ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2013-4

Mr. "HH", Applicant v. International Monetary Fund, Respondent

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Introduction

1. On March 6 and 7, and October 9, 2013, the Administrative Tribunal of the International Monetary Fund, composed for this case, pursuant to Article VII, Section 4 of the Tribunal's Statute, of Judge Catherine M. O'Regan, President, and Judges Andrés Rigo Sureda and Jan Paulsson,[1] met to adjudge the Application brought against the International Monetary Fund by Mr. "HH", a former staff member of the Fund.

2. Applicant was represented by Ms. Veronika Nippe-Johnson, Schott Johnson, LLP. Respondent was represented by Mr. Brian Patterson, Senior Counsel, and Ms. Juliet Johnson, Counsel, IMF Legal Department.

3. Applicant challenges the non-conversion of his fixed-term appointment to an open-ended appointment. In particular, he alleges that his transfer to a different Fund department during the course of his fixed term, without the renewal of his appointment for another three-year period, violated the Fund's Fixed-Term Monitoring Guidelines and deprived him of a fair opportunity to demonstrate his suitability for a career appointment prior to the decision on conversion. He additionally contends that the non-conversion decision was affected by other significant procedural defects, including that his supervisors allegedly failed to provide him with timely performance feedback and that the Human Resources Department (HRD) Director did not afford him an opportunity to be heard before taking the contested decision.

4. Applicant seeks as relief the rescission of the non-conversion decision and reinstatement for a three-year fixed-term appointment or, alternatively, monetary compensation for "tangible economic damage." Applicant additionally seeks "compensatory and moral damages" in the amount of three years' salary. Applicant also seeks legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4, of the Statute, if it concludes that the Application is well-founded in whole or in part.

5. Respondent, for its part, maintains that the non-conversion of Applicant's fixed-term

[1] Judge Jan Paulsson suffered an indisposition which rendered it impossible for him to travel to Washington, D.C. for the session of October 9, 2013. Accordingly, he participated on that date by telephone conference call.

appointment was a reasonable exercise of managerial discretion, properly grounded in Applicant's failure to meet the performance standards required for a career appointment with the Fund. In Respondent's view, Applicant was given a fair opportunity to demonstrate his suitability for conversion. He was provided ample feedback, warning of performance shortcomings, and extraordinary opportunities to overcome them. Respondent additionally maintains that Applicant's allegation that his transfer during the course of the fixed term violated the Fixed-Term Monitoring Guidelines is not properly before the Tribunal because Applicant failed to exhaust administrative review procedures in respect of the transfer and, moreover, he agreed to the transfer in his own interest. Respondent maintains that the non-conversion decision was taken in accordance with fair procedures and the applicable internal law.

Procedure

6. On May 16, 2012, Applicant filed an Application with the Administrative Tribunal, which was supplemented on May 24, 2012 in accordance with Rule VII, paras. 3 and 6. The Application was transmitted to Respondent on May 25, 2012. On June 8, 2012, pursuant to Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

7. On July 9, 2012, Respondent filed its Answer, which was corrected on July 11, 2012. On August 13, 2012, Applicant submitted his Reply. The Fund's Rejoinder was filed on September 13, 2012.

Applicant's request for anonymity

8. In his Application, Applicant requested anonymity pursuant to Rule XXII[2] of the Tribunal's Rules of Procedure. Applicant also, unusually, requested an "interim order" on his

[2] Rule XXII provides:

Anonymity

> 1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.
>
> 2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.
>
> 3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.
>
> 4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual.

request so that he might elect to withdraw his Application in the event that the Tribunal denied the anonymity request. Respondent opposed both the request for anonymity and the request for an interim decision.

9. On January 23, 2013, having considered the views of the parties, the Tribunal notified them of the following decisions: (1) although the Tribunal's Rules of Procedure do not expressly provide for interim decisions on requests for anonymity, the Tribunal found no merit to Respondent's objection to Applicant's request for such an interim decision in the circumstances of the case; and (2) Applicant had met the requirement of Rule XXII of showing "good cause" for protecting his privacy. Accordingly, the Tribunal granted Applicant's request for anonymity. The reasons for these decisions are elaborated below.

Request for an interim decision

10. In his Application, Applicant states that the "protection of his anonymity is of such importance to [him] that he respectfully requests that the Tribunal *rule on the issue through a separate interim order before it renders its final decision*" on his Application. (Emphasis in original.) Applicant maintains that such an order would "preserve Applicant's interests while not delaying the proceedings or imposing an undue burden on either the Tribunal or Respondent." Applicant asserts that rulings on anonymity routinely are issued by other international administrative tribunals in advance of judgments on the merits.

11. Respondent objects to Applicant's request for an "interim order." The Fund asserts that not only do the Tribunal's Rules of Procedure not provide for such interim decisions, but "Applicant's position amounts to a bargain with the Tribunal that he will only permit the Tribunal to review this case if it grants anonymity to Applicant." In the Fund's view, ". . . such tactics are not appropriate, and moreover, nothing will be lost by Applicant withdrawing his case, whereas the precedent established by granting anonymity in this circumstance will have long lasting repercussions."

12. The instant case is the first in which an applicant before the IMFAT has sought an interim decision on his request for anonymity.[3] Rule XXII of the Rules of Procedure is silent on the timing of the Tribunal's decision on anonymity. It does not expressly provide for such interim decisions; neither does it prohibit them. The benefit of deciding an anonymity request in advance of rendering a judgment on the merits—so as to permit the applicant to withdraw his application if anonymity is denied—is that, without such a mechanism, applicants who strongly value anonymity and whose anonymity requests have merit may be unnecessarily and inappropriately deterred from seeking recourse to this Tribunal.

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[3] In the case of *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007) the Tribunal notified the parties by letter of its decision granting anonymity prior to rendering its judgment on the merits of the application. *See Mr. "DD"*, para. 7. In that case, the applicant did not make a request for an interim decision on anonymity; the Tribunal issued the notification on its own initiative, along with its disposition of other requests.

13. The Tribunal observes that at least one international administrative tribunal provides in its Rules of Procedure for decisions on requests for anonymity of applicants to be made in advance of rendering decisions on the merits[4] and at least one other does so in practice.[5] In the view of this Tribunal, however, a case-by-case approach to deciding whether a decision on anonymity should be issued in advance of rendering a judgment on the merits will better allow the Tribunal to form a principled basis for its decision on anonymity, as anonymity of applicants remains the exception and not the rule in the IMFAT's Judgments. (*See* below.)

14. Accordingly, if an applicant expressly seeks a decision on an anonymity request in advance of the Tribunal's rendering a judgment on the merits of his or her application, the Tribunal, after affording the Fund an opportunity to respond, will consider whether such an interim decision is appropriate in the circumstances of the case. If an applicant does not expressly seek an interim decision, the Tribunal will ordinarily defer its decision on an anonymity request until it has had the opportunity to review the case on the merits and to decide whether anonymity is appropriate in the light of the nature of the evidence to be brought out in the judgment. There may also be cases in which the Tribunal's decision on the merits of the application may bear upon its decision for or against anonymity of the applicant.

15. In the instant case, the Tribunal concluded that it was able to take a decision on the anonymity request in advance of rendering its Judgment on the merits of the Application. The potential outcome of the case on the merits was not regarded as dispositive of the anonymity request and the Tribunal was able to assess the nature of the evidence that would be relevant to its Judgment in the case. Accordingly, the Tribunal granted Applicant's request for a decision on

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[4] The Rules of Procedure of the Inter-American Development Bank Administrative Tribunal (IDBAT) codify this practice at Article 30, which provides:

> 1. 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. Immediately thereafter and as an ancillary matter, the request for anonymity shall be transmitted to the Bank or the Corporation for comment within a period of time determined by the President.
>
> 2. The President of the Tribunal may grant a request for anonymity in cases in which publication of the complainant's name is likely to be seriously prejudicial to the complainant.
>
> 3. If the President should decide against granting anonymity, he shall allow the complainant a time period to decide whether he wishes to continue with his complaint or to withdraw it. In the latter case the proceedings will be ordered filed for the record.

[5] This practice of the World Bank Administrative Tribunal (WBAT) is illustrated in *BT v. International Bank for Reconstruction and Development*, WBAT Decision No. 464 (1 October 2012), para. 3 ("The Applicant's request for anonymity was granted on 17 January 2012.").

anonymity prior to rendering this Judgment on the merits of the Application. The substance of the decision on anonymity is considered below.

Request for anonymity

16. Before its adoption of Rule XXII (which has effect for all applications filed after December 31, 2004), the IMFAT ordinarily accorded anonymity to all applicants. As the Tribunal explained in *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 26, 2006), para. 13, Rule XXII revised that earlier practice. The Tribunal has stated that anonymity operates as an "exception to the general rule of making public the names of parties to a judicial proceeding" and the burden rests with the party seeking anonymity to show "good cause." *Id.*, para. 13. It is notable that in *Ms. "AA"*, the Fund had raised no objection to the applicant's request. The Tribunal held that it may not grant a request for anonymity pursuant to Rule XXII solely on the basis of the consent of the parties, that is, in the absence of a showing of "good cause." *Id.*, para. 12. The Tribunal in *Ms. "AA"* additionally commented that with the adoption of Rule XXII, it had ". . . sought to bring its practice into conformity with that generally observed, including the practice of other international administrative tribunals." *Id.*, para. 13.

17. This Tribunal consistently has applied, and recently has reaffirmed, the standard articulated in *Ms. "AA"*. *See Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), para. 9 ("In interpreting Rule XXII, this Tribunal consistently has held that granting anonymity to an applicant stands as an exception to the general rule of making public the names of parties to a judicial proceeding. The IMFAT has applied the principle, supported by international administrative jurisprudence, that anonymity generally is to be granted only in such cases as those involving alleged misconduct or matters of personal privacy such as health or family relations.")

18. To date, the IMFAT has decided ten requests for anonymity under Rule XXII. Of these, seven requests have been granted. *See Ms. "GG", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2013-3 (October 8, 2013), para. 13 (allegations of harassment, discrimination and retaliation against applicant, which, if established, would constitute serious misconduct); *Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 11 (challenge to misconduct proceedings; accusations relating to the conduct of other staff members; evidence relating to sexual relationships among staff members); *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 7 (health of applicant; allegations of mistreatment by supervisor); *Mr. "N", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2007-7 (November 16, 2007), para. 8 (child support dispute affecting benefits under Staff Retirement Plan); *Ms. "CC", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-6 (November 16, 2007), para. 7 (disability retirement request; alleged misconduct); *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 20 (allegations of misconduct against applicant; allegations by applicant of mistreatment by supervisor); and *Ms. "AA"*, para. 15 (to protect supervisors from allegations of harassment and hostile work environment that had

not been tested, as application was summarily dismissed for failure to meet exhaustion of remedies requirement).

19. The Tribunal has rejected three anonymity requests pursuant to Rule XXII. In *Sachdev*, the applicant challenged her non-selection for a promotion, the abolition of her position and her subsequent separation from service. She requested anonymity, asserting that her case involved '"confidential personal and professional information, including information regarding Applicant's health, welfare as well as personal family matters'" and that the financial loss caused by her separation from the Fund deserved protection as a '"matter of personal privacy.'" *Sachdev*, para. 7. The Tribunal rejected these arguments. On the issue of the asserted privacy of the applicant's financial situation, the Tribunal cited *Ms. D. Pyne, Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2011-2 (November 14, 2011), paras. 9-12 (*see* below). *Id.*, para. 10. As to the privacy of health information, the Tribunal observed that the applicant had made only "passing reference" to her health in her pleadings and that the Tribunal had not found these references to be "material to the case." At the same time, the Tribunal reaffirmed that in cases in which health matters have "played a central role and the Tribunal has engaged in extensive discussion of medical evidence, it has found good cause to protect the identity of the Applicant under Rule XXII." *Id.*, para. 11, citing *Ms. "CC"* and *Mr. "DD"*.

20. In *Pyne,* in which the applicant challenged decisions relating to her separation from the Fund as the result of a departmental reduction in force and her related benefits entitlements, the applicant sought anonymity on the ground that her submissions to the Tribunal included "extensive discussion" of her financial situation such as her salary and pension entitlements. The Tribunal rejected the applicant's contention that these were '"precisely the very private issues that Rule XXII was intended to protect"' and denied her request for anonymity. *Pyne*, paras. 9-12.

21. In *Mr. S. Ding, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2009-1 (March 17, 2009), the applicant challenged a Fund policy governing eligibility for children's Education Allowances and its application in his individual case. The Tribunal rejected his request for anonymity, in view of the standard it consistently has applied to such requests. *Ding*, paras. 8-11.

22. In the instant case, Applicant challenges the non-conversion of his fixed-term appointment to an open-ended appointment. Applicant asserts that his case involves ". . . sensitive information and substantive negative claims about Applicant's performance and affect his professional reputation with potentially serious negative consequences on his career and livelihood, as well as information about ill effects on Applicant's health suffered through severe stress in the months since the transfer was implemented." In particular, Applicant states that he is actively seeking employment and that he would ". . . risk further undeserved damage to his career if his name and the above-mentioned personal and negative information were to be published on the internet in a Tribunal decision" and that such publication would have "unquantifiable repercussions on his market value."

23. Applicant notes that information relating to performance assessments is ordinarily treated by the Fund with a high degree of confidentiality. He questions why "availing himself of his

right to seek legal recourse against the non-conversion decision to the Tribunal (after the strictly confidential Grievance Committee proceedings) he should . . . have to fear that his supervisors' unsupported and subjective claims about his performance shortcomings will be publicly available to all Fund staff, and indeed every internet user, under his full name."

24. Citing *Sachdev*, Applicant acknowledges that the standard applied by the IMFAT limits anonymity to "exceptional" cases, in which "matters of personal privacy" such as alleged misconduct, health or family matters are involved. Applicant asserts, however, that the "sensitive information and seriously negative claims about his performance at the core of this application—which would be reiterated in the Tribunal's published decision—are matters of personal privacy that should enjoy the same level of protection against public dissemination such as those matters previously recognized by the Tribunal."

25. Applicant emphasizes that "[i]n a day and age where every recruiter and potential new employer makes use of internet searches for background checks on candidates, the potential damage to Applicant's career prospects and re-employment prospects could be substantial and unavoidable."Applicant asserts that he is currently engaged in an extensive job search and that ". . . a background check with the use of internet search engines is nowadays performed by each and every prospective employer in the private and public sector anywhere in the world . . . ." Moreover, states Applicant, ". . . even the fact that Applicant challenged his employer before the Tribunal at all—cannot be underestimated."

26. Applicant also asserts that ". . . restrictive granting of anonymity no longer reflects a common practice established in international administrative jurisprudence." According to Applicant, that jurisprudence ". . . in recent years has seen a reversal[,] with the majority of international administrative tribunals now granting anonymity to applicants as a matter of general practice." In Applicant's view, this purported change reflects a recognition that Internet search engines have become a primary research tool for prospective employers. Applicant observes that in *Ms. "AA"* the IMFAT noted that it had revised its earlier practice to bring it "into conformity with that generally observed, including the practice of other international administrative tribunals." Applicant asserts that ". . . over the past six years the practice of other international administrative tribunals has evolved toward a general rule of granting anonymity upon a party's reasonable request . . . ."

27. Applicant urges the Tribunal to interpret Rule XXII ". . . to allow 'good cause' shown to include, at the minimum, cases such as his where the publication of a decision on the internet including sensitive and detailed information about applicant's work performance record would have the potential to severely impact [the applicant's] future career prospects." Applicant maintains that the "accessibility of the judgment to the public, on the other hand, will not suffer if Applicant's full name is substituted by an acronym."

28. Respondent, for its part, maintains that Applicant has not demonstrated "good cause" for anonymity under the applicable standard and that there is no basis for a more expansive interpretation of Rule XXII. In the view of the Fund, Applicant's request to interpret "good cause" to include cases involving sensitive and detailed information about work performance would create an exception that would ". . . completely swallow the Tribunal's recent

establishment of a presumption *against* anonymity" through the adoption of Rule XXII. (Emphasis in original.) "An applicant's concern about possible damage to one's reputation because of allegations in a Tribunal judgment about negative performance is not sufficient to meet the 'good cause' showing under Rule XXII, because if it were, then anonymity would again be the rule and not the exception."

29. Respondent also disputes Applicant's contention that international administrative jurisprudence in recent years has experienced a "reversal" of prior practice relating to the granting of anonymity. Respondent states that ". . . none of the cases cited by Applicant contain any statement or reasoning by these other tribunals that supports . . ." that contention.

30. As to Applicant's assertion that his case contains "sensitive and detailed information not only about his performance but his health," the Fund responds that it has not discussed Applicant's health in its pleadings and that his only citations are to his own Application. The Fund characterizes these references as "completely superfluous" to the issues of the case and accordingly maintains, citing *Sachdev*, para. 11, that Applicant makes only "passing reference[s]" to his health and those references are not "material to the case."

31. In cases in which health matters have played a central role and the Tribunal has engaged in extensive discussion of medical evidence, the Tribunal has found "good cause" to protect the identity of the Applicant under Rule XXII. *See Sachdev*, para. 11, citing *Ms. "CC",* para. 7 (challenge to denial of disability pension); *Mr. "DD",* para. 7 (medical evidence submitted in connection with claim of workplace harassment). The question arises whether, in the instant case, health information is relevant to the issues of the case so as to provide "good cause" for protecting Applicant's identity from disclosure. In the view of the Tribunal, Applicant's assertions relating to his health are peripheral to the issues of the case and do not, of themselves, form a basis for the granting of anonymity in this case.

32. Importantly, Applicant's request for anonymity raises the question of whether protection of an applicant's professional reputation, in the context of a challenge to a performance-based decision, may constitute "good cause" for granting anonymity pursuant to Rule XXII. Do applicants who bring challenges to decisions reflecting on their professional performance deserve protection against public disclosure of their identities just as do those whose cases involve "alleged misconduct or matters of personal privacy such as health or family relations" (*Sachdev*, para. 9)? Has Applicant shown "good cause" for protecting his privacy?

33. The Tribunal observes that there is no precedent directly governing a decision on Applicant's anonymity request. None of the applicants who has sought anonymity under Rule XXII expressly raised in support of their request a concern for protecting their professional reputation in the light of allegations of performance deficiencies. Three Judgments to date in which applicants challenged the non-conversion of their fixed-term appointments were not subject to Rule XXII, as the applications were filed prior to January 1, 2005.[6] In *Ms. "AA",* the

[6] *See Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997); *Ms. "T", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-2 (June 7, 2006); *Ms. "U", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-3 (June 7,

(continued)

applicant also challenged the non-conversion of her fixed-term appointment; however, neither her request for anonymity nor the Tribunal's ground for granting that request related to protecting the applicant's professional reputation against allegations of performance deficiency. In *Sachdev*, the applicant sought to protect "confidential personal and professional information." Among the decisions she challenged was her non-selection for a promotion. The gravamen of that claim, however, was that she had been entitled to selection based on past practices of the Fund. Her anonymity request did not expressly seek to protect disclosure of information potentially damaging to her professional reputation and the Tribunal did not address that issue in deciding the request. *Id.*, paras. 7-12.

34. In support of his position that this Tribunal should interpret "good cause" for granting anonymity under Rule XXII to encompass the protection of an applicant's professional reputation in the context of a challenge to a performance-based decision, Applicant asserts that the practices regarding anonymity of applicants in judgments published by other international administrative tribunals have shifted in recent years toward greater protection of applicants' privacy. Accordingly, a question raised by Applicant's anonymity request is whether the IMFAT's position that the standard it applies to anonymity decisions is "supported by international administrative jurisprudence," *see, e.g., Sachdev*, para. 9, continues to be valid.

35. The Tribunal has surveyed the current practices of a number of other international administrative tribunals with regard to the anonymity of applicants. It concludes that these practices are varied and remain in flux.[7] Applicant's assertion that there has been a shift in the

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2006).

[7] The Tribunal surveyed the practices of the Asian Development Bank Administrative Tribunal (AsDBAT), African Development Bank Administrative Tribunal (AfDBAT), European Union Civil Service Tribunal (EUCST), Inter-American Development Bank Administrative Tribunal (IADBAT), International Labor Organization Administrative Tribunal (ILOAT), United Nations Dispute Tribunal (UNDT), United Nations Appeals Tribunal (UNAT), and World Bank Administrative Tribunal (WBAT). These tribunals represent a range of practices. Some grant anonymity routinely upon request, while others do so only rarely. *See, e.g., Yisma v. Secretary-General of the United Nations*, UNDT Order 63 (NY/2011), para. 11 (denying anonymity request in case challenging disciplinary penalty, noting that Tribunal is ". . . alive to the fact that the granting of confidentiality in cases of this nature, without sufficient reasons given to satisfy the Tribunal that confidentiality is justified, has the potential to not only invite requests of this kind in every matter concerning disciplinary proceedings, but to negate a key element of the new system of administration of justice—its transparency"). A number of tribunals report an increase both in the number of anonymity requests received and in the proportion of these that are granted. Some tribunals, such as the EUCST apply a particular legal standard such as "legitimate reasons" in deciding anonymity requests, while others do not. *See, e.g.,* EUCST Rules of Procedure, Article 44(4) ("On a reasoned application by a party or of its own motion, the Tribunal may omit the name of the applicant or of other persons mentioned in connection with the proceedings, or certain information, from the publications relating to a case if there are legitimate reasons for keeping the identity of a person or the information confidential."). In cases in which anonymity is granted, some tribunals designate the name of the case with the actual initials of the applicant while others assign random initials. Of the tribunals surveyed, the ILOAT, uniquely, publishes the names of applicants in the print versions of its Judgments but (beginning with Judgments rendered in May 2002) anonymizes its Judgments when posting them on the Internet.

practices of other tribunals in favor of greater protection of privacy appears to be borne out, at least to some extent. But the matter is not clear cut. The Tribunal does not agree, as Applicant suggests, that "the majority of international administrative tribunals [are] now granting anonymity to applicants as a matter of general practice" To the extent that some tribunals grant anonymity without articulating their rationale for doing so, their practice is at odds with Rule XXII of the Rules of Procedure of this Tribunal, which requires a showing of "good cause." *See Ms. "AA,"* para. 12 (rejecting proposition that anonymity could be granted by consent of the parties without a showing of "good cause").

36. In *Ms. "AA"*, para. 13, the Tribunal referred to the "general rule of making public the names of parties to a judicial proceeding." The Tribunal is mindful that public justice encourages the lawful exercise of authority. Whether special considerations and sensitivities arise in the context of the adjudication of employment disputes of international civil servants is not clear. What is clear, however, is that potential applicants should not be unreasonably deterred from pursuing recourse to adjudication before this Tribunal in those cases in which the Tribunal determines that there is particular ground for shielding the applicant's identity. Such deterrence would undermine the very purposes that the Tribunal exists to serve.

37. The Tribunal has recognized that it plays a "unique role as the sole judicial actor within the Fund's dispute resolution system" and that its mandate, in contrast to that of the Fund's Grievance Committee, is "not simply to resolve disputes but to interpret the law of the Fund." *Ms. "BB",* para. 65. *See also* Commentary[8] on the Statute, p. 13 ("It would be the function of the tribunal, as a judicial body, to determine whether a decision transgressed the applicable law of the Fund."). The Tribunal notes that the Fund provides a system for the resolution of staff disputes up to the Tribunal stage in which anonymity is maintained, and recently it has instituted a confidential mediation option as well.

38. The Tribunal has always weighed the benefits of public justice against the privacy interests of individuals.[9] This tension is reflected in the Statute itself, which provides as follows at Article XVIII:

> 1. The original of each judgment shall be filed in the archives of the Fund. A copy of the judgment, attested to by the President, shall be delivered to each of the parties concerned.
>
> *2.* A copy shall also be made available by the Secretariat on

[8] The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009).

[9] The UNDT has referred to this same tension. *See Yisma*, para. 8 ("Transparency in judicial proceedings, however, must be balanced against the necessity to do justice in individual cases, including by granting certain measures of confidentiality in respect of a party's identity where it is found to be justified.").

> request to any interested person, *provided that the President may decide that the identities or any other means of identification of the applicant or other persons mentioned in the judgment shall be deleted from such copies.*

(Emphasis added.) The associated Commentary on the Statute, p. 42, states:

> Judgments of the Fund tribunal are to be made available to interested persons upon request; they *would be in the public domain and could be cited or published.* [footnote omitted] This Article further provides that the President would be authorized to decide whether to conceal the identity of the applicant or any other person mentioned in the judgment, such as a witness (e.g., the complainant in a sexual harassment case in which the disciplinary measures imposed on the perpetrator are being challenged), in copies of the judgment. The President would be guided by concerns for protecting the privacy of the individual involved or the confidentiality of the matter to the organization.

(Emphasis added.) Additionally, Rule XVIII, para. 4, of the Tribunal's Rules of Procedure provides that the Registrar shall ". . . notify the Fund community of the judgment and any appended opinions and shall arrange for their expeditious publication." Article XIII, Section 3, of the Statute requires that "[e]ach judgment shall be in writing and shall state the reasons on which it is based." The Tribunal endeavors to be circumspect in its dissemination of personal information relating to applicants and others in its Judgments, while at the same time taking care not to compromise the comprehensibility of those Judgments.[10]

39. In the view of the Tribunal, a principled approach to deciding anonymity requests must balance the value of public justice against the possibility that potential applicants may be unreasonably deterred from vindicating their rights through the only judicial forum that is available to them. Accordingly, the Tribunal reaffirms that Rule XXII operates as an "exception to the general rule of making public the names of parties to a judicial proceeding" and that anonymity may not be granted solely on the basis of the consent of the parties. Anonymity must

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[10] The Tribunal's first "Decision on protection of privacy and method of publication" (1997), which provided that persons shall be designated by acronyms and departments and divisions of the Fund by numerals, advised: "However, the application of these procedures *shall not prejudice the comprehensibility of the Tribunal's judgments.*" (Emphasis added.) Similarly, its "Revised Decision on the protection of privacy and method of publication" (2006) states that the "departments and divisions of the Fund shall be referred to by numerals unless specification is desirable for the comprehensibility of the Judgment or Order." *See, e.g., Mr. "R", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-1 (March 5, 2002), note 1 (identifying Applicant as Director of the Joint Africa Institute: "It is observed that in the case of Mr. "R", the basis of Applicant's complaint is found in the unique factual circumstances of the position he holds, hence, consistent with the Tribunal's policy that measures for protection of privacy '. . . shall not prejudice the comprehensibility of the Tribunal's judgments,' it has not been possible to avoid reference to Mr. "R"'s position.").

be supported by "good cause." *Ms. "AA"*, para. 13.

40. By maintaining anonymity as the exception and not the rule, the Tribunal also reaffirms that an applicant's bare assertion that contesting a decision before the Tribunal may lead to adverse employment consequences does not, of itself, justify granting anonymity pursuant to Rule XXII. *See Ding,* para. 11.

41. At the same time, the Tribunal is persuaded that developments have taken place in the eight years since it adopted Rule XXII (and in the six years since it first interpreted that Rule in *Ms. "AA"*) that require its consideration. These developments include a greater recognition of applicants' privacy interests by other international administrative tribunals, along with the increasingly prominent role of the Internet and the unprecedented level of disclosure that it affords. The Tribunal recognizes that its Judgments are now subject to search on the Internet for purposes that are unrelated to the goals of public justice. This development, in turn, may contribute to greater reluctance by potential applicants to exercise their rights to judicial review. In the view of the Tribunal, that reluctance of itself is not sufficient to warrant exception from the rule of publication.

42. In the instant case, Applicant's challenge to the non-conversion of his fixed-term appointment focuses upon alleged procedural defects in the decision-making process. The core of the evidence reviewed in this Judgment, however, relates to Applicant's job performance, which, in the view of his managers, fell short of that required for conversion to a career appointment with the Fund.

43. Performance reviews are a special category of human resources intervention designed, in the first place, to enhance and improve performance. Useful performance reviews are built on candor on the part of the reviewer. Confidentiality is thus important to the process for two reasons: it encourages candor by reviewers who might otherwise seek to protect a staff member from public criticism; and it protects the employee who can feel able to seek to improve his or her performance secure in the confidentiality of the process. Given that key evidence in this case relates to the assessment of performance, it is not possible to protect the confidentiality of the performance review process without concealing Applicant's identity. Were the Tribunal not to grant Applicant's anonymity request, the process of performance reviews going forward would inevitably be affected by the perceived risk of disclosure in future cases. In the circumstances, the Tribunal concludes that Applicant has established "good cause" for protecting his privacy. Accordingly, it has granted his request for anonymity pursuant to Rule XXII. In accordance with this decision, the Tribunal will also as far as possible not disclose information about Applicant that would enable him to be identified.

Oral proceedings

44. 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." Applicant has not requested oral proceedings.

45. The Tribunal had the benefit of the transcript of oral hearings held by the Fund's

Grievance Committee, at which the following persons testified: Applicant; senior officials of each of the departments in which he served; and the Director and Deputy Director of HRD. The Tribunal is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

46. In view of the extensive written record before it and in the absence of any request, the Tribunal decided that oral proceedings would not be useful to its disposition of the case.

Factual Background

47. The key facts, some of which are disputed between the parties, may be summarized as follows.

48. Effective October 1, 2007, Applicant was appointed to the staff of the Fund on a three-year fixed-term appointment at Grade B2 in "Department 1".[11]

Assessment of Applicant's performance in "Department 1"

49. As a fixed-term appointee, Applicant was assessed at six-month intervals during the term. These assessments, and Applicant's responses to them, are summarized below.

50. In the first six-month assessment, the Department Director praised Applicant for "put[ing] in a strong effort" at a time when "work pressures in the office were extremely high." He further noted that Applicant had managed a "complicated task of getting consensus" and that his "tenacity in approaching these issues is clear evidence of commitment." His "strong interpersonal skills" were also noted. At the same time, the Director observed that "more polished and pointed analysis" will enable Applicant to become a more effective independent leader. The evaluation referred as well to "strengthening oral and written communication skills." (Fixed-Term Performance Review/Performance Plan & Interim Performance Feedback, signed September 3, 2008.)

51. At the twelve-month mark, Applicant was rated on a series of job competencies. Of these, he was rated "CE" (Consistently Exceeded) in four competencies and "FM" (Fully Met) in eight, but only "PM" (Partially Met) in the remaining six competencies. The narrative portion of the evaluation noted that Applicant had been responsible for managing an important part of his unit's work and that his "tireless efforts have been an important factor in reaching the end." The Department Director also cited Applicant's "strong work ethic and collegiality." At the same time, he identified two areas for development in which he noted "strengthening in the period ahead is crucial: (i) analytical strengths; and (ii) communication skills." Both of these attributes, noted the Director, were essential to being an effective manager in his Department and in the

[11] The Tribunal's "Revised Decision on the protection of privacy and method of publication" (June 8, 2006), para. 3, provides in part: "The departments and divisions of the Fund shall be referred to by numerals unless specification is desirable for the comprehensibility of the Judgment or Order."

Fund at large. The Director indicated he would provide Applicant "ample opportunities to take forward work independently" in the year ahead. The assessment form records, and Applicant has not disputed, that performance discussions were conducted over three sessions in December 2008 and January 2009. (Fixed-Term Performance Review/ 12-Month Performance Review, signed February 18, 2009.)

52. On June 1, 2009, a performance meeting was held between Applicant and his Department Director. According to the Department Director's later testimony, he told Applicant at that meeting that if he had had to make a decision on conversion at that time he would not recommend it. (Tr. I, p. 117.) On the same date, he circulated to Applicant a draft of the Fixed-Term Performance Review/Second Full Performance Review. This review again identified as strengths a "strong work ethic, collegiality and a strong drive for results," but cautioned: "Two areas for strengthening performance—analytical strengths and communication skills—that were identified in the last APR as a precondition to be an effective and independent manager . . . still remain below the critical mark." (draft Fixed-Term Performance Review/Second Full Performance Review, unsigned.)

53. In a Memorandum for Files of August 12, 2009, circulated to both Applicant and HRD, the Department Director provided a Fixed-Term Performance Review for the third six-month period, i.e., the half-way mark of Applicant's three-year fixed-term appointment. This "Mid-point Review" Memorandum included an assessment of Applicant's performance and suggested possible options in the light of that assessment. The Department Director noted: ". . . polished products remained infrequent. In my view this reflects two areas for strengthening performance—analytical strengths and communication skills—that were identified in APRs for about a year as a prerequisite to being an effective and independent manager of the work program." The Memorandum further indicated: "We have discussed seeking work assignments in ["Department 1"] that would help in strengthening . . . development areas identified above. *In addition, we have also discussed seeking work opportunities outside ["Department 1"] that will match [Applicant]'s skills better. While I will continue to facilitate the goals listed above including through providing more feedback and assigning a mentor, [Applicant] is encouraged to pursue these paths also. These issues have also been raised in an initial discussion with HRD.*" (Memorandum for Files from "Department 1" Director, August 12, 2009.) (Emphasis added.)

54. As detailed below,[12] effective October 27, 2009, Applicant transferred to "Department 2". More than a month following that transfer, on December 8, 2009, the "Department 1" Director signed the Fixed-Term Performance Review/Second Full Performance Review for the period ending October 23, 2009. That review noted that its finalization ". . . has been somewhat delayed by [Applicant]'s request to include the feedback exercise conducted mid-year" and that performance discussions had taken place in five sessions over a six-week period. The evaluation reiterated that "[f]rom the outset of [Applicant]'s employment, and as documented in various

[12] *See infra* Transfer to "Department 2".

previous performance assessments, two areas—analytical and communication skills—were identified for strengthening and a pre-requisite for being an independent and effective manager." The evaluation described two major assignments during the review period in which Mr. "HH" encountered difficulties. As to one assignment, it noted that the "absence of an analytical construct principally reflected a lack of appreciation of the underlying data and the concomitant policy issues." (Fixed-Term Performance Review/Second Full Performance Review, signed December 8, 2009.)

55. The Fixed-Term Performance Review/Second Full Performance Review concluded by referring to Applicant's interdepartmental transfer as follows: "During the last year, [Applicant] expressed the desire that a 'second pair of eyes' assess his performance. Since that expression, HRD and I canvassed appropriate departments where the development areas identified in this, and previous performance assessments, can be addressed. HRD has found a suitable assignment in ["Department 2"] and ["Department 2"] has expressed its willingness to take on this task." (*Id.*)

Transfer to "Department 2"

56. The circumstances leading up to Applicant's interdepartmental transfer are a matter of dispute between the parties.

57. Following the performance meeting of June 1, 2009, Applicant exchanged communications with the "Department 1" Director relating to the possibility of finding a position in another department to which he might transfer. The Department Director testified that Applicant initiated the idea of such a move so that he might be evaluated by a "second pair of eyes." (Tr. I, pp. 116, 163-164.) Applicant, for his part, testified that it was the "Department 1" Director himself who suggested that Applicant's strengths would be better utilized in another department. (Tr. II, p. 356.)

58. During the summer of 2009, Applicant pursued vacancy applications within the Fund. In response to one of those applications, Mr. "HH" was later informed:

> The reason [Applicant]'s application was not forwarded is that he is on a fixed-term appointment, during which time staff members cannot apply for positions outside of their department. As you may know, the fixed-term appointment period is meant to help a department assess if a staff member can take up long-term employment with the Fund and therefore there are restrictions on movement. *The only time that a staff member can move departments while on fixed-term is if there is a planned agreement between two departments for this to happen. In such cases, the fixed-term has to start again.*

(Email from Review Committee member to Applicant, October 20, 2009.) (Emphasis added.) The record also shows that the HRD Deputy Director had indicated to the "Department 1" Director in June 2009 that HRD was prepared to intervene to make an "exception" to the rule that would prevent Applicant from applying for vacancies prior to the 30-month mark in his

fixed term. (Email from HRD Deputy Director to "Department 1" Director, June 11, 2009.)

59. On July 30, 2009, Applicant met with the HRD Deputy Director, who testified that Applicant had expressed in that meeting that "failure was not an option" for him, and that they had ". . . concluded together that there were basically two options. One was to find a way to strengthen his performance in ["Department 1"] to convince his current supervisor that he was suitable for long-term employment in the Fund at the B-level, or perhaps to look at some place where he could have a second pair of eyes that would look at him." (Tr. II, p. 124.)

60. On the same day, Applicant apprised his Department Director of this conversation, noting that three options had been identified: "1) continue in ["Department 1"] – with an internal mentor and an action plan [to] close the gaps; 2) apply to other B-level positions in the Institution as they come-up. Need to wait [for] opportunities to come-up; 3) swap with other B-level position in another department in a managed and arranged way. Need to identify department and find staff from another department willing to transfer." (Email from Applicant to "Department 1" Director, July 30, 2009.)

61. According to Respondent, during the following month (August 2009), the HRD Deputy Director contacted several departments, including "Department 2", seeking a placement for Applicant. On September 17, 2009, the HRD Deputy Director floated within HRD a possible "[s]wap agreement to facilitate career development . . . and assessment of fixed-term staff member[s'] suitability for conversion" for a period of two years. "[Applicant]'s fixed-term will be extended by the period necessary to allow a full two-year swap. Six months prior to end of the 2 year period, decision about conversion will be made." (Email from HRD Deputy Director to HRD Division Chief, cc to HRD Director, September 17, 2009.)

62. In response, the HRD Division Chief advised: "[T]he three-year fixed-term appointment cannot be extended and therefore there is a provision in place that allows for the fixed-term appointment to start again if a staff member transfers to another department to avoid the problem of hitting against the end of the term appointment. It also provides for a sufficient period to monitor the performance to ensure that the right career decision is made." (Email from HRD Division Chief to HRD Deputy Director, cc HRD Director, September 17, 2009.) The HRD Deputy Director replied: "I think we want to very much avoid extending him for another 3 years (that wd [would] probably be a deal breaker for [the Departments])" as the function contemplated in "Department 2" was expected to be of a limited duration. (Email from HRD Deputy Director to HRD Division Chief, cc to HRD Director, September 17, 2009.)

63. The above message was then passed to another HRD Division Chief who cautioned: "I have a problem with this. There is no scope in the employment framework for extending the 3 year fixed term appointment. We also don't issue FT [fixed-term] for less than 3 years. We have to be cautious on how we proceed. . . .We should halt and first talk to avoid a mess ahead." (Email from 2nd HRD Division Chief to HRD Division Chief, and forwarded to HRD Deputy Director, September 18, 2009.)

64. Shortly thereafter, in a Memorandum for Files of September 23, 2009, one of the HRD Division Chiefs recorded that he and the Directors of "Department 1" and "Department 2" had agreed that Applicant would transfer to "Department 2" for the period October 26, 2009 – April

30, 2011 under a "limited-term appointment." This approach was proposed "to allow [Applicant] additional time for further assessment, and for the Fund to make a decision on his long-term career prospects." The Memorandum explained that ". . . ["Department 1"]'s current assessment of [Applicant]'s Fixed Term (after 2 years) has raised some important concerns (documented in the APRs), suggesting that they will likely not recommend him for conversion to open-ended status." Accordingly, ". . . an additional assessment testing period in a different unit and under a different supervisor would be useful." (Memorandum for Files from HRD Division Chief, September 23, 2009.) The Memorandum explained the "limited-term appointment" proposal as follows:

> Given that the Fund's current policy does not allow for an extension of the 3 year fixed-term appointment, it was agreed that in order to allow him additional time beyond October, 2010 (end of 3 year fixed-term appointment), [Applicant]'s fixed-term appointment will be changed to a limited-term appointment to allow him to transfer to ["Department 2"]. The use of a limited-term appointment from October 26, 2009 to April 30, 2011 will have no impact on his benefits: such an appointment would also permit conversion to a fixed-term appointment as well as open-ended positions.
>
> Within this framework, and based on a structured performance monitoring plan to include further assessment of his drafting and analytical skills, ["Department 2"] will give their views on [Applicant]'s potential for a long-term career in the Fund no later than November 15, 2010. This review, alongside the annual performance reports from ["Department 1"] and ["Department 2"] would provide the institution with the basis for taking a decision on whether to extend, convert or terminate the limited term appointment.

(*Id.*) This particular arrangement, however, did not come to pass because Applicant rejected its terms. Instead, when presented with three alternatives, Applicant chose to transfer to "Department 2" while retaining his existing fixed-term appointment.

65. Initially, the HRD Division Chief reported that Applicant was ". . . open to the idea and is thinking about the proposed arrangement. His main concern is the change in employment terms from FT [fixed-term] to LT [limited-term] and would have preferred an extension of his FT. I have explained to him that the LT was the best option given that there is no scope for extension of FT beyond the 3 years." (Email from HRD Division Chief to HRD Director and Deputy Director, September 24, 2009.)

66. On October 5, 2009, the "Department 1" Director communicated to the "Department 2" Director that Applicant had decided to transfer between the departments while maintaining his existing fixed-term appointment:

> . . . [Applicant] was offered a 6 month extension through March 2011 so that you would have 12 months to test him on an assignment. While this necessitated a move to limited-term appointment, the Fund was willing to offer a letter that stated that this change in contractual status would not carry a higher or lower presumption of staying or separating than what the current contractual status does. We also told him that this was the institution's preferred position to enable him to get a reasonable amount of time in another department.
>
> [Applicant] has decided that he will move under his current contract. . . . On the presumption that he moves under the contract, you will have to give him a self contained assignment that would test analytics and writing. . . .

(Email from "Department 1" Director to "Department 2" Director, October 5, 2009.)

67. In his Grievance Committee testimony, Applicant explained that he was reluctant to accept the option of a limited-term appointment because such appointments carry no expectation of conversion and because the associated benefits differed between fixed and limited-term appointments. Applicant testified that the issue of conversion in particular "raised a red flag" in his mind and he regarded the proposal as a "clear change of intentions [of] the institution in terms of conversion." He also testified that he was not comfortable with the idea of a "side letter" and that he never saw a draft of such letter. (Tr. II, pp. 398-400.)

68. In early October 2009, Applicant was asked to confirm his decision to transfer to "Department 2" while maintaining his three-year fixed-term appointment. At that time, Applicant sought clarifications from an HRD Division Chief as to how his transfer fit into the fixed-term monitoring framework. Applicant posed the following question: "Why not implement the procedures presented in the second paragraph of the "Mobility" section of the *Fixed-Term Monitoring* process . . . ?" The HRD Division Chief replied:

> As I explained earlier, we cannot implement the procedures for mobility during fixed-term as you cited. The reason is that such procedures will require a FT [fixed-term] vacancy, a selection process, and a department willing to select you for a new three year fixed-term appointment. This is the approach that you have explored with your application for a position in [other departments]. If you were selected for any of those positions, then you could have been considered for a new 3 year fixed-term appointment. However, the current move to ["Department 2"] was considered in the context of your being provided a broader assessment framework of your fixed-term appointment in order to make a decision on next steps in April.

(Email correspondence of October 8-15, 2009 between Applicant and HRD Division Chief.)

69. As to the effect of the transfer on the fixed-term monitoring process, the HRD Division Chief responded: "Given that you asked for the move, with a preference to maintain your current fixed-term contract with the Fund, the monitoring process should be consistent and unchanged." The HRD Division Chief continued: "[Y]our assignment in ["Department 2"] should reflect opportunities to help further assess your analytical and writing skills, which were part of the areas or concerns raised in your assessment by ["Department 1"]. So this is a continuation of the FT [fixed-term] monitoring process, and will be consistent with your current fixed-term contract." With regard to performance assessments: "["Department 1"] would conduct the 2 year assessment and ["Department 2"] will assess and give an input for the 30 month decision in April 2010." (*Id.*)

70. On October 20, 2009, in an email communication to the relevant Department Directors, the HRD Deputy Director recorded that Applicant had informed him that he "accepts the option to move to ["Department 2"], effective Tuesday October 27, while keeping his current three-year fixed-term contract." (Email from HRD Deputy Director to Directors of "Department 1" and "Department 2", cc Applicant and HRD officials, October 20, 2009.) Accordingly, Applicant began work in "Department 2" in late October 2009.

71. In a November 3, 2009 Memorandum for Files, the "Department 1" Director and the HRD Deputy Director recapped the events leading up to Applicant's interdepartmental transfer:

> In light of important concerns raised in previous APRs, [Applicant] indicated his desire to be evaluated by a second pair of eyes. [The "Department 1" Director] proposed a two-track approach: (i) for [Applicant] to approach [the HRD Deputy Director] to seek HRD assistance in identifying another work assignment where these development needs could be further strengthened; and (ii) hand-in-hand, [the "Department 1" Director] would approach department heads to see if similar assignments were available.
>
> [Applicant] had a discussion of his situation with [the HRD Deputy Director] and asked for HRD assistance in identifying another assignment. Since that meeting, both [the "Department 1" Director] and [the HRD Deputy Director] have approached departments seeking a suitable match. Recently, [the HRD Deputy Director] identified that a match existed between the desire of [Applicant] to work with a second supervisor and ["Department 2"].
>
> In taking forward this transfer, it was made clear to [Applicant] that a transfer within an initial three-year term is unusual and that a transfer to ["Department 2"] would be the result of his request to be evaluated by a second pair of eyes. Accordingly, HRD explained to [Applicant] that he had three possibilities: (i) [Applicant] stay in his current assignment in ["Department 1"] where he would serve out the remaining period of his three-year

> fixed-term appointment; (ii) cancel the current three-year fixed-term contract and replace it with a limited-term contract extended through April 2011 (18 months), thereby allowing an extended period of time for evaluation by a second pair of eyes; and (iii) move to ["Department 2"] under the current three-year fixed term contract.
>
> . . . .
>
> After considerable reflection, [Applicant] informed [the HRD Deputy Director] that his decision was to transfer to ["Department 2"] under his current three-year fixed term contract to facilitate assessment of his competencies by another supervisor. The said transfer took place on October 27, 2009.

(Memorandum for Files from ["Department 1"] Director and HRD Deputy Director, "[Applicant]'s Transfer from ["Department 1"] to ["Department 2"]," November 3, 2009.)

72. In mid-December 2009, Applicant, in a Memorandum to the HRD Deputy Director and the "Department 1" Director, again raised the issue of the applicability of the "mobility" provision of the Fixed-Term Monitoring Guidelines:

> **Despite being an unusual move, the HR rules for Fixed-Term Contract have clear directives that in an inter-departmental transfer, a new fixed-term contract should be issued.** The memorandum does not explain why the institution did not follow the directives found in the *Mobility Section* of the HR Guidelines; it also does not indicate under which HR rule my transfer was implemented.

(Memorandum from Applicant to HRD Deputy Director and "Department 1" Director, "Reply to Memorandum for Files [of November 3, 2009]," December 18, 2009.) (Emphases in original.) He additionally protested that the Memorandum for Files documenting the transfer had not been reviewed with him prior to the transfer but delivered only after the fact. Applicant also asserted that he "**. . . did not request to move to ["Department 2"]**. The move to ["Department 2"] was not initiated by me, nor did I request HRD's assistance in identifying another assignment." (Emphasis in original.) Applicant concluded: "As the above items raise serious concerns regarding my professional career which should have been clarified before my transfer, I would like to have them addressed in order to ensure that my contractual terms are protected and the Fund's policies are observed." (*Id.*) The Fund in its pleadings before the Tribunal does not dispute that it did not respond to this communication, stating: "Although Applicant made a record of his objections . . . this was not a proper request for administrative review, and in any event, Applicant did not take the further step of filing a timely grievance with the Grievance Committee after he received no response to his objections."

Assessment of Applicant's performance in "Department 2"

73. As noted, Applicant's transfer to "Department 2" became effective October 27, 2009, i.e., approximately six months in advance of the date on which the decision as to conversion was to be taken.

74. The "Department 2" Assistant Director testified that soon after Applicant's arrival in the Department he observed that ". . . no matter what feedback I was providing on those written documents, the ability wasn't—didn't seem to be manifesting itself. . . . I felt that the weakness in writing that I had heard of in the past was much more serious than I thought." (Tr. II, p. 41.) As a result of this concern, the Assistant Director approached the Senior Personnel Manager (SPM) of the Department for advice, as it was "very clear to [him] that [he] would not wait six months to then give an assessment or feedback to [Applicant]." According to the Assistant Director, the SPM suggested setting objectives and holding monthly feedback meetings, "something along the lines of a performance improvement plan." The Assistant Director testified that he implemented this advice. (Tr. II, pp. 42-44.)

75. On January 8, 2010, a performance feedback meeting was held between Applicant, the "Department 2" Assistant Director and the SPM. That meeting was summarized by the Assistant Director in a Memorandum for Files of January 27, 2010, which noted that four performance objectives had been set at the start of Applicant's work in the Department. These objectives were designed to require Applicant to apply ". . . general managerial competencies . . . in the areas of managing work, applying analytical skills, and producing written products expected of B level staff in general in the Fund with minimal supervision . . . ." The Memorandum further noted that Applicant had been advised that it was appropriate to provide him with "early feedback . . . as soon as reasonably possible, given the fact that important expectations were not being met to date" and stated that monthly follow-up sessions were anticipated. (Memorandum for Files from "Department 2" Assistant Director, cc to Applicant and HRD, "Feedback to [Applicant] on his performance in ["Department 2"]," January 27, 2010.)

76. On February 19, 2010, Applicant provided an extensive written response to the January 27 Memorandum for Files. In that response, Applicant sought to rebut his supervisor's assertions relating to his work performance on particular assignments. (Memorandum for Files from Applicant, cc "Department 2" Assistant Director and HRD, "Reply to Memorandum for Files," February 19, 2010.) Also on February 19, a further performance meeting was held. That meeting was documented by the "Department 2" Assistant Director in a lengthy Memorandum for Files of March 1, 2010, in which he stated that he had ". . . informed [Applicant] that his performance had not met the expectations for [specified] activities because substantially his written products had required the same degree of review and revision as in the prior period described in the January 27 memorandum . . . ." (Memorandum for Files from "Department 2" Assistant Director cc Applicant and HRD, "Feedback Meeting with [Applicant] of February 19, 2010," March 1, 2010.)

77. Two further performance meetings (of March 15 and April 15) were held with Applicant in "Department 2". These meetings included the Department Director and SPM, along with the Assistant Department Director, and were documented in detailed Memoranda for Files. The latter

meeting was recorded as having lasted an hour and a half. Among other observations, the Department Director had ". . . explained that the examples . . . demonstrated that [Applicant's] draft was insufficiently analytical, which was one of the key competencies for B-level staff." (Memorandum for Files from "Department 2" Assistant Director cc Applicant and HRD, "Feedback Meeting with [Applicant] on April 15, 2010," April 16, 2010.) (*See also* Memorandum for Files from "Department 2" Assistant Director cc Applicant and HRD, "Feedback Meeting with [Applicant] on March 15, 2010," March 23, 2010.)

Non-conversion decision

78. By Memorandum of April 12, 2010, the "Department 2" Assistant Director communicated to the HRD Deputy Director his Department's overall assessment of Applicant's performance in anticipation of the decision on conversion. He explained that during the period in "Department 2" Applicant had been expected to display "general managerial competencies . . . , applying analytical skills, and producing written products expected of B-level staff in general with minimal supervision." It was additionally noted that "[t]his assessment must be tempered by the recognition that [Applicant] has only been in ["Department 2"] for about 5 months compared with his 24 months in ["Department 1"]. Moreover, it recognizes that he has been faced not only with the normal transition difficulties associated with moving departments, but he has had to tackle challenges stemming from largely unfamiliar assignments." "Nevertheless," the assessment concluded, "[Applicant]'s work has not yet displayed sufficient analytical skills or creative problem-solving capability. He has not shown consistent initiative in coming forward with suggestions or with practical and timely possible solutions to discuss with his supervisors. He did not deliver two important work assignments on time that would have allowed him to articulate his strategic vision and to craft a product without major inputs from others." (Memorandum from "Department 2" Assistant Director to HRD Deputy Director, cc Applicant, HRD Director, and others, "Assessment of [Applicant]," April 12, 2010.) Applicant produced a response to this final assessment by Memorandum of April 19, 2010, in which he disputed the evaluation of his performance on a series of job responsibilities. (Memorandum from Applicant to "Department 2" Assistant Director, cc Department Director, SPM, HRD Deputy Director, HRD Director, "Reply to memorandum 'Assessment of [Applicant],'" April 19, 2010.)

79. In April 2010, the Fund's HRD Director took the decision not to convert Applicant's fixed-term appointment to open-ended status. The HRD Director acknowledged in her Grievance Committee testimony that it was not usual practice for the HRD Director to take a decision on conversion of a fixed-term appointment but that as Mr. "HH" had been evaluated in two different Departments she reviewed the assessment of each of the Department Directors and took the final decision. (Tr. II, p. 259.) The HRD Director testified that the process she undertook included discussion with the two Department Directors and review of documentation, including Applicant's written responses to the evaluation of his performance. (Tr. II, pp. 264-265.) In his Grievance Committee testimony, the "Department 2" Assistant Director confirmed that his Department provided its input to the non-conversion decision, concluding that the "expectations of the performance had not been met in the period under review in ["Department 2"]. (Tr. II, pp. 60-61.)

80. The non-conversion decision was communicated to Applicant in a meeting of April 19,

2010, in which the Director and Deputy Director of HRD both participated. According to the HRD Deputy Director's Memorandum for Files, Applicant was informed in that meeting of the grounds for the decision, namely, ". . . significant gaps relative to the standards expected of B-level staff with respect to work management, including the ability to handle multiple tasks, drive for results, and ability to produce high-quality output under tight deadlines; analytical skills; strategic vision and leadership skills; and the ability to work independently and deliver close-to-final written products." In the meeting of April 19, Applicant questioned the decision on both substantive and procedural grounds and scheduled a follow-up meeting with the HRD Director. (Memorandum to Files from HRD Deputy Director, "Meeting with [Applicant] on Conversion Decision," cc Applicant, HRD Director and Directors of "Department 1" and "Department 2", April 20, 2010.) The follow-up meeting was held two days thereafter; according to the HRD Deputy Director, Applicant ". . . emphasized his disappointment that he had not had an opportunity to convey his views on the matter to [the HRD Director] before she took the decision whether to convert or not." (Memorandum for Files from HRD Deputy Director, "[Applicant] - Additional Meeting April 21," April 22, 2010.)

Channels of Administrative Review

81. Following notification of the non-conversion of his fixed-term appointment, Mr. "HH" challenged that decision before the Fund's Grievance Committee, pursuant to GAO No. 31. The Committee considered the Grievance in the usual manner, on the basis of oral hearings and the briefs of the parties. On December 22, 2011, the Committee issued its Recommendation and Report, recommending that Applicant's Grievance be sustained in part, on the ground that Mr. "HH"'s transfer to "Department 2" without the benefit of a new fixed-term appointment violated the "mobility" provision of the Fixed-Term Monitoring Guidelines. The Grievance Committee recommended that Applicant be granted a monetary award in the amount of one year's salary and full reimbursement of the costs of his legal representation before the Committee. (Grievance Committee Recommendation and Report, December 22, 2011.)

82. Without commenting on the Grievance Committee's substantive conclusions, Fund Management accepted the recommendations that Applicant be granted a monetary award equal to one year's salary, along with full reimbursement of his legal expenses. (Letter from Deputy Managing Director to Applicant, February 14, 2012, and covering email of February 16, 2012.)

83. On May 16, 2012, Applicant filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

84. The principal arguments presented by Applicant in his Application and Reply may be summarized as follows.

1. Respondent abused its discretion in deciding not to convert Applicant's fixed-term appointment to an open-ended appointment.

2. Applicant's transfer to a different Fund department during the course of his fixed

term, without the renewal of his appointment for another three-year period, violated the Fund's Fixed-Term Monitoring Guidelines and deprived him of the opportunity to demonstrate his suitability for a career appointment prior to the decision on conversion.

3. The Tribunal has jurisdiction to review the circumstances of the transfer.

4. Applicant did not initiate, request or agree to the transfer.

5. The proposal that Applicant change from a fixed-term appointment to a limited-term appointment, providing an additional six months in the new department, was not an acceptable option.

6. The improper transfer during the course of Applicant's fixed-term appointment, in violation of the Fixed-Term Monitoring Guidelines, invalidates the non-conversion decision.

7. The non-conversion decision was affected by other serious procedural errors.

8. Applicant's supervisor delayed completing the scheduled performance reviews according to the timetable set by the Fixed-Term Monitoring Guidelines.

9. The HRD Director improperly took the non-conversion decision herself and failed to provide Applicant the opportunity to be heard before taking the decision.

10. Applicant seeks as relief:

    a. rescission of the non-conversion of his fixed-term appointment and reinstatement for a three-year fixed-term appointment or, alternatively, compensation for "tangible economic damage";

    b. "compensatory and moral damages" in the amount of three years' salary; and

    c. legal fees and costs incurred in pursuing his case before the Administrative Tribunal.

Respondent's principal contentions

85. The principal arguments presented by Respondent in its Answer and Rejoinder may be summarized as follows.

1. The Fund's decision not to convert Applicant's fixed-term appointment to an open-ended appointment was a reasonable exercise of managerial discretion. Applicant's performance was properly evaluated and fell short of that required for conversion.

2. Applicant failed to exhaust channels of administrative review with respect to the transfer decision, and the Tribunal accordingly is without jurisdiction to address

his challenge to it.

3. Applicant initiated, promoted and knowingly agreed to the transfer and is thereby estopped from challenging the transfer as a violation of the Fixed-Term Monitoring Guidelines.

4. The circumstances of Applicant's transfer between departments did not taint or invalidate the non-conversion decision.

5. Applicant received repeated cautionary evaluations of his performance and extraordinary opportunities to demonstrate his suitability for a career appointment with the Fund.

6. Any minor delays in the performance assessment process do not invalidate the non-conversion decision; the Fixed-Term Monitoring Guidelines provide only indicative timing and Applicant was given continuous feedback.

7. The HRD Director considered Applicant's written rebuttals of the assessments of his performance before taking the non-conversion decision.

Relevant Provisions of the Fund's Internal Law

86. For ease of reference, the principal provisions of the Fund's internal law relevant to the consideration of the issues of the case are set out below.

GAO No. 3, Rev. 7 (May 1, 2003), Section 3

87. GAO No. 3, Rev. 7, Section 3, provides:

> *Section 3. Types of Staff Positions and Appointments*
>
> This section sets forth the Fund's employment framework and the policies governing (a) staff positions, (b) staff appointments, and (c) benefits entitlements for the different categories of employment.
>
> 3.01 *Types of Staff Positions*
>
> Staff members may be appointed to fill either a regular staff position or a term position.
>
> 3.01.1 *Regular positions*. Regular positions are for an indefinite period.
>
> 3.01.2 *Term positions*. Term positions are positions for a limited period of time and are subject to a sunset clause. They shall be designated by management, on the advice of the

department concerned, and in consultation with the Human Resources Department and the Office of Budget and Planning.

3.02 *Types of Staff Appointments*

3.02.1 *Open-ended appointments*

3.02.1.1 Open-ended appointments are for:

(i) functions that carry out the mission of the Fund (positions directly involved in consultations and negotiations with member countries and those that perform other key ongoing functions essential to the basic operation of the Fund); and

(ii) functions that support the mission of the Fund and

(a) for which the Fund wishes to build expertise and the skills requirements are not likely to change significantly over several years, or

(b) that require institutional knowledge and continuity.

3.02.1.2 Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment. Persons holding fixed-term appointments shall be designated as fixed-term staff members.

3.02.1.3 If fixed-term staff members meet the performance requirements, demonstrate potential for a career at the Fund, and meet the Fund's staffing requirement, their appointment may be converted from fixed-term to open-ended status at the expiration of the fixed-term appointment. Persons holding open-ended appointments shall be designated as regular staff members.

3.02.1.4 Staff recruited to fill senior level positions (Grades B3–B5) shall receive three- to five-year fixed-term staff appointments. After completion of the initial fixed-term appointment, these appointments may be renewed without limit for

fixed-term periods up to five years up to mandatory retirement age, or converted to open-ended appointments.

3.02.1.5 Staff who rejoin the Fund may, at the discretion of the Fund, be offered an open-ended appointment without first having to complete successfully a fixed-term appointment, provided that they were regular staff at the time they separated from the Fund. This provision shall not apply to former staff members who are appointed to B3–B5 positions.

3.02.2 *Limited-term appointments*

3.02.2.1 Limited-term appointments shall normally be used in the following cases:

(i) The organization and/or functions of a department are under review; consequently, the skills needed for some of its functions are likely to change significantly over a few years; or the long-term need for some positions is not certain; or

(ii) The function supports the mission of the Fund and is likely to continue, but the Fund does not wish to build expertise in the function, or the skills required to fulfill the function are expected to change significantly; or

(iii) The function is required for a limited period or fewer positions will be required to support a function after initial startup costs. In these cases, some or all of the administrative budget positions are authorized for a limited period (term positions).

3.02.2.2 Limited-term appointments shall be for a period of up to three years and may be extended once up to a cumulative period of five years in that position. Limited-term appointments shall not carry any expectation of conversion to open-ended appointments in the position. Persons holding limited-term appointments shall be designated as limited-term staff members.

3.02.2.3 Employees on secondment from another institution or government agency shall be given limited-term appointments. Staff members holding such appointments shall have no expectation or possibility of conversion to an open-ended appointment in any position at the Fund unless specifically agreed between all the parties. With the approval of the parent institution and of the Fund, the initial limited-term appointment may be extended for up to two years.

3.03. *Benefits for fixed-term and limited-term appointments*

3.03.1 Fixed-term and limited-term appointments shall carry all the benefits of open-ended appointments except that

(i) eligibility for a salary advance for the purchase of a home shall be determined in accordance with the provisions of GAO No. 22; (Financial Assistance Through Salary Advances)

(ii) staff members on fixed-term or limited-term appointments for less than two years shall

(a) be eligible for reduced appointment and resettlement benefits, in accordance with GAO No. 8; (Relocation Benefits and Separation Grant) and

(b) not be eligible for home leave.

(iii) staff members on fixed- or limited-term appointments of two years or more shall be eligible but not required to participate in the Staff Retirement Plan. In respect of a fixed-term or a limited-term staff member who chooses not to participate in the Staff Retirement Plan, the Fund, at the staff member's request, shall pay the previous employer's normal contribution to the staff member's regular retirement plan, provided that the staff member has arranged to continue participation in such a plan during his period of service with the Fund, and provided further that

> the annual amount paid by the Fund shall not exceed 14 percent of the amount that would be the staff member's notional gross remuneration if he were a participant in the Staff Retirement Plan.

(Emphasis added.)

Fixed-Term Monitoring Guidelines

88. The Fund's Fixed-Term Monitoring Guidelines, which governed during the relevant period, provided in part:

> **The Fixed-Term Monitoring Process**
> The fixed-term period is intended to provide the Fund with adequate time to assess both the business need for the position, as well as the staff member's suitability for this and other positions within the Fund, before making a decision to offer an open-ended appointment. Specific objectives of the fixed-term monitoring process are to:
>
> - Assist managers in evaluating the performance of new staff in their current role and their potential for a long-term career in the Fund;
> - Help new staff perform at full capacity by ensuring that they receive clear work objectives and structured feedback that helps convey the Fund's expectations; and
> - Help the Fund in making an informed career employment decision towards the end of the fixed-term period.
>
> The monitoring process has a set number of stages and specific fixed-term performance review (FTPR) forms have been designed for each stage in the process with the competency ratings aligned to the regular annual performance review (APR) forms. Fixed-term staff members only complete regular APR forms after the conversion decision to open-ended status has been made.
>
> Following the Employment, Compensation, and Benefits (ECB) review, **fixed-term appointment offers made on or after May 1, 2006 for staff in Grades A1 to B2 will be for a three-year term**. At the 30th month of the staff member's appointment, the Fund will make a decision to either convert the staff member to regular status or to let the employment relationship lapse at the end of the fixed-term period. **It will not be possible to extend these fixed-term appointments beyond 36 months**.

The option to offer a limited extension for up to one year will continue for fixed-term staff appointed or offered appointments before May 1, 2006. For this group of staff, the career employment decision will fall due at the 18th month (for two-year fixed-terms) and at the 30th month (for three-year fixed-terms). Confirmation of the length of the staff member's fixed-term appointment can be made by consulting their employment history (chron) report or the fixed-term panel in PeopleSoft.

These changes become effective immediately, apply to all fixed-term staff subject to the monitoring process, are summarized in the table below, and illustrated in the **attached table**. Each stage of the fixed-term monitoring process is explained in more detail in the sections that follow.

Stage	Timing	Purpose	FTPR Form Section 1/
Performance Planning	Within 3 months	To brief the staff member on their role and on the fixed-term process.	A
Interim Review	6–7 months after performance planning discussion	To document the staff member's early progress and adjust work objectives, if necessary.	B
12-month Review (First Full Review)	At the 12th month	To provide the staff member with a detailed performance assessment and add or revise work objectives for the coming year.	C
Mid-point Review	Halfway between the 12-month Review and the Second Full Review (APR cycle). Mandatory where this gap is greater than 9 months.	To ensure that staff members receive adequate feedback between the two detailed performance assessments (the 12-month Review and Second Full Review). This Mid-point Review is to be documented in a memorandum for files.	Memorandum for files
Second Full Review	During the regular APR cycle that falls at least 6 months after the 12-month review.	To provide the staff member with a second detailed performance assessment, adjust revise work objectives if necessary, and document the staff member's merit information for performance over the fiscal year.	D

Career Decision Review	At the 30th month	To arrive at a career employment decision after assessing the staff member's performance and potential over the full fixed-term period and considering staffing needs.	E–F
End of Fixed-term	End of 36-month:	• conversion or • separation	–

1/ Forms are found in Word (IMF/Forms/Career-Related Forms/Fixed-Term Performance Review)

Performance Planning

The manager is expected to brief the staff member on their role and on the fixed-term monitoring process soon after the fixed-term begins and at the latest, within three months of the start date.

- In developing the performance plan for the staff member (Section A of the FTPR form), it is recommended that the manager first reflect on the performance standards that will be expected from the staff member in two and a half years, before setting work objectives and performance expectations for the first year.
- The target date for the first performance review, the interim review, should also be determined, indicated on the form, and conveyed to the staff member during the performance planning discussion.
- The staff member's fixed-term panel in PeopleSoft has provision for the interim review date to be entered and this should be done by the ASPM or OM after the performance planning discussion has taken place. The date will then show up in the monthly report to departments on upcoming reviews.

During the first year, the staff member will also be working towards familiarization of the position, department, and the Fund. Performance reviews in the following months and years will provide opportunities to confirm, revise, or expand initial work objectives to accommodate changing divisional work plans and the fixed-term staff member's enhanced capacity.

Assessment of Performance and Potential

As laid out in the key features of the monitoring process, staff members on a three-year fixed-term will receive three or four assessments before the career employment assessment at the 30th

month takes place: (i) the interim review, (ii) the 12-month review, (iii) the mid-point review, and (iv) the second full review. The manager is therefore asked to remember to make full use of the period leading up to the career employment decision by using each review stage to indicate the extent to which fully successful performance in the position has been demonstrated.

The staff member should also be assessed against potential for a longer-term career in the Fund. With each review, as performance assessments are considered, the manager will have opportunity to reflect on areas where the staff member exhibits strong potential. Areas where the staff member fully meets or consistently exceeds standards will likely be indicative of future potential and if so, should be noted as such against the specific competencies.

Interim Review

This brief review is conducted six to seven months after the performance planning discussion and provision is made in Section B of the FTPR form for the manager to document the staff member's early progress and to adjust work objectives, if necessary. After this feedback is conveyed, the staff member may wish to add comments in the space provided. The section is then signed off by the manager, SPM, and staff member. At this point, the fixed-term review panel in PeopleSoft should be updated by the ASPM or OM to indicate that this review has been completed and the form distributed as indicated on the form.

12-month Review

A detailed performance assessment is conducted around the 12th month of the staff member's fixed-term. This assessment is captured on Section C of the FTPR form as follows:

- The staff member briefly lists key achievements over the 12-month period and forwards the form to his/her manager.
- Before scheduling the performance discussion, the manager assesses the staff member's performance against established standards for the position and rates the staff member against each competency. In the narrative section, the manager elaborates on the staff member's key strength[s] and areas for improvement. The review form should be shared with the staff member ahead of the performance discussion.
- After the meeting, the manager records the outcome of the discussion and notes any new or revised objectives for the coming year. For staff on a three-year fixed-term and if applicable, the manager also indicates the target date for the mid-point review (see **illustrative timetable**). This date is also available on the staff member's fixed-term panel in PeopleSoft.

- The section is signed off by the manager, SPM, and staff member and as before, the fixed-term review panel in PeopleSoft should be updated by the ASPM or OM to indicate that this review has been completed and the form distributed as indicated on the form.

Mid-point Review
For staff with a gap of nine months or more between the 12-month Review and the Second Full Review, a Mid-point Review will be conducted halfway through this period. This review is only applicable to staff on three-year fixed-terms and the indicative review date can be found on the staff member's fixed-term panel and in the report on upcoming reviews that departments receive at the beginning of each month.

The outcome of the Mid-point Review is to be documented by the manager in a memorandum for files. The staff member should receive a copy of this memorandum, the department should also retain a copy, and the original should be forwarded to the department Human Resources Officer in the Staff Development Division (SDD).

Second Full Review
This is the second detailed performance assessment and will take place during the regular APR cycle. The assessment is completed on Section D of the FTPR form, not the regular APR form, and is only applicable to staff on three-year fixed-terms.

- The staff member briefly lists their key achievements since the 12-month review and forwards the form to their manager.
- Before scheduling the performance discussion, the manager assesses the staff member's performance against established standards for the position and rates the staff member against each competency. In the narrative section, the manager elaborates on the staff member's key strength[s] and areas for improvement. This should be shared with the staff member ahead of the performance discussion.
- After the meeting, the manager records the outcome of the discussion and notes any new or revised objectives for the coming year and signs the form.
- Once the merit exercise has been concluded, the department review and merit information section will be completed and signed by the SPM.
- The staff member reviews and signs the form. As before, the fixed-term review panel in PeopleSoft is updated by the ASPM or OM to indicate that this review has been completed and the

form is distributed as indicated at the bottom of the form.

Addressing Poor Performance

A critical aspect of the fixed-term monitoring process is timely attention to performance issues. Unsatisfactory performance in one or more key areas should be addressed as soon as this becomes evident and the department's SPM and ASPM should be consulted for advice on the most appropriate course of action. SDD should be kept informed by the ASPM as needed. SDD may consult/involve LEG as appropriate.

The most appropriate approach to handling poor performance during the fixed-term will depend on several factors, including—but not limited to—the performance gap, remedial support provided thus far, and the fixed-term monitoring stage. If not sufficiently documented and addressed in the context of a fixed-term review stage, other possible approaches include documenting the performance issues in a memorandum to the staff member or establishing a Performance Improvement Plan (PIP) for the staff member. If performance fails to improve after a reasonable period or if performance is clearly inadequate in key areas, the staff member should be placed on probation with a PIP that details the improvement required. A staff member can be placed on probation at any time during the fixed-term monitoring process and probation may lead to separation of the staff member before the end of the fixed-term period.

. . . .

Mobility

Fixed-term staff are expected to remain in the same department, and will normally retain the same position, for the duration of the appointment. Interdepartmental mobility will only be possible after the career employment decision has been made, i.e. after the staff member has been in the department for two and a half years. Fixed-term staff will only be able to apply to—internally or externally—advertised positions after conversion to open-ended status.

In exceptional cases, where it is clearly in the Fund's interest to reassign the staff member to a different department before conversion to open-ended status, the staff member will be offered a new fixed-term appointment and the fixed-term monitoring process will begin anew. Such arrangements require agreement between the staff member and the two departments involved, and the

endorsement of HRD through RSD.

(Emphasis in original.)

Staff Bulletin No. 06/6 (Change in Policy: Three-Year Fixed-Term Appointments) (May 25, 2006)

89. Staff Bulletin No. 06/6 governed Applicant's fixed-term appointment and provided in part:

> *This Staff Bulletin announces a change in policy for fixed-term appointments at Grades A1 to B2. Effective for offers made on or after May 1, 2006, all fixed-term appointments at these grade levels, including those in the Economist Program, will be increased from a two-year term to a three-year term.*
>
> . . . Under this framework, the Fund will make a decision at the 30th month of a staff member's appointment to either convert the staff member to regular status or to let the employment relationship lapse at the end of the fixed-term period. Fixed-term appointments will not be extended beyond 36 months.
>
> The purpose of this policy change is to provide the institution with a longer period during which to assess both the business need for the position, as well as the staff member's suitability for this and other positions within the Fund, before making a decision to offer an open-ended appointment. . . .

(Emphasis in original.)

Consideration of the Issues

90. The Application of Mr. "HH" presents the following question for the consideration of the Administrative Tribunal. Did the Fund abuse its discretion in deciding not to convert Applicant's fixed-term appointment to an open-ended appointment? In answering this question, the following issues need to be addressed:

(i) What is the significance of the Grievance Committee's recommendation, and of Fund Management's response, in respect of the Committee's conclusion that Applicant's interdepartmental transfer was not consistent with the "mobility" provision of the Fixed-Term Monitoring Guidelines?

(ii) What is the standard of review that governs in challenges to non-conversion decisions?

(iii) May Applicant raise as a ground for challenging the non-conversion of his fixed-term appointment the allegation that his interdepartmental transfer during the course of the fixed term was inconsistent with the Fixed-Term Monitoring Guidelines?

(iv) If the transfer may be raised as a ground for challenging the non-conversion decision, was Applicant's interdepartmental transfer, without the renewal of his fixed term for another three-year period, consistent with the "mobility" provision of the Fixed-Term Monitoring Guidelines?

(v) If the transfer was not consistent with the Fixed-Term Monitoring Guidelines, what impact, if any, does that inconsistency have on the non-conversion decision and, in particular, can it be said that the interdepartmental transfer during the course of the fixed term resulted in the non-conversion decision being arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures?

(vi) Did Applicant's supervisors provide him with the requisite monitoring and feedback over the course of the fixed term?

(vii) In taking the non-conversion decision, did the Fund afford Applicant a reasonable opportunity to be heard?

(i) What is the significance of the Grievance Committee's recommendation, and of Fund Management's response, in respect of the Committee's conclusion that Applicant's interdepartmental transfer was not consistent with the "mobility" provision of the Fund's Fixed-Term Monitoring Guidelines?

91. Before addressing the merits of the dispute, the Tribunal notes that the Application has been filed following the acceptance by Fund Management of a recommendation by the Grievance Committee that Applicant be compensated for what the Committee concluded was a failure of the Fund to follow its internal law governing interdepartmental transfer during the course of a fixed-term appointment. (As noted above,[13] the Fund granted Applicant the recommended monetary award without commenting on the substance of the Grievance Committee's conclusions.) Applicant states that he brings the Application because, in his view, the Grievance Committee failed to appreciate the gravity of the alleged failure of fair process and that that failure should vitiate the non-conversion decision itself. Respondent counters that there has been no procedural error and that, in any event, Applicant has already received substantial compensation.

92. The task for the Tribunal is, as always, to consider the contentions of the parties *de novo*. *Ms. "BB",* paras. 60-66. *See also Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 96 (Tribunal's review authority "fully penetrates the layer of administrative review provided by the Grievance Committee"). Moreover, the "authority of the Administrative Tribunal to make both findings of fact and conclusions of law, and therefore to review *de novo* the legality of an administrative act of the Fund, stems from the Tribunal's unique role as the sole judicial actor within the Fund's dispute resolution system." *Ms. "J"*, para. 95; the mandate of the Tribunal is not simply to

[13] *See supra* Channels of Administrative Review.

resolve disputes but to interpret the law of the Fund. *Ms. "BB"*, para. 65. The Grievance Committee's responsibility, by contrast, is to ". . . make recommendations to the Managing Director in order to facilitate the fair and expeditious resolution of disputes." *See* GAO No 31, Rev. 4 (October 1, 2008), Section 1. The Tribunal has observed that the fact of Management's frequent acceptance of the Grievance Committee's recommendations highlights the Committee's role as part of the dispute settlement process. *Ms. "BB,"* para. 64.

93. Accordingly, the fact that the Fund paid Mr. "HH" a monetary award following the Grievance Committee's recommendation, without commenting on the Committee's substantive conclusions, does not affect the Tribunal's weighing of the merits of his case. If the Tribunal concludes that Applicant has prevailed in whole or in part on this Application, it may take account of that payment in determining the appropriate measure of relief.

(ii) What is the standard of review that governs in challenges to non-conversion decisions?

94. The non-conversion of a fixed-term appointment is an individual decision taken in the exercise of managerial discretion. The Administrative Tribunal consistently has invoked the following standard set forth in the Commentary on the Statute:

> [W]ith respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.

Commentary on the Statute, p. 19. The Tribunal has observed that the abuse of discretion standard is a "flexible one that this Tribunal has tailored in a manner appropriate to the nature of the case presented," *Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012), para. 75, and that the depth of scrutiny may vary ". . . according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker," *Ms. "J"*, para. 99.

95. In reviewing decisions involving assessment of professional qualifications, the Tribunal has often cited the following portion of the Statutory Commentary:

> This principle [of deference to managerial discretion] is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.

Commentary on the Statute, p. 19. *See Sachdev,* paras. 98-99 (challenge to non-selection for

promotion); *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 72 (same); *Mr. "F", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2005-1 (March 18, 2005), para. 70 (finding "persuasive" Fund's position that Mr. "F" was not qualified for a redesigned position following the abolition of his post).

96. The Tribunal has characterized the decision whether to convert a fixed-term appointment to open-ended status as a "performance-based decision," referencing the same paragraph of the Commentary on the Statute. *Ms. "J",* para. 108 and note 27; *see also Ms. "T", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-2 (June 7, 2006), para. 36; *Ms. "U", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-3 (June 7, 2006), para. 36. In later summarizing the approach it had taken in *Ms. "C", Applicant v. International Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), the Tribunal explained: "Noting evidence in the record of performance deficiencies, the Tribunal *deferred to management's assessment* . . . that Ms. "C" had not met the standard of performance required for conversion of her appointment to regular staff." *Ms. "J"*, para 108. (Emphasis added.) Likewise, the World Bank Administrative Tribunal (WBAT) has observed in relation to non-conversion decisions that the ". . . Tribunal will not substitute its own judgment for that of the Respondent on the staff member's suitability for permanent employment." *Salle v. International Bank for Reconstruction and Development,* WBAT Decision No. 10 (1982), para. 30. This Tribunal has concluded that "[w]hen managers take such a decision . . . with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination." *Ms. "T",* para. 53, and *Ms. "U",* para. 53.

97. The Tribunal has also observed that the discretion at issue in the conversion of fixed-term appointments is necessarily distinct from that exercised by management in the separation of a staff member for unsatisfactory performance. *Ms. "T"*, para. 37; *Ms. "U"*, para. 37. Accordingly, the ". . . concept of unsatisfactory performance as used in respect of probation is wider than the same concept used with respect to a confirmed staff member." *McNeill v. International Bank for Reconstruction and Development*, WBAT Decision No. 157 (1997), para. 34. The Fund's Fixed-Term Monitoring Guidelines emphasize that "[t]here must be a clear positive assessment of performance and potential before the important commitment to career employment is made." (Fixed-Term Monitoring Guidelines, overview page.) A fixed-term appointee has no entitlement to the continuation of his employment beyond the term of the appointment, and the burden of proof rests squarely with the applicant in challenging a decision not to convert his fixed-term appointment to regular staff. *Ms. "C"*, para. 21; *Ms. "T"*, para. 37; *Ms. "U"*, para. 37.

98. At the same time, the Fund's discretionary authority to decide upon a staff member's suitability for conversion is necessarily constrained by principles of fair treatment and by the applicable internal law. The Tribunal has recognized in particular that the fixed-term appointee must be afforded adequate opportunity to demonstrate performance consistent with suitability for career employment. *Ms. "T"*, para. 38; *Ms. "U"*, para. 38. *See also McNeill*, para. 44 ("While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met."). As this Tribunal has emphasized, such

opportunity should indicate that the decision ". . . has not been based on a performance which has manifestly not benefitted from adequate supervision and guidance," *Salle*, para. 32, quoted in *Ms. "T"*, para. 38; *Ms. "U"*, para. 38. The appointee is to be evaluated periodically, given adequate warning of performance deficiencies and a reasonable opportunity to remedy them. These principles are recognized in both the Fund's Fixed-Term Monitoring Guidelines and international administrative jurisprudence. *See Ms. "T"*, para. 38; *Ms. "U"*, para. 38.

99. In a case in which a fixed-term assessment process was marked by procedural irregularity, the Tribunal sustained the non-conversion decision while awarding compensation for procedural failure. In *Ms. "C"*, paras. 41-43, the Tribunal held that ". . . imperfections and irregularities did mark the process of the Fund's decision and permit the Tribunal to find against the Fund not wholly, but in part." These irregularities consisted principally in the failure to provide the fixed-term appointee with the opportunity to answer accusations made against her by co-workers as to her interpersonal skills, as well as to apprise her fully of perceived deficiencies in her performance and of the steps she might take to correct them. *Id.* The Tribunal subsequently has commented that, in awarding a remedy in *Ms. "C"*, it ". . . underscored the importance of procedural fairness in the exercise of discretionary authority even in circumstances in which the lapse of fair process does not result in the rescission of the challenged administrative act." *Negrete*, para. 140.

> (iii) May Applicant raise as a ground for challenging the non-conversion of his fixed-term appointment the allegation that his interdepartmental transfer during the course of the fixed term was inconsistent with the Fixed-Term Monitoring Guidelines?

100. The Tribunal addresses at the outset Respondent's assertion that allegations relating to Applicant's transfer during the course of the fixed term are not properly before the Tribunal because Applicant failed to exhaust administrative review procedures in respect of the transfer and that he is estopped from challenging the transfer because he agreed to it in his own interest. For the reasons set out below, the Tribunal finds no merit to Respondent's objections to its consideration of Applicant's allegations relating to the interdepartmental transfer.

101. Respondent asserts that although Applicant made a record of his objections,[14] that memorandum was "not a proper request for administrative review" and that he did not "take the further step of filing a timely grievance with the Grievance Committee after he received no response to his objections." The Grievance that Applicant did file challenged only the non-conversion decision.

102. The Tribunal observes that among the allegations raised by Mr. "HH" in his Grievance was that the "Fund's refusal to issue a new fixed-term contract . . . was in clear violation of the Fund's own Guidelines," and that the Fund ". . . should not have created a situation that forced Grievant to accept a transfer which was highly prejudicial to his conversion potential . . . ." (Grievance, pp. 39, 46.) Accordingly, Applicant in his Grievance raised essentially the same allegation relating to his transfer that he raises now before this Tribunal.

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[14] *See supra* Factual Background; Transfer to "Department 2", para. 72.

103. Applicant maintains before the Tribunal that the "circumstances of the transfer may . . . be examined in the overall context of the closely related and challenged non-conversion decision" and that those circumstances form an "important element in the Tribunal's determination whether Applicant was treated fairly during his entire fixed-term appointment." Applicant contends that ". . . the legality of the transfer is an issue inextricably linked to the challenged final non-conversion."

104. In the view of the Tribunal, Respondent's objection that Applicant failed to invoke timely administrative review procedures misreads the nature of Applicant's complaint. Applicant does not challenge the transfer itself. Rather, he seeks to show that the decision he does contest, i.e., the non-conversion of his fixed-term appointment in April 2010, was tainted by the terms of his October 2009 interdepartmental transfer, which he alleges was taken in contravention of the "mobility" provision of the Fixed-Term Monitoring Guidelines.

105. The question for the Tribunal in this case is whether the decision not to convert Applicant's fixed-term appointment to open-ended status constituted an abuse of the Fund's discretion. In the view of the Tribunal, the fact that Applicant did not initiate administrative review proceedings following his transfer to "Department 2" does not preclude the Tribunal from taking into account the terms of that transfer in deciding whether Applicant has established that the challenged non-conversion decision was ". . . arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures." Commentary on the Statute, p. 19.

106. Respondent additionally contends that Applicant is estopped from challenging the terms of the transfer because he accepted the option that he did and cannot be heard to complain about it: "[Applicant] knowingly accepted the exceptional arrangements offered—which had been proposed for Applicant's own benefit—and waited to see whether he would realize the hoped-for conversion to an open-ended appointment in ["Department 2"]. Although that did not come to pass, Applicant received the advantage of an additional opportunity to prove himself in ["Department 2"], and it would be inequitable to allow Applicant to belatedly challenge the exceptional nature of the transfer which he accepted."

107. This Tribunal has held, however, that even where a staff member may be said to have accepted particular terms of employment, such terms may still be subject to challenge:

> [T]he fact that a staff member accepts an offer that he or she is free to decline does weigh against challenge to the terms of the contract so accepted. But it is a question only of presumption. The Fund and an applicant for a position in the Fund are not in an equal negotiating position; e.g., as this case shows, the Fund is in possession of relevant information not within the knowledge of an applicant. Accordingly, while the presumption holds, the staff member nonetheless can be heard to argue contrary claims, as in this case, of misrepresentation of facts or irregularity in the process of appointment. The Tribunal concludes that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him

> from challenging the legality of the Fund's determination of grade and salary.
>
> Moreover, precisely what Mr. D'Aoust did accept may be open to question. When the then Director of Administration considered Mr. D'Aoust's request for a revision of his grade and salary, he found that there had occurred in the process of Mr. D'Aoust's appointment events that possibly created a certain degree of misunderstanding and confusion in his mind concerning 'the exact status of the job.'. . . . From these facts the Tribunal deduces that there is room for doubt as to whether there was a true meeting of the minds regarding the nature of the job at the time Mr. D'Aoust accepted his position. If there were not such a meeting of minds, Mr. D'Aoust cannot be treated to his detriment as if there were. The Tribunal accordingly concludes on this ground as well that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of their determination.

D'Aoust, paras. 12-13; *see also Mr. "O", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), para. 84 (challenge to terms of appointment affording limited rather than indefinite reentry to Fund's service following appointment as Advisor to an Executive Director).

108. Accordingly, that Applicant may have accepted the terms of the transfer does not preclude the Tribunal from considering his allegation that the transfer was inconsistent with the Fund's rules and thereby deprived him of fair process in the non-conversion decision. As considered below, the question of Applicant's acceptance of the transfer may be relevant, however, to the Tribunal's consideration of the merits of that allegation.

> (iv) Was Applicant's interdepartmental transfer, without the renewal of his fixed term for another three-year period, consistent with the "mobility" provision of the Fixed-Term Monitoring Guidelines?

109. Applicant, correctly, points out that the "mobility" provision[15] prohibits interdepartmental

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[15] The "mobility" provision of the Fixed-Term Monitoring Guidelines states:

> **Mobility**
> Fixed-term staff are expected to remain in the same department, and will normally retain the same position, for the duration of the appointment. Interdepartmental mobility will only be possible after the career employment decision has been made, i.e. after the staff member has been in the department for two and a half years. Fixed-term staff will only be able to apply to—internally or externally—advertised positions after conversion to open-ended status.
>
> In exceptional cases, where it is clearly in the Fund's interest to reassign the

(continued)

transfers during the course of a fixed term except when that transfer is taken in the interest of the Fund and when the staff member is given a new three-year fixed-term appointment. Respondent, also correctly, counters that ". . . had the Fund strictly adhered to the Guidelines, Applicant would not have transferred from ["Department 1"] *at all*." (Emphasis in original.)

110. The "mobility" provision of the Fixed-Term Monitoring Guidelines must be read in the light of Staff Bulletin No. 06/6 (Change in Policy: Three-Year Fixed-Term Appointments) (May 25, 2006), which revised an earlier policy that permitted the extension (and transfer) of fixed-term appointees for additional development and testing. *See, e.g., Ms. "C",* paras. 9-10; *Ms. "T",* paras. 19, 43; *Ms. "U"*, paras. 16, 45. Effective May 1, 2006, all new offers of fixed-term appointments at Grades A1-B2 were increased from a two-year to a three-year term and extensions eliminated. Under the framework introduced by Staff Bulletin No. 06/6, the "Fund will make a decision at the 30th month of a staff member's appointment to either convert the staff member to regular status or to let the employment relationship lapse at the end of the fixed-term period. Fixed-term appointments will not be extended beyond 36 months." The Fixed-Term Monitoring Guidelines themselves emphasize: "At the 30th month of the staff member's appointment, the Fund will make a decision to either convert the staff member to regular status or to let the employment relationship lapse at the end of the fixed-term period. **It will not be possible to extend these fixed-term appointments beyond 36 months.**" (Emphasis in original.)

111. Applicant was offered three options: (i) to remain in "Department 1", maintaining his existing three-year fixed-term appointment (which would have been in compliance with the Fixed-Term Monitoring Guidelines); (ii) to transfer to "Department 2" on a limited-term appointment, to provide an additional six-month period in "Department 2" before the conversion decision would be taken; or (iii) to transfer to "Department 2", while maintaining his existing three-year fixed-term appointment. The latter two choices were not consistent with the Guidelines, and Applicant chose the third.

112. Applicant now protests that he did not "agree" to the transfer. He states: "Applicant was faced with a false choice. When Applicant finally accepted to transfer under his ongoing fixed-term contract it was simply for lack of any other feasible and available options." Applicant contends that ". . . once [the "Department 1" Director] had strongly suggested to Applicant to consider an interdepartmental move, Applicant was **willing** to entertain the idea and he undertook the steps suggested by [the "Department 1" Director], such as discussing his options with HRD and applying to positions in other departments (unaware of course, that prior to his conversion he was not even eligible to apply due to the very rules in place)." (Emphasis in original.) Applicant asserts that he was "simply abiding by [the "Department 1" Director]'s authoritative suggestions."

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staff member to a different department before conversion to open-ended status, the staff member will be offered a new fixed-term appointment and the fixed-term monitoring process will begin anew. Such arrangements require agreement between the staff member and the two departments involved, and the endorsement of HRD through RSD.

113. Although Applicant asserts that he did not initiate, request or agree to the transfer, the record of the case shows otherwise.

114. Applicant further contends: "[E]ven if Applicant had requested the move, if the Fund was not willing to provide him with a new 3-year fixed term appointment, then it should not have **allowed** the transfer. The Fund should not have led Applicant into a situation where he had only a false choice among three options (remain in ["Department 1"] where his supervisor did not want him, transfer to ["Department 2"] under his ongoing fixed term or change his contract to a limited-term appointment) all of which were prejudicial to him." (Emphasis in original.)

115. The facts of the case, as the record reveals them to be, show that the transfer was made with Applicant's agreement in what he believed to be his own best interest so that he might be evaluated under different supervision. The record further reveals that the Fund recognized that proving himself in a new environment might be difficult for Applicant given the relatively short period that remained in his fixed term before the conversion decision was to be taken. For that reason, HRD, in collaboration with the two Department Directors, devised an option whereby Applicant might extend his time in "Department 2" for an additional six months by way of a "limited-term appointment." Applicant apparently mistrusted this option and rejected it. In his Grievance Committee testimony he explained that he was concerned that such an arrangement might jeopardize his opportunity for conversion, given that limited-term appointments by definition do ". . . not carry any expectation of conversion to open-ended appointments in the position." GAO No. 3, Section 3.02.2.2. Respondent asserts that a "comfort letter" was offered and declined.[16]

116. In his Grievance Committee testimony, the HRD Deputy Director sought to explain the options and arrangements of October 2009 in the light of what he referred to as an unwritten "practice" of the Fund to permit transfer during the course of a fixed-term appointment (but not the extension of the fixed term) with the staff member's agreement. (Tr. II, pp. 134-141.) Similarly, in its pleadings before the Tribunal, Respondent asserts: "The Guidelines do not forbid other arrangements, but they state that any arrangements to transfer a fixed-term staff member between departments will require agreement between the staff member and the two departments involved, and the endorsement of HRD."

117. What is clear is that under the Fund's framework for conversion of fixed-term appointments the fixed-term appointee is ordinarily to remain in the same position and in the same department for the duration of his fixed term, except in the "exceptional" circumstances specified in the "mobility" provision of the Fixed-Term Monitoring Guidelines.

118. When Applicant in October 2009, i.e., before the effective date of the transfer, sought

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[16] In his Grievance Committee testimony, the HRD Deputy Director sought to explain the proposed arrangement as follows: "You cannot formally convert a limited-term appointment into an open appointment, but you can give somebody a job who has finished his limited-term appointment in the Fund, and you can give them even a permanent staff position because you can say that they have already, you know, completed a substantial amount of service equivalent to what would have been a normal fixed-term." (Tr. II, p. 171.)

clarification from an HRD Division Chief as to how the transfer would fit within the fixed-term monitoring framework, he specifically inquired: "Why not implement the procedures presented in the second paragraph of the "Mobility" section of the *Fixed-Term Monitoring* process. . . ?" In response, Applicant was informed that ". . . we cannot implement the procedures for mobility during fixed-term as you cited. The reason is that such procedures will require a FT [fixed-term] vacancy, a selection process, and a department willing to select you for a new three year fixed-term appointment. This is the approach that you have explored with your application for a position in [other departments]. If you were selected for any of those positions, then you could have been considered for a new 3 year fixed-term appointment." (Email correspondence of October 8-15, 2009 between Applicant and HRD Division Chief.)

119. In the view of the Tribunal, the transfer was not a transfer contemplated within the proviso set out in the Guidelines. That proviso contemplates a transfer before conversion to open-ended status where it is in the interests of the Fund to do so. In such a case, the staff member will be offered "a new fixed-term appointment and the fixed-term monitoring process will begin anew." (Fixed-Term Monitoring Guidelines, "Mobility" provision.)

120. What is clear from the record is that the arrangement to transfer Applicant to "Department 2" arose not from any independent institutional need to reassign staff but rather in response to the performance difficulties that Mr. "HH" had encountered in "Department 1", his assertion to a senior HRD official that "failure was not an option" for him, and his own efforts to seek alternate channels by which to prove his potential for career employment with the Fund. The Tribunal accordingly concludes that it cannot be said that the transfer was taken "clearly in the Fund's interest."

121. In the view of the Tribunal, because the transfer was not made "clearly in the Fund's interest," the exception contained in the "mobility" provision did not apply and did not mandate that Applicant's transfer from "Department 1" to "Department 2" be accompanied by a new three-year fixed-term appointment. At the same time, that provision additionally states: "Fixed-term staff are expected to remain in the same department, and will normally remain in the same position, for the duration of the appointment."

122. In the view of the Tribunal, the Fixed-Term Monitoring Guidelines are clear. They permit transfer during the currency of a fixed-term appointment only in narrow circumstances: (i) when it is "clearly in the Fund's interest," (ii) when the staff member and both relevant departments agree, (iii) only on condition that the staff member is offered a new fixed-term appointment for three years in the position to which he or she is to be transferred, and (iv) the transfer is endorsed by HRD. Those narrow circumstances were not present in the case under consideration.

123. Accordingly, the Tribunal concludes that the transfer of Applicant was not in accordance with the Fund's internal law. The question that next arises is what effect the fact that the transfer was not in accordance with the Fund's internal law had on the subsequent non-conversion decision.

> (v) Given that the transfer was not consistent with the Fixed-Term Monitoring Guidelines, what impact, if any, does that inconsistency have on the non-conversion decision and, in particular, can it be said that the interdepartmental transfer during the

course of the fixed term resulted in the non-conversion decision being arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures?

124. The transfer process was not consistent with the Fixed-Term Monitoring Guidelines, but the question for consideration in these proceedings is whether that inconsistency had the consequence that the non-conversion decision itself constituted an abuse of the Fund's discretion. Applicant asserts that it did and contends, in particular, that, as a result of the Fund's decision to offer him a transfer contrary to its internal rules, he was unfairly required to choose among three options.

125. In order to answer this question, it will be helpful to understand the policy that underlies the Fixed-Term Monitoring Process set out in the Guidelines. The Guidelines commence by stating that the fixed-term period "is intended to provide the Fund with adequate time to assess both the business need for the position, as well as the staff member's suitability for this and other positions within the Fund, before making a decision to offer an open-ended appointment." Ongoing monitoring of fixed-term staff is central to these goals and the Guidelines state further that one of the aims of the monitoring process is to "[h]elp new staff perform at full capacity by ensuring that they receive clear work objectives and structured feedback . . . ."[17]

126. The restrictions on a staff member's mobility during a fixed-term appointment must be understood in the light of these goals. Accordingly, the policy underlying the restrictive "mobility" rule appears to be that a staff member should be given a fair opportunity to prove that his or her fixed-term appointment should be converted to open-ended status. The Guidelines therefore prohibit a staff member being moved from one department to another apparently to avoid staff members on fixed-term appointments not being given adequate time to adapt to the job and establish a suitably high level of performance. The only exception explicitly contemplated in the Guidelines to this policy arises where the Fund considers it in its interest to transfer the staff member. Then the Guidelines require that the staff member be given a new fixed-term appointment and the monitoring process will start afresh. The consequence of this exception is that a staff member will not be disadvantaged—in terms of the opportunity to demonstrate performance consistent with the conversion of his or her fixed-term appointment—by a personnel decision that is taken by the Fund in its own interest.

127. In considering the effect of the transfer decision on the non-conversion decision in this case, the Tribunal is mindful that, as Respondent correctly points out, if the Fund had adhered strictly to its rules, Applicant would have been afforded no choice at all. He would have been required to remain in his current Department for the duration of the three-year term where he had already been warned that his performance was lacking.

128. The facts of the case, as the record reveals them to be, show that the transfer was made with Applicant's agreement in what he believed to be his own best interests so that he might be evaluated under different supervision. The record further reveals that the Fund recognized that

[17] The full text of the provision is set out at para. 88 above.

proving himself in a new environment might be difficult for Applicant given the relatively short period that remained in his fixed term before the conversion decision was to be taken. For that reason, HRD, in collaboration with the two Department Directors, devised an option whereby Applicant might extend his time in "Department 2" by way of a "limited-term" appointment for an additional six months. Applicant rejected this option, expressing concern that such an arrangement might jeopardize his opportunity for conversion, given that limited-term appointments by definition do ". . . not carry any expectation of conversion to open-ended appointments in the position." GAO No. 3, Section 3.02.2.2. Respondent asserts that a "comfort letter" was offered and declined. The purpose underlying the decision to offer Applicant a transfer was not inconsistent with the spirit of the Fixed-Term Monitoring Guidelines, although the transfer was inconsistent with the letter of those Guidelines. The purpose was to give Applicant an opportunity to be supervised by a "second pair of eyes" in a different department to show that he was able to perform at a level which would result in his conversion to an open-ended appointment.

129. What is clear is that the Fund sought a solution, outside of its written law, by which it would afford Applicant the opportunity to be evaluated under different supervision to assess his suitability for career employment as a B-level manager in the institution. Applicant agreed to the transfer, effective October 27, 2009, under the terms that he did, that is, while continuing in the three-year fixed-term appointment that was to expire in October 2010 unless a favorable conversion decision was made in April 2010 (the 30-month mark of the fixed term). In agreeing to the terms of the interdepartmental transfer, Applicant rejected two alternative options: (a) to remain in his original department for the duration of the fixed-term, with the conversion decision determined solely by the assessment of his performance in "Department 1"; or (b) to transfer to "Department 2" by way of a limited-term appointment designed to afford him a full year, rather than six months, of evaluation in new circumstances.

130. Although the option offered to Applicant was not consistent with the Fund's internal law, it was not unfair to Applicant to seek to create an opportunity for him to prove his worth to the Fund as a staff member by effecting an interdepartmental transfer during the course of his fixed-term appointment. Had the Fund applied its internal law in this case, Applicant would not have been given a second opportunity to establish his suitability for career employment, and, on the record before the Tribunal, would almost certainly not have had his fixed-term appointment converted to an open-ended appointment. The Tribunal concludes that the fact that the Fund sought, with Applicant's acquiescence, to give him a second opportunity cannot be said to be unfair or unreasonable to Applicant such that it vitiated the non-conversion decision.

(vi) Did Applicant's supervisors provide him with the requisite monitoring and feedback over the course of the fixed term?

131. International administrative jurisprudence and this Tribunal have recognized that the fixed-term appointee is to be evaluated periodically, given adequate warning of performance deficiencies and a reasonable opportunity to remedy them. In short, the fixed-term appointee must be afforded adequate opportunity to demonstrate performance consistent with suitability for career employment. *Ms. "T"*, para. 38; *Ms. "U"*, para. 38. The Fund's internal law gives effect to these principles in the Fixed-Term Monitoring Guidelines, which set out a timetable for

periodic assessment of the fixed-term appointee's performance and advise that a "critical aspect of the fixed-term monitoring process is timely attention to performance issues." (Fixed-Term Monitoring Guidelines, "Addressing Poor Performance.")

132. Was Applicant given an adequate opportunity to demonstrate performance consistent with suitability for career employment?

133. Applicant contends that his supervisors failed to provide him with appropriate monitoring and feedback, in contravention of the Fund's Guidelines and international administrative law. In particular, Applicant complains that the "Department 1" Director failed to adhere to the assessment timetable provided in the Fixed-Term Monitoring Guidelines. The Fund responds that the "minor delays in no way invalidate the non-conversion decision because the Guidelines provide only indicative timing, and Applicant was being given continuous feedback."

134. In the view of the Tribunal, Respondent fully met its responsibilities for periodic assessment and feedback over the course of the fixed term. Any concern that this assessment and feedback may not have followed with precision the timetables indicated in the Fixed-Term Monitoring Guidelines is overcome by the frequent and detailed feedback sessions that were held with Applicant. For example, when, more than a month following Applicant's transfer, on December 8, 2009, the Department Director signed the Fixed-Term Performance Review/Second Full Performance Review for the period ending October 23, 2009, that review noted that its finalization ". . . has been somewhat delayed by [Applicant]'s request to include the feedback exercise conducted mid-year" and that performance discussions had taken place in five sessions over a six-week period. (Fixed-Term Performance Review/Second Full Performance Review, signed December 8, 2009.) As this Tribunal observed in *Ms. "U"*, para 41, "[w]hat is significant is that . . . cautionary evaluations repeatedly were communicated."

135. In his Fixed-Term Performance Review/12-Month Performance Review, signed February 18, 2009, Applicant was notified of two areas in which "strengthening in the period ahead is crucial: (i) analytical strengths; and (ii) communication skills." These skills were identified to Applicant as "essential" to being an effective manager in the Fund. In a draft Fixed-Term Performance Review/Second Full Performance Review, circulated to Applicant on June 1, 2009, the Director of "Department 1" cautioned: "Two areas for strengthening performance—analytical strengths and communication skills—that were identified in the last APR as a precondition to be an effective and independent manager . . . *still remain below the critical mark*." (Emphasis added.)

136. In the view of the Tribunal, the record fails to support Applicant's assertions. The record shows that Applicant had the benefit of regular and detailed evaluation of his performance. When weaknesses emerged in analytical and communications skills, both competencies that were deemed essential to successful performance at Mr. "HH"'s level of responsibility in the Fund, he was given assignments that were specifically designed to develop and test the competencies in which he was seen to lag. The "Department 1" Director testified that when Applicant experienced difficulty in succeeding at one particular assignment he was next assigned another, designed to test comparable skills but drawing upon Applicant's prior work experience. (Tr. I, p. 102.) Still, Applicant did not succeed at this next assignment. The "Department 1" Director also

testified that by "rolling up [his] sleeves" and taking on a failed assignment himself, he sought to demonstrate how such assignment should be executed. (Tr. I, pp. 102-105.)

137. The evidence also shows that Applicant was given timely warning that critical elements of his performance fell short of the level expected for his conversion to an open-ended appointment. Significantly, as early as June 1, 2009, Applicant was informed that his analytical and communications skills remained "below the critical mark," weaknesses of which Applicant had been alerted as early as his six-month review. At the eighteen-month juncture, his Department Director signaled increased and diversified efforts to help Applicant to succeed. These included assigning a mentor and consideration of possibly ". . . seeking work opportunities outside ["Department 1"] that will match [Applicant]'s skills better." These efforts were also raised in discussion with HRD. (*See* Memorandum for Files from "Department 1" Director, August 12, 2009.) (*See also* Tr. I, pp. 110-111.)

138. Moreover, Applicant understood the import of these evaluations of his performance. Indeed, Applicant responded vigorously to them, launching a series of detailed memoranda in an effort to rebut his supervisors' assessments of his work product and process.

139. When Applicant moved to "Department 2", he received the benefit of monthly feedback sessions with the Assistant Director of that Department. Yet again, in a new environment and under different supervision, Applicant was seen as falling short of the requisite level of performance for conversion of his appointment.

140. The "Department 2" Assistant Director testified that soon after Applicant's arrival in the Department he observed that ". . . no matter what feedback I was providing on those written documents, the ability wasn't—didn't seem to be manifesting itself. . . . I felt that the weakness in writing that I had heard of in the past was much more serious than I thought." (Tr. II, p. 41.) As a result of this concern, the Assistant Director approached the Senior Personnel Manager (SPM) of the Department for advice, as it was "very clear to [him] that [he] would not wait six months to then give an assessment or feedback to [Applicant]." According to the Assistant Director, the SPM suggested setting objectives and holding monthly feedback meetings, "something along the lines of a performance improvement plan." The Assistant Director testified that he implemented this advice. (Tr. II, pp. 42-44.) This is precisely the approach indicated by the Fixed-Term Monitoring Guidelines.[18]

141. On January 8, 2010, a performance feedback meeting was held between Applicant, the "Department 2" Assistant Director and the SPM. That meeting was summarized by the Assistant Director in a Memorandum for Files of January 27, 2010, which noted that four performance objectives had been set at the start of Applicant's work in the Department. These objectives were designed to require Applicant to apply ". . . general managerial competencies . . . in the areas of

[18] *See* Fixed-Term Monitoring Guidelines, "Addressing Poor Performance" ("A critical aspect of the fixed-term monitoring process is timely attention to performance issues. Unsatisfactory performance in one or more key areas should be addressed as soon as this becomes evident and the department's SPM and ASPM should be consulted for advice on the most appropriate course of action.").

managing work, applying analytical skills, and producing written products expected of B level staff in general in the Fund with minimal supervision . . . .” The Memorandum further noted that Applicant had been advised that it was appropriate to provide him with “early feedback . . . as soon as reasonably possible, given the fact that important expectations were not being met to date” and stated that monthly follow-up sessions were anticipated. (Memorandum for Files from “Department 2” Assistant Director, cc to Applicant and HRD, “Feedback to [Applicant] on his performance in [“Department 2”],” January 27, 2010.)

142. In the view of the Tribunal, the record confirms that Applicant’s supervisors provided him ample and timely performance feedback over the course of his fixed term. The Tribunal finds no merit to Applicant’s contentions otherwise.

(vii) In taking the non-conversion decision, did the Fund afford Applicant a reasonable opportunity to be heard?

143. Applicant additionally alleges that the Fund failed to give him a “reasonable opportunity to be heard” before taking the non-conversion decision. In particular, he asserts that the HRD Director should not have taken the decision herself, that specific sections of fixed-term monitoring forms were not completed, and that the HRD Director failed to take into account Applicant’s views before taking the contested decision.

144. Respondent, for its part, asserts that under the fixed-term monitoring process the opportunity to be heard is afforded at the time of each performance assessment. It is not disputed that Applicant availed himself of those opportunities, submitting a series of detailed written rebuttals to his supervisors’ assessments. These rebuttals are part of the record before the Tribunal.

145. The HRD Director acknowledged in her Grievance Committee testimony that it was not usual practice for the HRD Director to take a decision on conversion of a fixed-term appointment but that as Mr. “HH” had been evaluated in two different Departments she reviewed the assessment of each of the Department Directors and took the final decision herself. (Tr. II, p. 259.)

146. The HRD Director explained that she took the decision because “. . . this was a very senior position within the Fund at the B level and there were representations from two department heads. . . .” She testified that she discussed Applicant’s performance with both Directors and reviewed the documentation, including Applicant’s submissions and the performance evaluations, in taking the decision not to convert Applicant’s appointment. (Tr. II, pp. 259-260, 264-265.) The HRD Director conceded that Sections E and F of the relevant form were not completed but that “[w]hat’s important is that the information that one needs to make the decision in terms of the performance is provided.” (Tr. II, pp. 294-296.) The HRD Deputy Director additionally testified to a meeting among himself, the HRD Director, the “Department 1” Director and the “Department 2” Director. He characterized the decision-making process as a “very methodological, systematic decision,” based on documentation and discussion. (Tr. II, pp. 200-201.)

147. This approach, moreover, was consistent with what Applicant had been advised when he

inquired in October 2009 of an HRD Division Chief about the effect of the transfer on the fixed-term monitoring process: "["Department 1"] would conduct the 2 year assessment and ["Department 2"] will assess and give an input for the 30 month decision in April 2010." (Email correspondence of October 8-15, 2009 between Applicant and HRD Division Chief.)

148. This Tribunal consistently has emphasized the importance of the right to be heard as a component part of the Fund's internal law and general principles of international administrative law. *See generally Ms "EE"*, paras. 187-199. Of particular pertinence is *Ms. "C"*, in which the Tribunal observed, in the context of the decision not to convert a fixed-term appointee, that ". . . adequate warning and notice are requirements of due process because they are a necessary prerequisite to defense and rebuttal," *Ms. "C"*, para. 37. In that case, the Tribunal concluded that ". . . most fundamentally, when Ms. "C"'s supervisor was given evidence by her co-workers of her interpersonal deficiencies, Ms. "C" should have been afforded meaningful opportunity to rebut that evidence." *Id.*, para. 42, citing *Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992), para. 9.

149. The facts of the case of Mr. "HH" differ markedly from those considered in *Ms. "C"*, in which this Tribunal held that the applicant had sustained compensable harm when her non-conversion decision was taken in the absence of her being given the opportunity to respond to accusations by co-workers that her interpersonal skills were lacking. In the instant case, by contrast, Applicant was given repeated warnings that his performance fell short in respect of analytical and communications skills. Applicant was apprised of these concerns from the earliest review of his performance, and he actively sought to counter these perceptions of his performance, including through extensive written responses. In these circumstances, the Tribunal finds no failure on the part of the Fund to provide Applicant ample opportunity to present his own version of the pertinent facts before taking the decision not to convert his fixed-term appointment to open-ended status.

150. Nor is the Tribunal persuaded that there was any failure of fair process in the fact that the HRD Director herself took the non-conversion decision. In the view of the Tribunal, it was entirely reasonable in the circumstances for the HRD Director to take the decision, taking into account the views and documentation provided by the senior officials of the two Departments in which Applicant had served. Accordingly, the Tribunal cannot sustain Applicant's contention that the Fund failed to afford him a reasonable opportunity to be heard before taking the decision not to convert his fixed-term appointment.

Conclusions of the Tribunal

151. In the view of the Tribunal, Applicant has not met his burden of showing that the Fund abused its discretion in deciding not to convert his fixed-term appointment to an open-ended appointment. Applicant's performance was evaluated periodically over the course of his fixed term, including on a monthly basis in the final six months prior to the non-conversion decision. Applicant was given repeated warning that his skills in key competencies fell short of those required for a career appointment with the Fund, and he was provided the opportunity to raise his performance to the requisite level. Moreover, the Tribunal concludes that Applicant's contention that the fixed-term monitoring process and the non-conversion decision were affected by a

material failure of fair process in respect of his interdepartmental transfer during the course of the fixed term is without merit. For these reasons, the Tribunal cannot find that the Fund abused its discretion in deciding that Applicant did not "meet the performance requirements [and] demonstrate potential for a career at the Fund," GAO No. 3, Section 3.02.1.3, as required for conversion to open-ended status.

152. One last observation should be added concerning the consistent application of rules. On the facts of this case, the Tribunal has concluded that Applicant did not suffer any compensable harm as a result of a decision to transfer him from one department to another during the course of his fixed-term appointment. That transfer was inconsistent with the internal law of the Fund, but, in the view of the Tribunal, Applicant was not disadvantaged by that inconsistency in respect of the non-conversion of his appointment. Yet, the Tribunal notes, there is a clear institutional interest in the consistent application of rules. The Human Resources Department and senior managers throughout the Fund should understand that the inconsistent application of rules undermines trust among staff members and may foster grievances not easily remedied.

Decision

FOR THESE REASONS

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

The Application of Mr. "HH" is denied.

Catherine M. O'Regan, President

Andrés Rigo Sureda, Judge

Jan Paulsson, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
October 9, 2013