

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2005-3

Elizabeth A. Baker, Applicant v. International Monetary Fund, Respondent
Gamal Zaki El-Masry, Applicant v. International Monetary Fund, Respondent
Atish Rex Ghosh, Applicant v. International Monetary Fund, Respondent
Meral Karasulu, Applicant v. International Monetary Fund, Respondent
Marco Pani, Applicant v. International Monetary Fund, Respondent
Carlos E. Piñerúa, Applicant v. International Monetary Fund, Respondent
Binta B. Terrier, Applicant v. International Monetary Fund, Respondent

Admissibility of the Applications

Introduction

1. On December 5 and 6, 2005, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the matter pending in the case brought against the International Monetary Fund by seven of its staff members.
2. Applicants, in identical Applications, contest as arbitrary and an abuse of discretion the IMF Executive Board's January 24, 2005 decision expanding the range of discretion that it may exercise in setting the annual staff compensation. The Fund has responded to the Applications with a Motion for Summary Dismissal, contending that Applicants have not met the requirement of Article II, Section 1(a) of the Tribunal's Statute that a staff member may only challenge the legality of an administrative act "adversely affecting" him.
3. A Motion for Summary Dismissal suspends the period for answering an application until the Motion is acted on by the Tribunal. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Applications.

The Procedure

4. On April 25, 2005, Applicants filed seven identical Applications with the Administrative Tribunal. On May 6, 2005, the Tribunal denied Applicants' requests, included with their Applications, for waiver of the statute of limitations to file amended Applications.¹

¹ The Tribunal concluded that Applicants had not met the requirements of Article VI, Section 3:

(continued)

5. The Applications were transmitted to Respondent on May 6, 2005. As the Applications raised identical issues of law and fact, Respondent was invited to file a single Answer to the seven Applications. On May 10, 2005, pursuant to Rule IV, para. (f),² the Registrar circulated within the Fund a notice summarizing the issues raised in the Applications.

6. On June 8, 2005, pursuant to Rule XII³ of the Tribunal's Rules of Procedure, Respondent filed a Motion for Summary Dismissal of the Applications. The Motion was

“3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.”

² Rule IV, para. (f) provides:

“Under the authority of the President, the Registrar of the Tribunal shall:

...

(f) upon the transmittal of an application to the Fund, unless the President decides otherwise, circulate within the Fund a notice summarizing the issues raised in the application, without disclosing the name of the Applicant, in order to inform the Fund community of proceedings pending before the Tribunal; ...”

³ Rule XII provides:

“Summary Dismissal

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.
2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.
3. The complete text of any document referred to in the motion shall be attached in accordance with the rules established for the answer in Rule VIII. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the motion. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the motion.
4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Applicant.
5. The Applicant may file with the Registrar an objection to the motion within thirty days from the date on which the motion is received by him.

(continued)

transmitted to each Applicant on the following day. On July 12, 2005, pursuant to Rule XII, para. 5, Applicants filed a joint Objection to the Motion, which was transmitted to the Fund for its information.

7. The Tribunal decided that oral proceedings,⁴ which neither party had requested on the Motion for Summary Dismissal, would not be held as they were not deemed useful to the disposition of the Motion.

8. Pursuant to Rule XII, para. 2, the filing of a Motion for Summary Dismissal suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. Accordingly, the present consideration of the case is confined to the issue of its admissibility.

The Factual Background of the Case

9. As a result of lengthy consideration by the Joint Fund and Bank Committee of Executive Directors on Compensation, the Fund and the World Bank in 1989 adopted a revised compensation system for their staffs. During 1998-2000, the Fund's compensation system was extensively reviewed in order to further the staffing objectives and requirements of the Fund and to ensure that the Fund's salaries remained appropriately related to markets in which it competes for staff. In the light of recommendations from management, the Executive Board annually has decided on the adjustment needed to align the Fund's salary structure with the comparator markets. In January 2005, when the foregoing systems had been in effect for 16 years, the Executive Board decided to modify the compensation system once again. It is the modification adopted in January 2005 that has given rise to the Applications now before the Tribunal.

10. The Executive Board's decision was announced to the staff the following day by email message of the Director of Human Resources:

“... After considering a number of options, the Executive Board decided to amend the current salary-setting system....”

6. The complete text of any document referred to in the objection shall be attached in accordance with the rules established for the reply in Rule IX. The requirements of Rule VII, Paragraph 4, shall apply to the objection to the motion.

7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Fund.

8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests.”

⁴ Article XII of the Tribunal's Statute provides that the Tribunal shall “... decide in each case whether oral proceedings are warranted.” Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held “... if ... the Tribunal deems such proceedings useful.”

The amendments approved by the Executive Board have the effect of expanding the circumstances under which management and the Executive Board can exercise discretion in setting this year's annual salary increase. Executive Directors favoring greater scope for discretion have expressed the concern that in recent years the annual salary increases indicated by the U.S. market have been larger than needed to maintain the international competitiveness of Fund salaries, and that the discretion the Board has exercised in limiting salary increases should be preserved this year.

The change agreed by the Executive Board today makes it possible for judgment on the size of the structural increase to be exercised when the payline for the Fund falls within the 10-20 percent testing range for international competitiveness, as well as when it falls outside the testing range. However, the extent of such discretion within the testing range is constrained—unlike the discretion that has been available outside the range—and must continue to be based on an evaluation of the factors bearing on the international competitiveness of Fund salaries. Moreover, no consideration has yet been given to whether or how such discretion would be exercised in determining the salary increase for this year; those decisions will be taken up by Executive Directors during the annual salary review in March.”

11. Following the Executive Board's January 24, 2005 decision, the Managing Director announced to the staff of the Fund that two errors had been discovered in the comparator data utilized in the 2004 compensation review. The correction of these errors had the effect of placing the 2004 U.S.-indicated increase within the testing range. As a result, on March 30, 2005, the Executive Board approved a supplementary increase in the Fund's salary structure of two percentage points, with effect from May 1, 2004.

12. This retroactive adjustment, in turn, placed the Fund's 2004 salary structure two percentage points higher relative to the U.S. comparator, which increased the base for the 2005 market comparison, thereby lowering the amount of increase indicated by the U.S. market for 2005. Accordingly, the structural increase actually called for by the amended compensation system, as approved in the 2005 compensation round, did not differ from the increase that would have been called for under the system existing prior to its January 2005 amendment.

The Channels of Administrative Review

13. Pursuant to Article VI, Section 2⁵ of the Statute of the Administrative Tribunal, an application challenging the legality of a “regulatory decision” may be filed with the Tribunal

⁵ Article VI, Section 2 provides:

(continued)

within three months of its announcement or effective date. There are no channels of administrative review to exhaust in respect of regulatory decisions being challenged directly.

14. The contested decision of the Executive Board was announced to the staff on January 25, 2005. On April 25, 2005, Applicants filed their Applications with the Administrative Tribunal.

Summary of Parties' Principal Contentions

15. The parties' principal arguments as presented by Applicants in their Applications and Objection to the Motion and by Respondent in its Motion for Summary Dismissal may be summarized as follows.

Applicants' contentions on the merits

1. The Executive Board's decision of January 24, 2005 fails to comply with the Fund's "rules-based" compensation system and is therefore contrary to the internal law of the Fund, which has been established by the Fund's past practices, creating legitimate expectations on the part of the staff.
2. The decision is contrary to general principles of international administrative law and infringes upon Applicants' terms and conditions of employment.
3. The decision is not based on objective analysis and fails to support the international competitiveness of staff salaries as required by the Fund's Articles of Agreement.
4. Accordingly, the Executive Board's decision of January 24, 2005 is arbitrary and an abuse of discretion.

Respondent's contentions on admissibility

1. The challenged Executive Board decision of January 24, 2005, which allowed for the exercise of greater discretion in taking the subsequent decision regarding the structural salary adjustment for 2005, had no adverse financial consequences for the Applicants in the 2005 compensation review.

"An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision."

2. Applicants have not shown any other adverse effect flowing from the decision. Any other alleged effects are abstract and hypothetical and conflate the issue of adverse effect with the merits of Applicants' case.
3. Accordingly, Applicants have failed to establish any foreseeable and definite adverse effect resulting from the contested decision, as required for admissibility under the Statute.

Applicants' contentions on admissibility

1. A basic distinction may be drawn between individual and regulatory decisions of the Fund with regard to their respective "adverse effects." Regulatory decisions relate to the balance of interests between Management and the staff. The widening of the discretionary powers of Management affects this balance and opens the door for more specific decisions affecting the rights of the staff.
2. It is clear that the Executive Board's intention in amending the compensation system was to lower the amount of increase indicated by the U.S. market in 2005 to a level that would not have been permissible prior to the January 2005 amendment. That Applicants suffered no actual adverse financial consequences in the 2005 compensation exercise was solely a result of a quirk of circumstance, i.e. discovery of data errors in the 2004 exercise.
3. Accordingly, the contested decision gives rise to foreseeable and definite adverse effects, relating to Applicants' individual legal situations, as Applicants' terms and conditions of employment have been affected by the widening of the Executive Board's discretion to set the annual compensation for Fund staff.

Consideration of the Issues

16. By the grant of authority given by its Statute, the IMFAT is vested with jurisdiction to review two types of "administrative acts" of the Fund, "individual decisions" and "regulatory decisions" of the Fund. Respondent rightly points out that an applicant to the Tribunal must meet the statutory requirement of being "adversely affected" by the contested decision, irrespective of whether that decision is challenged in the context of a challenge to an "individual decision" or to a "regulatory decision."

17. In Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 61, the Tribunal held that the "intendment of [the "adversely affected"] requirement is simply to assure, as a minimal requirement for justiciability that the applicant has an actual stake in the controversy":

"In analyzing Respondent's contention that Ms. "G"'s Application falls outside the scope of the Tribunal's jurisdiction *ratione materiae*, it is instructive to consult the Commentary adopted by the

Executive Board in adopting the Tribunal's Statute. With respect to the requirement that an applicant be 'adversely affected' by an administrative act of the Fund, the Commentary observes as follows:

'...a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.'

(Report of the Executive Board, p. 13.) A question is whether the intentment of this requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy. Answering that question affirmatively, it is clear that the Applicant is adversely affected, because her claim is not hypothetical nor is the response that she seeks to her claim merely advisory."

The Tribunal accordingly held that Ms. "G" had standing to challenge the regulatory decision of the Fund's Executive Board (in the context of an individual decision not to make exceptions in her case), a decision to deny to staff in her visa status the class of employment benefits known as "expatriate benefits." The injury alleged by Ms. "G" was that she was unfairly denied benefits for which she would have been eligible had her visa status differed.

18. The Fund bases its Motion for Summary Dismissal of the Applications on the provision of the Statute empowering the Tribunal to pass judgment on any application by a member of the staff challenging the legality of an administrative act "adversely affecting" him⁶ (*supra*, Respondent's contentions on admissibility). It maintains that:

"... there is a threshold issue whether the Applications provide a reasonable basis that the Applicants have been 'adversely affected' within the meaning of the Statute."

19. In the view of the Tribunal, the facts permit the Applicants to surmount this threshold. The Executive Board of the Fund, in January 2005, took a decision that widens the range of discretion that it may exercise in setting staff salaries. Application of that decision in 2005 did not have adverse financial consequences for the compensation of staff members for the

⁶ Article II, Section 1(a) provides:

"1. The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him;"

reasons explained above. Nevertheless, the decision of the Executive Board was adopted and remains in force. It will be applied in 2006 to affect the compensation of staff members, unless the Executive Board decides otherwise.

20. In the view of the Tribunal, the widening of the Fund's discretion to adjust the compensation of staff members of the Fund permits the Applications to cross the threshold of admissibility. That threshold is not steep, because, by the terms of Rule XII of the Rules of Procedure, an application may be summarily dismissed only "if it is clearly inadmissible." As has been established by the Administrative Tribunal of the ILO, an international civil servant need not await the realization of the institution's adverse decision to seek a remedy in respect of it; an application is receivable in such circumstances to challenge a regulatory decision affecting the individual's rights if the organization's rules allow such a direct challenge. As the Fund's Motion for Summary Dismissal recalls, the Executive Board, in considering the draft of the Tribunal's Statute, considered in particular the Ayoub (No. 2) case, in which the ILOAT ruled on the Applicants' challenge to an amendment to pension regulations before the application of the decision in the individual cases, as it was already certain that the Applicants would be adversely affected if the amendment stood, although they might not retire for many years. (Ayoub (No. 2), ILOAT Judgment No. 986 (1989).) Similarly, the ILO Administrative Tribunal in the case of Aelvoet (No. 6) and others, ILOAT Judgment No. 1712 (1998), Consideration 10, held :

"As the Tribunal has said before, there may be a cause of action even if there is no present injury: time may go by before the impugned decision causes actual injury. The necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant's position."

21. In the view of the Tribunal, in respect of the Applications before it, there is "some present effect." That effect is inherent in the wider discretion that the Executive Board has assumed in respect of salary adjustments which, in the absence of further action by the Executive Board, will be applied in 2006.

22. This conclusion is supported by the Report of the Executive Board on the Statute of the Tribunal which explained the utility of affording staff the right directly to challenge regulatory decisions of the Fund:

"Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision."

(Report of the Executive Board, p. 25.) The foregoing passage thus looks to resolution of a question of the legality of regulatory decisions “... before there has been considerable reliance on, or implementation of, the contested decision.”

23. In the light of the foregoing considerations, the Applications before the Tribunal are not “clearly inadmissible.” Accordingly, the Tribunal denies the Fund’s Motion for Summary Dismissal of the Applications.

24. As the Fund’s Motion for Summary Dismissal is denied, the exchange of pleadings pursuant to Rules VIII – X of the Tribunal’s Rules of Procedure will resume. The filing of the Motion suspended the time for answering the Applications until the Motion was acted on by the Tribunal. (Rule XII, para. 2.) Thus, in view of the denial of the Motion, the Fund’s Answer on the merits, Applicants’ Reply and the Fund’s Rejoinder will follow, according to the schedule prescribed by the Rules.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:

The Fund's Motion for Summary Dismissal is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
December 6, 2005