there exists no basis for the summary dismissal decision.

i) Mischaracterization of the relevant conduct

50. The Applicant argues that there are no “*facts necessary to sustain a disciplinary sanction against [the Applicant].*” He argues that filing a criminal complaint cannot constitute “serious misconduct” and therefore the disciplinary measures under AO 2.04 cannot be imposed. The Applicant argues that the specific examples provided in AO 2.04 para. 2.1 for “misconduct” do not include staff filing a criminal complaint and that “*...there is no other similar prohibition in any other internal rule of the ADB...*”.

51. The Applicant states that under AO 2.02 para 4.3 (iii) “*[s]taff members who have such claims [concerning the terms and conditions of their employment] and had access to the foregoing procedures [internal grievance and appeal procedures] may not resort to national courts or other tribunals outside ADB to resolve such claims*”. He argues however that “*[e]vidently, there is no prohibition to file a criminal complaint by a victim under ADB's internal law.*” He argues that his actions “*... in reporting a crime to law enforcement are not the pursuit of an employment grievance; they are rather the pursuit of criminal justice.*”

52. In this regard, the Applicant submits that only Philippine courts can determine whether any criminal offence has been perpetrated and “*[n]either the Bank, nor the Tribunal has the*

jurisdiction to decide upon the Criminal Complaint.” The Applicant cites *Bares*, Decision No. 5 [1995] I ADBAT Reports 55, to contend that “*if the Applicant is prevented from filing the Criminal Complaint, he will be denied access to any forum that can determine his Criminal Complaint. ... Just because the Applicant has been under the employment of a public international organization, it does not follow that he is to forgo his right to seek criminal justice as a victim.*” He also cites previous examples at the Bank where a staff member’s criminal complaint for libel made to the Philippine authorities did not result in a summary dismissal (see *Cabal*, Decision No. 22[1996] II ADBAT Reports 163) and a case where the Bank itself referred criminal matters to the police (see *Galang*, Decision No. 55 [2002] VI ADBAT Reports 25)).

53. The Applicant contends that the Respondent’s argument of referring allegations of fraud is irrelevant, disputes that the criminal complaint is improperly motivated, and argues that any allegations are irrelevant as they are raised *ex post facto*. According to the Applicant, he “*has pursued criminal justice in good faith and with an absolute determination to pursue justice, as is his fundamental human right: ultimately, it is a question for Philippine domestic courts whether the Accused are guilty.*”

ii) Respondent’s assertion of reputational harm is irrelevant

54. The Applicant also argues that AO 2.04 para. 6.2 must be considered when deciding if the misconduct is serious. He submits that the Bank’s contentions regarding the perceived harm to its reputation due to the criminal complaint and issues of immunities are “irrelevant and baseless.” He maintains that the contentions are irrelevant because “*ADB’s internal law does not state that “misconduct” can be a consequence of persons in the accused position having to raise immunities*”. He also argues they are baseless because the complaint is against “the individual Accused and not ADB”. He argues that his conduct has “*not brought the ADB into disrepute in a relevant sense.*” ... “*Any perceived reputational harm to the ADB is a direct consequence of the actions of its own staff, i.e. the Accused.*” Finally, he argues that AO 2.04 para. 6.3 (the criteria for imposing disciplinary measures) mentions “dismissal” and not “summary dismissal”, and so the latter cannot be sanctioned under AO 2.04 para. 6.3 according to its plain meaning.

*Respondent's Position**i) The Applicant violated his duties and responsibilities.*

55. According to the Respondent, the Applicant's criminal complaint "*sought to besmirch Respondent's reputation, to embarrass the Respondent, and to threaten colleagues with criminal prosecution for undertaking acts in their official capacity*". The Bank contends that these acts are "*inconsistent with the Applicant's responsibilities under AO 2.02 para. 4.3 (i) ("Staff members...must avoid any action... which may reflect unfavourably upon their position as employees of an international organization....")*".

56. The Respondent also argues that the commencement of litigation in national courts against ADB and/or members of the ADB management team or staff, concerning a grievance that has not been resolved in ADB's internal justice system, is a violation of a staff member's duties and responsibilities to ADB under AO 2.02, para 4.3 (iii). Accordingly, the Respondent argues that this violation of the Applicant's duties and responsibilities subjected him to disciplinary proceedings, with the consequence of summary dismissal warranted by the seriousness of the misconduct. The Respondent relies on *Mr. W v Secretary General*, OECD Administrative Tribunal Case no. 61 [2006], para. 14 where the Tribunal upheld as "valid and proportionate" a decision of the OECD Secretary-General in dismissing its OECD staff member for pursuing criminal proceedings (defamation and non-public injury in the French courts) against other OECD officials acting in their official capacity.

ii) Respondent refutes Applicant's contention that he was "reporting a crime"

57. The Respondent challenges the Applicant's claims that he was reporting a crime. It argues that evidence points to the Applicant having instigated the criminal complaint based on a desire and motivation to fix what he perceived to be shortcomings in the Respondent's workplace. The Respondent argues that this evidence includes the fact that the Applicant sought monetary damages amounting to 50 million pesos (approx. USD \$1 million) from his colleagues when making the criminal complaint.

58. The Respondent argues that the Applicant should have reported his colleagues' actions as "internal fraud" and notes that no such process was initiated by the Applicant, "*which*

further undermines the credibility of his claim that filing the criminal complaint was simply reporting a crime.”

59. The Respondent concludes that the Applicant knew, or ought to have known, as an experienced employee of the Bank, that seeking recourse for an internal grievance within the national legal system of the Philippines was a serious violation of his duties and responsibilities, and that such conduct would constitute serious misconduct for which he would be disciplined, including by summary dismissal.

iii) Harm to the Bank

60. The Respondent argues that the Applicant's actions amounted to a serious breach of trust and that his continued employment could not reasonably be considered in the interest of the Bank. It argues that AO 2.04 para. 6.3 provides that “[t]he disciplinary measure of dismissal for misconduct is particularly appropriate when the misconduct is serious or recurrent, or has jeopardized, or would in the future be likely to jeopardize the [Respondent's] reputation”. The Respondent submits that the Applicant's behaviour had implications for: (i) the internal operations of the ADB; (ii) the potential chilling effect that the pursuit of criminal complaints might have on other ADB staff in the context of the Respondent's merit-based performance and assessment system; (iii) the Respondent's reputation; and (iv) immediate harm to colleagues.

61. In relation to (i) above on the internal operation of the ADB, the Respondent stresses the importance of enjoying immunity “*from every form of legal process*” and maintaining confidence in the effectiveness and integrity of the internal justice systems of ADB. The Respondent considered the Applicant's actions an “*attempt to subvert the Respondent's internal justice system, which is a grave and serious matter given the consequences...*”. It also noted that mission travel is essential to the Bank's operations and that the Applicant's complaint threatened to disrupt the business functions of the Bank as it authorized Philippine law enforcement authorities to impose travel restrictions on those colleagues who had been accused.

62. On point (ii) above, on the effect on the merit-based performance and assessment system, the Respondent argues that supervisors would be unlikely to continue to be candid in their feedback for fear of reprisal in national criminal proceedings.

63. On point (iii) above, the Respondent argues that the criminal complaint casts aspersions on it and on the integrity and reputation of its staff and operations. It created the impression that the Respondent's internal standards processes and justice system were inadequate or corrupt and that there were no proper and independent internal review procedures available to the Applicant or other ADB staff.

64. Finally on point (iv) above, about the immediate harm to colleagues, the Respondent notes that the delivery of the subpoenas to staff caused significant anxiety, confusion and misunderstandings among those staff, their families and all ADB staff. The criminal complaint exposed the staff to the risk of arrest and imprisonment in the Philippines for acts done by them in their official capacity.

65. The Respondent concludes that it acted properly, and within its discretion, to take the decision as it needed to mitigate further damage and to send a strong and clear message to staff that the instigation of criminal proceedings against fellow staff for carrying out their official duties would not be tolerated.

Finding (1): Did the conduct amount to misconduct within the scope of AO 2.04?

66. The Tribunal recalls that AO 2.04 "Disciplinary Measures and Procedures" provides examples of misconduct at para. 2.1 and notes "... *Misconduct includes, but is not limited to, the failure to observe the Staff Regulations, AOs, Administrative Circulars and all other duties of employment. ...*". It is clear from the wording "not limited to" or "includes" that the enumeration of grounds for misconduct is not exhaustive but provides only examples. Whether filing a criminal complaint against staff members of the Bank to local authorities constitutes a misconduct shall be determined in its context. The ADBAT Decisions of *Cabal* and *Galang (supra)* cited by the Applicant in support of his arguments should be distinguished from the current case. The Bank has tacitly, in the former case, and explicitly, in the latter case, waived the immunities because the crime in each respective case was committed clearly outside the official duties of the persons concerned.

67. In the present case, the statements (the "crime" according to the Applicant) were all made in the framework of the selection process. In this context, the Tribunal also recalls the Appeals Committee's decision to uphold the Appeal was based on the shortcomings in the

procedures and not on the contents of the statements made by the officials in the selection process. The statements were made in the process of the selection procedure and, therefore, it was in an official capacity for which the persons are protected by the immunities that the Bank enjoys. These immunities are essential to the functioning of international organisations such as the ADB and well recognized by international law. It is for the Bank to decide whether or not it will waive these immunities in specific circumstances.

68. In this respect, the Applicant contends that it is the local court which has the competence to decide the official nature of the acts, citing a decision of the Philippine Supreme Court, *Liang v People Case* (GR No.125865, 28 January 2000). The Tribunal notes that Art XIII of the Headquarters Agreement between the Bank and the Philippine Government provides that: “.... *The Bank shall waive the immunity accorded to any person if, in its opinion, such immunity would impede the course of justice and the waiver would not prejudice the purposes for which the immunities are accorded.*” (*Emphasis added.*) Normal interpretation of the Agreement would be that determination of whether the conduct of ADB staff is of an official nature or not, rests with the Bank, rather than with the national courts. In the case of a dispute concerning the Agreement, the only forum to determine the authenticity of an interpretation of the provisions of the Agreement is vested in the arbitral tribunal which may be set up under Section 52 of the Agreement.¹

69. The Tribunal considers that the filing of a criminal complaint against ADB and/or members of the ADB management team or staff in the national legal system is a grave issue for an international institution particularly as the Applicant’s grievance had not yet been resolved within the internal justice system. This is a violation of a staff member’s duties and responsibilities to ADB under AO 2.02, para 4.3 (iii), which states:

¹ Section 52: Any dispute between the Government and the Bank concerning the interpretation or application of this Agreement or any supplementary agreements, or any question affecting the headquarters seat or the relationship between the Government and the Bank, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators: one to be appointed by the Government, one to be appointed by the Bank, and the third, who shall be chairman of the tribunal, to be chosen by the first two arbitrators. Should the first two arbitrators fail to agree upon the third, the Government and the Bank shall request the President of the International Court of Justice to choose the third arbitrator. A majority vote of the arbitrators shall be sufficient to reach a decision which shall be final and binding. The third arbitrator shall be empowered to settle all questions of procedure in any case where there is disagreement with respect thereto.

“Administrative review and appeals procedures for the review and settlement of the claims of staff members concerning the terms and conditions of their employment are set out in AO 2.06, and AO 2.07 provides for a right of appeal to ADB’s Administrative Tribunal. Staff members who have such claims and had access to the foregoing procedures may not resort to national courts or other tribunals outside ADB to resolve such claims.”

70. The Applicant has contended that his filing was simply for the purpose of reporting a crime. The Tribunal endorses the principle in *Bares* (ibid) that a victim should not be left without a remedy to seek criminal justice. The Tribunal also observes that the Applicant’s frustrations were exacerbated by a two-month delay in constituting the Appeals Committee. However, in this case the Applicant had an opportunity to avail himself of the ADB’s internal justice system, namely reporting an alleged crime under the Integrity Principles and Guidelines (IPG) to the Office of Anticorruption and Integrity (OAI). In fact, the Applicant failed to do so. In addition, according to AO 2.10 para 4.1, the Applicant had a duty to report “any suspected integrity violation to OAI.” Further, if the Applicant had reported the alleged crime to OAI and had still not been satisfied, he could then have asked the Bank to waive the officers’ protection of immunity. In the Tribunal’s view, the Applicant is required to comply with these internal procedures and he might have been better advised not to have taken precipitous legal action in the local courts.

71. Moreover, the Tribunal notes that the Applicant seeking monetary damages amounting to 50 million pesos (approx. USD \$1 million) from his colleagues when making the criminal complaint provides evidence that he was motivated to achieve more than merely reporting a crime.

72. In view of the foregoing, the Tribunal finds that the Applicant’s initiation of the criminal proceedings before the Mandaluyong City Prosecutor constitutes serious misconduct as contemplated by AO 2.04.

Issue (2) Proper procedures in taking the decision of summary dismissal

Applicant’s Contention

73. The Applicant argues that i) the Bank’s failure to apply its own laws and investigate the alleged conduct to determine if it was “serious misconduct” is an error of law; and ii) the

failure to establish the objective facts pursuant to an unbiased investigation means that the relevant facts were not gathered and considered. He argues that the President took his decision “without any consideration of the nature and reasons behind the complaint” and he had no chance to be heard. He further argues that AO 2.04 para. 7.1, which, in referring to section 24 of the Staff Regulations provides, that “the President ... may summarily dismiss a staff member for serious misconduct in accordance with the procedures to be established by the Bank” does not provide for any arbitrary power vested with the President to summarily dismiss a staff member without due process.

Respondent’s Position

74. The Respondent argues that i) the Applicant was afforded the relevant due process within the context of a summary dismissal and that an opportunity to be heard was not required as there were no facts in dispute, or which the Respondent failed to consider, when deciding to summarily dismiss him. The Respondent further argues that, ii) the fact that the Applicant’s intentions and actions were clear prompted the Respondent to quickly address the clear misconduct and no investigation could or was needed to be made other than to verify whether the Applicant had so seriously violated his duties and responsibilities as described in the Staff regulations and AO 2.02 as to warrant his summary dismissal.

Finding (2): Did the Respondent follow proper procedures in taking the decision of summary dismissal?

75. The Tribunal notes that the President has the power to summarily dismiss a staff member for serious misconduct in accordance with AO 2.04, para.7.1. It also notes that the DG, BPMSD, as the duly authorized officer, notified the Applicant of this decision in writing through its 18 November 2015 memo including the reasons.

76. With regard to the lack of an investigation, paragraphs 8 to 11 of AO 2.04 provide for the investigative process, formal disciplinary procedures and the decision-making process regarding disciplinary measures. However, the Tribunal notes that paras. 8 to 11 of AO 2.04 address cases of *allegations* of misconduct. Unlike cases such as theft or physical assault where the conduct on which the disciplinary measures are taken must first be investigated for the determination of a fact before the President makes a decision, in this case the facts were not in doubt. The criminal complaint had been filed and a subpoena issued. Harm had already

been inflicted upon the Bank, as well as the accused persons, and there seemed to be little need for undertaking an investigative process and other procedures to assess the facts that led to the dismissal decision.

77. A critical concern of the Applicant was that in his view the President was not aware of his personal circumstances. In fact, the Tribunal finds the President was provided with the criminal complaint that included details of the Applicant's personal circumstances and "*nature and reasons behind the complaint*" such as the alleged damage to the Applicant's "*integrity and reputation as a professional*" and "*sleepless nights, wounded feelings, debilitating stress, high anxiety, moral shock and social embarrassment*". Therefore, these personal details of the Applicant were properly before the President when he made his decision.

78. The Tribunal, therefore, does not find a violation by the Respondent of Applicant's due process rights.

Issue (3) Was the Decision Summarily to Dismiss Discriminatory or an Abuse of Discretion?

Applicant's Contention

79. The Applicant argues that in summarily dismissing the Applicant, the President took into account irrelevant considerations (such as perceived reputational harm) and failed to consider relevant considerations (such as the personal circumstances of the Applicant that warranted his criminal complaint). The Applicant also contends that his summary dismissal was "*motivated by pursuing malicious retribution against him for questioning the impropriety in the selection process, where he appealed and comprehensively prevailed.*" The Applicant further argues that his summary dismissal merely one week before the release of the Appeals Committee Report which was to affirm his appeal and report unfavourably on the Bank's handling of the selection process, denied him the opportunity as an employee to apply for the reselection and was driven by retaliation and prejudice.

Respondent's Position

80. The Respondent argues that it took into account all relevant considerations when assessing the disciplinary measure that were appropriate in the circumstances and that there is no evidence that there was an improper motive for Respondent's decision to summarily dismiss the Applicant.

Finding (3): Was the decision to summarily dismiss discriminatory or an abuse of discretion?

81. The Tribunal considers that the Applicant has not presented evidence of discrimination or an abuse of discretion. The Tribunal earlier stated that "the burden of proof rests on the person who makes allegations, namely, the Applicant ..." (see *Mr. E*, Decision No.103 (12 February 2014), *Ms G*, Decision No. 106 (23 September 2015), para. 36). The Tribunal also noted in *Azimi*, (Decision No. 88 [2009], ADBAT Reports Vol VIII, para. 31) that "...[m]ere belief by the Applicant that the Respondent acted in improper motive does not produce a sufficient proof for the dismissal decision to be considered as arbitrary or abuse of power." In this case, the Tribunal is not convinced by the argument that the dismissal one week before the Appeals Committee findings demonstrates discrimination because the chain of events shows that dismissal was triggered immediately upon knowledge that the Applicant had filed his criminal complaint and issued the subpoena to a staff member.

82. The Applicant is concerned that in adopting the sanction of dismissal without giving proper consideration to his length of service, there has been an abuse of discretion by the President. Indeed, the Tribunal notes that the Applicant makes reference AO 2.04 para.6.2(g) which provides that "*the staff member's length of satisfactory service*" should be "*taken into consideration*" when assessing the seriousness of the misconduct. This may appear to give favourable consideration to a long serving staff member, but at the same time it can be a double-edged sword. It would normally be expected that someone who has served more than 20 years would know the consequences of actions such as criminal filing in national courts. The Tribunal noted in *Nagarajah Gnanathurai*, Decision No. 79 (17 August 2007), para. 30 that "[t]he fifteen (15) years of service by the Applicant to ADB led the President to believe that the Applicant should have known better."

83. In addition, as found above, when the President took the summary dismissal decision, he had information before him about the Applicant's personal circumstances.

84. The Tribunal finds that the Applicant has not shown that the President took into account irrelevant considerations or failed to consider relevant considerations. The Tribunal therefore determines that the dismissal decision was not discriminatory, an abuse of discretion, or retaliatory.

Issue (4) Was the Disciplinary Measure Proportionate to the Offence?

Applicant's Contention

85. The Applicant argues that the decision to summarily dismiss him was manifestly disproportionate to his conduct.

Respondent's Position

86. The Respondent argues that the decision to summarily dismiss the Applicant was not a disproportionate response to his serious misconduct. Referring to the criteria for imposing disciplinary measures provided under AO 2.04 that help judge the seriousness of the misconduct, the Respondent argues that the serious nature of the Applicant's actions in filing the criminal complaint is a grave abuse sufficient to justify summary dismissal.

Finding (4): Was the disciplinary measure of summary dismissal proportionate to the misconduct?

87. The Tribunal may not substitute its assessment for that of the President, unless there is a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty. (*Hua Du*, Decision No 101 [2013] IX ADBAT Reports 82, para. 54).

88. The gravity of the Applicant's misconduct justifies a disciplinary measure, and in a most severe form, dismissal. AO 2.04 para. 6.2 provides different criteria to assess the seriousness of the misconduct, including: "(a) the degree to which the standard of conduct has been breached by the staff members"; "(b) the gravity of the adverse consequences and damage or potential damage to ADB, its staff, or any third party"; "(f) whether the misconduct was a deliberate act"; and "(g) the personal circumstances of the staff member and the member's length of satisfactory service." Moreover, AO 2.04 para. 6.3 further

provides: “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.” The filing of the criminal complaint was a clear breach, with serious adverse consequences for the Bank and colleagues, it was deliberate, and the personal circumstances and length of service were taken into account. Moreover, each of these elements justify a finding under para. 6.3 that the breach of trust was so serious that continuation of the Applicant’s service was not in the interest of the Bank. Therefore, the Tribunal concludes that the summary dismissal was proportionate to the misconduct.

89. The Tribunal acknowledges that the Applicant may have felt discriminated against and desperate because of the improper selection process and long delay in the formation of the Appeals Committee, however that did not justify his actions.

Issue (5) Is the Further Disciplinary Measure Properly Before the Tribunal and, if so, was the measure justified?

Applicant’s Contention

90. The Applicant argues that the disciplinary sanction imposed on 29 February 2016 of discontinuing his and his dependents’ participation in the insurance plan, is a further attempt to sanction him, and is retaliatory and otherwise unlawful.

Respondent’s Position

91. The Respondent argues that the Applicant did not file a request for review of the further disciplinary proceedings in a timely manner as required by AO 2.06. Thus the Applicant’s request for review of that decision is out of time.

Finding (5): Was the further disciplinary measure properly before the Tribunal and, if so, was the measure justified?

1) Is the further disciplinary measure properly before us?

92. The Respondent refers to the finding of the Appeals Committee that it would not consider the further disciplinary measure because it was not the subject of the Appeal challenging the summary dismissal. The Tribunal notes that brief mention of the impending

further disciplinary action was made in the Appeal submitted to the Committee on 15 December 2015.

93. Article II(3) of the Tribunal Statute provides that: “*No ... application [to it] shall be admissible, except upon exceptional circumstances as decided by the Tribunal*”. In this case, the Tribunal considers that exceptional circumstances exist, including the fact that the Appellant continued to raise the question of the legitimacy of the additional disciplinary measure. As the Applicant continually raised the question, the Tribunal considers in these circumstances that there was no need for a fresh application before an Appeals Committee to exhaust internal remedies before applying to the Tribunal. For these reasons, the Tribunal considers that the second disciplinary measure is properly before it.

2) Was the further disciplinary measure justified?

94. The Tribunal is not persuaded by the Applicant’s argument that the additional measure cannot be imposed because at the time it was imposed he was no longer an employee. The disclosure of confidential information which attracted the sanction was committed when the Applicant was still an employee. At the time he filed his criminal complaint with the Mandaluyong City Prosecutor’s office he disclosed eight internal Bank documents including the redacted version of the notes of the VP Panel. Such disclosure could only be made by authorized persons. As the Bank was aware of this disclosure at the same time as it was aware of the criminal complaint, any additional disciplinary measure should have been imposed at the time of the dismissal and not a few months later. When the case is reviewed in totality, this sanction appears to the Tribunal to be, if not unlawful, then unjustified.

95. In light of the above, the Tribunal concludes that the additional disciplinary measure was not justified and should therefore be rescinded.

Conclusions

96. The Tribunal finds that the Applicant’s case has no merit concerning issues (1), (2), (3), and (4). With respect to issue (5), the Tribunal has concluded that the additional disciplinary sanction was unjustified.

Relief

97. The Tribunal now turns to the Respondent's plea for the Tribunal to order costs against the Applicant "for defending this case" in accordance with Article X para. 6(b) of its Statute. This provision states that the: "... *Tribunal may order that reasonable compensation be made by the applicant to the Bank for all or part of the cost of defending the case, if it finds that:*

(a)

(b) *the applicant intended to delay the resolution of the case or to harass the Bank or any of its officers or employees.*"

98. The Tribunal does not find that the Applicant intended to harass the Bank or any of its officers or employees in bringing "this case" to the Tribunal. It accordingly finds that the conditions under Article X para. 6(b) are not met and denies the Respondent's request for costs. Noting that the Respondent is currently withholding some payments to the Applicant on the expectation of a decision granting costs to the Respondent, the Tribunal orders all amounts payable to the Applicant to be released without delay.

99. As the Tribunal has upheld the Applicant's dismissal as valid, he has lost his core argument. However, the finding that the additional disciplinary measure was not justified warrants an award of costs to him in the sum of USD \$1000.

DECISION

For these reasons, the Tribunal unanimously decides:

- (i) to rescind the 29 February 2016 disciplinary sanction discontinuing the Applicant's and dependents' participation in the medical insurance plan;
- (ii) to direct the Bank to release amounts payable to the Applicant without delay;
- (iii) to award the Applicant costs in the amount of \$1,000;
- (iv) to dismiss all of the Applicant's other claims; and
- (v) to reject the Respondent's request for compensation for costs under Article X para 6(b) of the Statute of the Tribunal.

Lakshmi Swaminathan

/s/

President

Gillian Triggs

Shin-ichi Ago

/s/

Vice President

/s/

Member

Anne Trebilcock

Chris De Cooker

/s/

Member

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

At Asian Development Bank Headquarters, 6 January 2017