

## **JUDGMENT CASE NO. 23**

### **ARMINDA BURIA-HELLBECK vs. IDB**

The Inter-American Development Bank Administrative Tribunal,

Composed of Doctor Agustín Gordillo, President, the Honorable Kenneth G. Smith, Vice President, Doctor Ildélio Martins, Doctor Alfredo Martínez-Moreno, Doctor Baltasar Cavazos-Flores, the Honorable Thomas Buerghenthal, and the Honorable Luzius Wildhaber, considered the case following the procedures established in Articles 20, 21, 22 and 23 of the Rules of Procedure of the Tribunal.

Complainant was represented by her attorney, Dr. Christa McClure. The Bank was represented by Maria da Cunha, Esq., of the Office of the General Counsel of the Bank. In addition to the written submissions the Tribunal examined witnesses and on 17 November 1989 heard oral arguments.

#### **WHEREAS:**

1. On 17 July 1989 Ms. Arminda Buria-Hellbeck, a national of the United States of America who holds a law degree and is a former member of the professional staff of the Inter-American Development Bank, filed a Complaint with this Tribunal petitioning that:

A. The decision taken by Mr. Luis A. Sánchez-Masi, Administrative Manager on 21 April 1988 not to confirm her appointment be declared null and void;

B. Complainant's appointment be confirmed;

C. The comments of 19 April 1988 by Mr. Weston Williams, Deputy Manager of Human Resources (HUR) which modified her performance evaluation for the 22 April 1987 - 15 March 1988 period as finalized on 20 April 1988 be expunged from Complainant's personnel file and all other files the Bank maintains, and that her performance evaluation be restored as of 16 March 1988;

D. Complainant be awarded full back pay with all benefits from 22 August 1988, the date she left the Bank;

E. Complainant be compensated in the amount of fifty thousand dollars for damages to her professional reputation, anguish, and humiliation suffered due to the Bank's actions;

F. Complainant be awarded all attorney's fees.

2. In support of her petition Complainant made the following submissions:

A. The contested decision resulted from a violation of due process and constitutes an abuse of discretion by the Bank. The Deputy Manager HUR did not discuss his

negative conclusions with Complainant before he integrated them into her evaluation. The decision not to confirm was directly linked to that evaluation.

B. The decision not to confirm was tainted by abuse of discretion because it was based on improper use of documentation, insufficient communication and violated relevant Personnel Policies of the Bank. The Deputy Manager HUR based his conclusion on situations which are exaggerated and untenable at best, if not artificially created. Furthermore, Complainant was never informed of official inquiries nor was she presented with any documentation regarding those situations. Her immediate supervisor, Mr. Fernando Jiménez, Labor Relations Advisor, never mentioned these situations to her as a matter of concern nor counselled her as to which area of performance she had to improve. He did not refer to any such situations in her performance evaluations.

C. The contested decision was a disciplinary action in disguise, contrary to Personnel Policy No. 326. It was improperly motivated and as such, constituted an abuse of discretion. In 1987 Complainant filed a formal grievance claiming that she was being subjected to harassment by her immediate Supervisor. The fact that she undertook to pursue her right to grieve was held against her. The decision not to confirm was directly linked to the exercise of the right to grieve.

3. The Bank answered the Complaint and asked the Tribunal to dismiss the petitions on the following grounds:

A. The Complaint is not admissible, because:

- (i) Complainant did not present her claim to the Conciliation Committee within the time limits prescribed;
- (ii) Complainant never submitted her complaint to the Administrative Manager as required;
- (iii) Complainant altered the substance of her claim upon presenting it to the Conciliation Committee.

B. The Bank's decision not to confirm Complainant's permanent appointment, in view of the interests of the Bank and of Complainant's manifest unsuitability for the position for which she was employed, was a proper exercise of the Bank's discretion in accordance with the terms of Complainant's employment contract and the Bank's Personnel Policies.

- (i) It did not constitute a violation of due process. The discretion accorded to the Administration regarding confirmation is contractually described as "complete." In the comments attached to her evaluation, the Deputy Manager HUR clearly set forth valid reasons for his recommendation not to confirm Complainant's appointment. He did not discuss the evaluation or his comments with Complainant because he was not required to do so.
- (ii) The Bank's decision not to confirm Complainant's appointment was based on uncontested and conclusive facts; facts which are confirmed by proper documentation or by the recollection of the individuals involved.
- (iii) The Bank's decision not to confirm Complainant's appointment was not arbitrary, capricious or improperly motivated. In considering Complainant's

confirmation the Deputy Manager HUR weighed all the information at his disposal without consideration of the sexual harassment issue one way or the other.

(iv) The Bank's decision not to confirm Complainant's appointment was based on correct conclusions which are corroborated by Complainant's previous employment history.

4. The parties produced voluminous documentary evidence consisting of memoranda, internal correspondence, affidavits, resolutions, rules, policies, legal writings and court decisions from this and other administrative tribunals. On instructions from the President of the Tribunal the Executive Secretary heard the testimony of three witnesses, and the full Tribunal examined seventeen other witnesses presented by the parties. On its own motion, the Tribunal ordered the Bank to provide additional evidence related to the investigation, conclusions and disposition of the harassment grievance formalized by Complainant in 1987. A recording of Complainant's deposition before the committee investigating those charges, the notes made by the members of the investigating committee during the hearings, and an affidavit by one of its members were provided.

5. The following are the relevant facts of the case:

A. On 22 April 1987, Complainant accepted a permanent appointment as a Human Resources Officer of the Bank. Her contract contained the following clause: "Probationary Period: Your appointment will be provisional for a period of one year, during which time either party to this agreement may end it by 30 days written notice. Upon completion of the probationary period, which may be extended at the option of the Bank, the Bank will decide, in its complete discretion, if your appointment will or will not be confirmed. You will be notified in writing of the decision."

B. In late July or early August 1987, on instructions from her Supervisor, Complainant ordered a duplicate key be made for the unit secretary's desk without disclosing that fact to her. Her request resulted in an argument with Building Facilities and Security staff.

C. In August of 1987, Complainant was loud and insulting when complaining to a nurse in the Health Unit about an Aide Mémoire she had prepared, the contents of which Complainant found unacceptable.

D. In September 1987, Complainant requested one month's leave to undergo surgery, for recuperation and the remainder of the month as annual leave. She did not complete a Leave Request Form before her departure. Upon her return, on 21 October, her Supervisor found her medical certificate to be defective. She then supplied a new certificate which satisfied the Bank's requirements.

E. Upon return from leave, on 21 October 1987, Complainant informed the Deputy Manager HUR that she was being subjected to sexual and other harassment by her Supervisor and asked to be transferred. On 6 November 1987, she filed a formal grievance. A fact finding panel was convened which conducted a series of interviews with Complainant and her Supervisor. The panel orally related the allegations of both parties to the Deputy Manager HUR. He, in turn, sent a memorandum to both Complainant and her Supervisor in which he concluded that both should draw upon their maturity and common sense to overcome the personal conflicts which were making it impossible for

them to work together. No further action was taken on the grievance. Complainant appealed to the Administrative Manager, requesting that her grievance be resolved.

F. In December 1987, a Human Resources Officer forgot a personnel file in Complainant's office. Since the file room was already closed, Complainant promised to lock it up until the next working day. The Supervisor came across the file in Complainant's desk while working on the weekend. The Supervisor expressed his concern because the file related to a staff member with whom Complainant had several acquaintances in common. This episode led to charges and countercharges concerning the file and the manner in which it found its way into Complainant's possession.

G. On 20 December 1987 Complainant had a conversation with the Administrative Manager. The Administrative Manager also met with her Supervisor. From that date on Complainant did not insist on the continuation of her grievance claim.

H. On 22 December 1987, Complainant and her Supervisor discussed her six-month interim evaluation. Although she had no access to it, the Supervisor did prepare, as an annex to his own interim evaluation by the Deputy Manager HUR, a statement in which he pointed out that Complainant's professional skills were satisfactory but that she lacked the special talents and confidence building skills required in the Labor Relations Advisory Unit and that he would recommend that she be transferred and given an extended probation period.

I. On 19 January 1988, Complainant's car was booted while parked in a fire lane inside the Bank's underground garage, allegedly with a parking sticker which was not hers. When she found her car she complained angrily but was told that unless she provided an explanation in writing her car would not be released. She did, and the car was freed. She denied having a sticker in her car.

J. In early March 1988, the Deputy Manager HUR reminded the Supervisor to prepare a performance evaluation of Complainant for confirmation purposes. On 16 March 1988, the Supervisor evaluated Complainant's performance as generally "at the norm" while characterizing her communication skills and her ability and utility at working together with other professionals in groups "at above the norm".

K. On 21 April 1988, the Administrative Manager informed Complainant of the decision not to confirm her appointment. Attached to the decision was the finalized performance evaluation with the Deputy Manager's recommendation not to confirm because she lacked the qualities essential for her position. In the evaluation the Deputy Manager HUR stated that Complainant had shown a continuous course of major and minor confrontations with her co-workers, during which she had displayed disrespectful attitudes towards the Bank and its policies and the professionalism of her colleagues, as demonstrated by the Health Unit and garage incidents.

L. On 26 April 1988, Complainant formally initiated a grievance claim against the 21 April 1988 decision by the Administrative Manager, which culminated in these proceedings.

## **CONSIDERING:**

That Personnel Policy 326 gives a discretion to the Conciliation Committee to admit a matter outside the period of 90 days prescribed therein "in special cases."

That objection was taken and fully argued before the Conciliation Committee that the complaint to the Committee was out of time. The Committee rejected the objection and admitted the claim "given the circumstances of the case" (see paragraph 5.01 of Committee's conclusions). The Committee must, therefore, be deemed to have considered all the circumstances and to have regarded those circumstances as amounting to "a special case." The Tribunal considers therefore that it has no valid reason for holding that the Committee wrongly exercised its discretion.

That as regards the objection that the complainant failed to exhaust the grievance procedure by not complaining to the Administrative Manager before complaining to the Conciliation Committee, the Tribunal regards the decision of the Committee to admit the complaint as precluding the raising of any objections to a prior defect in procedure unless, of course, the decision of the Committee to admit the complaint can be shown to have been an improper exercise of discretion. This is the more so when, in the circumstances of this case, it is clear that a complaint to the Administrative Manager would have been futile.

For the above reasons, the Tribunal holds that the preliminary objections must be rejected and declares the complaint admissible.

## **CONSIDERING FURTHER THAT:**

1. It is a well-established principle of law, which this Tribunal has already had occasion to invoke, that all administrative decisions, including discretionary ones, must respect basic principles of due process of law, including the requirement that they be adopted by impartial officials, after fair proceedings, on sufficient factual grounds and providing reasonable and adequate justification.

To put it in the words of the World Bank Administrative Tribunal, a decision is invalid if it "constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure" (In re Saberi 1981, paragraph 23, *World Bank Administrative Tribunal Reports* 1982, Decisions 5-9, p.8). In short, that the exercise of discretionary power is not absolute.

2. In this case, although the existence of a conspiracy against Complainant has not been proved, officials of the Bank, at various stages of the proceedings: showed bias or prejudice in regard to the very nature of Complainant's charges of sexual harassment; improperly treated her complaint, without adequate fact-finding and without providing sufficient written justification; appeared to assume that the allegations were not well-founded; and further decided that this was purely a private matter between adults, even though the events took place at the Bank's premises and during office hours.

3. Although Complainant had withdrawn her sexual harassment grievance and did not seek to reintroduce it before this Tribunal, the existence of that grievance bears on the resolution of the instant case. For whether or not the grievance was meritorious—an issue the Tribunal need not decide—the evidence clearly supports the conclusion that the manner in which the Bank dealt with the grievance and the fact that Complainant filed it in the first place, colored the Bank's perception of Complainant's suitability for confirmation. In view of the fact that the charges of

sexual harassment brought to the attention of the Bank by Complainant were not frivolous and that, furthermore, they were not investigated in a timely and serious manner by the Bank, the Tribunal is entitled to take account of the effect these charges and their disposition had on her claim.

Indeed, Bank officials seem to have been so preoccupied with what they perceived to be Complainant's personality as reflected in the fact of her grievance or the nature of the various facts being alleged by and against Complainant, that they lost sight of the chilling effect their treatment of the complaint would have on future grievances that might be filed against the Bank.

4. The foregoing conclusions find support in the following facts: Complainant was informed that her grievance would be dealt within a certain fashion, and then the Bank proceeded differently; no written report was ever made on the complaint, not even on the various additional charges she made; the essence of the panel's oral report was never communicated to Complainant; the report was not provided to the Tribunal either, even when it was formally requested; no adequate explanation of this omission has been provided to the Tribunal, up to the date of this ruling.

Although the position Management chose to adopt was that the contents of the grievance was a private matter between two adults, it took actions and drew inferences against only one of them, namely Complainant. Her file, moreover, was amplified after the fact in order to strengthen the position of the Bank in this litigation.

Similar conclusions can be drawn about the solidarity of employees and officials in favor of one of the parties involved and against Complainant, which created the impression, albeit erroneous, that there was a conspiracy. Furthermore, although Complainant's case was premised on the assumption that a conspiracy existed against her because she had filed a sexual harassment grievance, and that she was being punished for having made such allegations, this apparent generalized perception of Complainant by her colleagues was mistakenly presented by the Bank in oral arguments as proving Management's case, whereas it actually proves Complainant's.

Allegations of sexual harassment may not and should not have been dealt with as they were, in a superficial manner, without adequate investigation, written conclusions or even oral conclusions made available for judicial review at the appropriate time.

#### **THEREFORE:**

As for the specific claims submitted by Complainant, the Tribunal rules as follows:

1. Although the Bank's decision is not entirely unsupported by the facts, it was adopted without complying with due process requirements, and is therefore rescinded.
2. It does not follow from the above, however, that the Bank should set in motion fresh procedures for confirmation or denial thereof, or that the Tribunal itself orders confirmation.
3. From Complainant's file shall be expunged all documents irregularly added to it while the Bank was preparing to defend this action, long after the initial decision was taken. A copy of this ruling shall also be added to that file, should Complainant so desire.
4. No back pay is awarded.

5. Complainant is entitled to fifty thousand dollars as compensation for material and moral injury as a result of the Bank's irregular procedures under paragraph 1 above.

Washington, D.C., 18 November 1989.

Agustín Gordillo.

Alfredo Martínez-Moreno.

Baltasar Cavazos-Flores.

Thomas Buergenthal.

Luzius Wildhaber.

Judge Smith and Dr. Martins respectfully dissent from the decision of the majority of the Judges, on the merits of the Complaint.

In their judgment, on the documentary and oral evidence presented, it has not been established that in exercising the discretion not to confirm the Complainant's appointment, the responsible officers of the Bank were influenced by any improper motive or by considerations not stated in the evaluation of the Deputy Manager HUR. Nor can it be said, in their opinion, that on the evidence presented the basis of the decision of the officers was not justified.

Dr. Martins respectfully dissents further disallowing the Complaint on the basis that it was time barred.

Washington, D.C., 18 November 1989.

Kenneth G. Smith.

Ildélio Martins.

Hernán Sáenz-Jiménez  
Executive Secretary.