

JUDGMENT CASE No. 70

NT vs. IDB

The Administrative Tribunal of the Inter-American Development Bank, composed of Judge Alejandro Serrano Caldera, President; Judge Andrew Derek Burgess, Vice-President; Judge Isaac Sandoval Rodríguez; Judge María Ángela Poliche de Sobre Casas; and Judge Guilherme Augusto Caputo Bastos, considered the case pursuant to the procedure established in the Tribunal's Rules of Procedure.

The Complainant argued his own case. The Inter-American Development Bank (hereinafter the "Bank" or "IDB") was represented by Rodolfo B. Graham, Esq. The Tribunal heard oral argument on 26 October 2009.

WHEREAS:

I. Underlying proceedings on the record

A. The Complaint is preceded on the record by decisions adopted by the Complainant's immediate supervisor, the Chief of the Benefits and Salaries Section of the Department of Human Resources (HRD/BPS), the President of the Ethics Committee, the Vice President for Finance and Administration, the interim General Manager of Department of Human resources (HRD), and the Secretary of the Conciliation Committee, as well as the proceedings of the Bank's Office of Institutional Integrity (OII) in connection with the conduct of Mr. NT, the Complainant. As the Chair of the Ethics Committee indicated on 17 April 2007, that Committee received an allegation in which the Committee was informed that Mr. NT had on two occasions falsified visa applications. The Ethics Committee asked OII to conduct an investigation. The findings in OII's final report were that there was sufficient evidence that the Complainant had violated the Bank's Code of Ethics when, on 19 October 2006 and 16 March 2007, he knowingly provided false information on his G-IV visa applications. According to the Committee, the violations of the Code in question included breaches of its provisions regarding use of information, the guide for conduct in specific situations, as well as National Laws and Privileges and Immunities. Specifically, the Ethics Committee concluded that Mr. NT had violated the provisions of the Code that address a failure to provide truthful information, intentionally reporting false information, and a breach of the Core Value of Integrity.

B. Given these findings, the Ethics Committee recommended that Mr. NT be "barred from Bank employment for a period of two years beginning..." 26 October 2007.

II. The Complaint (First Part)

A. On 19 October 2008 Mr. NT, a Brazilian national and a Research Assistant, filed a Complaint that has two parts. These parts are set out in detail hereafter. The First Part refers to his employment in the Office of Evaluation and Oversight (OVE) and avers as follows:

1. The Complainant challenges the decision whereby he was declared barred from Bank employment for a period of two years beginning with the date of the Memorandum of 26 October 2007, and

2. The Complainant describes the purpose of his Complaint to be to prove that he did not violate the Code of Ethics inasmuch as he did not forsake his obligation to provide truthful information, did not intentionally falsify information, and did not violate the Core Value of Integrity.

B. The Complainant's petitions that the Tribunal adjudge and declare:

1. As measures of reparation, that the sanctions resulting from the decision to bar him from employment be quashed.

2. As compensation, that he be hired by the Bank on the basis of a clean record and that his service record in the Department of Human Resources be purged; that he be appointed a Project Coordinator, which would be a position on the level of the next step that he would have held had this episode not occurred.

3. In relation with the OVE contract, that in application of treble damages a sum equivalent to the damages for the months of February, March and April 2007, which he calculates to be US\$63,000.00

C. The Complainant makes the following statement of facts:

1. He states that his contract at OVE was for the period starting 1 November 2006 and ending 31 January 2007.

2. He claims that he was offered the opportunity to remain with OVE through 30 April 2007, in two stages thus: one contract from 23 October 2006 to 28 February 2007 and a second contract running from 28 February 28 through 30 April 2007.

3. He was informed of the new dates of the contract—which differed from the first offer of employment—with very little advance notice. The change of dates was done after the staff at OVE had already processed his visa, with the dates of the original offer of employment.

4. He signed the contract with OVE on 31 October 2006.

5. He received a visa issued on 6 November 2006.

6. The investigation conducted by the OII was not exhaustive inasmuch as the Complainant's new supervisors were never interviewed.

D. The Complainant relies on the following legal grounds:

1. In the final report on its investigation, the OII states that there is sufficient evidence to show that the Complainant violated the Bank's Code of Ethics when,

on 9 October 2006 and on 16 March 2007 he knowingly provided false information on his G-IV visa application.

2. The Complainant contests this finding and points out that OVE had requested his visa papers on 19 October 2006. At that time the only dates he had were the dates shown on the first offer of employment, that is, until 30 April 2007. He did not know that the Deputy Manager would change everything on 27 October 2006, as it was then that was told of the change.

3. The Complainant contends that the staff at OVE should never have allowed the visa unit to process his visa with incorrect dates, since OVE knew that the dates had changed. He claims that OVE staff tried to protect themselves by remaining silent about the promise made to the Complainant.

4. The Bank had not trained the Complainant on visa procedures.

5. The Complainant is able to document his good record of performance at the Bank.

III. The Complaint (Second Part)

A. In the Second Part of his Complaint, the Complainant refers to his service in the Bank's Regional Operations Department 2, in the State and Civil Society Programs Division (RE2/SC2), where he was a research assistant and avers as follows:

1. He challenges the decision that he identifies as the one in which he is declared barred from Bank employment for a period of two years beginning 26 October 2007.

2. He also challenges his sudden dismissal from the Bank. In this context he alleges noncompliance with the terms of reference of the contract and the provisions of the Bank's Policies on Personnel Management. He contends that: (a) the terms of reference did not include any obligations associated with responsibility for final verification of the dates within the Visa Unit; (b) his dismissal was done without following a reasonable, prescribed procedure for dismissal, in violation of the Bank's Policies on Personnel Management; (c) the treatment he received was discriminatory, harmful to his reputation, defamatory and libelous; (d) in his dismissal no consideration was given to his performance in IDB and included discriminatory stereotypes and predispositions, and (e) he was not accorded the benefits of equality of employment opportunity.

3. The Complainant describes the purpose of his Complaint to be to prove that he did not violate the Code of Ethics inasmuch as he did not fail to provide truthful information, never intentionally falsified information, and did not violate the Core Value of Integrity.

B. The Complainant petitions the Tribunal to adjudge and declare:

1. That the punishment ordered in the decision he is challenging be suspended and cancelled as a corrective measure.

2. As compensation, that he be contracted at the Bank on the basis of a clean record and that he be paid full and retroactive compensation based on the unlawfully cancelled contract with RE2/SC2 (subtracting the amount already received) and the corresponding triple damages. The compensatory damages being claimed, which cover the period from 31 March 2007 to 31 December 2007, are to restore the Complainant at least in part, to the financial condition he enjoyed before the contract was unilaterally cancelled. It covers the following: (a) unlawful dismissal by virtue of the failure to honor the statements of the employer which, explicitly or implicitly, had promised him a certain degree of job security, (b) criminal and civil defamation (slander) which the Complainant attributes to an employee of the IDB; (c) discrimination by Bank employees; (d) acts against his person and damage to his reputation (e) the loss of earning power he sustained and the earnings lost between 31 March 2007 and the date on which the compensatory damages are paid. By his calculation, the compensation he is claiming comes to a total of US\$206,580.00

C. The Complainant makes the following statement of facts

1. Having entered an incorrect date on the visa application form, the Complainant tried to correct the matter in the Visa Unit and the RE2/SC2 Division on 26 March 2007, when Bellagamba, a staff member with the Visa Unit, brought the problem to his attention. He also asked the Ethics Committee to consider the matter; he apologized and told that Committee that the mistake was unintentional.

2. He describes his error in filling out the form as a natural human mistake, which staff member Bellagamba in the Visa Unit did not initially pick up either. He notes also that it is impossible to circumvent the Bank's visa application review process, because the PEOPLESOFT program, which controls contracts, is fully integrated into every area of the Bank, the Department of Human Resources and the Visa Unit and the data contained in that system is entered exclusively by the corresponding administrative officer.

3. The Complainant sets out the sequence of steps he claims to have taken to correct the matter through conversations he had with other relevant officers of the Bank, including Ms. Claudia Valderrama from RE2/SC2, the Ombudsperson, and Mr. Robert Deal from HRD/BPS.

4. The Complainant was dismissed on 30 March 2007 by the Division Chief of RE2/SC2 and the Administrative Officer for the Region.

5. He denies that there is any evidence to show that he tried to circumvent the system or that he lied to the Benefits and Visa Officer. He states that the evidence underlying the OII investigation consisted of conflicting statements. The Complainant specifically challenges the statements made by certain witnesses and claims that two of them were attempting to disassociate themselves from any involvement in the process that led to the error and to place blame on the Complainant instead.

D. The Complainant states that the legal grounds for the second part of his Complaint are as follows:

1. The Complainant contends that his termination was an unlawful dismissal, that the prescribed procedure was not followed (that the process should have included an investigation of the case and a sequence of warning letters in the event any problem were detected.)
2. He adds that the charge against him was not based on impartial opinions and that the evidence compiled belies the good reputation that the Complainant previously enjoyed within the Bank. He analyzes in detail those aspects of the statements made to the OII by staff members.
3. He denies that he was responsible for the final verification of the dates and argues his Terms of Reference were incomplete on the matter.

IV. **Answer to the Complaint**

The Bank answered the Complaint arguing that it must fail as there is no unlawful or prejudicial act. Accordingly, the Bank asserts, it is inadmissible and without merit.

A. The Bank begins its statement of facts stating that the Complainant entered into four contracts with IDB:

1. Development Effectiveness and Strategic Planning Department (DEV/DEV) Contract. On 3 March 2006 the Complainant signed a first contract with the Bank to work (contractually) as a Research Assistant in DEV/DEV form 16 March through 15 June 2006.
2. Project Procurement Division of the Development Effectiveness and Strategic Planning Department (DEV/PRM) Contract. On 7 June 2006 the Complainant signed a second contract with IDB to work (contractually) on a temporary assignment in DEV/PRM from 16 June through 31 October 2006.
3. OVE Contract. On 16 October 2006, while the Complainant's contract with DEV/PRM was still in force, Mrs. Giselle Commons informed the Complainant that OVE would have a temporary assignment available from 23 October 2006 through 28 February 2007.

On 17 October 2006, after meeting with Mrs. Commons, the Complainant informed that he would accept the offer to work for OVE. However, the Complainant was then informed that a contract would require an interview and the approval of OVE's Manager.

On 18 October 2006, the Complainant sent Mrs. Angélica McInerney, a OVE staff member, an Email with two letters of recommendation issued by staff members of DEV (were the Complainant was still employed).

On 19 October 2006, when he had not yet been interviewed by OVE's Manager, the Complainant submitted an application for the extension of his G-IV

visa in which he stated that the expiration date of his contract with the Bank was 30 April 2007.

On 31 October 2006 the Complainant signed his OVE Contract. This contract expressly provided that his employment would be from 1 November 2006 through 31 January 2007 and that the contract superseded all previous communications, agreements or understandings, both oral or in writing, between the parties.

On 6 November 2006 the Department of State issued the Complainant an extension of his G-IV visa through 30 April 2007.

4. RE2/SC2 Contract. On 20 February 2007 the Complainant signed a Research Assistant contract to work for in RE2/SC2. This contract would be effective that same day (20 February 2007) and run through 31 December 2007.

On 16 March 2007 the Complainant submitted a new G-IV visa application to HRD/BPS. This time the Complainant declared that the date of completion of employment would be 31 July 2008. The Department of State issued the Complainant a G-IV visa expiring on 15 March 2008 (this because, on account of reciprocity, the Department of State has the policy of not issuing visas for more than one year to Brazilian citizens). However, the visa stamped on the passport has a note stating that the Complainant's contract with IDB expires on 31 July 2008.

5 The Bank contends that on 26 March 2007 it was discovered that in applying for a visa extension the Complainant had failed to coordinate the application process with RE2/SC2. The staff member who made the discovery reported to her superior that the Complainant had entered false information on the application form, as his contract with RE2/SC2 run only through 31 December 2007 and not through 31 July 2008, as he stated in his application. When asked by visa unit's officer regarding the matter, the Complainant stated that he had another contract with expiration date on 31 July 2008 and offered to bring a copy the next day. However, the following day, he asked that the 31 March 2008 date be erased and that 31 December 2007 be entered instead.

6. In keeping with clause (7) of his contract, on 3 April 2007, the Complainant was given notice of the decision to terminate his services effective 18 April 2008. .

7. On 17 April 2007, the issue was reported to the Ethics Committee, which in turn asked OII to investigate. On 26 October 2007, the President of the Ethics Committee informed the VPF that the Committee recommended that the Complainant be barred from Bank employment for a period of two years beginning 26 October 2007. The VPF accepted the recommendation and the Complainant was notified of that decision on 29 February 2008.

8 On 11 March 2008, the Complainant filed a complaint with the General Manager of HRD challenging the VPF decision.

9 On 6 and again on 9 June 2008, the Complainant filed complaints with the Conciliation Committee, challenging the termination of his contract in RE2/SC2, and VPF's decision barring him from employment for two years.

10. On 16 July 2008, the Conciliation Committee informed the Complainant that his claim in connection with the termination of his contract was extemporaneous and that it found no violation of due process of law in the proceedings that led to his being barred from employment for two years.

B. The Bank relies on the following legal grounds in requesting that the Complaint be dismissed:

1. The VPF's decision that is challenged in the Complaint was adopted after completing a process conducted by the Ethics Committee that established that the Complainant had perpetrated the irregularities cited in that decision, which it considered to be breaches of the Bank's Code of Ethics. The Committee arrived at that conclusion after examining the results of the investigation conducted by the OII, the evidence and the facts in the case, and the rebuttal by the Complainant himself.

The Bank rejects the Complainant's arguments alleging inconsistencies or violations that he claims were committed in his case. It dismisses as without merit the Complainant's argument to the effect that he had not been trained in how to complete a visa application. The Bank adds that when applying for the visa, the Complainant was well aware that he could not state as the date of expiration of his contract, a date based on an expectation of a lengthier contract.

2. The Bank complied with the provisions of the Complainant's contract of employment, which precludes damages, and consequently, the reparation sought.

3. The Complainant is not entitled to the termination procedures that he claims, which only applies in cases of performance issues involving staff members. This entitlement does not, under any circumstances, extend to contract personnel, much less to a case-like that of the Complainant—which involves violations of the Code of Ethics. In this Case the contract with RE2/SC2, dated 20 February 2007, expressly stipulated that the contract could be terminated by the Bank for any reason and prior to its expiration, with 14 days advance notice or immediately in cases of misconduct.

4. There is no evidence of discrimination.

5. A contract employee has no guarantee of future employment in the Institution. The expectation of continued employment does not exist.

6. The claim seeking compensation for the OVE contract is without merit, as the Complainant never received a binding offer of a contract through 30 March 2007. Nothing in the record shows that the alleged offers were made by authorized officers; even if they had been made, they would have had no legal effect because of the contract that the Complainant entered into with OVE on 31 October 2006 expressly states (in Clause 9) that it supersedes any previous

communication. In addition he never filed the necessary claims before the proper authorities, steps which are necessary to come before the Tribunal.

V. **Replication and Rejoinder**

In his Replication the Complainant reiterates that the Ethics Committee ignored evidence and never sought the testimony of key impartial witnesses. The Tribunal must acknowledge that OII's investigation relied on biased statements and information from staff members who were even responsible for the mistakes themselves.

In its Rejoinder the Bank reiterates that the Complaint is without merit as the VPF's decision of 20 December 2007 to bar the Complainant from employment by the Bank for two years is totally legitimate. This is so as it was issued after a proceeding before the Ethics Committee which concluded that the Complainant had provided false information when applying for renewals of his G4 visa. The Complainant is not entitled to damages, as the Bank has not caused him any harm and, moreover, his request for compensation of "*treble damages*", multiplied by two is not provided for in the provisions of the Statute of this Tribunal.

VI. **Anonymity**

The Complainant requested anonymity pursuant to Article 30 of the Rules of Procedure of the Tribunal which reads

"Anonymity. A complainant who wishes that his name not appear in the documents that the Tribunal publishes, may request anonymity at the time when the complaint is submitted to the Tribunal or at any time before the case is listed for decision by the Tribunal..."

The Bank was heard and stated that it had no objection and the President granted the Complainant's request.

VII. **The Evidence**

A. In addition to the abundant documentary evidence produce by the parties, the President of the Tribunal admitted the testimony of Mr. Guilherme Sedlacek, Ms. Giselle Commons, Mr. Jorge Sapoznikow, Mr. Sixto Aquino, Ms. Claudia Valderrama, Mr. Adalberto Bellagamba, Mr. Robert Deal, Ms. Marina Ashworth, Ms. Angélica McInerney, Ms. Ana Santiago, Ms. María Clara Pescetto, Mr. Valentim Boucas, and the Complainant.

B. At the beginning of the hearing of witnesses the Banks Counsel informed the Tribunal that in meeting some witnesses, he was able to identify (the previous day) two documents relative to the Complainant's claim that while interviewing with OVE, he was initially offered a contract for 6 months as a research assistant. (Based on that offer, before the contract was signed, he proceeded to file the G-IV visa application renewal form with the Visa Unit.) These documents are Emails sent by Ms. Angélica McInerney, OVE's Administrative Officer, both dated 19 October 2006. One addressed to Mr. Bellagamba, from the Visa Unit requesting an extension or renewal of Mr. NT's G-IV visa

and the second one, also from Ms. McInerney, addressed to Mr. NT, informing him of the request she had sent to the Bank's Visa Unit. These documents establish that the dates included by the Complainant in his visa application to work for OVE, were those the Bank had given him at the time. Counsel for the Bank stated that he was filing those documents for the Tribunal to consider, particularly as regards the need to hear those witnesses whose testimony were to address these facts.

C. The Tribunal decided that, given the new evidence it would only be necessary to hear the testimonies of the following witnesses: Mr. Guilherme Sedlacek, Mr. Jorge Sapoznikow, Ms. Claudia Valderrama, Ms. Adalberto Bellagamba, Ms. Robert Deal and the Complainant Mr. NT

CONSIDERING:

1. Clause 8 of the Complainant's contract with RE2/SC2 establishes that if any dispute should arise between the Complainant and the Bank as to the interpretation of the contract or of any matter or subject in connection therewith, which cannot be settled by amicable agreement between the Complainant and the Bank, then in accordance with applicable Bank codes, policies, rules, and procedures, the matter shall be referred to the properly constituted grievance bodies established by the Bank for resolution of disputes between the Bank and its employees. This Administrative Tribunal is one such organ duly established by the Bank. Accordingly, based on the foregoing, the Tribunal has jurisdiction to hear the instant case.

2. The Complainant challenges the decision of the VPF of 20 December 2008 that embraces the recommendation of the Ethics Committee that orders the disqualification of the Complainant from being hired by the Bank for two years.

The recommendation of the Ethics Committee to the VPF states:

“DATE: October 26, 2007

TO: Mr. Carlos Hurtado

Vice President, Finance and Administration

FROM: Ms. Alicia Ritchie Chair, Ethics Committee

SUBJECT: The Case of NT C-2007-0091

This matter concerns the behavior of Mr. NT, an IDB consultant who has worked for the Bank since October 31, 2006. On April 17, 2007 the Ethics Committee received an allegation informing the Committee that Mr. NT had, on two occasions, falsified applications for his G-IV visa.

The Ethics Committee accepted jurisdiction and requested for the Office of Institutional Integrity (OII) to conduct an investigation. The final investigative report by OII concluded that there is "sufficient evidence to demonstrate that Mr. [NT] violated the Bank's Code of Ethics on both October 19, 2006 and March 16, 2007, when he knowingly provided false information on his G-IV visa applications." The violations to the Code include: (1) Use of Information' where it states clearly that "Employees may never intentionally misrepresent the truth, especially when providing information to the Bank or parties that do business with the Bank"; (2) in the same section of the Code under Use of Information it also says that "Provision of information to or about the Bank shall be done in a manner consistent with the Core Values of the institution and, (3) as is stated in the OII report, "Mr. [NT]'s

attempt to obtain a G-IV visa of the United States for seven months more than allowed under his contract with the Bank also violates the general norm of conduct mandated by the Code of Ethics which states, in pertinent part, that: "[e]mployees shall not use or attempt to use privileges or immunities for personal benefit that would be inconsistent with the Bank's Charter."¹²

On September 18, 2007 the Ethics Committee held a hearing with Mr. NT. Mr. [NT] said that in one of the applications for the visa he made a mistake on the date. He stated that he tried to fix it but the application had already been transmitted to the State Department. In the second incident of Mr. [NT]'s visa application he claimed that he had a verbal offer of a job. The Ethics Committee did not find these explanations credible because as part of his administrative duties Mr. [NT] dealt with consultants who needed G-IV visas and he was well familiar with the Bank's Visa office, its process and procedures. He knew he could not make an application for a visa when he did not have a contract or at a minimum an e-mail from the hiring unit to the Visa office. In addition to the outcome of this hearing, the Ethics Committee carefully reviewed the OII Investigation Report and interviewed Mr. Robert Deal from Human Resources to understand the Bank's process for G-IV visa holders. In the interview with Mr. Deal we learned that this is the first case where an employee has falsified an application for a G-IV visa.

As was found in the investigation, the areas of the Code of Ethics violated by Mr. NT include: (1) not providing truthful information; (2) intentional misrepresentation of information; and, (3) the violation of the Core Value of Integrity.

Based on these violations of the Code of Ethics, the Ethics Committee recommends that Mr. NT be barred from Bank employment for a period of two years beginning with the date of this memorandum."

At the outset of the witness hearing, the attorney for the Bank informed the Tribunal that he had identified two emails that show that OVE had initially offered a contract as a research assistant for a period of six months. Based on that offer the Complainant proceeded, before signing the respective contract, to submit the form for renewal of his G-IV visa to the Visa Unit. Those emails establish show that the dates that the Complainant included on his visa application of 19 October 2006 corresponded to the information that the Bank had communicated to him when he signed that visa application.

The existence of those emails shows that: (a) the statements of several staff members made in the investigation by the OII were inconsistent with the facts; (b) the investigation undertaken by the OII was not exhaustive or efficacious insofar as it did not go deeper into the inquiry, as it should have; (c) in the Ethics Committee, did not interview staff member—who were identified by the Complainant—and who would have clarified the error of the OII's investigation; (d) the Conciliation Committee erred when it did not "*find any violation of due process,*" and (e) the late handing over of those emails to the Bank's attorney, and consequently to the Tribunal, was a serious omission.

The recommendation from the Ethics Committee to the VPF was based on the presupposition that the Complainant "*had falsified applications for his G-IV visa on two*

occasions.” Indeed, when the Manager of Human Resources asked the Ethics Committee to reconsider the recommendation, it answered that *“One error is possible, but two is not credible.”*

In view of the foregoing, the recommendation of the Ethics Committee lacks a factual foundation, insofar as one of the bases for it did not exist. Accordingly, the decision by the VPF is flawed.

All of the above is without prejudice to the Complainant having included an inaccurate date in his visa application of 16 March 2007. He acknowledged as much, attributing it to a mistake on his part, which he sought to correct once he became aware of it.

3. The Complainant asks that his record in the Human Resources Department stemming from his requests for renewal of his G-IV visa be cleared up.

4. The Complainant's contract with RE2/SC2 in Clause 7 establishes that the Bank has the right to terminate this agreement for any reason, at any time prior to the expiration of its term. Consequently the Complainant's claims derived from his termination on 3 April 2007 cannot prosper.

5. The Complainant requests that the Tribunal order the Bank to hire him as a Project Coordinator (a position on the next level of his previous position). The Complainant's request is not within the Tribunal's jurisdiction.

6. The Complainant asks for compensation in the amount of US\$63,000.00, considering that the contract he was offered with OVE was shorter than what he had originally been offered; and compensation in the amount of US\$206,580.00 due to the early termination of his contract with RE2/SC2.

NOW THEREFORE:

The Tribunal orders:

The annulment of the decision of the VPF of 20 December 2007.

The removal from the Complainant's Personnel File of all documents related his G-IV visa renewal applications.

The Bank to pay the Complainant the sum of US\$79,015.68 as compensation for moral injury to his reputation and to his prospects of new employment. This amount determined on the basis of the two years the Complainant was barred from employment in the Bank.

All other claims of the Complainant are dismissed

Washington, D. C., 30 October 2009

Alejandro Serrano Caldera

Andrew Derek Burgess

Isaac Sandioval Rodríguez

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Guilherme A. Caputo Bastos

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