ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2015-2

Ms. K. Abu Ghazaleh, Applicant v. International Monetary Fund, Respondent
(Admissibility of the Application)

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INTRODUCTION

1. On November 11, 2015, 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 Jan Paulsson and Edith Brown Weiss, met to adjudge the Motion for Summary Dismissal of the Application brought against the International Monetary Fund by Ms. Kawthar Abu Ghazaleh, a former contractual employee of the Fund. Applicant was represented by Mr. Peter C. Hansen, Law Offices of Peter C. Hansen, LLC. Respondent was represented by Ms. Diana Benoit, Senior Counsel, IMF Legal Department.

2. In accordance with her contract of employment and the Fund's rules governing locally-recruited contractual employees, Applicant has initiated arbitration proceedings against the Fund arising from her former employment. Applicant contends that in the pending arbitration proceedings, the arbitrator has failed to act with impartiality. In her Application before the Tribunal, Applicant contests the Fund's decision to reject her proposals either to consent to a challenge to the designated arbitrator before the American Arbitration Association (AAA) or to replace the arbitrator with one mutually acceptable to the parties. Applicant additionally states that she challenges a "regulatory decision" of the Fund by which the Fund asserts the right to rule on challenges to the Fund's designated arbitrators. Applicant does not ask the Tribunal to rule on the merits of the underlying dispute that is the subject of the arbitration proceedings.

3. Applicant seeks as relief rescission of the Fund's decision refusing to consent to a challenge to the designated arbitrator before the AAA, an order requiring the Fund to refer that challenge to the AAA or an order removing the arbitrator from the case and his replacement with an arbitrator mutually acceptable to the parties. Applicant additionally seeks monetary compensation for the alleged denial of her rights, as well as fees and costs associated with vindicating those rights.

4. The Fund has responded to the Application with a Motion for Summary Dismissal on the ground that the Tribunal lacks jurisdiction *ratione personæ* and *ratione materiæ* over the Application of a former contractual employee seeking to challenge a decision arising in the context of the dispute resolution process available to contractual employees.

5. A Motion for Summary Dismissal suspends the period for answering the Application until the Tribunal decides the Motion. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Application.

PROCEDURE

6. On June 19, 2015, Applicant filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on June 24, 2015. On June 30, 2015, pursuant to Rule IV, para. (f), of the Tribunal's Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

7. On July 24, 2015, pursuant to Rule XII,[1] Respondent filed a Motion for Summary Dismissal of the Application. The Motion was transmitted to Applicant on July 27, 2015. On August 27, 2015, pursuant to Rule XII, para. 5, Applicant filed an Objection to the Motion, which was transmitted to the Fund for its information.

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[1] Rule XII provides:

Summary Dismissal

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.

2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.

3. The complete text of any document referred to in the motion shall be attached in accordance with the rules established for the answer in Rule VIII. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the motion. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the motion.

4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Applicant.

5. The Applicant may file with the Registrar an objection to the motion within thirty days from the date on which the motion is received by him.

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

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

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

A. Applicant's requests for production of documents

8. In her Application, Applicant has made requests for production of documents, pursuant to Rule XVII. These document requests relate to the merits of Applicant's allegations of lack of impartiality on the part of the arbitrator. In the view of the Tribunal, the document requests are not pertinent to the decision on the Motion for Summary Dismissal and Applicant has not so argued. Accordingly, the Tribunal does not rule on these requests.

B. Applicant's request for oral proceedings

9. Applicant also requested in her Application that the Tribunal hold oral proceedings, pursuant to Rule XIII, for purposes of examination of witnesses. Again, this request relates to the merits of the Application and not to its admissibility. Applicant has not sought oral proceedings for purposes of making an oral argument on the admissibility of the Application. In the absence of such request, the Tribunal decided that oral proceedings would not be held in respect of the Motion, as they were not deemed useful to its disposition.

C. Applicant's request for anonymity

10. In her Application, Applicant has requested anonymity pursuant to Rule XXII.[2] Applicant states that she seeks anonymity to avoid further harm to her career and because matters of personal privacy are at issue and may be referenced in the Judgment.

11. Rule XXII, para. 4, provides that the Tribunal shall grant an anonymity request "where good cause has been shown for protecting the privacy of an individual." The Tribunal has consistently held that granting anonymity to an applicant is an exception to the ordinary rule that the names of parties to a judicial proceeding should be made public. *See Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13; *Ms. N. Sachdev, Applicant v. International Monetary*

[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.

Fund, Respondent, IMFAT Judgment No. 2012-1 (March 6, 2012), para. 9. Anonymity is generally only granted in cases "involving alleged misconduct or matters of personal privacy such as health or family relations." *Sachdev,* para. 9. The Tribunal has also extended the protection of Rule XXII to cases in which key evidence brought out in the judgment relates to the assessment of an applicant's work performance, so as to protect the candor of the performance assessment process. *Mr. "HH", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2013-4 (October 9, 2013), paras. 42-43.

12. In the instant case, the gravamen of Applicant's complaint, namely, that she has been denied recourse to an impartial arbitrator, is an issue of law that does not bear upon issues of personal privacy. *See Mr. E. Weisman, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-2 (February 26, 2014), para. 14 (denying anonymity request; "Applicant's personal circumstances are not pertinent to the Tribunal's consideration of the essential issue of the case," where applicant challenged a rule of the Fund).

13. Applicant additionally asserts that she seeks anonymity to "avoid further harm to her career" resulting from her claims. The Tribunal has held that a bare assertion that adverse employment consequences may result from publication of an applicant's name does not, of itself, form a basis for granting a request for anonymity, and it has so held irrespective of whether or not the applicant is currently employed by the Fund. *See Weisman*, para. 16; *Mr. "HH"*, para. 40 (former staff member; anonymity granted on other grounds); *Mr. S. Ding, Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2009-1 (March 17, 2009), para. 11.

14. Applicant also states that she seeks anonymity because the judgment is "unlikely to name other persons involved in this case." In the event that her anonymity request is denied, Applicant calls upon the Tribunal to name "all persons involved in the case—including the relevant officials and the challenged arbitrator."

15. In balancing the value of public justice against the privacy interests of individuals, the Tribunal distinguishes between individuals who are parties to the case and those who are not. The Tribunal's practice is not to name persons other than the applicant in the case. *See Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012), para. 10 and cases cited therein. The Tribunal finds no reason to deviate from its usual practice in the instant case. In this Judgment, as always, the Tribunal has endeavored to be circumspect in its dissemination of personal information relating to Applicant and others, while at the same time taking care not to shirk its duty to give full and comprehensive reasons for its decision. *Weisman*, para. 14.

16. For the foregoing reasons, the Tribunal concludes that Applicant has not established "good cause" for granting her request for anonymity in this Judgment on the admissibility of the Application.

FACTUAL BACKGROUND

17. The key facts may be summarized as follows.

18. Applicant was employed as a locally-recruited contractual employee in one of the Fund's overseas operations. Her employment contract stated: "The terms of your employment will be based on the Fund's internal rules, not on local labor law, and will be guided by this contract." Applicant's employment contract provided for dispute resolution up to and including final and binding arbitration:

> If you consider that the Fund has failed to meet any of its obligations to you under this employment contract, and if you are unable to resolve the dispute locally, you may, within 3 months of the date that you learned or reasonably could have learned of the alleged breach of the terms and conditions of your employment contract, submit a written complaint to the Director of the Human Resources Department. If the complaint is not then resolved to your satisfaction within 45 days, you may appeal the matter to arbitration by sending a written request for arbitration to the Director of the Human Resources Department within 30 days of your receipt of the response from the Director of the Human Resources Department. Following the Employment Arbitration Rules of the American Arbitration Association, the arbitration will be conducted by a neutral professional arbitrator designated by the Fund. The decision of the arbitrator will be final and binding on both parties.

19. The contract additionally stated: "Under your appointment, you will not be eligible for any benefits other than those in this letter and those specified in the Handbook for Locally Recruited Employees as applicable to your category of employment." The Handbook states as follows, with regard to dispute resolution:

> **XI. DISPUTE RESOLUTION**
>
> It is Fund policy to provide local employees access to a fair process for resolving disputes.
>
> **11.1 Eligibility**
>
> All locally hired employees are covered by the process which should be reflected in their contracts.
>
> **11.2 Role and responsibilities**
>
> The heads of office are responsible for ensuring that employees are aware of the policy and for ensuring that the process is fairly followed. The employee is responsible for first exhausting informal avenues to resolve the dispute before resorting to the formal process. Once the informal avenues are exhausted, the employee may follow the procedures described below.

> **11.3 Procedures**
>
> In order to resolve a local employee's issue as early as possible, and to avoid the costs of arbitration, the dispute resolution process requires that the local employee first bring his/her claim to [the] Human Resources Department for consideration, specifically, the Division Chief of the Client Relations and Executive Sourcing Division. The decision by the Division Chief can then be appealed to the Director of [the] Human Resources Department. Once the Director of the Human Resources Department has reviewed the decision and notified the employee of his/her decision, that decision could be challenged through final binding arbitration. In such cases, the arbitrator would be designated by the Fund and the decision reviewed in the context of the terms and conditions set out in the employee's contract.

("Handbook for Locally-Recruited Employees in the Field Offices of the Fund" (Handbook), pp. 22-23.) The Handbook also states: "[F]or locally recruited employees, the letter of appointment/contract is the operative document with respect to employment terms and conditions." (*Id.*, p. 3.)

20. Pursuant to these dispute resolution procedures, on May 18, 2014, Applicant filed a Request for Arbitration. In the course of the ensuing arbitration proceedings, a dispute has arisen as to the impartiality of the arbitrator. It is that dispute that Applicant seeks to raise before this Tribunal.

21. By email of April 6, 2015, Applicant's counsel requested the arbitrator to recuse himself from the proceedings. Applicant states that the recusal request was made directly to the arbitrator "as a courtesy," before bringing a formal challenge to his continuance in her case. The Fund filed an opposition to the request on April 10, 2015, to which Applicant replied on May 1, 2015. On May 11, 2015, the arbitrator issued a "Ruling on Grievant's Motion for Recusal," declining to recuse himself.

22. Following the arbitrator's ruling, Applicant's counsel wrote to Fund counsel in the case, seeking the Fund's consent to bring a challenge to the arbitrator before the AAA. This request was denied. (Email correspondence of May 20-21, 2015.)

23. Thereafter, on May 25, 2015, Applicant's counsel made a written request to the Fund's Managing Director, seeking consent "(1) to have the AAA rule on the challenge, or to replace [the arbitrator] with a mutually acceptable and true neutral, such as the President of the IMF Administrative Tribunal; and (2) to have the Fund reimburse [Applicant] for the costs incurred in vindicating her rights." (Letter from Applicant's counsel to Fund's Managing Director, May 25, 2015.)

24. On June 1, 2015, the Fund's General Counsel responded on behalf of the Managing Director, denying the requests and asserting that the Fund ". . . remain[ed] convinced that the arbitration process in this case is in full compliance with the terms of your client's contract with

the Fund and in line with applicable rules and best practices for due process." The General Counsel additionally stated: "Given the Fund's immunities from legal process, the institution views a robust dispute resolution system as a key element of the terms and conditions of employment at the Fund." The General Counsel concluded that the Fund has ". . . full faith in the arbitrator's professionalism and ability to conduct a neutral arbitration, and we are committed to allowing the arbitration process to run its full course without external influence or intervention." (Email from Fund's General Counsel to Applicant's counsel, June 1, 2015.)

CHANNELS OF ADMINISTRATIVE REVIEW

25. There are no channels of administrative review applicable in the circumstances under which the instant Application arises. The essential facts leading up to its filing have been recounted above.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

26. The parties' principal arguments as presented by Applicant in her Application and her Objection to the Motion, and by Respondent in its Motion for Summary Dismissal, may be summarized as follows.

A. Applicant's contentions on the merits

1. Applicant has a right to have an impartial arbitrator decide her employment dispute with the Fund, as recognized in her employment contract and as a fundamental tenet of international administrative law. By precluding Applicant's challenge to the impartiality of the arbitrator, the Fund has deprived Applicant of that fundamental right.

2. Permitting either the opposing party or the arbitrator himself to decide on his impartiality violates fundamental principles of due process, as well as AAA rules, which apply by reason of Applicant's contract and explicitly reserve challenges for the AAA to decide.

3. The Tribunal may remove the arbitrator on grounds of conflict of interest and bias.

4. Applicant seeks as relief:

    a. rescission of the Fund's decision to prevent her access to an impartial authority outside the Fund to hear her challenge to the arbitrator;

    b. an order requiring the Fund to refer the challenge to the AAA or an order rescinding the Fund's designation of the arbitrator and requiring his removal from the case;

    c. if the arbitrator is replaced with a new arbitrator, an order obliging the Fund to consult with Applicant to appoint a mutually acceptable replacement arbitrator;

d. an order that the case be evaluated on its merits by the new arbitrator in its original form;

e. one year's salary for moral and intangible damages; and

f. reimbursement of fees and costs.

5. In her Objection, Applicant additionally seeks an award of costs for defending against the Fund's Motion for Summary Dismissal.

B. Respondent's contentions on admissibility

1. The Tribunal is a tribunal of limited jurisdiction and cannot exercise powers beyond those granted in its Statute.

2. As a former contractual employee of the Fund, Applicant is not within the Tribunal's jurisdiction *ratione personæ*, as prescribed by Article II, Section 1(a) of the Statute.

3. Applicant is not within the Tribunal's jurisdiction *ratione personæ* as prescribed by Article II, Section 1(b), which applies in cases brought "by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant." The arbitration clause of Applicant's employment contract does not represent a "benefit" within the meaning of this provision.

4. The subject matter of Applicant's complaint is not within the Tribunal's jurisdiction *ratione materiæ*. The contested decision by the Fund's General Counsel is not an "administrative act" of the Fund within the meaning of Article II, Section 2(a).

5. Applicant was not "adversely affected" by the contested decision, as required by Article II, Section 1 of the Statute in order to bring an Application to the Tribunal.

6. Applicant has not challenged a "regulatory decision" as defined by Article II, Section 2(b).

C. Applicant's contentions on admissibility

1. Respondent has not shown that the Application is "clearly inadmissible" and therefore it should not be summarily dismissed pursuant to Rule XII.

2. The Tribunal has jurisdiction over the Application under Article II, Section 1(b) of the Tribunal's Statute, which provides for jurisdiction over claims brought "by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an

administrative act concerning or arising under any such plan which adversely affects the applicant." The arbitration procedure constituted a formal benefit, contractually promised to Applicant and regulated by Fund law and policy. The Tribunal may rule on the scope and implementation of that benefit.

3. The Tribunal has jurisdiction *ratione materiæ* over the Application. The General Counsel's decision was a final administrative decision by the Fund on the parameters of Applicant's benefit, and Applicant has been "adversely affected" by that decision.

4. The Tribunal additionally has jurisdiction pursuant to Article II, Section 2(b) to review the "regulatory decision" by which the Fund asserts a right of Fund management to rule on employee challenges to the Fund's unilaterally designated arbitrators.

5. Denying recourse to raise a challenge before an impartial authority outside Fund management would deny a benefit and constitute a denial of justice.

6. Applicant has no mechanism other than the Tribunal to ensure that her challenge to the arbitrator for bias can be raised before an impartial decision-making body.

CONSIDERATION OF THE ADMISSIBILITY OF THE APPLICATION

27. Applicant is a former contractual employee of the Fund who seeks to challenge a decision relating to pending arbitration proceedings arising within the dispute resolution process available to the Fund's contractual employees. The question presented by the Motion of Summary Dismissal is whether Applicant's challenge falls within the Tribunal's jurisdiction *ratione personæ* and *ratione materiæ* to decide.

28. Article II of the Statute sets out the Tribunal's jurisdictional competence as follows:

> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> > a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
> >
> > b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.

29. It is not disputed that, as a former contractual employee of the Fund, Applicant may not invoke the Tribunal's jurisdiction *ratione personæ* pursuant to Article II, Section 1(a), which is limited to challenges by "member[s] of the staff." *See generally Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999)

(dismissing for lack of jurisdiction application by contractual employee alleging that he should have been categorized as a staff member). The Tribunal has observed that the legislative history of the Statute suggests that the ". . . exclusion of contractual employees from the Tribunal's jurisdiction *ratione personæ* was a considered choice of its drafters, reflecting a recognition that a separate dispute settlement mechanism exists for resolution of disputes with contractual employees." *Id.*, para. 47. *See also* Commentary[3] on the Statute, p. 15 ("Nor would persons employed under contract to the Fund have access to the tribunal.").

30. Applicant does not challenge the existence of separate dispute resolution systems for staff and non-staff employees of the Fund, and she does not seek to raise for the Tribunal's consideration the underlying dispute pending in the arbitration proceedings. At the same time, Applicant seeks a judgment by the Tribunal as to the fairness of the implementation of the dispute resolution process applicable to her as a contractual employee.

A. Does the Tribunal have jurisdiction *ratione personæ* over Applicant, pursuant to Article II, Section 1(b) of the Statute?

31. While conceding that she is not a "member of the staff" for purposes of Article II, Section 1(a), Applicant seeks to invoke Article II, Section 1(b) as the basis for the Tribunal's jurisdiction *ratione personæ* in this case. That provision extends the Tribunal's competence to an application brought by "an enrollee in, or beneficiary under, any retirement *or other benefit plan maintained by the Fund as employer* challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant." (Emphasis added.)

32. Accordingly, the question is whether, as Applicant contends, she is an enrollee in a "benefit plan maintained by the Fund as employer" within the meaning of Article II, Section 1(b) of the Statute, so as to challenge an "administrative act concerning or arising under . . . such plan which adversely affects" her.

33. The Statutory Commentary accompanying Article II, Section 1(b) reads as follows:

> Section 1(b) sets forth the competence of the tribunal with respect to the retirement and other benefit plans maintained by the Fund, such as the Staff Retirement Plan (SRP), the Medical Benefits Plan (MBP), and the Group Life Insurance Plan.[3] *This provision would allow individuals who are not members of the staff but who have rights under these plans to bring claims before the tribunal concerning decisions taken under or with respect to the plan*. Such individuals would include beneficiaries under the SRP and nonstaff enrollees in the MBP, for example, a deceased staff member's widow who continues to participate in the MBP. Such individuals

[3] 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).

> would, however, be entitled to assert claims only with respect to decisions arising under or concerning the Fund's retirement or benefit plans; they would not have the right to challenge other types of administrative acts before the tribunal.
>
> [3]The tribunal would be authorized to review decisions relating to or arising under the Staff Retirement Plan (SRP), whether of an individual or general nature. Other tribunals, including the WBAT, have jurisdiction to consider whether there has been nonobservance of the provisions of a staff retirement plan. See, e.g., WBAT Statute, Article II(1). It should be noted that the SRP, Art. 7.1(d), permits the tribunal to exercise such jurisdiction.

Commentary on the Statute, p. 13. (Emphasis added.)

34. Applicant contends that she is "enrolled in a formal benefit plan (i.e. the 'employer-promulgated [arbitration] plan' instituted by the Fund . . . by virtue of her non-staff employment by the Fund," a "benefit program that is organized and operated by the Fund for the benefit of [Applicant] and other members of her non-staff employee class." Applicant notes that the Handbook ". . . announces to non-staff employees that the Fund always sends their employment disputes with the Fund to arbitration." *See* Handbook, XI. Dispute Resolution, 11.1 Eligibility ("All locally hired employees are covered by the process which should be reflected in their contracts.").

35. Applicant emphasizes that the Tribunal's Statute does not define "benefit plan." She contends that the text of Article II, Section 1(b) and its associated Commentary, which use the terms "or other benefit plan" and "such as," suggest that an inclusive rather than exclusive interpretation of the term is appropriate.

36. Respondent counters that the ". . . clear legislative intent is that Article II, Section 1(b) confers jurisdiction on individuals who are enrolled in a formal benefit plan" and that the arbitration provision in Applicant's employment contract "does not in any way resemble such a benefit plan." The Fund additionally invokes a canon of statutory construction, *ejusdem generis*, providing that when a general word or phrase follows a list of specific items, the general word or phrase will be interpreted to include only items of the same type as those listed; Respondent maintains that it is plain that "in the phrase 'retirement or other benefit plan,' the general term 'other benefit plan' means a formal policy or program of the same type as a retirement plan." In the view of the Fund, the "expansive" construction of Article II, Section 1(b) suggested by Applicant would ". . . defeat the Fund's explicit framework of 'a separate dispute settlement mechanism' from that of staff members, for contractual employees claiming breach of their contract[s]," citing *Mr. "A"*, para. 47.

37. The Commentary on the Statute, p. 13, and this Tribunal's jurisprudence make clear that a variety of individuals who are not members of the staff of the Fund may be enrollees in or beneficiaries under a "benefit plan maintained by the Fund as employer" within the meaning of Article II, Section 1(b). *See Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), para. 57 (examples provided in the Statutory Commentary of persons covered by Article II, Section 1(b) are "not meant to be

exhaustive"), citing *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 63.

38. In two cases in which the Tribunal, over the Fund's objections, exercised jurisdiction over non-staff member enrollees in, or beneficiaries under, Fund benefit plans, the construction of the phrase "benefit plan maintained by the Fund as employer" was not at issue. *See Estate of Mr. "D"*, paras. 58-63 (jurisdiction over successor in interest to non-staff member enrollee, i.e., widower of deceased staff member, in Fund's Medical Benefit Plan (MBP)); *Mr. "P" (No. 2)*, paras. 48-65 (admissibility of application for intervention by ex-spouse of enrollee in Fund's Staff Retirement Plan (SRP) as a "beneficiary under a Fund benefit plan, for purposes of challenging the legality of the [SRP] Administration Committee's Decision on her Request to give effect to the [division of marital property] order" pursuant to SRP Section 11.3). The benefit plans under which those cases arose, namely, the MBP and SRP, are plans established principally as employment benefits for Fund staff members.

39. Here, by contrast, Applicant seeks to invoke the Tribunal's jurisdiction to raise a challenge concerning a purported "benefit plan"—the arbitral dispute resolution system that functions as an alternative to recourse to the Tribunal for contractual employees—that has been adopted *exclusively for non*-staff employees of the Fund. The question thus arises whether a "benefit plan maintained by the Fund as employer" (Article II, Section 1(b)) includes the dispute resolution process afforded by the Fund to its contractual employees.

40. The Tribunal observes that the expression "maintained by the Fund as employer" does not reference "staff" employment. However, in the view of the Tribunal, whatever ambiguity may be found in that expression cannot be construed to bring within the Tribunal's jurisdiction a challenge to the fairness of the process for resolution of disputes over which the Tribunal is expressly—by Article II, Section 1(a)—denied jurisdiction. Although Applicant does not challenge the existence of separate dispute resolution systems for staff and non-staff employees, she asks the Tribunal to perform a supervisory (or appellate) function vis-à-vis the dispute resolution system applicable to contractual employees. Such a function lies outside the ambit of, and is inconsistent with the logic of, the limitations on the Tribunal's jurisdiction *ratione personæ* and *ratione materiæ* as mandated by its Statute. In Respondent's words: "[Applicant's] current dispute with the Fund concerns the interpretation and scope of the arbitration clause of her contract. She is not entitled to substitute a different dispute resolution mechanism for that interlocutory dispute, and certainly not one, such as the Tribunal, which operates on the basis of statutorily limited jurisdiction that does not extend to cases such as hers."

41. In the view of the Tribunal, the underlying logic and purpose of the Statute, which is to provide a judicial mechanism for the resolution of employment disputes arising between the Fund and its staff members, precludes interpreting the scope of Article II, Section 1(b) to allow the Tribunal to receive applications from contractual employees dissatisfied with the procedures afforded them under the separate dispute resolution process that governs pursuant to their contracts. To decide, as Applicant urges, that the dispute resolution mechanism provided to the Fund's contractual employees is a "benefit plan maintained by the Fund as employer" within the meaning of Article II, Section 1(b) of the Tribunal's Statute would be inconsistent with the overall purpose of the Statute, which is to provide a dispute resolution system for members of the

staff. For this reason, Applicant's effort to invoke the Tribunal's jurisdiction *ratione personæ* must fail.

B. Does the Tribunal have jurisdiction *ratione materiæ* over Applicant's complaint?

42. Given that Applicant has conceded that her only possible claim to the Tribunal's jurisdiction *ratione personæ* is through Article II, Section 1(b)—a possibility that the Tribunal has rejected above—her contention that the complaint lies within the Tribunal's jurisdiction *ratione materiæ* must also fail, for the reasons set out below.

43. In cases in which jurisdiction *ratione personæ* is conferred on the Tribunal solely by Article II, Section 1(b), the scope of the Tribunal's jurisdiction is a ". . . narrow one, embodying a limitation on its jurisdiction *ratione materiæ* in such cases to challenges to administrative acts taken under the applicable benefit plan and adversely affecting the applicant." *Mr. "P" (No. 2)*, para. 64. The Tribunal has concluded above that Applicant cannot invoke its jurisdiction *ratione personæ* pursuant to Article II, Section 1(b). *A fortiori* Applicant's assertion that she has raised a complaint within its jurisdiction *ratione materiæ* is also defeated.

C. Has Applicant raised a challenge to a "regulatory decision" as defined by Article II, Section 2(b)?

44. Applicant additionally contends that the contested decision of the Fund's General Counsel ". . . in its breadth also constituted a 'regulatory decision' asserting a right on the part of the Fund's management to rule on employee challenges to the Fund's unilaterally designated arbitrators." Respondent, for its part, maintains that the General Counsel's decision of June 1, 2015, responding to Applicant's requests of May 25, 2015, does not constitute a "regulatory decision" within the terms of the Tribunal's Statute.

45. Having concluded above that Applicant has failed to raise a complaint within its jurisdiction *ratione materiæ*, the Tribunal must necessarily also decide that Applicant has failed to raise a justiciable challenge to a "regulatory decision." This conclusion is reinforced by the Statutory definitions of "administrative act" and "regulatory decision," which expressly reference "staff" employment. *See* Article II, Section 2(a) ("'administrative act' shall mean any individual or regulatory decision taken in the administration of the *staff* of the Fund" (emphasis added); Article II, Section 2(b) ("'regulatory decision' shall mean any rule concerning the terms and conditions of *staff employment*, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund") (emphasis added).

46. The Tribunal has emphasized that the "limitations on the Tribunal's jurisdiction *ratione personæ* and *ratione materiæ* appear to be closely intertwined. By the terms of the Statute, actions constituting 'administrative acts' are defined as restricted to those taken in the administration of the 'staff'. Hence, Fund actions taken with respect to others, for example, contractuals, are outside the scope of the Tribunal's jurisdiction *ratione materiæ*." *Mr. "A"*, para. 51. In *Mr. "A"*, the Tribunal made clear that the applicant's claim was barred not only because it fell outside the Tribunal's jurisdiction *ratione personæ* but also outside its jurisdiction *ratione materiæ*. *See Mr. "A"*, para. 100 (3) ("[T]he Fund's decision to enter into a contract or series of

contracts with an individual to serve as a contractual employee, rather than as a member of the staff, is not a 'decision taken in the administration of the staff' (Art. II, para. 2.a.).").

47. In the instant case, Applicant's complaints, both in relation to her own case and more broadly as to the dispute resolution system applicable to contractual employees in general, do not fall within the competence of this Tribunal as provided by its Statute.

D. Is the Tribunal permitted or required to exercise jurisdiction on the ground that Applicant's complaint may otherwise escape review by an impartial adjudicatory body?

48. Applicant's essential complaint in this case is that she has been denied recourse to an impartial decision maker to decide the merits of the claim arising from her former employment with the Fund. Applicant asserts that this alleged lack of recourse to an impartial decision maker is in breach of the arbitration clause of her contract, violates general principles of international administrative law, and constitutes a denial of justice.

49. Applicant contends that she has "no mechanism other than the Tribunal to ensure that her . . . challenge [to the arbitrator] for bias can be raised before an impartial decision-making body" and that she has been "severely harmed by the Fund's wrongful blockage of access to an impartial decision-making body (i.e. the AAA), which is aimed at rendering the Fund's promise of a 'neutral arbitrator' unenforceable and thus void."

50. Article III of the Tribunal's Statute makes clear that the "Tribunal shall not have any powers beyond those conferred under this Statute." The Commentary on the Statute, p. 16, elaborates: "[T]he statutory provision defining the competence of the tribunal is, at the same time, a prohibition on the exercise of competence outside the jurisdiction conferred." The Tribunal has observed that ". . . international administrative tribunals are tribunals of limited jurisdiction and may not exercise powers beyond those granted by their statutes." *See generally Mr. "A"*, paras. 56-59.

51. For this reason, the Tribunal in *Mr. "A"* concluded that the ". . . fact that Applicant's claim will otherwise not be judicially examined does not require or entitle the Tribunal to exercise jurisdiction in this case." *Mr. "A"*, para. 95. The Tribunal emphasized: "The jurisdiction of the Administrative Tribunal is conferred exclusively by the Statute itself. This Tribunal is not free to extend its jurisdiction on equitable grounds, however compelling they may be." *Id.*, para. 96.

52. In summarily dismissing the application of Mr. "A", the Tribunal nonetheless registered its "disquiet and concern" regarding a practice that "may leave employees of the Fund without judicial recourse." *Id.*, para. 97. Such a result, observed the Tribunal, is "not consonant with norms accepted and generally applied by international governmental organizations." *Id*. Nonetheless, the Tribunal felt obliged to conclude that it was for the "policy-making organs" of the Fund, rather than for the Tribunal, to consider and adopt means of providing appropriate avenues for the resolution of disputes of the kind at issue in the case of Mr. "A", "notably disputes over whether the functions performed by a contractual employee met the criteria for a staff appointment rather than those for contractual status." *Id.*

53. In this case too, the Tribunal registers its significant disquiet and concern. Respondent's Handbook for Locally-Recruited Employees explicitly states that Fund policy gives locally-recruited contractual employees access to a fair process for resolving disputes. As noted above, the Fund's General Counsel affirmed that "[g]iven the Fund's immunities from legal process, the institution views a robust dispute resolution system as a key element of the terms and conditions of employment at the Fund." Yet, as has been shown above, where an arbitrator has been unilaterally appointed by the Fund in accordance with the provisions of the contract of employment, a contractual employee who contests the impartiality of the arbitrator has no recourse to an independent third party to decide that claim.

54. A fair system for resolving employment disputes should be designed to ensure that employees have confidence in the fair adjudication of their disputes. That confidence can be engendered in the case of arbitral dispute resolution by ensuring that arbitrators are selected by agreement between the parties, or, alternatively, where the Fund selects the arbitrator, by providing a mechanism for third party adjudication of challenges to the impartiality of the arbitrator. Neither mechanism exists here. In the view of the Tribunal, this is an important matter that the Fund needs to address in order to ensure that its dispute resolution process is, as it claims, both fair and seen to be fair.

CONCLUSIONS OF THE TRIBUNAL

55. Applicant seeks to raise a challenge to an element of the dispute resolution process applicable to locally-recruited contractual employees of the Fund, both in its application to her and more generally. For the reasons set out above, that challenge falls outside the scope of the Tribunal's jurisdiction *ratione personæ* and *ratione materiæ*. Because the Tribunal may not decide claims outside of its jurisdictional competence, the Application must be dismissed.

DECISION

FOR THESE REASONS

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

The Motion for Summary Dismissal is granted and the Application of Ms. Abu Ghazaleh is dismissed.

Catherine M. O'Regan, President

Jan Paulsson, Judge

Edith Brown Weiss, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
November 11, 2015