



**IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC
COMMUNITY OF WEST AFRICAN STATES (ECOWAS)**

HOLDEN AT ABUJA, IN NIGERIA

ON 3RD, DAY OF FEBRUARY, 2020

SUIT No: EWC/CCJ/APP/40/17

JUDGMENT NO: ECW/CCJ/JUD/02/20

BETWEEN

PROF. (ENGR) JOSEPH ADELEGAN

- APPLICANT

AND

ECOWAS BANK FOR INVESTMENT AND DEV.

- RESPONDENT

COMPOSTION OF THE COURT

Hon. Justice Gberi-Be Ouattara

- Presiding

Hon. Justice Keikura Bangura

- Member

Hon. Justice Januaria T. Silva Moreira COSTA

- Member

**Assisted by Mr. Tony Anene-Maidoh, Esq.
Registrar**

- Chief

JUDGMENT

Parties

The Applicant is Prof. (Engr.) Joseph Adelegan a former employee of the Respondent. The Respondent is ECOWAS Bank for Investment and Development is an institution created by the new Article 21 of the Revised Treaty of ECOWAS as amended by the Supplementary Act No. A/SA.9/01/07 of 19 January, 2007.

Subject Matter of the Proceedings

The Applicant's claim is for the alleged non-compliance by the Respondent with provisions of its Staff Rules and Regulations in the recruitment exercise conducted to fill the vacant position of Director, Public Sector Operations of the Defendant. The Applicant claimed to have applied for the position but was wrongfully terminated by the Respondent when he protested that the said recruitment exercise was riddled with anomalies.

The Applicant's Claim

The Applicant submits that he is a professor of Civil and Structural Engineering, in the employment of the Respondent as the Head, Environment and Sustainable Development Unit. He was appointed by way of letter dated 8th October, 2012 and was subsequently confirmed by a letter dated 1st April, 2015 as a permanent staff. That the conferment of the permanent staff status on him was on the basis of his yearly performance, professional knowledge, self-management, communication skills, creativity and innovation, interpersonal relations, team spirit and orientation on

corporate culture among others. That the Applicant alleged that confirmation as permanent staff coupled with the comment of the Respondent (President) encouraging him to “*continue in the path*” affirms the fact that the Respondent was extremely satisfied with his performance and conduct.

The Applicant avers that while in the employment of the Respondent, he appraised and supervised projects as he was the only environmental and social safeguard expert in the employment of the Respondent in both public and private sector operations without recourse to any consultant.

That by reason of the Applicant’s academic and professional qualification and experience, he applied as an internal candidate for the vacant position of the Director of Public Sector Operation pursuant to an advertisement dated 12th May 2015 made by the Respondent. The Applicant states that to his greatest consternation, he was not shortlisted for the position even though he was allegedly over qualified for the said position, despite the fact that the Respondent’s Staff Rules and Regulations provides that priority should be given to internal candidates among applicants with equal qualifications and skills. That upon the realization he had not been shortlisted for the position, he wrote to the Respondent via a letter dated 14th July, 2016, 15th July, 2016 and 29th August, 2016; and a memo dated 4th July, 2016 respectively in protest. The Applicant claims that as a result of the said letters, the Respondent subsequently invited him for the psychometric test and thereafter he was invited for a written test and oral interview. That shortly after the recruitment exercise was conducted, the Applicant was informed by the Respondent at a panel meeting that he was not successful for the position. That this came as a shock to him

considering his academic and professional qualifications as well as his experience, which far exceeds the requirement for the position.

The Applicant claims to have investigated the recruitment exercise conducted by the Respondent and discovered the following irregularities and flaws:

- I. That the Togolese Human Resource firm KAPI Consult initially hired to conduct the recruitment was abruptly disengaged and a supposed South African firm by the name MCA Training International was hired to replace KAPI Consult.
- II. That the MCA Training International was not existing as at the period of time it was hired by the Respondent to conduct the recruitment exercise.
- III. That the said MCA Training International had been struck out of the list of registered companies in South African since 16th July, 2010.
- IV. That to due diligence, conducted on MCA Training International, showed that some of its key personnel only have secondary school level qualification.
- V. That the supposed head office address of MCA Training International located at No. 7 Uizicht, Sturke Road, Welgemoed, 7530 Cape Town is a private residence.
- VI. That the management of the Respondent during its 53rd meeting of the Board of Directors, requested one of its agenda under the recruitment exercise for a waiver of the age requirement of a 52 years old candidate for the position of Director of Public Sector Operation despite having stated in its advertisement for the position, that all external candidates should not exceed 45 years of age.

The Applicant alleged that by a letter and memoranda dated 14th April, 2017, 4th May, 2017 and 23rd May, 2017 respectively, he wrote to the Board of Directors of the Respondent protesting of the fraudulent acts and irregularities that marred the recruitment exercise. That the Respondent in response expressed its satisfaction with the way and manner the said recruitment exercise was conducted. The Applicant avers that in a bid to seek amicable redress in respect of the said recruitment exercise and injustice meted on him, he requested the Respondent to invoke a mediation mechanism for the settlement in accordance with Article 76 and 77 of its staff rules and regulations. That rather than addressing the Applicant's complaints, the Respondent summarily and capriciously terminated his appointment without due process and without affording him any opportunity to defend himself.

That the said termination of the Applicant's appointment is an oppressive retaliation from the management of the Respondent against him for exposing the fraudulent activities during the recruitment exercise.

That the Respondent having received the letters from his solicitors, is yet to redress his complaint and reinstate him.

The Applicant therefore claims the following reliefs:

1. **A DECLARATION** that the Respondent acted arbitrarily, capriciously and in breach of the Applicant's **right to fair hearing** when the Respondent terminated the Applicant's appointment with the Respondent in May, 2017 without having given the Applicant notice of allegations of any wrong doing and the opportunity of defending himself before the Applicant's appointment was terminated.

2. **AN ORDER** of the Honorable Court setting aside the decision of the Respondent terminating the appointment of the Applicant as Head, Environment and Sustainable Development Unit of the Respondent.
3. **AN ORDER** of the Honorable Court reinstating the Applicant to his position as Head, Environment and Sustainable Development Unit of the Respondent.
4. **AN ORDER** of the Honorable Court directing the Respondent to pay the Applicant's salaries, entitlements and benefits due and payable to the Applicant from May, 2017 till the day judgment is delivered in the suit and Twenty-five (25%) percent interest per annum of total sum from May, 2017 till date of the judgment.

PARTICULARS:

YEARLY REMUNERATION AND ONE TIME EMPLOYMENT BENEFITS OF THE APPLICANT

(1) YEARLY REMUNERATION (EMPLOYMENT SALARY, ALLOWANCES AND BENEFITS)

- a. 12 month(s) salaries (including 13th and 14th months' salary) = USD 114,184
- b. Educational grant for four (4) children (USD 5000 × 4) = USD 20,000
- c. Home leave travel cost (every two years) for staff, spouse and four children (studying abroad) yearly conversion = USD 6,500 per year
- d. Paid leave (30 days year) converted to cash = USD 12,234
- e. Medical expenses for applicant, spouse and four children to be paid by the Bank up till the day judgment is delivered.
- f. Employee's yearly contribution to the pension scheme to be paid by the Respondent up till the day judgment is delivered.

g. Salary increment in Step every two years (yearly conversion) and average compounding = USD 5,341 (currently in P5 Step 2 and due for P5 Step 3 on January 2, 2018)

TOTAL REMUNERATION PER YEAR = USD 158,259

(2) ONE TIME EMPLOYMENT BENEFITS

UNPAID MEDICAL EXPENSES FOR ENGR (PROF) JOSEPH ADELEGAN, SPOUSE AND CHILDREN SUBMITTED TO THE BANK 1, 2017.

Outstanding and unpaid medical expenses = USD 12,054 (these submitted medical expenses was acknowledged by the Bank in their letter dated 8th June, 2017 and Ref. 256/2017/BIDC-EBID/CDRH/AS)

OUTSTANDING LEAVE DAYS FOR 2017 outstanding leave (28 days) for 2017 converted to cash = USD 11,420

TOTAL REMUNERATION PER YEAR= USD 158,259

TOTAL ONE TIME EMPLOYMENT BENEFITS = USD 29,474

SUM TOTAL SALARIES, ENTITLEMENTS AND BENEFITS USD 187,733.

5. **A DECLARATION** that the Respondent's decision not to pick or select the Applicant as the successful candidate in the recruitment exercise conducted or caused to be conducted by the Respondent in year 2016 for the position of Director, Public Sector Operations of the Defendant is oppressive, unfair and arbitrary having regard to the

relevant rules and regulations of the Respondent governing the said recruitment/selection exercise.

6. In the alternative to relief 5 above, **AN ORDER** of the Honorable Court setting aside the recruitment exercise conducted or caused to be conducted by the Respondent in year 2016 for the position of Director, Public Sector Operations of the Defendant on the ground that the said recruitment exercise was flawed by fundamental irregularities and fraud.
7. **The sum of One Hundred Thousand Dollars (\$100,000)** as the cost of this lawsuit.
8. **The sum of Ten Million Dollars (\$10,000,000.00)** as damages for the wrongful termination of the Plaintiff's appointment by the Defendant.
9. **10% interest per annum of the total judgment sum until the said sum is liquidated.**

AND FOR SUCH FURTHER OR OTHER ORDERS as this Honorable Court may deem fit to make in the circumstances.

The Respondent's defense

The Respondent denies the Applicant's narration of facts and states that the Applicant was an early candidate of EBID disciplinary committee on account of gross misconduct. That as a probationary employee he breached his duty of fidelity and confidentiality by speaking directly to a third party in unflattering terms and making derisive and negative comments concerning a decision taken by management of EBID.

The Respondent contends that due to the Applicant's misconduct, the Respondent queried the Applicant and subsequently meted out disciplinary measures against him by extending his confirmation as permanent staff by a period of one year. The Respondent states that no fraud, irregularities and or flaws were responsible for the non-recruitment of the Applicant for the position of Director, Public Sector Operations but that it made considerable effort to make sure that the Applicant was shortlisted by KAPI Consult after he had not being initially shortlisted by KAPI.

The Respondent alleges that the shortlisting exercise conducted was not on basis of the Applicant's numerous protest letters but on EBIDs principle of giving priority to internal candidates which was extended to all internal candidates for various positions. Respondent further averred that KAPI Consult and MCA were involved in the recruitment exercise and the conduct of the psychometric online assessment respectively and that they discharged their duties satisfactorily. That their recruitment was also in accordance with due process.

The Respondent states that the Applicant was not the only internal candidate who was unsuccessful in the exercise and that in fact all the internal candidates were unsuccessful. That when the Applicant got a glimpse that he was unsuccessful for the position, his started to consistently complain and display acts of indiscipline.

The Respondent avers that the Applicant's appointment was terminated on grounds of his blatant indiscipline and insubordination which was incompatible with its standards, values and culture of any corporate environment such as the Respondent's Bank. That the said termination was as a result of several acts of misconduct deserving disciplinary action

which resulted in the lawful termination of the Applicant's appointment in accordance with the Rules and Regulations governing his employment.

The Respondents list the acts of misconduct as follows:

- i) The disgraceful encounter with AMBA Immobilizer.
- ii) The Hillacondji Boarder violence in 2014 which resulted in the Respondent's Bank being involved by mobilizing resources to intervene and save the Applicant and his family from a violent incident involving the Applicant.
- iii) A mission to Cote d'Ivoire where the Applicant proceeded to embark on leave without notice knowing how important his duty was to the Ivorian authorities.
- iv) The Applicant's blatant indiscipline towards the management of the Respondent's Bank which culminated in his appointment being terminated.

In view of the Respondent's defense, it submitted that the Applicant's action lacks merit and that he was rightfully terminated in accordance with the Rules and Regulations of the bank and therefore not entitled to the reliefs sought.

The Respondent therefore are seeking the following:

- a. An order dismissing the Applicant's application with substantial costs.
- b. An order compelling the Applicant to return the Respondent all properties including laptop/computer unlawfully detained by the Applicant since the lawful termination of his appointment.

ISSUES FOR DETERMINATION

- 1. Whether the Court has the competence to hear and determine the application.**
- 2. Whether the application is admissible.**
- 3. Whether the Applicant was unfairly dismissed by the Respondent.**

ISSUE 1: Whether the Court has competence to hear and determine the application.

Competence is a jurisdictional issue that is settled by law. Generally, the Court by itself cannot assume competence to exercise jurisdiction on any matter except by means of statutory provisions conferring on it the competence to exercise jurisdiction on any issue that comes before it.

The Court is aware that amongst the several grievances contained in the application of the Applicant, there is an allegation of violation of right to fair hearing by the Respondent, failure by the Respondent to comply with the Provisions of the Staff Rules and Regulations in the recruitment exercise conducted to fill the vacant position of Director , Public Sector Operation of the Respondent's Bank and the unfair dismissal of the Applicant without due process and in blatant contravention of the relevant provisions dealing with discipline and dismissal. The Applicant alleged that by letter and a memoranda dated 14th April 2017, 4th May 2017 and 23rd May 2017, he wrote to the Board of Directors of the Respondent protesting of the fraudulent act that marred the recruitment exercises. That the Respondent in response expressed its satisfaction with the way and manner the said recruitment exercise was conducted. The Applicant avers that in a bid to

seek amicable redress in respect of the said recruitment exercise and injustice meted on him, he requested the Respondent to invoke a mediation mechanism for the settlement in accordance with Article 76 and 77 of its Staff Rules and Regulations (EBID). That rather than addressing the Applicant's complaints, the Respondent summarily and capriciously terminated his appointment without due process and without affording him any opportunity to defend himself.

In effect the Applicant's grievance is that his employment with the Respondent Bank was terminated following a protest letter he wrote directed to the Board of Directors without giving him the right to present his case. It is no doubt that one of the reliefs being sought by the Applicant in his application is a declaration that the Respondent acted arbitrarily, capriciously and in breach of the Respondent's right to fair hearing. The right to be heard is a fundamental human right which is in accordance with the Principles of Natural Justice. The Applicants having alleged violation of such right invoked a human right issue and this therefore gives the Court the competence to hear the application in accordance with Article 9 (4) of the Supplementary Protocol (A/SP.1/01/05) amending the Protocol of the Court (A/P1/7/91). It provides that the Court shall have jurisdiction to determine cases of human rights violation that occur in Member States.

In addition to the above, this Court has made several decisions on competence relying on Article 9 (4) of the Supplementary Protocol and has concluded in series of their decision that mere allegation of human rights is sufficient to invoke the jurisdiction of the Court. See: BAKARRE SARR (ECW/JUD/03/11), HADIJATOU KAROU (ECW/CCJ/JUD/06/08). On the

basis of the foregoing analysis this Court holds that it has the competence to hear and determine this application.

ISSUE 2: Whether the application is admissible.

On the issue of whether the application is admissible, the Court notes that the Applicant filed his application pursuant to the following provisions:

- i. Article 11 of the Protocol of the Court (A/P1/7/91)
- ii. Article 33 of the Rules of Procedure of the Court
- iii. Article 7 of the ECOWAS General Conditions on the privileges of ECOWAS Community Staff & Revised Treaty
- iv. Article 4(2), 9 and 78 (5) of the ECOWAS Bank of Investment and Development Staff Rules and Regulations.

Article 11 prescribes the mode of bringing applications before the Court and Article 33 of the Rules of Procedure provides for the form an application of this kind as referenced in Article 11 of the Protocol. Article 7 of the ECOWAS General Conditions on the privileges of ECOWAS Community Staff & Revised Treaty is self-explanatory. Article 4(2), 9 and 78 (5) of the ECOWAS Bank of Investment and Development Staff Rules and Regulations which deals privileges and immunities, separation from services and appeals for arbitration. The Court notes that with the exception of reference to Article 4 (2) 9 and 78 (5) of the ECOWAS Bank of Investment and Development Staff Rules and Regulations all the other references are not applicable to the present application. However, this does not mean that the application is not admissible because the Court notes that the Applicant has sought to rely on Article 4(2), 9 and 78 (5) of the ECOWAS Bank of Investment and Development Staff Rules and

Regulations is the internal working guide that regulates the relationship between management and its employees.

In determining whether this application is admissible the Court will assess the grievances of the Applicant which falls into three categories: violation of right to fair hearing, non-adherence to internal staff rules and regulations, and unfair dismissal.

The Court notes also that in spite of the fact that the Applicant relied on the wrong provisions of the statute, the Court can nonetheless admit the application on the rational that as long as there is a claim for violation of right the application will be admissible. However, reliance on the Staff Rules and Regulations of the ECOWAS Bank for Investment and Development as contained in the application will suggest that there is a dispute between the employee and the management. As such the Court is guided by the provisions of Article 9 (1) (f) of the Supplementary Protocol (A/SP.1/01/05) amending the Protocol of the Court which reads thus:

“(1) The Court has competence to adjudicate on any dispute relating to the following:

f. the Community and its officials.

This conclusion is based on the fact that the Applicant in this case was an employee of the ECOWAS Bank of Investment and Development (hereinafter EBID) and the Respondent being an institution of ECOWAS and the grievances contained in the application justifies that there is a dispute between the employee as an official and the Bank as an institution of ECOWAS. Therefore, Article 9 (1) (f) of the Supplementary Protocol is directly applicable to this application. On the strength of the reference to

Article 9 (1) (f) (supra) the Court holds that this application is admissible and accordingly declares it as admissible.

ISSUE 3: Whether the Applicant was unfairly dismissed by the Respondent.

The Court will determine whether the Applicant was unfairly dismissed by addressing the following: the law governing dismissal - Dismissal in fact, the right to be heard and non-compliance with the rules in the recruitment process.

- **The law governing dismissal : Dismissal in fact**

The Applicant averred that he was appointed by way of letter dated 8th October, 2012 marked as Exhibit 2 and that he was later confirmed by way of letter dated as 1st April, 2015 and marked as Exhibit 3 of the Applicant's annexure. The Respondent confirms the appointment and further affirmed that the Applicant's appointment was governed by the Staff Rules and Regulations. However, the Respondent states that the Applicant failed to be confirmed upon completion of his probation and was confirmed a year later due to disciplinary measures taken against the Applicant, and relies on a letter dated 26th December, 2013 marked as Exhibit 7 in the Respondent's annexure.

The fact of the relationship between the parties was clearly illustrated in the case of *Ifeta v. Shell Pet. Dev. Co. Ltd* (2006) 7 MJSC 121 at page 133, para. G, Mohammed JSC had this to say: *"In the determination of this issue, I need to emphasize the binding-ness of the terms of the contract of service between the parties. There is no doubt that the parties' freedom of*

contract carries with it the inevitable implication of sanctity of their contracts. This means that if any question should arise with respect to the contract, the terms in any documents which constitute the contract are, invariably, the guide to its interpretation. On this premise, the material question is; what did the parties in the instant case agree with respect to the termination of the contract of service”.

The Court notes that the parties in this action have become embroiled in a dispute in which the Applicant submits, inter alia, a prayer that the Court makes *“A Declaration that the Respondent acted arbitrarily, capriciously and in breach of the Applicant’s right to fair hearing when the Respondent terminated the Applicant’s appointment with the Respondent in May, 2017 without having given the Applicant notice of allegations of any wrong doing and the opportunity of defending himself before the Applicant’s appointment was terminated.”* The Court recalls that the employment of the Applicant was governed by the Staff Rules and Regulations (EBID) therefore, should any dispute arise between the parties, they will have recourse to the same. The said Staff Rules and Regulations (EBID) has provisions governing dispute, discipline, and dismissal, the parties having agreed that this is the prevailing law, they are therefore bound by its application.

The ECOWAS Bank for Investment and Development Staff Rules and Regulations in Article 1.5 defines *“employee/Staff member”* as any person recruited by the Bank under a fixed-term contract (FTC) or an open-ended contract (OEC) or a temporary appointment. Having concluded, from the Letter of Appointment and Confirmation (supra) and the subsequent corroboration by the Respondent that the Applicant was a staff member

and the parties confirming that their relationship is bound by the Staff Rules and Regulations (EBID), the Court will set-forth the provisions governing dismissal.

The Court recalls Article 10 of the Staff Rules which states:

1. *A staff member who infringes the standards of conduct stipulated in the Staff Rules and Regulations or who infringes generally accepted conduct expose themselves to the disciplinary measures stipulated in the Staff Regulations. Depending on the seriousness of the offence, the disciplinary measures taken by the Institution in each particular case may range from a warning to a suspension with or without salary, or with reduced salary, to demotion, or dismissal as provided for in Article 9 of the Staff Rules. A Staff member may also be suspended with pay, pending the investigation of charges laid against them and pending a decision on their case.*
2. *Any disciplinary measure taken against a staff member shall be notified to the latter in writing.*

Further, Article 9 of the Staff Rules and Regulations (EBID) provides that a staff member can be terminated for unsatisfactory performance or misconduct. Notwithstanding the aforementioned provisions, Article 11 of the Staff Rules and Regulations (EBID) states that a staff member should be heard i.e. they possess the right of appeal. The Court also notes that Article 63 (1) of the Staff Rules and Regulations (EBID) defines dismissal as “*separation from service at the initiative of the Bank. Dismissal shall be decided by the President.*”

The Applicant avers that he was unfairly dismissed by the Respondent by way of letter dated 10th May, 2017 which is marked and Exhibited as 16 of the Applicant's annexure. The authenticity of the letter is not in dispute and the Respondent, in terminating the Applicant, relied on the following provisions of the Staff Rules and Regulations; Article 63 (3) (h), Article 72 (2) (d) and Article 72 (4). The Court is inclined to set out the aforementioned provisions for clarity. Article 63 (3) (h) provides that: "*A staff member's appointment may be terminated without notice...for any serious offence as defined in Article 72 (2) and (4) of the Staff Regulations.*" Article 72 (2) (d) states that: "*The following are offences which when committed by a staff member shall be punishable by the sanctions set forth in Article 75 paragraph 2 of the Staff Regulations.*" Further, Article 72 (4) provides that:

- a) *The gravity of the offence committed shall be assessed in relation to the circumstances (aggravating or extenuating) surrounding the events, the personality of the officer concerned and the latter's responsibilities, the repetitive nature of the offence, the past conduct of the officer, the impact of the consequences of the offence on the integrity, reputation or interests of the Bank, the intentional or non-intentional nature of the offence or the negligence giving rise to it.*
- b) *Any offence may lead to a disciplinary measure which shall be in proportion to its seriousness.*

Having considered the relevant provisions applicable to dismissal, the Court will now proceed to determine whether the said dismissal was fair. In doing, so the Court will examine the facts of the Applicants alleged

misconduct as outlined in the Termination Letter (supra) by the Respondent are listed thus:

- That the Applicant had an extended probationary period because he misconducted himself and spoke directly to a third party. That he made comments about decision taken by management which were abusive to wit: *“it is annoying to hear this”, “it is disappointing and time wasting;”*
- That he was queried for his conduct and his response was unsatisfactory to his superior who submitted the issue for disciplinary measure, the outcome of which was a delay in his confirmation;
- That his landlord made certain complaints which resulted in him being asked to vacate the premises;
- That whilst travelling between Nigeria and Togo with his family he had been detained the border police for misconduct;
- That the Applicant had abandoned a mission unceremoniously which resulted in Management writing him a letter of advice to refrain from unprofessional and disrespectful conduct;
- That he had sent a letter complaining of irregularities in the recruitment exercise and that he had attacked Management’s credibility in the said letter by using unprintable words like “manipulation” and “change of scores in favor of Management.”

The conclusion made by the Respondent from the alleged infractions cited was that the Applicant was a very intolerable and ungovernable staff. The Court notes that the above outlined misconducts of the Applicant have been dealt with by management and disciplinary action have been taken against the Applicant and therefore it cannot be relied on by management

as justification for terminating the employment of the Applicant because the issues have been spent,

In determining whether the actions of the Respondent was lawful the Court will again refer to the Staff Rules and Regulations (EBID), which states that the Respondent can separate any staff member on its own initiative pursuant to Article 9 (3) of the Staff Rules and Regulations (EBID) and that the said act will in itself be a disciplinary measure pursuant to Article 9 of the of the Staff Rules and Regulations (EBID). However, the exercise of this power dictates that it should be done fairly. Accordingly, the of the Staff Rules and Regulations (EBID) provides that the Bank sets up an appeal mechanism so that the aggrieved staff member will be given the opportunity to present his case or have recourse to defend his action without fear of reprisal pursuant to Article 11. The intent of the latter Article is to guarantee the right to fair hearing, and the compliance with due process in such a circumstance. Due process in the instant case is the right to be heard, to be fairly treated, efficiently and effectively by the management in the administration of justice especially when dealing with issues of misconducts that will give rise to disciplinary actions. The rights to due process therefore places limitations on the exercise of disciplinary powers, in order to guarantee fundamental fairness and justice. The Court in the case of *Dr. Rose Mbatomon Ako V. West African Monetary Agency & ORS.* (ECW/CCJ/JUD/01/13), noted that “*the termination of appointment under regulations of any institution of ECOWAS including West Africa Monetary Agency is under statutory obligation to follow for terminating employment of staff.*”

The Respondent alleges misconducts by the Applicant for which he was queried during the period of his probation yet, the Court notes that he was duly confirmed and made a permanent staff. The Court is inclined to view this as an indication of settlement on the issue as the Respondent had the option pursuant to Article 21 (4) of the Staff Regulations to terminate the Applicant's appointment at this stage. Further, the Court notes that the Respondent's aim was to canvas a pattern of behavior that will justify the act of dismissal of the Applicant. Whilst the acts listed have been explicit, the Respondent failed to keep in view the intention of the drafters of the Staff Rules and Regulations (EBID), which is to safeguard due process at all times.

In the case of *Edoh Kokou V. ECOWAS COMMISSION* (2010) ECW/CCJ/JUD/03/10 2010 pg. 38 para 54, this Court noted that Article 59(d) and 69(6) of the ECOWAS Staff Regulations makes provision for the guarantee of fair proceedings to staff members of the Institution, in such manner as to protect them against arbitrariness, particularly in matters concerning dismissal. Hence, any dismissal effected without the observance of this guarantee, violates the provisions of Article 59(d) and is thereby illegal, null and void.

The Court therefore finds that dismissal based on the Staff Rules and Regulations (EBID) was not complied with i.e. Article 10, 9 (3) and 11 and therefore, the act of terminating the employment of the Applicant is of no legal effects and devoid of safeguard to due process and the Court so hold.

- **The right to be heard**

At this point the Court notes that the Staff Rules and Regulations deems dismissal, among others, as a disciplinary measure for serious offences pursuant to Article 10 (1) and that Article 11 makes room for any staff member in this predicament to be heard. Article 11 (2) specifically states that a staff member can appeal to the ECOWAS Court for measures taken by the Respondent where there is an allegation of non-compliance with service conditions or question a disciplinary measure.

The Applicant, by way of memo dated 30th August, 2016 requested for a mediator in accordance with Article 77 of the Staff Regulations. The Respondent's Staff Rules and Regulations specifically Article 76 states that one of the principles guiding an appeal is access to mediation at any moment. The Court notes that the Respondent failed to comply with its own Staff Regulations in its response dated 2nd September, 2016. The same read thus:

“Referring to Article 77 of the Staff Rules and Regulations, senior management in consultation with staff representatives designated a staff member to mediate in the conflict resolutions. This designation could not be effected since the adoption of the Staff Rules and Regulations, the true reflections for this purpose have in particular not been able to succeed up to this moment. Your memorandum has the advantage to challenge us on the question to any arrangements to be taken.”

The Court finds this response from the Respondent is ambiguous and that it failed to comply with the provisions of the Staff Rules and Regulations at the time management of the Bank terminated the appointment of the Applicant. The Applicant submitted that his solicitors wrote a letter (Exhibit 18) to the Respondent stating that they had failed to accord him the

benefits of Article 78 of the Staff Rules and Regulations and sought several reliefs therefrom. The Respondent in their argument maintained that the President had absolute powers of dismissal on grounds of misconduct and gross insubordination.

The Court notes the words and phrases of the Applicant which the Respondent submitted as abusive language such as: *“manipulation,” “it is annoying to hear this, “it is disappointing and time wasting”* etc. were in the ordinary sense of the words and phrases and the ordinary meaning attach to them not abusive to justify the reprisal that follows. Having due regard of Article 11 of the of the Staff Rules and Regulations (EBID) which requires that a staff member be heard without the fear of reprisals and given the ordinary meaning of the words and phrases submitted as abusive, the Court deems the act of termination on said grounds to be excessive and tantamount to the act of reprisal in itself. Further, that the Respondent failed to allow the Applicant to defend himself even after dismissal to which he had a right pursuant to the Staff Rules and Regulations. The general objective of the ECOWAS Community is that staff members of ECOWAS should be able to work in an environment devoid unfairness by affording them the right to due process. The Respondent’s failure to hear the Applicant’s appeal depicts a unilateral exercise of discretionary powers by the Bank without recourse to the laid down procedure which was arbitrary and not in the best interest of the institution in particular and the ECOWAS Community in general and the Court so holds.

- **Non-compliance with the rules in the recruitment process**

The Applicant’s claim is that the Respondent failed to comply with the provisions of its Staff Rules and Regulations in the recruitment exercise

conducted to fill the position of Director, Public Sector Operations in the Respondent's institution. Coupled with this is the subsequent termination of the appointment of the Applicant for protesting against the said non-compliance. He further submits that Article 6 of the Respondent's Staff Rules and Articles 13 and 14 of the Regulations provides for the conditions for the recruitment of professional staff. Particularly sub paragraph 2 of Article 13 of its Staff Regulations which states that priority should be given in descending order to applicants with equal qualifications and skill in the following order:

- a. staff serving at EBID;
- b. Nationals of Member States which are least represented among the staff at the Bank;
- c. Staff of other ECOWAS institutions;
- d. Nationals of other Member States.

The Applicant supports his claim of possessing the necessary qualification and skill with Exhibit 1 which is labeled as "*A copy of the Plaintiff's Curriculum Vitae.*" He also submits Exhibits 2 and 3 respectively, which are letters of Appointment dated 8th October, 2012 and Confirmation of Appointment dated 1st April, 2015 as evidence of being a staff of the Respondent at the time of the recruitment for the post of Director, Public Sector Operations. The Applicant submitted his nationality via his curriculum vitae as Nigerian, thereby making him a citizen of the Community: See Exhibit 1. The Respondent admits that the Applicant was duly appointed and subsequently confirmed after a prolonged probationary period.

In interpreting Article 13 aforementioned, the Court notes that whilst the requirement for priority is in descending order favoring candidates within the institution, it does not mandate exclusive recruitment of said candidates. Black's Law Dictionary, Sixth Edition at page 1194, defines priority inter alia as *"When two persons have similar interests in respect of the same subject-matter, but one is entitled to exercise his right to the exclusion of the other, he is said to have priority."* The Court is mindful that the entitlement comes on the premise of equal qualification and skill; Article 13 (2) therefore serves as a mechanism of distinction in the event of equal qualification and not as a tool for discrimination of candidates. Article 13 of the Regulations is to be read at all times in tandem with Article 6 of the Staff Rules which states that whilst priority is given to the highly qualified staff, geographical distribution, physical fitness for the post, and manner of appointment are also considerations of merit. Further, the Court deems Article 14 as the personification of non-discrimination in the recruitment of professional staff. However, Article 13 (3) gives the internal staff member a priority by being exempted from the age limitation set out in recruitment.

The evidence submitted by the Applicant is that a vacancy was advertised by the Respondent, one for which he applied; the Court notes Exhibit 5 attached in support of this. The Applicant also submitted Exhibit 6 which is a letter to the President of the institution protesting for not being shortlisted in the recruitment exercise. The Court also notes that whilst the Respondent alleges that the Applicant vehemently attacked the credibility of management in this letter the content of the letter denotes an enquiry as to why the Applicant was not short listed and recounts the qualifications of the latter, whilst imploring for an investigation into what he called an

abnormality. Further in Exhibit 13, put forward by the Respondent, a memo dated 29th August, 2016 by the Applicant the crux of it is a plea for review of the process and a reiteration of qualification and skill for the post, whilst stating rumors about the reasons for the alleged abnormality. The Court is seised with evidence of the qualification and skill of the Applicant and the fact that he was a staff of the institution. The fact that the Applicant tried to notify the management as to the necessity of applying Article 14 of the ECOWAS Bank for Investment and Development Staff Rules and Regulations is not lost on the Court.

Given the preponderance of evidence, the Court notes that the Respondent did not directly rebut the evidence adduced but submitted Exhibits 15 as their rebuttal. Exhibit 15 is a letter dated 6th June, 2017 from KAPI CONSULT, agents for the recruitment process. This piece of evidence adduced was a claim of the score of the Applicant in the initial stage of the recruitment leading to his disqualification. This was supported during oral testimony to wit:

IGWILO: Thank you My Lords. Can you tell My Lords the outcome of the assessment? Thank you Sir.

PW1: My Lord, in the first phase of our mission with EBID, as I explained, we produced a report and on the basis of the assessment of the candidates that we have received, we suggested the candidates that has passed for the next stage. And we were surprised to see two years or three years after, a letter from the bank informing us that one of the candidates have suggested that there has been fraud in the mission which we have completed as well as the premature suspension of our

contract. And we sent a letter to the bank that our contract had never been terminated prematurely because we carried out our duty to the last and we submitted our report. But with regard to the candidate that has complained in this letter, making reference to our report, we have given the result of what this candidate scored and it would not be allowed at our level to qualify him because all the candidates scored thirty, and of course to be admissible you need to have twenty five over thirty but the candidate had (23.5). Therefore, he wasn't qualified, he was not admitted and we reported to the bank in that manner by giving them a new copy of our report. And reported to the bank that it is the decision of the bank to admit only the internal candidates, those that were already employees of the bank. It is the bank that allowed them to continue the process even if they haven't got the average in the pre-qualification and that is what we have summarized in the letter which we have sent to the bank with regards to the allegations made.

Therefore, in the instance of rebutting the intention of Article 13 (2) of the Staff Rules, especially given the evidence of qualification that the Applicant adduced, the Respondent led evidence through the consultant who disclosed that the Applicant did not obtain a pass mark during the course of interview and therefore was not qualified for the job. The Respondent's witnesses who were the consultants that were engaged for the recruitment process and who actually conducted the interview for the recruitment gave evidence before the court that the applicant did not obtain pass mark required of him to be recommended for the job. As such, the burden of

proof now shifted to the Applicant to show to the Court by way of proof of evidence that he scored the highest mark in the interview. A burden that the Applicant failed to sufficiently discharge. Since the burden of proof shifted to the Applicant it remain his duty to discharge this burden of proof in accordance with the principle that he who alleges must proof the truthfulness of his allegation. In the case of FEMI FALANA & ANOR V. REPUBLIC OF BENIN & 2 ORS (2012) ECW/CCJ/JUD/02/12, this Court held that *“as always, that the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the court to believe the statement of the claim”*. On this note, the Applicant did not sufficiently discharge the burden of proof that shifted on him when the Respondent witnesses led evidence before this Court that he did not obtain any pass mark that will warrant him to be recommended for the job and therefore not qualified for the job.

In determining whether the process of recruitment of the Respondent did not comply with the rules as submitted by the Applicant, the Court will analyze the evidence in support of the claim. The Applicant submits that his letter of protest dated 4th July, 2016 seeking for investigation of the process, shows that at some point the process became marred with irregularity. In response to the Applicant’s Counsel’s question the Respondent’s witness, KAPI CONSULT who had submitted a letter stating that the Applicant scored 23.5 out of a score of 30, testified to wit:

ADEDEJI: That’s alright. Will you be surprised to be aware today that the Defendant participated in subsequent interviews? Will you be surprised? Will it surprise you?

*PW1: In the screening interview process I was not surprised because I was informed by the bank that after our shortlisting, they have decided that all the internal candidates, that's people that are already working in the bank and that are candidates that have not passed the shortlisting stage, the bank decided on the own that all those that have **about twenty five** will be retained for the next stage. Therefore, I know that some candidates will redo that. (Bold for emphasis)*

The Respondent submits Exhibit 17, a letter dated 28th April, 2017 as its rebuttal to the claims of irregularity alleged by the Applicant. In the letter, the Respondent reminded the Applicant that the same process which he condemns as being fraught with irregularity was the one used in his initial recruitment. In a twist, the Respondent's submits the Applicant's letter dated 8th May, 2017 and marked as Exhibit 18 which ironically maintains the claim of the Applicant that the process was illegal but fails to rebut the evidence in the Respondent's Exhibit 17 which is the Letter reminding the Applicant that the process was fair because it was the same one used to employ him in the first instance. The issue before the Court is non-compliance with the Staff Rules and Regulations of the Respondent pursuant to recruitment of the position for Director, Public Sector Operations not a prior process. The Court notes also that the said Staff Rules and Regulations provides that a staff member can question the conditions of service if they feel that it goes contrary to the law.

Therefore, as to whether the Applicant submitted evidence in support of his claim of non-compliance with procedure by the Respondent in the recruitment process, the Court finds that he did not sufficiently discharge

the burden of proof required of him. In adducing evidence of qualification and skill and being a member of staff pursuant to Article 13 (2) of the Staff Regulations, the Court further finds that the Applicant partially discharged his burden of proof. The Applicant having failed to submit evidence in support of his scores been the highest of all the scores of the other candidates in the interview process for recruitment and also having failed to adduce evidence of superior qualification and skill of other candidates that were so far selected, failed to sufficiently discharge his burden of proof in accordance with standard of proof required of him. In view of this analysis, the Court notes that whilst the Respondent had denied the allegation of non-compliance with the rules during the recruitment process, the Applicant did not adduce sufficient evidence to either rebut the evidence led by the Respondent nor did he do so during cross-examination to support this claim as alleged. The Applicant has therefore failed to discharge the burden of proof required of him to support the claim the allegation of non-compliance by the Respondent with the rules in the recruitment exercise and the Court so holds.

DECISION

For the reasons stated above, the Community Court of Justice, sitting in public after hearing the parties, and their submissions duly considered in the light of the provisions of the ECOWAS Bank for Investment and Development's Staff Rules and Regulations and the Supplementary Protocol of the Court, hereby declares as follows:

1. That the Court declares itself competent and the application is admissible.

2. The Respondent acted arbitrarily and unfairly in terminating the Applicant's appointment in May 2017 without affording him the opportunity of defending himself, thereby making the act illegal.
3. That the claim by the Applicant with respect to the Respondent's act of excluding the Applicant in the selection process contrary to Article 13 (2) & (3) of the ECOWAS Bank for Investment and Development's Staff Rules and Regulations cannot be sustained and therefore dismissed.

In consequence of which the Court orders the Respondent to pay the Applicant as follows:

1. That the Respondent pays Seventy Five Thousand United State Dollars (\$75,000) as damages for unfair termination.
2. The Court dismisses all other claims brought by the Applicant against the respondent in this application.
3. Orders the Applicant to return to the Respondent all properties in his possession that belong to the Respondent and was giving to him upon his employment with the Respondent Bank.
4. Orders the Respondent to pay to the Applicant the costs of this action in the sum of two million Nigerian Naira (2,000,000.00) Naira.
5. The Court order either party to comply fully with the terms of this judgement within a time frame of one (1) month from the date of this order.

THIS DECISION IS MADE, ADJUDGED AND PRONOUNCED PUBLICLY BY THIS COURT, COMMUNITY COURT OF JUSTICE, ECOWAS; SITTING AT ABUJA, NIGERIA ON THE DAY 3rd February, 2020.

Hon. Justice Gberi-Be OUATTARA, Presiding

Hon. Justice Keikura BANGURA, Rapporteur

Hon. Justice Januaria T. Silva Moreira Costa, Member

Mr. Tony Anene MAIDOH, Chief Registrar