

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 387/2007 (Carlos BENDITO (V)
v. Governor of the Council of Europe Development Bank)**

The Administrative Tribunal, composed of:

Mrs Elisabeth Palm,
Mr Angelo Clarizia,
Mr Hans G. Knitel, Judges,

assisted by:

Mr Sergio Sansotta, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Carlos Bendito lodged his appeal on 15 January 2007. On 19 January 2007, it was registered as file 387/2007.
2. On 8 March 2007, Mr J.-P. Cuny, the appellant's counsel, filed a supplementary memorial.
3. On 13 April 2007, the Governor submitted his observations on the appeal. The appellant filed a memorial in reply on 21 May 2007.
4. The public hearing of the appeal was held in Tribunal's hearing room in Strasbourg on 14 June 2007. The appellant was represented by Mr J.-P. Cuny, the Governor by Mr J.-M de Forges.
5. In response to a document submitted by the Governor's counsel during the hearing containing comments on the appellant's requests, the Tribunal invited his counsel to submit his own comments. These were received on 25 July 2007.

6. On 9 October 2007, the Tribunal asked the parties to try to reach a friendly settlement and gave them a deadline of 31 December 2007. It also stated that after this date, it would rule on the case as soon as possible, exercising its unlimited jurisdiction (Article 60, paragraph 2 of the Staff Regulations).

7. On 12 December 2007, the Governor's counsel submitted observations on the comments of 25 July 2007 and made proposals for a settlement.

8. On 31 December 2007, counsel for the appellant made his comments on the observations and informed the Tribunal of his proposals for a settlement.

9. On 10 January 2008, the bank announced that it could not accept the counter-proposal.

10. After finding that the parties could not reach a settlement, the Tribunal ruled as follows.

THE FACTS

I. BACKGROUND

11. The appellant, a Spanish national, was recruited by the Council of Europe Development Bank ("the Bank") on 5 March 2001.

He was employed as a permanent staff member for a probationary period with a fixed term contract of two years attached to a permanent post. Following an initial decision on 25 July 2003 to extend the contract for one year, the Bank informed the appellant that it was terminating his contract as of 31 October 2003, in accordance with Article 17, paragraph 3 of the Staff Regulations.

12. After submitting two unsuccessful administrative complaints on 4 and 9 September 2003 under Article 59 of the Staff Regulations, the appellant lodged two appeals with the Tribunal (Nos 317/2003 and 318/2003 *Carlos Bendito v. Governor of the Council of Europe Development Bank*).

In a decision handed down on 8 October 2004 ("the decision of 8 October 2004"), the Tribunal set aside the Governor's decision to interrupt the contract during the probationary period because the Joint Committee had not been consulted.

13. Following this decision, the Governor brought the matter before the Joint Committee Following the Committee's meeting; On 23 December 2004, the Governor terminated the appellant's contract with immediate effect, in Rule No. 7/2004. Following the dismissal of his administrative complaint, the appellant challenged this in the Tribunal on 30 March 2005 in appeal No. 346/2005.

In a decision handed down on 19 May 2006, the Tribunal found that the appeal was ill-founded in so far as it sought the setting aside of Rule No. 7/2004. The Tribunal decided that the

appellant was entitled to his salary for the months of the notice period that should have been specified in Rule No. 7/2004.

14. In the meantime, the appellant had lodged appeals under Article 59, paragraph 1 of the Staff Regulations, requesting the rapid payment of a sum corresponding to the salaries that were owing to him for the period from 31 October 2003 to 31 December 2004 (extended to 31 March 2005 following the Tribunal's decision in Appeal No. 346/2005).

Having failed to gain satisfaction, the appellant lodged an administrative complaint, the dismissal of which he challenged in Appeal No 348/2005.

In a decision of 19 May 2006, the Tribunal declared the appeal ill-founded.

In connection with the part of the appeal concerning the non-payment of salaries, the Tribunal noted that the parties had agreed that these should be paid after deduction of the appellant's additional earnings (paragraph 51 of the decision). It added that the appellant must inform the Governor of his earnings between 1 November 2003 and 31 March 2005 (*ibid*). It noted that the parties had disagreed on the nature and comprehensiveness of the information which the appellant provided (*ibid*). It concluded that the appellant had not given the Governor all the information he should have provided for the latter to execute the first decision (Appeal No. 346/2005). The Tribunal therefore rejected this ground.

II. THE CIRCUMSTANCES OF THE CASE

15. On 4 June 2006, the appellant lodged a fresh request under Article 59, paragraph 1, *in fine*, of the Staff Regulations. He asked the Governor to pay him a sum corresponding to his salary for the period between 1 November 2003 and 31 March 2005 (seventeen months' salary). The appellant attached a number of documents containing information on the nature and extent of his collaboration with a company.

16. On 19 June 2006, the Bank's counsel told the Tribunal that the Bank considered that the documentation supplied was insufficient, under the terms of paragraph 52 of the decision of 19 May 2006. In particular, he asked why the appellant had not supplied tax notices from the Spanish tax authorities.

17. On 18 July 2006, the appellant lodged a second request under Article 59, paragraph 1, *in fine*, of the Staff Regulations. He asked the Governor to pay him a sum corresponding to his salary for the period between 1 November 2003 and 31 March 2005. The appellant attached a few documents. These included a legal opinion from a firm of Spanish tax law specialists (Gil, Tejedor y asociados) concerning "the possibility" that the appellant had earned income in Spain in the 2003, 2004 and 2005 tax years.

18. On 27 July 2006, the Bank acknowledged receipt of this request and told the appellant that it was going to ask a firm of Spanish lawyers to consider the documents produced.

19. On 9 August 2006, the appellant supplied the bank with a certificate from the competent Spanish tax authorities stating that he did not appear in the VAT register.

20. As the Bank had not replied to the request of 18 July 2006, on 16 October 2006 the appellant lodged an administrative complaint with the Governor against the implicit rejection of his request (Article 59 of the Staff Regulations).

21. On 15 November 2006, the Bank's Director of Human Resources informed the appellant that the Governor had rejected his complaint. At the same time the appellant received a copy of a report that the Bank had commissioned from a firm of Spanish lawyers (Legal Link).

22. On 15 January 2007, the appellant lodged the present appeal.

III. THE APPELLANT'S ECONOMIC ACTIVITY IN SPAIN

23. After the appellant had left the Bank, on 9 and 24 March 2004 a company called Innovest Strategic Value Advisors inc. signed a "memorandum of understanding" with Carben International Advisors – a company established by the appellant and of which the appellant was the representative. According to the memorandum, "*Innovest is granting under this agreement to Carlos Bendito the responsibility and full powers to commercialize and develop Innovest Strategic Value Advisors products and services in Spain*". For this activity, the appellant would receive commissions and a fixed sum (€ 20 000 per year), if a certain level of commissions (€ 50 000) was not reached.

24. According to information supplied to the Tribunal, commissions of around € 65 000 were paid.

25. Carben International Advisors subsequently ceased trading. When its accounts were closed, it appeared that Carben had not made any profit as its operating costs, which under Spanish law could be offset against profits, were shown to be greater than the declared revenues. On 1 March 2005, the appellant started work for a Spanish bank: Triodos bank NV SE.

IV. REGULATIONS CONCERNING THE BANK

26. The Council of Europe Development Bank – formerly the Social Development Fund and before that, the Council of Europe Resettlement Fund – was established in 1956 as a Council of Europe partial agreement.

The Tribunal has described this institution and the rules governing its activities in its decisions of 29 September 1995 on appeals Nos 189 and 195/1994, 190, 196, 197/1994 and 201/1995. Here, it is sufficient to recall that according to Article IX, Section 1.d of the Bank's Articles of Agreement, the Council of Europe Staff Regulations shall be applicable to the staff of the Bank in any matter not covered by a specific decision of the Administrative Council.

The relevant Council of Europe and Bank provisions pertaining to the appellant's dispute with the Bank concerning his dismissal were summarised in the decision of 8 October 2004 on Appeals Nos 317/2003 and 318/2003 and that of 19 May 2006 on Appeal No 346/2005.

THE LAW

27. The appellant has lodged this appeal against the Governor's decision to reject the administrative complaint in which he requested the payment of salaries for the period between 1 November 2003 and 31 March 2005. In his last letter to the Tribunal (dated 31 December 2007), the appellant stated that the compensation, based on a table previously presented by the Governor, would be € 198 925.45, the total sum, including interest, as of October 2007, and would become € 201 300.41, including interest, as of January 2008. Finally, the appellant asks the Tribunal to award him € 6 500 as costs for these proceedings.

28. In his last letter, dated 10 January 2008, the Governor rejects this proposal. In his previous letter, dated 12 December 2007, he stated that from the information at his disposal he estimated that for the fifteen months in question the appellant's real income had "probably been not less than € 80 000". He added that setting the amount he should pay the appellant, over and above the payment made on 4 May 2005, at € 60 000 seemed to him to be fair compensation for the detriment actually suffered by the appellant.

I. THE PARTIES' ARGUMENTS

29. According to the appellant, the Governor's decision not to pay the salaries due, despite the information that he had supplied, was in breach of both the general legal principle of *res judicata* and Article 60, paragraph 6 of the Staff Regulations, whose legitimacy and justification is based on that general principle of law.

30. Paragraph 52 of the decision of 19 May 2006 on Appeal No 348/2005 required him to produce not only certificates issued by the Spanish tax authorities but also information on his earnings or income from his activities with a company.

31. The appellant states that, following the decision of 19 May 2006, he supplied the Governor with full information on the nature of his employment since the termination of his contract with the Bank and his total earnings (paragraph 16 of his supplementary memorial). He therefore considers that he had discharged his duties in this respect. He adds that he even asked a firm of Spanish lawyers to examine the documents supplied and state whether, in the light of this documentation, he could be considered to have received income other than that declared to the Spanish tax authorities.

32. He maintains, however, that the Bank has done everything in its power to impede him by systematically casting doubt on his honour and resorting to speculation and innuendo, most of which was defamatory in nature. Based on a second expert opinion, he challenges the opinion issued by the Spanish firm to the Bank. He also argues that the Bank's attitude is incompatible

with international civil service law. He relies on the case-law of the ILOAT (judgment No. 1340 of 13 July 1994).

33. The appellant maintains that the total sum he is owed for the period 1 November 2003 to 31 March 2005 is € 201 300.41. He arrives at this figure by adding interest and deducting the amount already paid by the Governor, a salary paid by a Spanish bank and health insurance contributions. He has also asked for a performance bonus.

His calculation is as follows:

Amounts (as of January 2008) to which he is entitled:

Salary: € 164 597.32

Interest: 30 949. 84

Pension fund (including interest): 1 717.17

Health insurance (including interest): 9 730.49

Leaving allowance: 20 779.28

Salary for three months' notice; 29 770.44

Total A: 257 544.54

From this must be deducted:

Advance received from the Bank: 50 000

Salary March 2005: 3 533.85

Contributions to Spanish social security: 2 710.28

Total B: 56 244.13

TOTAL A less TOTAL B: 201 300.41

34. The Governor disputes not the appellant's right to compensation but his method of calculating it.

35. He maintains that a number of questions concerning the appellant's income raised by the firm Legal Link have still not been answered. For example, he cites the appellant's personal and family expenses attributed to the CARBEN company to reduce its profits, and the failure to charge commission that was nevertheless provided for in his agreements with the two companies INNOVEST and BBVA.

36. The Governor makes a number of further points and concludes that because of the quantity and complexity of the documents supplied by the appellant it is not possible to produce a reliable estimate of his professional income for the period 1 November 2003 to 31 March 2005.

The Governor also makes a series of comments on the appellant's claims regarding his salary, the payment of a performance bonus and the re-evaluation of sums owed (issues on which the appellant should not be granted satisfaction), health insurance contributions and an annual increase in salaries according to the scales used by the Bank.

His calculation is as follows:

Gross salary November-March 2005: € 164 071.00
Leaving allowance
[71 480.55 - pension fund less
43 088.69 – amount paid 28 391.86

TOTAL 192 463.06

From this must be deducted:

Advance received from the Bank: 50 000

TOTAL less sum advanced 142 463.06

After taking account of salary deductions of € 3 533.85 received by the appellant from Triodos bank and his social security contributions, paid in Spain, of € 2 710.28, the Governor estimates the total figure to be € 136 218.93.

37. Following the written and oral proceedings, the Governor considers that, in addition to the payment of € 50 000 already paid to the appellant, the Bank should pay him the sum of € 60 000 as appropriate compensation for detriment actually suffered, since he considers that during this period the appellant's real income was probably not less than € 80 000.

II. THE TRIBUNAL'S ASSESSMENT

38. The Tribunal recalls first that, as already indicated in paragraph 6, in considering this case it can exercise its unlimited jurisdiction (Article 60, paragraph 2 of the Staff Regulations), because it is a dispute of a pecuniary nature.

39. Secondly, it recalls that once again, as in Appeal No 348/2005, it is concerned not with the failure to execute one of its previous decisions but rather with a disagreement between the parties about how to execute it.

40. Given these material differences of opinion, the Tribunal is convinced that it would have been preferable for the parties to reach a friendly settlement of this dispute that took account of their respective positions. Since such a settlement has not been forthcoming, the Tribunal will rule on the matter in the light of the information supplied to it, which it will assess *ex aequo and bono*.

41. The Tribunal considers that it must first determine the amount of salary that the Bank should have paid to the appellant for the period 1 November 2003 – 31 March 2005 and then subtract the sum that the appellant earned during this period from any other occupation, of whatever variety.

42. Regarding the first point, the Tribunal considers that when the preparation of the case was completed, there was a large measure of agreement between the parties on the gross salary that would have been paid to the appellant by the Bank during the period in question. Apart from that,

given the reason for the appellant's dismissal, the Tribunal considers that his request to be paid a performance bonus is unjustified.

43. On the second point, namely the sum to be deducted from the salary, the Tribunal notes that the parties disagree on the amount of earned income received by the appellant during this period.

44. The Tribunal observes that, for the purposes of this case, it must take account of all the appellant's income, whether from paid employment or from commissions on activities carried out directly by himself or via the company, CARBEN, that he established.

45. In its decision of 19 May 2006 (Appeal No 348/2005), the Tribunal found that the appellant had not given the Governor all the information he should have provided to enable the Governor to calculate the sum to be paid. The Tribunal now finds that even though the appellant has since supplied a certain number of documents, these have not removed all uncertainties.

46. The Tribunal notes that the documentation supplied to it by the appellant mainly concerns his requests concerning unpaid salaries. On the other hand, he has provided very little information on his earnings during the period in question. It appears from this documentation that he received only a limited income. Yet the appellant has little to say in response to the Governor's doubts – which the Tribunal does not consider to be unjustified – about these earnings and has provided no valid information to dispel these doubts.

47. The Tribunal also agrees with the Governor that some of the expenses attributed by the appellant to the company CARBEN must be considered to be “personal and family expenses, which would clearly make his personal income less believable”. The Tribunal also notes that it was stated in the “memorandum of understanding of March 2004 that certain sums would be paid to the appellant.

48. In his requests, the appellant asks for the payment of capitalisable interest to ensure, as far as possible, a *restitutio in integrum*, in accordance with the general legal principle of *res judicata*, as expounded in international case-law. In support, he relies on Judgment 1384 of the International Labour Organisation Administrative Tribunal (ILOAT).

49. For its part, the Governor maintains that there is nothing in the Staff Regulations to authorise such financial operations. He also argues that the appellant is solely responsible for the length of the proceedings.

50. The Tribunal considers that in principle the request to be paid interest is justified. In the absence of any specific regulations on the subject, the rate should be based on national and international examples.

In this particular case, however, the Tribunal considers that the request to be paid interest is not entirely justified because the appellant is mainly responsible for the delays in providing the evidence necessary to make the relevant calculations (see, for example, Appeal No 348/2005 -

Bendito (IV), Tribunal decision of 19 May 2006). The Tribunal can therefore only award a part of the interest.

51. In view of these considerations, the Tribunal considers that the Governor's estimate of the income earned by the appellant to be taken into account is closer to the correct figure than that of the appellant.

52. Based on its assessment of the documents supplied to it, the Tribunal therefore concludes that the Governor must pay the appellant a lump sum of € 80 000, in addition to the € 50 000 already paid. This amount includes the interest referred to in paragraph 50.

III. COSTS

53. The appellant, who used the services of a lawyer, has requested € 6 500 in costs. The Tribunal considers it reasonable that the Bank refund € 5 000 (Article 11, paragraph 2, of the Tribunal's Statute – Appendix XI of the Staff Regulations).

IV. CONCLUSION

54. The Governor must pay the appellant the sum of € 80 000 and the sum of € 5 000 for costs.

For these reasons,

The Tribunal:

Orders the Governor to pay the appellant the lump sum of € 80 000 in addition to the € 50 000 already paid;

Rejects the remainder of the appeal;

Orders the Governor to pay the sum of € 5 000 for costs.

Delivered at Strasbourg on 27 June 2008, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. Sansotta

E. Palm