ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2015-3

Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent

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INTRODUCTION

1. On October 28 and 29 and December 8, 2014,[1] and November 12 and 13, 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 Application brought against the International Monetary Fund by Ms. "GG", a staff member of the Fund. Applicant represented herself in the proceedings. Respondent was represented by Ms. Jennifer Lester, Assistant General Counsel, and Ms. Juliet Johnson, Counsel, IMF Legal Department.

2. Applicant contends that the management of her former Department, in particular the Department Director, engaged in a pattern of retaliation (for reporting misconduct of another staff member), harassment (including sexual harassment), and gender discrimination towards her, which constituted a hostile work environment and resulted in a failure to credit fully her professional accomplishments, thereby impeding her career advancement. Applicant challenges: (i) Respondent's alleged failure to address the pattern of unfair treatment, which she brought to the attention of appropriate Fund officials; (ii) the Department Director's alleged purposive actions to undermine her candidacy before the Review Committee (RC) in 2009, when the RC decided not to advance her to the B List (also known as the RC List), thereby delaying her eligibility for promotion to B-level positions; (iii) her non-selection for a particular B-level position in her Department for which she applied in 2009 but which was not filled until after it was re-advertised in 2010; (iv) her non-selection for a different B-level position in the same Department in 2011, following her lateral transfer to a different Department; (v) her Annual Performance Reviews (APRs) for FY2009 and FY2010, which she contends were impermissibly affected by retaliation, harassment, and discrimination, based on factual errors and taken in disregard of Fund rules; (vi) 2011 revisions to the Fund's promotion policy, which she contends are arbitrary and unfairly discriminate against economist staff, as well as the failure to afford her the benefit of the "transitional measure" included in the revised policy; and (vii) elements of the administrative review and Grievance Committee processes, which she alleges constitute failures of due process and materially impair the evidentiary record of the case.

3. Applicant seeks as relief revision of her FY2009 and FY2010 APR ratings, retroactive promotions and salary increases, as well as monetary compensation for retaliation, harassment,

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[1] The meeting of December 8, 2014 was held in part via teleconference.

discrimination, and procedural failures. She also seeks compensation for the imputed cost of her time spent representing herself in the Tribunal and through the channels of review.

4. Respondent, for its part, maintains that the only issue properly before the Tribunal is Applicant's challenge to her FY2010 APR. That decision, in the Fund's submission, was taken in the proper exercise of managerial discretion and was reasonably supported by evidence. The Fund denies that the FY2010 APR decision was improperly motivated by discrimination, retaliation or harassment on the part of Applicant's Department Director or that he created a hostile work environment. The Fund moreover asserts that the FY2010 APR decision reflected the considered judgment of Applicant's direct managers, independent of any influence by the Department Director. As to Applicant's additional claims, Respondent maintains that they are inadmissible on the following grounds: (i) the claim she raised in 2009 to the effect that the Fund failed to address complaints of harassment, retaliation and discrimination is not justiciable, has not been exhausted through administrative review, and, in any event, is without merit; (ii) the complaint that her Department Director's conduct before the RC wrongfully undermined her candidacy for the B List is not justiciable as an "administrative act" of the Fund; (iii) the 2009 vacancy selection process did not constitute an "administrative act" adversely affecting Applicant; (iv) Applicant does not have standing to challenge the non-selection decisions of 2010 and 2011 because she did not apply for the vacancies; (v) she failed to raise a timely challenge to her FY2009 APR; (vi) she did not bring a timely challenge to the 2011 revision to the promotion policy "directly" with the Tribunal within three months of its announcement or effective date, and her challenge is not linked to an individual decision applying the revised policy in her case, and, in any event, the Fund did not abuse its discretion in adopting the policy or applying it to her; and (vii) her allegations of failures of due process in the administrative review and Grievance Committee processes are not within the jurisdiction of the Administrative Tribunal.

PROCEDURE

5. This is the second Application brought by Ms. "GG" before the Administrative Tribunal. The first was dismissed for failure to exhaust channels of administrative review because it raised claims that were "closely allied" with another claim still pending before the Fund's Grievance Committee. *See Ms. "GG", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2013-3 (October 8, 2013) (*Ms. "GG" I*). Following the conclusion of the Grievance Committee's proceedings, its recommendation to Fund Management and Management's acceptance of the Grievance Committee's recommendation,[2] Applicant filed the instant Application with the Administrative Tribunal on February 10, 2014. It was transmitted to Respondent on February 12, 2014. On February 18, 2014, pursuant to Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

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[2] *See infra* CHANNELS OF ADMINISTRATIVE REVIEW.

6. On March 31, 2014, Respondent filed its Answer to the Application, which was supplemented on April 7, 2014, pursuant to Rule VIII, para. 4. On May 12, 2014, Applicant submitted her Reply, which was supplemented on May 21, 2014, pursuant to Rule IX, para. 4. The Fund's Rejoinder was filed on June 26, 2014.

7. On September 11, 2014, following its consideration of the views of the parties, the Tribunal notified them of its decisions with respect to Applicant's requests for production of documents and for oral proceedings. In response to the Tribunal's decisions, the Fund submitted documents and information on September 26, 2014. On October 20, 2014, Applicant filed Comments on the Fund's submission.

8. At the conclusion of its session of October 28 and 29, 2014, the Tribunal decided it was necessary to seek additional information and views of the parties and, pursuant to Rule XI and Rule XVII, para. 3, requested additional documents and briefing from the Fund. The Fund's Responses were received on November 13 and December 1, 2014. Applicant's Comments on these submissions were filed on December 2, 2014 and January 16, 2015, respectively, and transmitted to the Fund for its information.

A. Applicant's requests for production of documents and information

9. Pursuant to Rule XVII of the Tribunal's Rules of Procedure, in her Application, Applicant requested production of the following documents and information:

1. Unredacted documents "(emails, memos, etc.)" relating to the selection of another candidate for the B-level position in her Department for which Applicant applied in 2009, Applicant's non-selection for the position, and the alleged withdrawal of the original vacancy announcement for the position in or about July 2009.

2. Memorandum from Applicant's Department to the RC in or about July 2009 (relating to the selection for the 2009 vacancy), as referenced in the second paragraph of the November 24, 2009 email from three RC members to the Human Resources Department (HRD) Director.

3. Memorandum of July 2011 from two Senior Personnel Managers (SPMs) to HRD, requesting that Applicant be "grandfathered" under the previous promotion policy.

4. FY2010 APRs of three senior economists in Applicant's Division.

5. The identity of an individual referred to by pseudonym in one of the Tribunal's earlier Judgments.

6. Documents to determine whether Applicant's Department had received permission from HRD to keep open the contested B-

> level position for a period of more than six months, from July 2009 until April 2010.

In her Reply, Applicant additionally requested "unredacted copies of the documents to the [Grievance] Committee on August 17, 2012 related to the RC list meetings and the . . . division chief selection." The Tribunal understood this request to include the handwritten notes of the RC meeting, which the Grievance Committee had reviewed *in camera*. (*See* Grievance Committee's Decision on Grievant's request to call additional witnesses and for additional documents, August 10, 2012, pp. 7-8.)

10. The Fund opposed all of Applicant's requests for production of documents and information on the grounds that there was already a comprehensive evidentiary record before the Tribunal and that the requests were irrelevant to Applicant's "core APR claim." The Fund also asserted that compliance with the requests would unduly infringe on the privacy of individuals. (Rule XVII, para. 2.)

11. The Tribunal notes at the outset that its disposition of Applicant's evidentiary requests left open its ultimate decisions on the issues of the case. Those issues include questions of the admissibility of Applicant's various claims. As noted above, Respondent disputes the admissibility of all but one of those claims, i.e., Applicant's challenge to her FY2010 APR.

12. In deciding the evidentiary requests, the Tribunal takes as its starting point the text of Rule XVII, para. 2, which sets out the grounds upon which the Tribunal may reject a request:

> The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of deciding on the request, the Tribunal may examine *in camera* the documents requested.

Accordingly, if the Tribunal cannot say that the evidence requested is "irrelevant to the issues of the case," it ordinarily will not have a basis to reject the request unless compliance with it would be unduly burdensome or would infringe on the privacy of individuals. In interpreting the requirements of Rule XVII, para. 2, the Tribunal has considered the record of the case as a whole and weighed the probative value of requested information against the burden posed by its production and the privacy interests of other staff members.[3] The Tribunal has held that where

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[3] *See, e.g., Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), paras. 21-22, 25 ("In view of the evidence in the record relating to the reassignment assistance that Applicant received, and the substantial body of jurisprudence in the light of which these facts may be considered, the Tribunal denies the request [for documents showing person-by-person the assistance provided by the Fund to re-position staff members affected by abolition of position or reduction in force since 2001] as unduly burdensome in view of its limited potential probative value"); *Ms. C. O'Connor (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-1 (March 16, 2011), para. 16 ("Examination of the [MAR] ratings of other

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similar information is found elsewhere in the record, requested documents may be denied on the ground that disclosure would not be of probative value to the applicant. *See, e.g.*, *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 15 (*in camera* review confirmed that another document already in the record had fairly summarized the requested document); *Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 13 (denying document request on ground that it would not be of probative value to the applicant "given the entire record that has been available to her").

13. The Tribunal observes that the Grievance Committee previously addressed many of the evidentiary issues that the Tribunal has now been called upon to decide. The Tribunal's own decisions are independent of the Grievance Committee's determinations, but not without taking note of the Committee's approach to the evidentiary questions. The Tribunal notes, in particular, the Grievance Committee's decision that, although it regarded Ms. "GG"'s challenge to her FY2010 APR as her only admissible claim, she would be permitted to introduce some documentary and testimonial evidence relating to events having taken place in 2009, namely the selection process for the 2009 B-level vacancy and the Department Director's alleged conduct before the RC in the 2009 meeting in which it decided not to advance Applicant to the B List. The Grievance Committee reasoned that these events were relevant to Applicant's contention that her FY2010 APR (which covered the period May 1, 2009–April 30, 2010) had been improperly motivated by retaliation, harassment, and discrimination on the part of the Department Director. (*See* Grievance Committee Report and Recommendation, April 25, 2012, p. 37.)

14. Applicant's Requests are considered below.

(1) Requests Nos. 1, 2 and 6 and Request made in Reply

15. In her Application, Applicant made three separate Requests (Nos. 1, 2 and 6) for documents relating to the selection process for the B-level vacancy in her Department for which she applied in 2009 but which was not filled until after it was re-advertised in 2010. Applicant contends that the selection process was unfairly affected by retaliation, harassment, and discrimination and that the decision forms part of a pattern of impermissible conduct toward her. In her Reply, Applicant additionally sought "unredacted copies of the documents to the

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staff members would not be probative of discrimination against Ms. O'Connor herself. Given the decision not to grant the request on grounds of relevancy, it is not necessary to consider Respondent's additional objection on grounds of privacy"), para. 22 (denying document request on ground that it would be "unduly burdensome" in the sense of Rule XVII, para. 2, to require production in the absence of evidence that the requested documents would be probative of any issue before the Tribunal); *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 10 (granting request only in part because "potential probative value of [candidates' applications for position] was outweighed by privacy interests of the candidates"; requiring production of candidates' Fund CVs in view of the "lack of objective evidence in the record as to the qualifications of the candidates for the vacancy, in particular of the documentation that formed the basis for the initial screening" decisions).

[Grievance] Committee on August 17, 2012 related to the RC list meetings and the . . . division chief selection."

16. Respondent opposed these Requests on the grounds that (i) Applicant's challenge to the 2009 non-selection decision is inadmissible for failure to initiate timely exhaustion of administrative review, and (ii) disclosure of documents generated during the deliberative process in the selection for a vacancy would impair the ability of managers freely to express their views on competing candidates.

17. As to Request No. 6, Applicant's request for documents to determine whether the Department received permission from HRD to keep open the vacancy for a period of more than six months, the Fund responded that Applicant had not established that the "vacancy was kept open." The Fund asserts that the vacancy was closed and re-advertised under a new requisition number and that in 2009 and 2010, different vacancy announcements were issued, different candidates applied, and different selection panels were assembled. In the Fund's view, it is "also entirely beside the point since Applicant did not apply to the . . . position when it was re-advertised in 2010." The purport of Applicant's Request appears to be to discover whether the Department engaged in irregular procedures in order to favor another candidate.

18. As noted above, although the Grievance Committee decided that Applicant's challenge to her FY2010 APR was the only claim admissible before the Committee, it gave her "leeway" to present evidence relating to particular events of 2009 in order to demonstrate improper motive in the FY2010 APR decision. In implementing its approach to the admissibility of evidence, the Grievance Committee also invoked its practice—which differs from that of the Administrative Tribunal (*see infra*)—of examining documents *in camera*, which were then made part of the record before the Committee although they were not disclosed to the Grievant.[4] Applicant's Requests Nos. 1 and 2 are identical to two requests that the Grievance Committee made of the Fund in the course of its proceedings. (*See* Grievance Committee Recommendation and Report, April 25, 2012, pp. 37-38.) The Selection Memorandum sought by Applicant in Request No. 2 was produced by the Fund for examination by the Grievance Committee *in camera*; the Committee examined the handwritten notes of the RC on the same basis.

19. It is not disputed that Applicant did not receive formal feedback on the 2009 vacancy selection process. The only explanations for Applicant's non-selection that appear in the record of the case are the competing testimony of the Department Director and the email message of the RC member who served on the Selection Panel. Applicant sought the Selection Memorandum, as well as testimony by the RC member (*see* below), to provide evidence of the "decision process and the irregularities that occurred."

20. Although the 2009 Selection Panel recommended another candidate for the post in preference to Applicant, that decision was not implemented because it was determined that only

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[4] *See* explanation by Grievance Committee Chair that RC notes are being placed "under seal," that Applicant has not been given a copy of the notes but they are part of the record. (7/10/12 Tr. 99.)

staff members who had already advanced to the B List could be considered eligible for the appointment. (Neither Applicant nor the selected candidate was on the B List at the time.) The vacancy was re-advertised in 2010 and subjected to a separate selection process. Applicant did not apply for the vacancy in 2010, allegedly because the Department Director had told her that the 2009 selectee was expected to be appointed and that staff member was placed in the post on an "in charge" basis.

21. In deciding Applicant's requests for documentation of the 2009 vacancy process, the Tribunal considered that it was not necessary to decide at that stage on the admissibility of Applicant's challenge to the 2009 selection decision. What was significant in the context of considering Applicant's discovery requests were her contentions that the 2009 vacancy selection process (a) formed part of a pattern of unfair conduct of which she was the object and to which the Fund failed effectively to respond, and (b) provided evidence relevant to her contentions that other administrative acts, including the FY2010 APR decision (the admissibility of her challenge to which is not contested) were tainted by retaliation, harassment, discrimination and a hostile work environment.

22. In its pleadings before the Tribunal, the Fund contends that Applicant's Requests relating to the 2009 vacancy selection process should be denied in the interest of preserving the free exchange of views among decision makers in promotion and selection decisions. Although opposing disclosure of the Selection Memorandum to Applicant, Respondent offered the Tribunal the opportunity to review it *in camera* as the Grievance Committee had done, stating that "[t]hese documents were examined by the Grievance Committee for evidence of bias, and none was found." The Fund emphasizes that to "preserve confidentiality" the Grievance Committee reviewed *in camera* the 2009 memorandum summarizing the assessment of candidates for the 2009 vacancy and concluded that it did not "evidence any improper motivation or action that would support a claim."

23. The Fund seeks to invoke the Grievance Committee's conclusions about the evidence as an argument for why the Tribunal need not examine it. Such an approach, however, runs counter to the Tribunal's approach to the admissibility of evidence and to its authority to review Applicant's claims *de novo*. That the Grievance Committee examined the requested documentation and found that it did not support Applicant's allegations is not dispositive either of the question of the relevancy of the requested evidence or of whether the documentation supports Applicant's contentions. The Tribunal makes its own findings of fact and conclusions of law, *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17, and decides for itself whether an applicant's request for documents and information should be granted.[5]

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[5] The independence of the Tribunal's determination of the admissibility of evidence is illustrated in *Mr. "F",* para. 12 ("As to Request 3, reports of the senior economist assigned to advise on the personnel problems in the Section, the Tribunal concluded that, in order to protect the privacy of other persons, only those documents relating directly to Applicant should be produced. Examination of the documents revealed that the same standard had been applied

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24. Underlying the Tribunal's approach to *in camera* review is the principle that due process requires that the Tribunal found its Judgments only on evidence that has been subject to an adversary process. Rule XVII, para. 2, of the Tribunal's Rules of Procedure provides that "[f]or purposes of deciding on the request, the Tribunal may examine *in camera* the documents requested." The Tribunal has interpreted this provision to mean that documentation will be reviewed *in camera* solely for the purpose of deciding whether or not to grant the request. If, as a result of its *in camera* review, the Tribunal decides that the request shall be granted, the documentation ordinarily will be transmitted to the applicant who will be offered an opportunity to comment on it.[6] On the other hand, if the Tribunal decides on the basis of its *in camera* review to deny the request, it will not take the document into consideration in rendering its Judgment.[7]

25. In *Mr. R. Niebuhr, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-1 (March 12, 2013), para. 20, the Tribunal explained that its *in camera* examination of requested documents revealed that they were ". . . relevant to the issues of the case in documenting the bases for the [Administration] Committee's decisions and were relevant to Applicant's claims of bias in that process." The Tribunal additionally noted that, in reaching its decision, it had considered that in a number of other cases in which the dispute had arisen through the Administration Committee of the Staff Retirement Plan similar memoranda and minutes were part of the record before the Tribunal and that the Fund had not offered any basis for treating such documentation differently in the circumstances of the case. *Id.*

26. The Tribunal observes that in an earlier challenge to a non-selection decision, *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), the Fund had included as attachments to its Answer the summary evaluation sheets from two selection panels, redacted to show only the names of the applicant and the selectee. The documentation showed the relative rankings of the selectee and the applicant, as well as detailed comments on each of six candidates on a series of competencies for the position.

27. On September 11, 2014, the Tribunal notified the parties of the following decisions with respect to Applicant's Requests for production of documents concerning the 2009 vacancy selection process. The Tribunal granted Applicant's Request No. 2 for the Selection

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by the Grievance Committee in producing extracts of the materials to Mr. "F" during the Grievance Committee's proceedings. Accordingly, no further production of these documents was appropriate.").

[6] *See, e.g., Mr. R. Niebuhr, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-1 (March 12, 2013), paras. 17-20 (production of documents to applicant following Tribunal's *in camera* inspection; memoranda and minutes of the Administration Committee of the Staff Retirement Plan generated in the course of that Committee's denial of his request for a waiver of a provision of the Plan were relevant to the issues of the case, and Fund's claim of confidentiality could not be sustained).

[7] *See D'Aoust (No. 2)*, para. 10 (concluding, following *in camera* review, that a portion of the responsive documents "would not be transmitted to Applicant and accordingly would not be made part of the record before the Tribunal."). *See also N v. International Bank for Reconstruction and Development*, WBAT Decision No. 362 (2007), para. 2 (having reviewed particular documents *in camera*, the WBAT determined that they "do not contain additional information pertinent to its understanding of the application and therefore should not be entered into the record.").

Memorandum, considering that Applicant had not been given any formal explanation for her non-selection in 2009. Consistent with the Tribunal's practice in previous cases, to protect the privacy of other individuals, the Fund was asked to redact the Selection Memorandum so as to reveal the identities only of Applicant and the selectee. Additionally, the Fund was requested to append any record of an opinion dissenting from the selection decision. The Tribunal also granted Applicant's Request No. 6 for any documents to determine whether the Department had obtained permission from HRD to keep the position open for a period of more than six months, from July 2009 to April 2010. Respondent submitted responsive documents on September 26, 2014; Applicant filed her Comments on these documents on October 20, 2014.

28. Also on September 11, 2014, the Tribunal denied Applicant's Request No. 1 for additional documentation relating to the vacancy selection process, on the basis that the record was sufficient. Applicant's request for "unredacted copies of the documents to the Committee on August 17, 2012 related to the RC list meetings and the . . . division chief selection," which the Tribunal understood to include a request for the handwritten notes of the 2009 RC meeting that the Grievance Committee had reviewed *in camera,* was denied on the same ground. Applicant had not proffered any reason why "unredacted" documents should be produced to her. The record of the case includes the email of November 24, 2009 from three RC members to the HRD Director, the Grievance Committee testimony of the Department Director, as well as the feedback form provided by the RC to Applicant following its decision not to advance her to the B List in 2009.[8]

(2) Request No. 3

29. Request No. 3 sought a joint Memorandum from the SPMs of the two Departments in which Applicant served in 2010 and 2011, requesting that an exception be made to allow her to receive the benefit of the pre-existing policy governing promotions from Grade B1 to Grade B2, rather than be subject to the revised policy announced to the staff on July 1, 2011. That change in policy *inter alia* extended the minimum time-in-grade (TIG) from 12 months to 18 months for economists to become eligible for promotion from B1 to B2. Such promotions are made once annually, on November 1st. The revised policy additionally provided: "As a transitional measure for the upcoming November 2011 round, the TIG for economist promotions to B2 will be maintained at 12 months." (Memorandum from Deputy Managing Director to Fund Staff, "Management Approval of Promotion Policy Reform," July 1, 2011.) Applicant was promoted to B1 during the period between May 1 and July 1, 2011. Pursuant to the new policy, she did not become eligible for promotion to B2 until November 1, 2013. Applicant challenges the policy and its application to her.

30. The Fund opposed the Request on the ground that Applicant had not raised a timely challenge to the promotion policy and could not protest the failure to make an exception in her

[8] *See infra* FACTUAL BACKGROUND.

case. For the reasons set out below, the Tribunal has concluded that it does have jurisdiction to consider Applicant's challenge to the promotion policy and its application to her.[9]

31. On September 11, 2014, the Tribunal notified the parties of its decision to grant Applicant's Request that the Fund produce the Memorandum of July 2011 requesting that she be "grandfathered" under the B1/B2 promotion policy that had governed prior to July 1, 2011. The Tribunal could not say that the document was "irrelevant to the issues of the case" (Rule XVII, para. 2), given the interlocking nature of Applicant's claims, including her contentions that if her career had not been unfairly affected by a pattern of retaliation, harassment, and discrimination on the part of the Department Director, the RC would have advanced Applicant to the B List in February 2009 and that she would have been appointed to a B-1 vacancy prior to May 1, 2011. In granting this document request, the Tribunal additionally considered that compliance with it did not appear to be either "unduly burdensome" or to "infringe on the privacy of individuals" (Rule XVII, para. 2) and Respondent had not so argued.

32. In its decision of September 11, 2014, the Tribunal additionally requested that the Fund explain how the "transitional measure" included in the promotion policy had been implemented. Respondent submitted responsive documents and information on September 26, 2014. Applicant filed her Comments on October 20, 2014.

33. Following the Tribunal's session of October 28 and 29, 2014, the Tribunal requested that Respondent submit additional briefing on the merits of Applicant's challenge to the regulatory decision revising the B1/B2 promotion policy, and Applicant was given the opportunity to respond thereto. These submissions were filed on December 1, 2014 and January 16, 2015, respectively.

(3) Request No. 4

34. Request No. 4 sought the FY2010 APRs of three senior economists in Applicant's Division. Applicant stated that she possessed copies of these documents by reason of her managerial responsibilities during the rating period; she requested that the Fund produce them for the Tribunal's inspection.

35. It is not disputed that Request No. 4 relates to an admissible claim, i.e., Applicant's challenge to her FY2010 APR. Accordingly, the Tribunal considered the relevancy of the requested documents in the light of the issues of the case and weighed their probative value against the privacy interests of other staff members.

36. Applicant states that she sought to introduce her colleagues' APRs as evidence to challenge the credibility of the Division Chief's testimony "in relation to his involvement with [her] 2010 APR and in relation to the relative comparison" with these staff members. Applicant

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[9] *See infra* CONSIDERATION OF THE ISSUES: Has Applicant raised an admissible challenge to the revised B1/B2 promotion policy and its application to her?

asserts that these documents demonstrate that her Division Chief's rating proposals were "not independent and that he proposed them according to his effort to conform to [the Department Director]'s preferences." In particular, Applicant contends that the APR of one of her colleagues would provide evidence that, as a result of influence by the Department Director, Applicant was treated less favorably than she deserved in terms of recognition for a research paper several years following its publication. Additionally, Applicant asserts more generally that disclosure of the APRs would show that colleagues with lower work output and other measures of performance received higher APR ratings than did she in FY2010.

37. The Fund has responded that it is "not the province of the Tribunal to review all of the APRs for the A15 senior economists in [Applicant's Department] and decide for itself who should have received the 'Outstanding' rating in 2010." The Fund frames the issue before the Tribunal as "not whether, in the Tribunal's judgment, Applicant was more deserving of the 'Outstanding' rating than [her colleague] in 2010. Rather, the question is whether the evidence reasonably supports her 'Effective' rating, and whether the evaluation was free from improper motive."

38. Applicant, for her part, asserts that only by comparing her rating (and supporting evidence of her performance) against comparable information about other staff members can she establish improper motive in the contested APR decision. In her view, inconsistent application of performance standards may provide circumstantial evidence of improper motive.

39. The Tribunal notes that the contested FY2010 APR decision was necessarily a comparative exercise, based upon both "absolute" and "relative" measures of performance.[10] In the Grievance Committee proceedings, the Division Chief described the APR process as follows: "The [Department] has guidelines. . . . I have quantitative indicators . . . . [A]t the end of the day, it is a relative ranking." (9/16/11 Tr. 413-414.) The Division Chief explained that he makes a proposal to the front office in a bilateral discussion. This is followed by a Department-wide roundtable "where the ratings of all the staff in the department are decided, again taking into account that there are numerical quotas." (9/16/11 Tr. 414-415.)

40. In the circumstances, the Tribunal considered whether the potential probative value of performance information relating to staff members with whom Applicant competed for the rating that she contends she was unfairly denied outweighed the privacy interests of those staff members. For purposes of deciding the request, the Tribunal invoked its authority under Rule XVII, para. 2, to examine the documents *in camera*. Accordingly, on September 11, 2014, the Tribunal notified the parties, as to Applicant's Request No. 4 for the FY2010 APRs of three senior economists in her former Division, that the Fund was to deliver these documents (with the names of the three senior economists redacted) to the Tribunal for its *in camera* inspection. On September 26, 2014, Respondent provided the APRs for *in camera* review.

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[10] *See infra* FACTUAL BACKGROUND.

41. Having perused the requested documents *in camera*, the Tribunal concludes, in the light of the record as a whole, that the APRs of Applicant's colleagues do not provide additional material information. Accordingly, the Tribunal denies Applicant's request that these documents be made part of the record and will not take them into account in deciding her Application.

42. The Tribunal additionally notes Respondent's argument that Applicant should not be able to use, in advancing her claims through the dispute resolution process, confidential personnel documents relating to other staff members that she acquired in the course of carrying out her work responsibilities, citing *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007).[11] Applicant has responded that the Division Chief, in his Grievance Committee testimony, while not identifying Applicant's colleague by name, had unmistakably identified that staff member as having received an "Outstanding" rating based on other information he provided, thereby breaching confidentiality.

43. The question for decision in the instant case, however, is not the propriety of Applicant's use of confidential personnel documents relating to other staff members. The question here is whether, as an evidentiary matter, irrespective of Applicant's prior access to the documents, they are admissible to the record before the Tribunal. On that question, the Tribunal has concluded, after reviewing the documents, that they do not provide additional material information and will not be made part of the record of the case.

(4) Request No. 5

44. Request No. 5 sought the identity of an individual referred to by pseudonym in one of the Tribunal's earlier Judgments. Applicant asserted that she has reason to believe that the individual is one of the persons who figures in the present case and that information about that staff member, as presented in the Tribunal's earlier Judgment, is relevant to consideration of her Application.

45. The Fund opposed the Request, citing the need for even-handed application of the Tribunal's policy governing anonymity and asserting that information from another case is not relevant to Applicant's contentions, which she must prove on their own merits.

46. The Tribunal's practice is not to identify individuals by name in its Judgments, apart from parties to the case, i.e., Applicants and Intervenors. Rule XXII governs requests for anonymity of parties. As considered below, Applicant in this case seeks anonymity for herself and the Tribunal grants that request.[12] In granting anonymity to her previously in *Ms. "GG" I*, para. 13, the Tribunal observed: "The effect of this order is that not only will Applicant's identity

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[11] In *Ms. "BB"*, paras. 126-134, the Tribunal sustained a misconduct finding against an applicant who had downloaded, for the purpose of preparing a request for administrative review, salary and merit increase information for all Fund staff, as well as additional data relating to staff members in her organizational unit. The record showed that the magnitude of data accessed by Ms. "BB" had exceeded that required to carry out her work assignments.

[12] *See infra* Applicant's request for anonymity.

be protected, but the identity of other staff members who have been affected by the events under consideration in this case will also be protected."

47. On September 11, 2014, the Tribunal informed the parties that it had denied Request No. 5, having found no ground to deviate from its policy of protecting the identities of individuals who are not parties to a Judgment. Moreover, due process requires that the Tribunal decide the instant Application solely on the record developed in this case and not on the basis of extrinsic information. Accordingly, Applicant's Request to discover the identity of an individual referred to by pseudonym in one of the Tribunal's earlier Judgments was denied.

B. Applicant's request for oral proceedings

48. 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, provides in part: "Oral proceedings shall be held if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views pursuant to Rules VII-X, the Tribunal deems such proceedings useful." In determining whether oral proceedings will be "useful," the Tribunal consistently has taken account of the sufficiency of the written record of the case. *See, e.g., Ms. "BB"*, paras. 17-19 (denying request for oral proceedings in view of extensive Grievance Committee record and written documentation of the case).

49. In this case, the Tribunal has the benefit of the transcript of oral hearings held by the Fund's Grievance Committee, at which the following persons testified: Applicant; her former Department Director; her former Division Chief; her former Senior Personnel Manager (SPM); another senior official of the Department to whom Applicant reported in relation to a portion of her responsibilities; a former colleague in the same Department; and a former supervisor of Applicant in another Department. The Tribunal is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *D'Aoust*, para. 17.

50. Applicant requested oral proceedings to seek additional witness testimony, principally from the RC member who performed the due diligence in relation to Applicant's candidacy for the B List in 2009 and served on the Selection Panel for the B-level vacancy to which Applicant applied in 2009. The same RC member was one of the authors of the November 24, 2009 Memorandum to the HRD Director, which commented on the Department Director's conduct at the 2009 RC meeting when Applicant was not advanced to the B List. Applicant sought the RC member's testimony as to the "decision process and the irregularities that occurred."

51. Applicant additionally identified four other staff members as "potential witnesses" to the Department Director's "general conduct." The evidence that Applicant sought to elicit through their testimony was to demonstrate the Department Director's "characteristic hostile treatment of other people," including, for example, that he allegedly made racist and other offensive remarks at a high-level international meeting. Applicant asserts that two of these witnesses could testify to the Department Director's favoritism toward another colleague; that (male) colleague was

successfully nominated by the Department for the B List at the same 2009 RC meeting at which Applicant's candidacy was rejected. Applicant asserted that participation of these witnesses was either denied by the Grievance Committee[13] or they were reluctant to testify.

52. Respondent opposed Applicant's request for oral proceedings. As to the request for testimony by the RC member, Respondent asserted that it would not be appropriate for the RC member to testify about the RC's deliberations, which it maintains are strictly confidential. Moreover, the Fund asserted, the RC member's views regarding the Department Director's statements at the 2009 RC meeting, as well as her views of Applicant's interview performance for the 2009 position, are adequately reflected in the written record before the Tribunal.

53. Applicant correctly notes that in *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 13, where the applicant challenged elements of the selection process for a vacancy for which he was an unsuccessful candidate, the Tribunal had the benefit of the transcript of Grievance Committee proceedings that included testimony by the HRD staff member who conducted the initial screening of applications, all four members of the Selection Panel, the RC member charged with conducting the "due diligence" inquiry into the candidates' qualifications, as well as the HRD Director who was both the head of the hiring department and served as Chairperson of the Review Committee.

54. The text of *D'Aoust (No. 2)*, paras. 29-56, reveals that the HRD staff member testified before the Grievance Committee as to how he judged years of experience and qualifications in the initial screening process, supporting the view that the short-listed candidates had met the minimum qualifications for the position. Selection Panel members testified to the weight given to various qualifications stated in the vacancy announcement, as well as to their method for rating candidates by interviews and a written test. They testified that the same three candidates received the highest ratings on both of these indicators, as assessed by all four of the Selection Panel members. The RC member's testimony in that case in the Grievance Committee proceedings described the due diligence process and, in particular, how he evaluated candidates' supervisory experience in the light of the qualifications defined for the position.

55. In another challenge to a non-selection decision, *Sachdev*, the transcript of the Grievance Committee proceedings, which formed part of the record before the Tribunal, revealed that the applicant's SPM, who had served as a Selection Panel member, testified in detail about the selection process, as well as to her impressions of the applicant's and the selectee's performance in the interviews, including how they responded to specific questions and the particular strengths of the selectee. (This testimony was not reproduced in the Tribunal's Judgment.) The Judgment quotes the Grievance Committee testimony of the relevant department director, stating that the result of the interview process was that the selectee ". . . stood 'head and shoulders' above the

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[13] *See* Grievance Committee Decision on Grievant's request to call additional witnesses and for additional documents, August 10, 2012, pp. 3-5.

other candidates (Tr. 367), so much so that the Selection Panels suggested re-advertising the vacancy if that individual had not accepted the position." *Sachdev*, para. 41.

56. In deciding whether to hold oral proceedings for the purpose of taking additional witness testimony in the instant case, the Tribunal accordingly considered the sufficiency of the written record. In an email exchange that forms part of the documentary evidence, the relevant RC member noted that she had conducted the due diligence in relation to Applicant's consideration by the RC in 2009 and also served as a member of the Selection Panel for the 2009 B-level vacancy that arose in Applicant's Department. In that documentation, she stated: "To me it's a clear case of discrimination." As to the vacancy selection, she stated:

> [The other members of the selection panel] and I interviewed her along with two other candidates for a B level job (in the end the process turned out to be invalid because the person they were rooting for had not gone through the B list, so they withdrew the nomination). Of the 4 candidates we interviewed, she was heads and shoulders above the rest—this was acknowledged by the panel but they chose their favorite candidate in the write up. I basically told them that I would not go along with their proposal—was reflected in the write up (there are records of all this). The only reason I was told as to why [Applicant] did not cut it is because she is not from the region . . . .

(Email from RC member to five other women economists, November 24, 2009.) As to the Department Director's conduct at the RC meeting in February 2009, the documentary evidence additionally reveals the RC member's view that her due diligence indicated that Applicant was "very competitive" for the B List but that the Department Director had come to the meeting "(in itself unusual, as the normal practice is for the SPM to come to the RC meeting), and basically gave us a number of reasons why she should NOT be put on the list." (Email from three RC members to HRD Director, November 24, 2009.)

57. The Tribunal is able to compare these written statements of the RC member with the account given by the Department Director in his Grievance Committee testimony as to his conduct at the 2009 RC meeting.[14] (*See* 9/15/11 Tr. 62-63.)

58. Applicant did not indicate that she sought oral proceedings for purposes of making an oral argument on the issues of the case.

59. On September 11, 2014, the Tribunal notified the parties of its decision that oral proceedings would not be "useful" (Rule XIII, para 1) to its Judgment in the case. As to Applicant's request for witness testimony by the RC member who served as a member of the Selection Panel for the 2009 vacancy and who participated in the 2009 RC meeting in which the

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[14] *See infra* FACTUAL BACKGROUND.

RC decided not to advance Applicant to the B List, the Tribunal denied the request on the ground of the sufficiency of the written record of the case, as supplemented by the Selection Memorandum. As to Applicant's request for witness testimony by other staff members as to the Department Director's "characteristic hostile treatment of other people," the Tribunal concluded, based on the proffers that Applicant had made as to the proposed nature of such testimony, that such evidence would not be probative of the issues of the case.

C. Applicant's request to strike information from the record

60. In her Reply, Applicant asks the Tribunal to strike from the record three documents that Respondent has annexed to its Answer, namely the redacted Reports of Investigation prepared by the Fund's Ethics Office in response to complaints lodged by Applicant in late 2011 against her former Department Director, SPM, and Division Chief. Respondent opposes Applicant's request to strike the documents from the record, asserting *inter alia* that the fact of the Ethics investigations is relevant to rebut Applicant's claim that the Fund failed to address allegations of harassment, retaliation, and discrimination that Applicant had raised with appropriate Fund officials.

61. The Tribunal has recognized that the Ethics Office process of conducting investigations into alleged misconduct pursuant to GAO No. 33 (Conduct of Staff Members)[15] is distinct from the dispute resolution process governed by GAO No. 31 (Grievance Committee) and the Statute of the Administrative Tribunal, by which staff members may challenge the legality of administrative acts of the Fund adversely affecting them. In *Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 260, the Tribunal emphasized that the ". . . disciplinary process is not the only avenue of recourse when a staff member believes that he or she has been the object of impermissible workplace harassment." The Tribunal observed: "Whether or not [Applicant's retired supervisor] remained subject to the Fund's misconduct procedures following his retirement, Applicant's right to pursue a timely complaint of sexual harassment through the Fund's formal process for resolution of employment disputes was not extinguished by the conclusion of Mr. "X"'s employment . . . . Had Applicant raised a timely allegation of harassment through the channels of administrative review provided by GAO No. 31 (Grievance Committee), the question of 'whether Applicant experienced impermissible treatment to which the Fund failed effectively to respond,' *Mr. "DD"*, para. 113, would have been given legal resolution through that process." *Id.*, para. 262.

62. The Fund's written internal law makes plain that "[i]f employees believe that they have been subjected to discrimination, there are two avenues of formal recourse that may be pursued."

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[15] Among the forms of misconduct for which disciplinary measures may be imposed pursuant to GAO No. 33 is "misconduct in an official capacity, including abuse of authority, harassment, discrimination on the basis of sex, sexual orientation, race, creed or national origin, and retaliation against a staff member who participates in the Fund's dispute resolution system or in a disciplinary proceeding as either a complainant or a witness." GAO No. 33 (Conduct of Staff members) (May 18, 2011), Section 4 (v).

(HR Web: Discrimination Appendix 1, E. Formal Mechanisms.) These two avenues, (1) filing an Ethics complaint or (2) filing a challenge to an administrative act of the Fund through the dispute resolution system, are described to the staff as follows:

> 1. If the individual's main objective is to ensure that the discriminatory behaviors cease, a complaint may be addressed to the Ethics Advisor, who will conduct a preliminary investigation into the matter. If, on the basis of the Ethics Advisor's preliminary investigation, the Director of HRD or the Managing Director believes there are grounds for pursuing an investigation of misconduct, the Ethics Advisor will proceed with such an inquiry and report his findings to management or the Director of HRD. If it is concluded that an employee has engaged in misconduct, including discriminatory behavior, disciplinary measures may be imposed on the respondent.
>
> 2. If the individual's main objective is to seek redress for the damaging effect that discrimination has had on her/his career (e.g., if a decision affecting the individual is discriminatory, or if the Fund has failed to take adequate measures in response to a complaint of discrimination), the employee may seek review of the matter through the formal channels of dispute resolution in the Fund. This would normally entail following the procedures for bringing a grievance before the Grievance Committee (including prior administrative review), as set out in GAO No. 31. If following the grievance process the staff member remains dissatisfied with the result, she or he may file an application with the IMF Administrative Tribunal (IMFAT).

(Id.)

63. This is the first case in which the Tribunal has been presented with the question of what relevance, if any, the findings of the Ethics Office relating to complaints of misconduct may have upon the Tribunal's consideration of an application by a staff member alleging that the purported misconduct adversely affected her conditions of employment.

64. When, as a result of an Ethics Office investigation, a staff member is disciplined for misconduct, that staff member may challenge the disciplinary decision before this Tribunal. *See, e.g., Ms. "BB".* The Tribunal's degree of scrutiny in reviewing a finding of misconduct is comprehensive. *Id.*, para. 123-125; *see also Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 121. Accordingly, when its outcome is adverse to a staff member charged with misconduct, the Ethics process is manifestly not final.

65. Similarly, a finding by the Ethics Office exonerating a staff member following an investigation for misconduct cannot be accepted by the Tribunal as dispositive of the factual and legal issues as to whether an applicant has established that the alleged misconduct improperly

affected career decisions such as performance ratings and selection decisions and/or that the applicant was the object of a pattern of unfair treatment linked to the alleged misconduct. This is because it is the Tribunal's responsibility ". . . as a judicial body, to determine whether a decision transgressed the applicable law of the Fund." Commentary on the Statute,[16] p. 13. The Administrative Tribunal is the forum uniquely vested with that plenary authority. *See Ms. "J"*, para. 95 ("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.").[17] The Tribunal's task in this case is not to review a disciplinary decision but rather to decide whether the Fund has abused its discretion in failing to provide Applicant with a workplace free of unfair treatment.

66. Other international administrative tribunals, interpreting the staff rules of other international intergovernmental organizations, also have recognized that the punitive purpose of the misconduct process is distinct from the compensatory purpose of the system for the resolution of employment disputes. In *Rendall-Speranza v. International Finance Corporation*, WBAT Decision No. 197 (1998), the World Bank Administrative Tribunal (WBAT), although sustaining the view that a staff member had not committed sexual harassment (para. 77), nonetheless awarded compensation to the complaining party on the following grounds:

> The Tribunal also concludes, however, that this determination by the Bank, that no sexual harassment had been committed, should not have been regarded by the Bank as putting an end to the matter. There are forms of improper behavior, even though falling short of sexual harassment, that should engage the attention of the Bank and require action on the part of its management. The Tribunal is troubled by the inappropriate conduct acknowledged by the Director and the failure of the Bank to react to such behavior described by the Appeals Committee as "unbecoming a manager." In the publication entitled *Preventing and Stopping Sexual Harassment in the Workplace*, the Bank emphasized that managers

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[16] 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).

[17] *See also Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), paras. 130-136 (Fund's Workers' Compensation policy does not provide exclusive remedy to staff member who sustains injury as a result of harassment or hostile work environment because "District of Columbia law cannot be said to preempt the Tribunal's unique jurisdictional mandate to interpret the internal law of the Fund, in this case its prohibition on workplace harassment"; "[w]hile the Fund's Workers' Compensation policy may provide an exclusive remedy in lieu of tort actions, *it does not displace the Tribunal's remedial powers under its Statute to 'correct the effects' of an administrative act that it concludes has contravened the internal law of the Fund.*"). (Emphasis added.)

> have a primary responsibility in "establishing the tone for a healthy working environment." Among the steps outlined by the Bank to achieve this goal is included: "setting a good example – avoiding even the appearance of improper conduct . . ."

Id., para. 78.[18] *See also Mr. E. D. G. [FAO]*, ILOAT Judgment No. 3318 (2014) (following determination by Investigation Panel that supervisors' conduct had not amounted to harassment, the complaining party sought relief from the ILOAT, which, on its own review of the facts and law, concluded that the applicant had indeed been the object of harassment and remedied him accordingly).[19]

67. It is clear that the Fund has chosen to create a system for the resolution of complaints of misconduct that is separate from the channels of review available to staff members for challenging the legality of administrative acts adversely affecting them. A feature of the misconduct complaints ("Ethics") process in the Fund is that reports emanating from this process are maintained as confidential, except on a need-to-know basis. This approach precludes the complainant from having access to the reports. The Fund states that Applicant was informed by the Ethics Office only of the "result" of the investigations. Accordingly, Applicant has not had the opportunity to present rebuttal evidence as to the elements of those findings. The Tribunal also takes note of the fact that witnesses in a misconduct investigation are examined without the benefit of cross-examination in an adversary proceeding.

68. In the view of the Tribunal, the weight that it may give to Ethics Office findings is limited by the following factors: (i) the Tribunal's duty to assess independently the claims raised in an application so as to fulfill its obligation ". . . as a judicial body, to determine whether a decision transgressed the applicable law of the Fund," Commentary on the Statute, p. 13; (ii) the confidential nature of the investigatory process, by which the reports of investigation are withheld from the complaining party; and (iii) the requirement that, as a judicial body, the Tribunal is to draw its conclusions based on evidence tested through an adversary process. Accordingly, in the absence of a compelling reason, the Tribunal will not ordinarily have a basis for taking account of the findings of Ethics investigations.

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[18] At the same time, the WBAT has also held, in cases alleging retaliation, that ethics investigations may be useful to the WBAT's own fact-finding process and, in appropriate cases, it may suspend tribunal proceedings to allow for review of such claims by the World Bank's ethics office. *See Sekabaraga v. International Bank for Reconstruction and Development*, WBAT Decision No. 494 (2014), para. 42 ("In addition to ensuring a more complete factual record, prior review by EBC [Office of Ethics and Business Conduct] would also eliminate the possibility of the EBC reaching conclusions that are at variance with findings of fact made by PRS [Peer Review Services] or the Tribunal.").

[19] At the same time, the ILOAT cautioned that the ". . . finding of the existence of harassment, which has been reached at the end of proceedings to which the persons called into question are not party and in which they have therefore been unable to comment, may not under any circumstances be used against them in any context other than that of the instant judgment." *Mr. E. D. G.*, para. 10.

69. Staff members must feel free to pursue all channels of recourse when presented with circumstances that they perceive as raising issues both of misconduct by other staff members and of the illegality of an administrative act by which they have been adversely affected. Given the distinct purposes of these channels, and the differences among their fact-finding methods and standards of proof, the Tribunal concludes that it would not be appropriate to give weight to the findings made by the Ethics Office in response to Applicant's complaints.

70. In the light of the foregoing, the Tribunal grants Applicant's request to strike from the record the redacted Ethics Reports. The Tribunal will, however, take notice that Ethics investigations were undertaken and completed, given that Respondent has cited the Ethics inquiry in answering Applicant's allegation that it failed to respond effectively to her complaints of unfair treatment.

D. Applicant's request for anonymity

71. In her Application, Applicant has requested anonymity pursuant to Rule XXII of the Rules of Procedure, which provides that the Tribunal shall grant such a request "where good cause has been shown for protecting the privacy of an individual." Respondent does not oppose this request.

72. In interpreting Rule XXII, the Tribunal has repeatedly affirmed 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 Mr. E. Weisman, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-2 (February 26, 2014), para. 17; *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application),* IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13.

73. In granting the same Applicant's earlier request for anonymity in *Ms. "GG" I*, para. 13, the Tribunal reaffirmed that allegations of misconduct warrant a grant of anonymity.[20] Subsequent to its Judgment in *Ms. "GG" I*, the Tribunal has also granted requests for anonymity in the context of challenges to the assessment of job performance, so as to protect the candor of the assessment process. *See Mr. "HH", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-4 (October 9, 2013), paras. 42-43; *Ms. "JJ", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014- 1 (February 25, 2014), paras. 11-14.

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[20] *See Ms. "EE"*, 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"*, para. 7 (health of applicant; allegations of mistreatment by supervisor); *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"*, 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).

74. The instant Application concerns allegations of misconduct made against staff members of the Fund, as well as a claim of a pattern of retaliation, harassment and discrimination against Applicant. Applicant also challenges, as improperly motivated, the assessment of her work performance through the APR process. Accordingly, in the light of its jurisprudence and the allegations and evidence considered in this case, the Tribunal grants Applicant's request for anonymity.

75. Respondent additionally requests, in view of the nature of the allegations that Applicant has lodged against other staff members, that the Tribunal's Judgment "refrain from disclosing these staff members' names, position titles, department, and division titles." Applicant, for her part, expressly requests that the Tribunal be "circumspect in the description of the details" of the case in order to further protect her identity from disclosure.

76. As to Respondent's request for anonymity of other persons, the Tribunal, in accordance with its usual practice, will accede to that request as well. *See Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012), para. 10 and cases cited therein.

77. As to the parties' concern that disclosure of factual details may undermine the protection of the privacy of individuals, the Tribunal must, as always, "weigh[ ] the benefits of public justice against the privacy interests of individuals." *Mr. "HH"*, para. 38 and note 10. The Tribunal in this Judgment, as in others, 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 comprehensible reasons for its decision." *Weisman*, para. 14. The Tribunal's circumspection in describing factual circumstances that may be unique to an individual must, as necessary, yield to the primary obligation on the Tribunal to give sufficient reasons for its decision. *See Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), note 1. The Tribunal also reaffirms the importance of the vigorous enforcement of the provisions of the Fund's internal law protecting complainants and witnesses in the dispute resolution process from retaliation. *See Weisman*, paras. 15-16; GAO No. 31 (Grievance Committee), Rev. 4 (October 1, 2008), Section 10; GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Section 4.01(v) and Annex 6.

FACTUAL BACKGROUND

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

A. Developments in 2006–2008

79. In 2006, Applicant received an APR rating of "Outstanding." The Department Director testified that the rating significantly recognized a particular research paper that was later published in a leading professional journal. (9/15/11 Tr. 58.) Applicant was promoted to Grade A15 in the same year. (7/10/12 Tr. 149.) According to a timeline prepared by Applicant, which forms part of the record of the case, the paper was published in 2008.

80. Applicant's allegations of retaliation arise from an incident that took place in 2007. Applicant reported to her Department Director alleged misconduct on the part of another senior

official in the Department who served at the time as her direct supervisor. The allegations included sexual harassment of a consultant while on mission, a biased attempt to prevent the conversion of a term staff member to permanent staff, sexist and racist comments, inappropriate interference to provide advantages to "selected attractive young women" and hostility towards Applicant's staff. Applicant testified that she directly observed the official "really crossing the line with respect to constant womanizing" on mission. (7/9/12 Tr. 41.) Additionally, Applicant testified that one of her staff members was "very upset" at the official's providing an advantage to a "pretty young woman," which was "interfering with our ability to conduct our work." (7/9/12 Tr. 43.) Another of Applicant's staff members, "an African staff member, reported to [Applicant] in tears about racist comments that [the official] had made to her." (7/9/12 Tr. 44.) In another alleged incident, Applicant testified, the official unfairly sought to prevent the conversion to regular staff of a capable staff member. Applicant regarded this incident as the "straw that broke the camel's back" and decided that she should report the misconduct. (7/9/12 Tr. 44-49.) Applicant explained: "I wasn't doing this to be a troublemaker. . . . I liked working with [the official] because of our shared objectives, but I just wanted the misconduct to stop." (7/9/12 Tr. 48.) She set up a meeting with the Department Director and "explained to him that actually the behavior was out of control, that it was really upsetting staff." (7/9/12 Tr. 48-49.) In a follow-up meeting, she indicated to the Department Director that "some of my section members were willing to come to him and give their observations, and I know that my African section member did report to him." (*Id.*)

81. The record shows that the Department Director raised the matter with Fund Management, and the supervisor was disciplined as a result. (9/15/11 Tr. 65-66.)

82. Applicant asserts that, despite the disciplinary measures, the official's improper behavior did not stop. She observed that he became "more careful in making racist comments to my section members, but apparently [the Department Director] did not address the sexual harassment because [the official] continued going after women. . . . We heard many women saying that they were uncomfortable with [the official]. So it did not end." (7/9/12 Tr. 50-51.) She further alleges that the Department Director's testimony indicates that he did not regard the conduct of which she had complained as misconduct. In the Grievance Committee proceedings, the Department Director testified that in retrospect he thought that perhaps the actions of that supervisor were "just ill-judged humor." (9/15/11 Tr. 66.)

83. During the 2007 APR round, a few months following her report of misconduct against her direct supervisor, Applicant states that her APR rating and MAR (Merit-to-Allocation Ratio)[21] declined "precipitously." (7/9/12 Tr. 63.) Applicant asserts that the decline occurred despite a significant increase in her responsibilities, performance and outputs. She testified that she initially attributed the decline to retaliation by her immediate supervisor who was the subject of the misconduct allegations she had raised during the year, but that when she queried him the

[21] The MAR is the ratio of a staff member's actual merit increase to the amount budgeted for this purpose. *See* Staff Bulletin No. 08/03, note 4.

immediate supervisor informed her that he had proposed her for an "outstanding" rating but that the Department Director to whom she had reported the alleged misconduct had reduced Applicant's APR rating. (7/9/12 Tr. 64.)

84. In the 2008 APR round, Applicant asserts, her immediate supervisor again informed her that he had proposed rating her "outstanding" but stated that the Department Director had once more reduced Applicant's rating to "average." During the Grievance Committee proceedings, Applicant questioned the Department Director as follows: "My supervisor, . . . following the 2007 and 2008 round, indicated to me that he had proposed me for an outstanding, and you had been the individual to reject that proposal." The Department Director replied: "I don't recall . . . ." (9/15/11 Tr. 145-146.) Applicant's FY2008 APR stated that she had done "outstanding work in several different areas" and noted, in particular, that her "research has been very successful with recent publications in [leading professional journals]" and that she "continues to produce new, innovative papers." The APR stated that Applicant "played a critical role" in the success of the Division's activities. It concluded: "Finally, she is a very successful manager who is highly popular with her staff and invariably receives high evaluations. In short, an outstanding performer in a number of diverse areas." Her MAR is given as 1.02. (Applicant's FY2008 APR.)

B. Developments in 2009

(1) 2009 Nomination for B List

85. In advance of the February 2009 RC meeting, Applicant's Department nominated two of its staff members—Applicant and a male colleague—for inclusion on the B List, which facilitates promotion of senior economists to B-level positions in the Fund.[22] Applicant's colleague, but not Applicant, was accepted for the B List as a result of the 2009 RC meeting.

86. The conduct of Applicant's Department Director at the 2009 RC meeting is a matter of dispute between the parties. Applicant alleges that at the meeting at which her nomination was considered, her Department Director undermined her candidacy. In a document that forms part of the evidence before the Tribunal, three RC members reported that Applicant was "very competitive" for the B List but that the Department Director had come to the meeting "(in itself unusual, as the normal practice is for the SPM to come to the RC meeting), and basically gave us a number of reasons why she should NOT be put on the list." (Email from three RC members to HRD Director, November 24, 2009.)

87. In the Grievance Committee hearings, the Department Director provided his own account of his conduct at the 2009 RC meeting: "Obviously, my comments were supportive, because

[22] "The RC List is composed of Grade A15 'fungible' economist staff who are considered ready for advancement to Division Chief and Advisor positions in several departments. The RC identifies these candidates on a Fundwide basis for placement on the List, which is replenished as needed to meet projected B-level vacancies . . . . Except for specialist positions, inclusion on the List is a precondition for a Grade A15 economist to apply for a vacant B-level economist Division Chief or Advisor position advertised in the CO [Career Opportunities]." Staff Bulletin No. 03/27 (Senior Promotions and Appointments in the Fund) (December 19, 2003), Para. 9 and Annex IV.

when you take someone to the Review Committee, you're making a pitch for that person to be included on the list. So I'm sure I said a lot of supportive things." At the same time, he commented: "I never gild the lily. I never make the case that the candidate walks on water. All of the candidates have strengths and weaknesses . . . . So I'm quite sure I said a lot of very positive things about [Applicant]. I'm quite sure I also didn't say that she was perfect. And I'm quite sure the other candidate who was there, equally, I didn't say he was perfect, but I'm sure I said a lot of positive things. . . ." He concluded: "[I]t would be very strange to take someone to a Review Committee, to advocate for their promotion, and not to advocate fairly strongly." (9/15/11 Tr. 62-63.)

88. Following the RC's decision of February 2009 that Applicant would not be advanced to the B List at that time, she was provided with a "Feedback Summary" form, which gave as the basis for the decision: "Shows potential but needs further seasoning/development/testing." Applicant's "Strengths" were listed as follows: "Strong and versatile macroeconomist; Very strong analytical skills and publication record; Excellent researcher and teacher." At the same time, the following "Development Needs" were identified: "Expand managerial (including supervision of economists) and mission leadership experience; Strengthen diplomacy with supervisors." The "Overall Comments" section stated: "[Applicant] is viewed as a strong and versatile macroeconomist with clear potential for the B-level. To be more competitive for the RC List, the RC recommends that [Applicant] expand her managerial experience to include supervision of economists and gain additional mission leadership experience."

(2) 2009 B-level vacancy in Applicant's Department

89. Shortly after the 2009 RC decision on the B List, a B-level vacancy was advertised in Applicant's Department. Because Applicant had not been advanced to the B List, she was not initially eligible to apply. However, just before the vacancy was set to close, HRD allowed the Department to open the vacancy to A15 staff members who were not on the B List. The deadline for applications was extended by one week, and Applicant and others were notified directly by email from the SPM of the change in eligibility requirements. Applicant applied immediately for the position, a fact that was noted the next day in an email message from the SPM to the Department Director.

90. As candidates who were not on the B List were now being considered for the vacancy, an RC member was included on the Selection Panel. Applicant and three other staff members were interviewed for the position.

91. According to the Selection Memorandum that became part of the record of the case as a result of the Tribunal's September 11, 2014 decision on Applicant's requests for production of documents, the Selection Panel concluded that all four of the interviewed candidates ". . . had strong records and would likely be successful in the position." The Memorandum continued: "Based solely on the interviews, the panel ranked the candidates in order as [Applicant], [the selectee], [the other two candidates]. However, in examining the two top candidates and taking into consideration factors beyond the interviews, most of the panel ranked [the selectee] ahead of [Applicant]."

92. The Selection Memorandum summarized the experience and qualifications of each of the candidates and explained the Department's recommendation of the selectee in the following terms:

> [S]he would be the strongest among the candidates in explaining the Fund and our work in [the region], and in eliciting financial support—an important part of the Division Chief's work. Second, she is fluent in [language of the region]—a very useful attribute for our frequent negotiations with [country] on the . . . . Third, she has a good network of contacts in [the region] and is very familiar with the subtleties of political and economic issues in the region. Fourth, she was "in-charge" of the . . . Division for nine months and did an excellent job as the manager. Finally, [the Department] believes that as a [country in the region] national she would bring valuable diversity to a position that entails frequent contacts with [officials of the region].

93. Respondent has produced documentation showing that the RC member on the Selection Panel was provided the opportunity to comment on a draft of the Selection Memorandum before it was finalized. She responded: "It's fine. Please see two small edits." The proposed edits were to enhance the summary of Applicant's experience and qualifications by introducing the phrase "in top academic journals" in the discussion of Applicant's publications and by changing the word "good" to "very strong" in describing Applicant's management and leadership skills. Both of the revisions suggested by the RC member were incorporated in the final Selection Memorandum.

94. The Tribunal requested that the Fund produce "any documentation underlying the Selection Memorandum of June 9, 2009 . . . , including any grids showing the respective ratings of each of the candidates on the various competencies for the position (with names redacted except for those of Applicant and the selectee)." The Fund responded that, following a review of the files and consultation with both the former SPM of Applicant's Department and the Secretary of the RC, it concluded that "no such documents currently exist, if they ever existed." The Fund asserts that the former SPM has "apprised us that there was no formal comparative table of the candidates."

95. Applicant, in response, states that the lack of formal documentation comparing the candidates demonstrates a lack of proper consideration of the candidates and supports her view that the decision not to select her "stems from the improper discriminatory and retaliatory motives of the [Department] Director . . . and his personal animosity toward [her]."

96. Several months after the selection decision, in a November 24, 2009 email to a group of senior women economists (*see* below), the RC member on the Selection Panel described the selection process as follows: "Of the 4 candidates we interviewed, [Applicant] was heads and shoulders above the rest—this was acknowledged by the panel but they chose their favorite candidate in the write up. I basically told them that I would not go along with their proposal—was reflected in the write up (there are records of all this). The only reason I was told as to why [Applicant] did not cut it is because she is not from the region . . . ." (Email from RC member to

five senior women economists, November 24, 2009.) The Department Director, for his part, explained the selection decision in his Grievance Committee testimony in the following terms: "It was advantageous to be connected in [the region] and advantageous to speak some [language of the region]." The Department Director asserted that the selectee fulfilled these criteria because she was a native of the region. (9/15/11 Tr. 241-242.)

97. After the selection process had been completed, the RC advised HRD that Grade A15 candidates who were not on the B List should not have been considered. (9/16/11 Tr. 356 [testimony of SPM].) According to the Fund, the selection decision accordingly was "not implemented" and the requisition for the vacancy was cancelled. The selectee, however, was placed in the position on an "in charge"[23] basis later in 2009. According to Applicant, the Department Director informed her that this staff member was expected to be appointed to the position formally in the future. (7/10/12 Tr. 130.)

(3) Applicant's APR for FY2009 (May 1, 2008–April 30, 2009)

98. According to Applicant, during the 2009 rating year, her immediate supervisor, who had been the subject of the earlier misconduct complaint, left the Fund. Also, according to Applicant, her new supervisor, the Division Chief, told her that although he considered her performance to be "outstanding" he had reduced her performance rating to average in order to be seen as a "team player" by the Department Director. That supervisor, however, denied that he was under any pressure to change any of the ratings. (9/16/11 Tr. 440-441.) When asked in the Grievance proceedings about being a "team player" to the Front Office of the Department, he responded: "[W]hat I might have said is that we all work for the Front Office; we represent the office." (9/16/11 Tr. 443.) When asked whether he recalled mentioning "good soldier" in that context, he answered: "I might have. I think being a good soldier is sometimes an appropriate attribute. We all work as part of teams, and teams are more effective when there is team cohesion. . . . I mean, the debate stops at some point, and it doesn't mean we get everything that we want at all times." (9/16/11 Tr. 444.)

99. The Division Chief stated, in reference to the Department Director: "He's a strong personality. He's a strong intellect. And so, in that context, I advise him, and I don't try to outshine him and so forth. So I think, again, being a good soldier, being a good team player is not inconsistent with that characterization." (9/16/11 Tr. 447.) He continued: "I may have been trying to advise [Applicant] on what I was finding to be effective approaches of having more

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[23] Pursuant to Staff Bulletin No. 03/27, the "in charge" designation "conveys no presumption of subsequent promotion" and does not require RC endorsement. "Typically, this is used, with the explicit approval of HRD, to cover the prolonged absence of the Division Chief or when there is a legitimate reason for a delay in the filling of the vacancy or when the department has been unable to find a suitable candidate through the advertisement process. The position will need to be re-advertised within 12 months. The incumbent will need to compete with other candidates." Staff Bulletin No. 03/27, Box 2. The same Staff Bulletin also states: "Positions should be advertised as soon as they fall vacant unless approval is obtained from HRD to keep a position open for period of time, which should not exceed six months." Staff Bulletin No. 03/27, Para. 2.

leverage on [the Department Director] rather than anything else, kind of influencing him or enrolling him in things that I found dear." (9/16/11 Tr. 447-448.)

100. On her FY2009 APR, Applicant was rated "Fully Met (FM)" on fourteen competencies and "Consistently Exceeded (CE)" on four others, i.e., specialty knowledge, sound judgment/analytical skills, planning and organizing, and oral presentation skills. (Applicant's FY2009 APR.)

101. The Division Chief's "Overall Assessment" stated that "[s]ince becoming deputy chief of the . . . division . . . , [Applicant] has established herself as an effective partner in managing the division." He noted that in his absence she "demonstrated excellent organizational skills in handling multiple, time-sensitive assignments on short notice." As to Applicant's research accomplishments, the Division Chief commented: "She is publishing in prestigious, refereed outlets and her work is having an impact inside and outside the Fund." He concluded: "In sum, with this array of talents and experience [Applicant] is ready to assume higher levels of management responsibility." (*Id.*) The APR makes no mention of shortcomings.

102. In signing off on the APR, the SPM noted that Applicant is a "very strong economist and an excellent manager. I agree that [Applicant] is ready to take on a B-level position." Her MAR is given as 1.00. (*Id.*)

(4) <u>July 2009 follow-up meeting with Department Director; recourse to Ombudsperson and HRD Director</u>

103. According to Applicant, in late July 2009, the Department Director told her that he intended to make the selectee the acting division chief and that the selectee was more competitive for the B List. Applicant testified that the Director told her that the Department would not nominate her for the B List in the next round. (7/9/12 Tr. 139-140.) (When asked whether he recalled telling her in July 2009 that he was not going to nominate her for the subsequent RC list, he replied: "I recall that decision being made, and I assume either [the SPM] or I told you." (9/11/11 Tr. 213.))

104. In the same meeting of July 2009, Applicant states, she raised with the Department Director concerns about her APR ratings in the light of her performance accomplishments, including her publication in a leading professional journal. Applicant testified that in that conversation: "[H]e reacted instantly with anger, saying '[the publication in the journal] doesn't mean beans.' So I stayed calm and I asked him, 'Could you please advise me on what I could do, then, to improve my ratings,' and he said I could use charm, humor and personal appeal to him." (7/9/12 Tr. 141.)

105. Applicant testified that after the RC's decision not to advance her to the B List in 2009, the Department Director called her to his office to discuss the outcome and that ". . . he essentially launched into a personality diatribe which to me was admitting that he had not been supportive during the Review Committee. And even in this meeting he was saying things to the effect of that I need to be more charming with him." Applicant testified: "He used the word 'charming,' that I had to be more charming, and he even brought up the possibility or the suggestion that I could tell jokes as a way of being more charming." (7/9/12 Tr. 96.) Applicant

also testified that the Department Director commented that she looked younger than her age and had plenty of time for promotions. (7/9/12 Tr. 97-98.)

106. When asked in the Grievance proceedings whether he had advised Applicant to be more "charming," the Department Director responded as follows:

> [S]he would always focus on her analytic ability, which is strong. And I was always trying to get across that, when you judge people for promotion, you look at a bundle of attributes. You look at the analytics, the ability to write and speak clearly and persuasively, with gravitas, their managerial strengths, which means leadership, intellectual leadership, empathy with colleagues and subordinates, and all of that sort of thing. So I think probably on numerous occasions, I said think of the whole range.

(9/15/11 Tr. 69-70.)

107. The Department Director also testified that Applicant had a "tendency to argue a case - - to flog a dead horse, as it were, to argue a case again, and again, and again," and that what he tried to get across to her was: "[D]on't try and bludgeon people with your view. Try and coax them into your view. You can't just bang away at the same thing repeatedly. You've got to persuade people, coax them into your position rather than just trying to beat them into it." The Department Director testified: "It's a case of using more charm than aggression." He concluded: "[I]t's quite likely we did - - we certainly had a meeting where I was trying to get those points across, because I thought it was essential, if she was going to get on in the Fund, to learn those kinds of skills." (9/15/11 Tr. 70-71.)

108. Applicant states that she regarded the Department Director's alleged comments that she could improve her APRs by using "charm, humor and personal appeal to him" as sexual harassment and that, shortly thereafter, in July 2009, she met with the Fund's Ombudsperson to complain of a pattern of sexual harassment by her Department Director since 2007. (7/9/12 Tr. 141.)

109. Later, in October 2009, Applicant asserts, she met with the HRD Director, raising the same issues. According to Applicant, the HRD Director did not initiate any investigation of the alleged misconduct but rather asked her if she were thinking of leaving the Fund. Applicant's account of that conversation is as follows:

> [The HRD Director] expressed sympathy for my position, and actually her response focused on whether I was considering leaving the Fund, which I thought was strange. She said that if she experienced something of what I was describing to her that she wouldn't work in that kind of environment and that she would leave. . . . Beyond that, she didn't really address the point any further.

(7/9/12 Tr. 152-153.) Applicant also testified: "I did not discuss [the non-selection decision] with her . . . because I considered [the selectee] to be legitimate and I didn't know I had done so much better in the interview, but I did discuss the harassment." (7/9/12 Tr. 151.)

110. The Fund asserts that it is "highly implausible" that the HRD Director, also female, would have ignored a legitimate complaint of sexual harassment by a senior female economist and instead encouraged her to leave the Fund. The Fund also maintains that because Applicant did not raise the issue of "nonfeasance" by the then HRD Director, it did not investigate that complaint through administrative review or call the HRD Director as a witness in the Grievance proceedings.

111. Applicant additionally testified that in August 2009 she met with the SPM of her Department to report the Department Director's alleged statement that her publication in a leading professional journal "doesn't mean beans." On that occasion, she testified, she also asked the SPM about whether there was a language requirement for the B-level position for which she had not been selected and was told that there was not and that no such requirement was listed in the vacancy announcement. (7/10/12 Tr. 30-32.)

(5) November 2009 WEN exchange

112. On November 23, 2009, in response to an email interchange among a group of women economists at the Fund known as the Women's Economist Network (WEN), Applicant decided to "share [her] own story" with a subset of the WEN members, i.e., seven senior level female staff members. She stated that her situation was "very sensitive because it [was] ongoing" and requested "advice on the way forward." (Email from Applicant to seven women economist staff, November 23, 2009.) Applicant recounted that when she had been hired in her Department, she was told that research output was an important component of the APR: "In fact, my boss explicitly identified research as the determining factor in the APR, especially along the dimension of high quality publications." (*Id.*) Applicant continued:

> However, in the APR round immediately following, Mr. X in our front office, who almost unilaterally controls ratings and promotions, over-ruled my boss and instead significantly lowered my ratings. When I asked him about it, he said that there were special factors and strategic reasons. He added that I shouldn't be concerned because I am "too young" (not actually true) and "have plenty of years ahead for promotions." He assured me he would have a strategic plan for me as well. But, in the following two years, he again gave low ratings.
>
> I recently asked him to explain why he gave three years of low ratings, given that my . . . scores have been among the top in the dept, and I had a heavy mission load and several good publications, including the article in the [leading professional journal].

> In a telling burst of anger, he said "[an article in that journal] doesn't mean beans." So I asked if he could give me advice on what does matter for the ratings and how I could improve them. He said that I could "use charm, humor, and personal appeal" to him.

(*Id.*)

113. Applicant's "story" was discussed online among the group of senior women economists. One, who formerly had served as a supervisor to Applicant while in a different Department, stated: "We often talk about women plateauing unfairly at A-15 - - here is a concrete example. Are we going to let it go - - and let her bear the full cost by moving out of [the Department] and getting in the queue in another department - - or are we going to do something about it? Is it not possible for the RC to ask why she is not being put up [for the B List in the next round]?" The same staff member noted that Applicant previously had come to her for advice: "My advice has been that she should get out of [the Department], only because I didn't think she'd go anywhere if she pitted herself directly against [the Department Director]. Knowing [Applicant] well, I think his treatment of her is outrageous . . . . I too wish we could confront him without destroying her—but am not sure that is possible." Another asked: ". . . presumably she should a) talk to ombudsman and b) try to get out of [the Department]?" A third member of the group queried: "What can we advise her? I wonder if she has taken recourse to any of the grievance procedures. My guess is that she has not because crossing Mr. X can be a lethal proposition." (Email exchange of November 23, 2009.)

(6) November 24, 2009 email from three RC members to HRD Director

114. As a result of the above exchange, and as the next round of B List nominations (for the 2010 RC meeting) were due, three members of the RC sent a confidential message to the HRD Director who, pursuant to Staff Bulletin No. 03/27, para. 7, serves as the RC's Chair. The message reported the three RC members' observations relating to the Department Director's conduct at the RC meeting, identified Applicant's case as a "very serious matter of unfair treatment of an apparently high performing A15 woman," and asked the HRD Director whether Applicant's Department was nominating Applicant in the next round and, if not, whether the HRD Director could "question why this is not happening." It also repeated the assertions that Applicant had made in the online exchange about her interactions with the Department Director. The message stated in its entirety:

> Ahead of the RC meeting to consider nominations to the B-list, some of us on the review committee would like to bring to your attention the case of [Applicant]. If you recall, [Applicant] was the person that [her Department] nominated last time. [The RC member]'s due diligence on [Applicant] indicated that she was very competitive for the RC list. However, her director . . . came to the committee (in itself unusual, as the normal practice is for the SPM to come to the RC meeting), and basically gave us a number of reasons why she should NOT be put on the list. In the end, she was not put on the list. . . .

As you may also recall, she was also interviewed by [her Department] for a B level position and was turned down even though [her Department] acknowledged in their memo that the panel unanimously agreed that she had the best interview and had the credentials for the position. Another candidate was selected but this was not a unanimous decision since [the RC member] voted against the selection, which was also recorded in the memo that was sent to the RC.

We have recently had some contact with [Applicant] and she told us the following things:

1. The department had been told that research output, especially highly quality publications, is an important component of their APR. [Applicant] subsequently had a paper accepted in the . . . premier . . . journal in the field . . . . Her immediate supervisor was quite pleased and sent a complimentary email to senior staff in the department. However, in the APR round immediately following, the director (whom she did not specifically name), who has a significant say over ratings and promotions, over-ruled her immediate supervisor and significantly lowered her ratings. Moreover, she continued to get low ratings in the following two years.

2. She asked her director to explain why she had received three years of low ratings, given that her . . . scores have been among the top in the dept, and she had a heavy mission load and several good publications, including the article in the [leading professional journal]. She reports that he said something like "[an article in that journal] doesn't mean beans."

3. So she asked if he could give her advice on what does matter for the ratings and how she could improve them. He said that she could use charm, humor, and personal appeal to him.

As members of the Review Committee, we would like to know (1) if [Applicant's Department] is nominating [Applicant] for the list this time; and (2) if she is not, whether HRD or the RC has any say in the decision, and whether you can question why this is not happening.

We see this as a very serious matter of unfair treatment of an apparently high performing A15 woman and feel that if we waited until the meeting to ask [Applicant's Department] about the choice of nominees, it will be too late for this case.

(Email from three RC members to HRD Director, November 24, 2009.)

C. Developments in 2010

(1) 2010 Nomination for B List

115. Following the above communication, and follow-up communications between the HRD Director and Applicant's Department (9/15/11 Tr. 214-225), the Department nominated for the B List both Applicant and the female staff member who was then serving in an "in charge" capacity in the position for which both had competed in 2009. At its January 2010 meeting, the RC advanced both of the Department's nominees to the B List.

(2) 2010 B-level vacancy in Applicant's Department

116. Following the January 2010 RC List decisions, a new requisition was issued for the vacancy that had been advertised in Applicant's Department in 2009. The vacancy announcement was posted and, following a new selection process, the position was filled in spring 2010. Applicant did not apply for the vacancy. The same staff member who had been recommended for selection in 2009 was promoted to the position.

117. Applicant testified in the Grievance proceedings: "After hearing [the Department Director]'s statements to me in that meeting of July 2009, I felt that I could not see putting myself in a position of being his direct subordinate. I was by this time making every possible effort to get out of the department, even if that meant moving laterally at A-15, and so I didn't apply for that position purely because I could not handle it anymore." (7/10/12 Tr. 66.)

(3) Applicant's lateral transfer to another Department

118. In spring 2010, Applicant transferred to a position in a different Department while retaining her A15 grade level. According to Applicant, she sought out this new assignment in order to "escape the hostility of [her Department's] senior staff."

119. A senior official of the Department to which Applicant transferred, and who had supervised Applicant earlier in her career, testified that she had encouraged Applicant to apply for the vacancy to get away from the other Department. That official, who was an informal mentor to Applicant, had participated in the online exchange among senior women economists and shared the view that the "real reason" that Applicant was not advanced to the B List in 2009 was that the Department Director had undermined her candidacy at the RC meeting. She testified that she told Applicant that ". . . fighting with the director doesn't get you anywhere, just move departments." She further testified that she approached the SPM of the new Department and explained that, having known Applicant for some time, she had "quite a lot of confidence in [Applicant's] professional abilities." She suggested to the hiring officials in the new Department that it was important to look beyond Applicant's MARs in making the selection decision because she questioned whether those ratings were fair. She advised the SPM to "just look at her without paying attention to the MARs, just ask her tough economic questions and see how she responds in the due diligence." She additionally testified: "I want good economists, good managers and rigorous thinkers, and I look around for people that I think are good and I try to encourage them to come, and she was one of them." As to looking beyond the MARs in considering Applicant's

candidacy for the position in the new Department, the mentor testified: "The point is not to go through the process; the point is to find the best process, and if there is a piece of misinformation you've got to put it aside and look at the candidate." (7/9/12 Tr. 164-167, 185, 192-193, 198.)

(4) Applicant's APR for FY2010 (May 1, 2009–April 30, 2010)

120. Applicant's lateral move to another Department in May 2010 was followed shortly thereafter by her APR decision for FY2010, which encompassed the rating period May 1, 2009–April 30, 2010, and was prepared by the Department in which she had worked during that period.

121. In the portion of the APR completed by the staff member, Applicant listed her various publications. She noted that the paper published earlier in the leading journal had been cited by "many other int'l organizations and scholars." She listed additional publications as well. The Division Chief's responsive comments stated that Applicant "had another successful year conducting high-quality research . . . as evidenced by publications . . . . Applicant's research . . . is having substantial impact inside and outside the IMF. . . . Several high profile economists have cited [Applicant]'s work." (Applicant's FY2010 APR.)

122. The Division Chief further stated that Applicant "continued to be an effective partner in running the . . . division during FY 2010," and that she "continued to pursue an active, productive and policy-relevant research agenda that is having an impact within the Fund and in the broader economic policy community." The following were noted as "key strengths": "Analytical Skills - Analyzes issues and problems in a thorough, systematic manner; focuses on critical details while keeping sight of the big picture; makes well-reasoned, timely, and sound decisions"; "Oral Presentation Skills - Speaks clearly, articulately, and persuasively to command attention, establish credibility and gain influence"; "Planning and Organizing - Develops realistic plans, sets goals, aligns plans with company goals, plans for and manages resources, creates contingency plans, coordinates/cooperates with others." The Division Chief additionally characterized Applicant as an "accomplished manager" who also served as a mentor to less seasoned economists, "providing extremely insightful comments about their research," and that she was an "effective and accomplished public speaker and plans her interventions well, providing strong documentation in support of her arguments." Regarding "Development," the Division Chief wrote: "[Applicant] is an accomplished manager. She could benefit from additional, higher-level management training and regular coaching as she assumes the more complex role of leading area department missions." (*Id.*)

123. In his "Overall Comments," the Division Chief noted that Applicant had been an "effective partner in managing the . . . division during FY 2010. She is an able and accomplished economist with strong analytical abilities and drive for results. She has contributed enormously to maintaining a high standard of analytical excellence in the division and more broadly [in the Department]." He additionally observed: "[Applicant] has several other important qualities that make her a sought-after economist, including versatility, attention to detail, and strategic vision. When I was away on mission, I could trust the division would function smoothly under [Applicant]'s watch. She is fully capable of running her own division." (*Id.*)

124. Applicant was rated "Effective," the lowest rating on a scale that allowed Departments to rate up to 15 percent of their staff as "Superior" and another 15 percent as "Outstanding" (the top

rating). (9/16/11 Tr. 257.) The printed APR form explains that the rating is to represent the staff member's "Relative Performance Level," an assessment which is "derived from both *absolute performance* (contributions against objectives and other assignments, plus competencies displayed) and *relative performance* (peer comparisons, complexity/difficulty level of the assignments, impact on division/departmental results and workload) during the assessment period." (Emphasis in original.)

D. Developments in 2011

(1) 2011 vacancy in Applicant's former Department

125. In early 2011, the Department in which Applicant had been serving until spring 2010 advertised another B1 vacancy. Applicant asserts that although she considered herself well qualified for the job, she chose not to apply for it because the Department Director was the immediate supervisor of the position. Applicant states that she was "denied the chance to apply for the job, given that [my Department Director] had previously harassed me and discriminated against me over a period of several years. I could thus not take up the position for fear of further endangering myself." Another staff member was appointed to that position effective in April 2011.

(2) Applicant's promotion to B1 vacancy in a third Department

126. During approximately the same period, i.e., during the first half of calendar year 2011, Applicant, who in 2010 had transferred to another Department while retaining her A15 grade level, applied for and was selected to a B1 position in a third Department. The effective date of that appointment was in May 2011.

(3) Revision of B1/B2 promotion policy and requests for exemption on Applicant's behalf

127. On July 1, 2011, the Fund announced a new policy governing promotions. That change in policy extended the minimum time-in-grade (TIG) from 12 months to 18 months for economists to become eligible for promotion from Grade B1 to Grade B2 during the annual promotion exercise each November 1st. The policy additionally provided: "As a transitional measure for the upcoming November 2011 round, the TIG for economist promotions to B2 will be maintained at 12 months." (Memorandum from Deputy Managing Director to Fund Staff, "Management Approval of Promotion Policy Reform," July 1, 2011.)

128. As Applicant had been promoted to B1 during May 2011, under the new policy, she would not become eligible for promotion to B2 until November 1, 2013.

129. The record shows that a request for exemption from the new rule was made on Applicant's behalf in early July 2011, initially informally, by Applicant's SPM and discussed in an email exchange with HRD officials. On July 11, 2011, that request was denied by HRD, confirming that Applicant ". . . will fall under the new rules. Management's decision was to grandfather only those who have one year time-in-grade on November 1, 2011." (Email exchange of July 8, 11, 2011.)

130. In what appears to have been a formal follow-up request of July 13, 2011, the SPMs of Applicant's second and third Departments sent a joint Memorandum to the HRD Director seeking an exception to the new rule to permit Applicant to become eligible for promotion to Grade B2 in the November 1, 2012 promotion round. That Memorandum stated in its entirety:

> With this memo, we are seeking your approval of an exemption to the new minimum time-in-grade rule for B1 staff for [Applicant]. [Applicant] was chosen to be the new . . . on May . . . and promoted to B1 on May . . . of this year. Under the new rule, [Applicant] would fall just short of the 18-month requirement for possible promotion to B2 effective November 1, 2012. Rather, she will have to wait almost 2½ years before becoming eligible for such a promotion. Our initial understanding was that anyone promoted before the new policy was put in place would be grandfathered under the old system. This would have made [Applicant] eligible for the November 2012 promotion round.
>
> In our view the impact on [Applicant] seems excessive and not in line with the spirit of the change in the promotion policy, and we would request an exemption.

(Memorandum from SPMs to HRD Director, July 13, 2011.) It appears that the 2011 Memorandum to the HRD Director went unanswered.

131. One year later, on July 13, 2012, Applicant's SPM renewed the request for exception. (Email from SPM to HRD Director, July, 13, 2012.) HRD denied that request on September 11, 2012, stating: "The policy included a transitional measure for the November 2011 promotion round, allowing promotion of economists with 12 months time-in-grade at B01 by that time. However, this transitional measure was for the 2011 November round only, and limited to those who met the one-year TIG by November 2011 and therefore had a reasonable expectation of being considered for promotion that year." (Memorandum from HRD Deputy Director to SPM, September 11, 2012.)

132. When making its September 11, 2014 requests to the Fund, the Tribunal asked it to explain how the "transitional measure" referred to in the July 1, 2011 announcement of the new policy has been implemented. The Fund responded that "HRD did not apply this transitional measure to any B1 economists other than those who had 12 months time in grade by November 2011." (Affidavit of HRD Deputy Director, September 25, 2014.)

CHANNELS OF ADMINISTRATIVE REVIEW

133. The claims raised in the instant Application of Ms. "GG" arose in two distinct phases through the channels of administrative review provided by GAO No. 31. An understanding of the progress of Applicant's case through those channels is necessary for the consideration of Respondent's arguments that many of Applicant's claims are not admissible before the Tribunal. Since the Application challenges various aspects of the administrative review and Grievance

Committee processes, the course of the case through the channels of review is set out in detail below.

A. Applicant's First Request for Administrative Review (December 8, 2010)

134. On December 8, 2010, Applicant filed her first request for administrative review, asserting that her relative and absolute performance had been consistently at the top of her Department for the APR years FY2007 through FY2010 but that instead of rewarding her for strong performance, the Department Director ". . . actively discriminated against [her] as a woman economist for being too exceptional in [her] performance." (Documentation for [First] Administrative Review, p. 3.) Applicant asserted that the Department Director's conduct revealed a "pattern of discrimination and sexual harassment in APR ratings and promotions," that he "created a general environment in which personal bias, favoritism, discrimination, hostility and harassment flourished" and "systematically made rating and promotion decisions based on friendship and non-performance factors." (*Id.*)

135. In Applicant's view, the Director's alleged conduct caused managers in the Department to direct their efforts to "nurturing their own friendships with the Director, rather than managing their staff in the interest of the Fund" with the result, in Applicant's case, that her Division Chief for FY2010 allegedly "chose to collaborate in the discrimination against [her] (and others in his division)." (*Id.*, p. 3.) Applicant stated that her career was damaged by discrimination and personal bias and that her APR ratings would "continue to impact [her] applications for promotion[s]." (*Id.*)

136. Applicant further alleged that the Director engaged in "gender discrimination" in "basing [Applicant's] ratings on his subjective view of how 'charming' [she] had been to him as a female employee" and that he "sexually harassed" her in recommending that she use "charm, humor, and personal appeal" in her interactions with him in order to improve her APR ratings. (*Id.*, p. 4.)

137. Applicant asserted that the Department Director engaged in an "active and purposeful attack" against her Fund career in an effort to thwart it, denying her higher APR ratings for the four rating years FY2007–FY2010. (*Id.*, p. 3.) Applicant also asserted that her APR ratings were not consistent with the written assessments included in those reviews, which "recognized [her] outstanding performance, with no mention of any relative or absolute weakness or development need." (*Id.*, p. 14.) In FY2008, alleged Applicant, her direct supervisor had recognized her performance as "outstanding" but the Department Director allegedly reduced the rating. (*Id.*)

138. Applicant further alleged that in March 2009, after the RC had decided not to advance her to the B List, the Department Director told her she should be more "charming" with him and to be patient because she was young, had plenty of time for promotions, and looked younger than her age. (*Id.*, p. 15.)

B. HRD's Response to Applicant's First Request for Administrative Review (April 13, 2011)

139. Some four months later, on April 13, 2011, the HRD Director denied Applicant's request for administrative review of her "performance ratings . . . between 2007 and 2010." Citing GAO No. 31, Section 6, which provides that requests for administrative review must be filed within six

months of the challenged decision, the HRD Director stated: "Your requests relating to your 2007, 2008 and 2009 APR are therefore out of time and the focus of this review has been on your 2010 rating." At the same time, the HRD Director also rejected Applicant's specific allegation that the Department had failed to credit Applicant's research work, noting that a paper published by Applicant in 2007 had been "included in [her] 2006 APR, for which [she] received an outstanding rating" and that other research works were "also included in [her] APRs and have been taken into account." The HRD Director also found no evidence to dispute the assessment of the relative value of Applicant's work and that produced by other Department staff at her level for FY2010. As to management skills, the HRD Director also ". . . did not find any evidence that [Applicant's Department]'s relative assessment of [her] performance compared to [her] peers was based on improper considerations and that it should have been rated above the 'effective' level." (Memorandum from HRD Director to Applicant, "Your Request for Administrative Review," April 13, 2011.)

140. Addressing Applicant's allegations of discrimination and harassment, the HRD Director stated that she had found no evidence that the Department Director's actions were "improper or that his rating of [Applicant's] performance was motivated by bias or other improper motives." The FY2010 APR rating, she concluded, was the result of consensus among senior staff and reflected the proposal of the Division Chief, as endorsed by other participants in the Departmental roundtable. The HRD Director also concluded: "While I understand that [the Department Director] raised with you the need to be more collegial and take into account the broader perspective of the Department, I did not find that these statements concerning your performance were inappropriate, in particular in view of your new role as Deputy Division Chief." (*Id.*)

C. Applicant's First Grievance (June 9, 2011)

141. Following the denial of her complaint by the HRD Director, on June 9, 2011, Applicant proceeded to file a Grievance with the Fund's Grievance Committee. In her Grievance submission, Applicant challenged the decision to rate her "Effective" in the FY2010 APR. That decision, she alleged, was made by her Department Director, along with the SPM and immediate supervisor "operating under his direction." Applicant alleged that the FY2010 APR decision was based on "discrimination, bias, capricious and irrelevant factors." Applicant further asserted that, based on her record, she should have earned a rating of "outstanding" in absolute and relative terms "over each of the four APR years (FY2007–FY2010) on the basis of criteria set out by [her Department], but was repeatedly denied a rating higher than 'effective' due to a pattern of discrimination, bias, and capricious behavior that persisted over four years." (Grievance, June 9, 2011, p. 1.)

142. Applicant also alleged that the Department Director engaged in "verbal harassment to [her] over this same period, including sexual harassment." (*Id.*) Applicant contended that the Department Director and "his associates" violated the Fund's policies prohibiting discrimination and harassment:

> [The Department Director] further violated the Fund's code of conduct and prohibitions against harassment, including sexual harassment. [The Department Director] created and allowed a

> hostile and biased work environment, which contributed to harassment and discrimination over several years. He also failed to stop sexual harassment from another staff member under his supervision and retaliated against me for raising the issues.

(*Id.*, p. 5.) Applicant sought as relief the revision of her FY2010 APR rating to "Outstanding." (*Id.*, pp. 1, 5.)

143. In her Grievance, Applicant also responded to the determination by the HRD Director that she had not raised timely challenges to her FY2007, FY2008 and FY2009 APRs. Applicant stated that although she was "also subject to discrimination and harassment in the FY 2007, 2008, and 2009 APR years," she "could not file for administrative review since [she] was still in [the Department] at the time" and "[t]hey most certainly would have retaliated against [her] in ways that would have been difficult to prove." Applicant also alleged that the discrimination and harassment "escalated over time." In her Grievance, Applicant additionally stated:

> The Fund's discrimination policy states that "discrimination can be manifested . . . through a pattern of words, behaviors, action, or inaction." The APR decision of 2010 reflects discrimination that had its causal genesis from 2007 . . . . The pattern of biased and capricious behavior that occurred during the entire period is material to understanding the 2010 decision. Therefore, I am presenting evidence from 2007–2010 to establish the pattern of bias, capricious, and irrelevant factors in APRs, and I am only seeking relief for 2010.

(Appeal to Grievance Committee: Response to Administrative Review, p. 1.)

D. Developments in the Grievance Committee (September–November, 2011)

144. The Grievance Committee conducted witness hearings beginning in September 2011. As later recounted in the Grievance Committee's Report and Recommendation of October 15, 2013, the Committee decided at the pre-hearing conference that it had jurisdiction only over Applicant's challenge to her FY2010 APR decision. Nonetheless, the Grievance Committee afforded Applicant ". . . leeway in presenting evidence beyond her 2010 APR, especially with respect to her allegations that the 2010 rating was the product of a long period of retaliation, gender discrimination and harassment by [her Department Director]." The Committee explained that it ". . . adopted this liberal approach to relevance because events in 2009, even if beyond the Committee's jurisdiction for purposes of granting a remedy, might be relevant in establishing the intentions of the decision-makers in 2010." The Committee also noted that ". . . if the evidence showed a prior pattern of gender bias or hostile work environment directed against women, such evidence could be relevant to prove the Grievant's claim that the 2010 APR was a culmination of harassment directed against her by managers in [her Department]." (Grievance Committee Recommendation and Report, October 15, 2013, pp. 26-27.)

145. On November 14, 2011, the Grievance Committee held a hearing on a number of procedural issues. These included the Fund's Motion to Suspend Hearing on the ground that the

Ethics Office was undertaking investigations into allegations of misconduct brought by other staff members against senior officials of Applicant's former Department raising "substantially the same" questions of fact as those raised by Applicant's Grievance.[24] (Motion to Suspend Hearing, November 11, 2011, p. 1.) Both parties also sought suspension of the Grievance proceedings after Applicant indicated that she proposed to file additional requests for administrative review arising from a recently disclosed email document. (11/14/11 Tr. 27-28.) (*See* below.)

146. In mid-2012, notwithstanding the fact that the Ethics Office investigation was not complete, the parties agreed to the resumption of the Grievance Committee proceedings and further witness hearings were held in July 2012.

E. Applicant's Additional Requests for Administrative Review (November 14, 2011)

147. On October 14, 2011, in response to a discovery request, the Fund produced the email message of November 24, 2009 from three RC members to the HRD Director, which is reproduced above at para. 114.

148. Following production of the email message, on November 14, 2011, Applicant filed two new requests for administrative review. In her "Request for Administrative Review of Vacancy Selection," Applicant challenged her Department's "discriminatory decision not to select [her] to position of Division Chief." Applicant sought to excuse her delay in challenging the decision as follows: "Although my challenge relates to a vacancy announced in 2009, material information was withheld from me until last month. In particular, on October 14, 2011, I was informed about the content of an email from [RC member] to [HRD Director] . . . that indicates that the vacancy selection decision was based on discrimination." Applicant alleged that she was "barred from obtaining that position due to reasons of discrimination, bias, harassment, hostility, and retaliation, as discussed in [her then pending Grievance case]. If I had not been barred from this position for these irrelevant factors, I could have been promoted to B1 in mid-2009, and I would have been eligible for promotion to B2 on November 1, 2010." In this request for administrative review, Applicant sought as relief promotions to Grades B1 and B2, retroactive to mid-2009 and November 1, 2010, respectively, associated retroactive salary increases, as well as relief to "compensate [her] for working in a hostile work environment." (Memorandum from Applicant to Acting HRD Director, "Request for Administrative Review of Vacancy Selection," November 14, 2011.)

149. In a separate request of the same date, "Request for Administrative Review of Vacancy Selection, Effective Date of Promotion, and Associated Application of B1-B2 Promotion Policy," Applicant sought administrative review "regarding the confluence of three decisions that collectively have a negative impact on my career: first, the selection decision for [the B1] position in [her former Department] effective April . . . 2011; second, the May . . . 2011 effective

[24]Applicant thereafter filed similar Ethics complaints of her own. *See supra* PROCEDURE: Applicant's request to strike information from the record.

date of [her] promotion to B1 in [her new Department]; and third, the application of the new revised promotion policy from B1 to B2 as communicated to [her] in an HRD presentation on September 7, 2011." In respect of the 2011 vacancy in her former Department (for which she had not applied), Applicant asserted that it involved responsibilities that she had performed earlier, that she was on the B List at the time and had not yet been offered any other position, but that she was ". . . barred from this position due to reasons of discrimination, bias, harassment, hostility, and retaliation, as discussed in [her then pending Grievance case]." Noting that the successful candidate was appointed effective in April 2011, whereas Applicant did not attain a B1 appointment (in another Department) until after May 1, 2011, she sought the benefit of the earlier appointment date so that she would not be disadvantaged by the Fund's revised promotion policy announced July 1, 2011, a policy that set 18 months, rather than 12 months, as the minimum period to attain eligibility for promotion from B1 to B2 during the annual November 1st promotion round. Applicant sought as relief eligibility for promotion to B2 as of November 1, 2012, or earlier. (Memorandum from Applicant to Acting HRD Director, "Request for Administrative Review of Vacancy Selection, Effective Date of Promotion, and Associated Application of B1-B2 Promotion Policy," November 14, 2011.)

F. HRD's Responses to Applicant's Additional Requests for Administrative Review (December 13, 2011)

150. Both of Applicant's new requests for administrative review were denied a month later, on December 13, 2011. The request for review of her non-selection for the vacancy advertised by her Department in 2009 was denied on the ground that Applicant had failed to initiate administrative review within six months of the challenged decision. The Acting HRD Director's response nonetheless referred to the merits of the dispute as follows: "Even if your application had not been time barred, the record for that selection process does not support your claims. . . . While you were indeed ranked first based solely on the interviews, another candidate was ranked ahead of you taking into account factors beyond the interviews." The Acting HRD Director found the selection decision to have been based on an "objective assessment of the candidates' respective strengths and experience and the requirements for the position." Accordingly, he concluded that there was "no basis for [Applicant's] claim that the vacancy selection decision was based on discrimination or other irrelevant factors." (Memorandum from Acting HRD Director to Applicant, "Administrative Review: Vacancy Selection [Applicant's former Department]," December 13, 2011.)

151. The Acting HRD Director's response to Applicant's request for administrative review additionally noted that the Department had withdrawn the 2009 vacancy following feedback from the RC because "neither [Applicant] nor the preferred candidate was on the Review Committee list at the time (which was a requirement for appointment to a B-level fungible economist position . . .)." Accordingly, the Acting HRD Director found that Applicant's statement that she could have been promoted to B1 in mid-2009 was "incorrect." He additionally noted that when the position was re-advertised in March 2010, Applicant did not apply, although she had been accepted onto the B List by that time. (Memorandum from Acting HRD Director to Applicant, "Administrative Review: Vacancy Selection [Applicant's former Department]," December 13, 2011.)

152. As to Applicant's complaints relating to her non-selection for the vacancy that arose in her former Department in 2011, the effective date of her promotion in her new Department, and the applicability of the new promotion policy in the circumstances of her case, the Acting HRD Director responded as follows: (i) Applicant had no standing to challenge the selection process for a position for which she had not applied; (ii) there was no basis to challenge the effective date of her B1 promotion, as she had not alleged any fault with the selection process and there did not appear to have been undue delay in the appointment; and (iii) although the new policy for promotion from B1 to B2, announced to staff on July 1, 2011, included ". . . some transitional arrangements for the 2011 promotion round, [Applicant] fell well short of the 12 months of service at B1 that would have allowed [her] to be promoted in November 2011" and there was no basis for making an exception in her case to allow for her promotion short of the new 18-month requirement. (Memorandum from Acting HRD Director to Applicant, "Administrative Review: Vacancy Selection [Applicant's new Department], Effective Date of Promotion and Associated Application of B1-B2 Promotion Policy," December 13, 2011.)

G. Applicant's Second Grievance (December 16, 2011) and Grievance Committee's Decision on Fund's Motion to Dismiss (April 25, 2012)

153. Following the denial of her new requests for administrative review, Applicant filed a second Grievance on December 16, 2011, requesting that the new claims be considered by the Grievance Committee "in conjunction with the hearings related to [her] existing case." The new Grievance presented Applicant's claims and requests for relief in essentially the same terms as she had presented them for administrative review, including that she sought compensation for "working in a hostile work environment." As to her challenge to the application to her of the new promotion policy, she expressly sought an exception to "grandfather" her under the previous rule:

> [E]ven though [the B1 appointee in Applicant's former Department]'s effective date of promotion to grade B1 was only about *three weeks earlier* than mine, [that staff member] will be eligible for promotion to B2 *a full year earlier* than I will be under the new rules. Given that I was barred from contending for [the 2011 B1 position in her former Department] by [the Department Director]'s hostility and harassment, and given that the revision of the policy from 12 months to 18 months was not made until after the effective dates of both promotion decisions [her own and that of the individual appointed in her former Department], I respectfully request, at a minimum, that I should be grandfathered under the former 12 month policy.

(Appeal of claims to Grievance Committee, December 16, 2011, p. 2.) (Emphasis in original.)

154. On January 6, 2012, the Fund filed a Motion to Dismiss the new Grievance, to which Applicant responded on March 30, 2012. On April 25, 2012, the Grievance Committee granted the Motion and dismissed Applicant's new claims.

155. In dismissing Applicant's new claims, the Grievance Committee considered whether Applicant had demonstrated "exceptional circumstances" to excuse her failure to initiate timely administrative review of her non-selection for the vacancy advertised in her Department in 2009. In particular, the Committee considered whether her delay should be excused on the ground that she did not come into possession of evidence to support her new claims until documents were disclosed to her during the course of the Grievance proceedings. (Grievance Committee Report and Recommendation, April 25, 2012, pp. 12-13.) The Grievance Committee concluded that Applicant ". . . already possessed more than enough information to support a request for administrative review within the six months following her non-selection" for the vacancy and, therefore, the discovery of the November 24, 2009, email did not constitute an "exceptional circumstance" that excused Applicant's two-year delay in initiating administrative review. (*Id.*, p. 26-27.)

156. As to Applicant's challenge to her non-selection for the 2011 vacancy for which she had not applied, the Grievance Committee concluded: "[N]either fear nor futility can excuse a staff member from applying for a promotion before challenging the decision to fill the position. Staff members have no standing to complain about a promotion decision if they decline to apply for the promotion." (*Id.*, p. 30.)

157. With regard to the issue of the application of the revised B1/B2 promotion policy, the Grievance Committee concluded that because it had found itself to be without jurisdiction to consider Applicant's challenges to her non-selection for particular vacancies, there was no viable claim relating to the promotion policy. (*Id.*, p. 36.)

158. On May 30, 2012, the Grievance Committee reaffirmed its decision to grant the Motion to Dismiss the Grievance, following a request by Applicant for reconsideration and an opposition by the Fund. On June 8, 2012, Respondent informed Applicant that the Grievance Committee's dismissal of the claims arising through her requests for administrative review of November 14, 2011 should be considered final for purposes of ripeness of review by the Administrative Tribunal.

H. The Tribunal's Judgment in *Ms. "GG" I*

159. The dismissal by the Grievance Committee of Applicant's newly raised claims gave rise to Applicant's first Application to the Administrative Tribunal, filed on July 23, 2012. That Application was met by a Motion for Summary Dismissal, pursuant to Rule XII of the Tribunal's Rules of Procedure, in which the Fund asserted that all of Applicant's claims were inadmissible for a variety of reasons. As the Motion for Summary Dismissal suspended the period for answering the Application on the merits, the issue before the Tribunal in Applicant's first case was limited to the question of admissibility.

160. The Tribunal rendered its Judgment in *Ms. "GG" I* on October 8, 2013, concluding that the claims raised in the Application before the Tribunal (claims earlier dismissed by the Grievance Committee on jurisdictional grounds) were "closely allied" with another claim—Applicant's challenge to her FY2010 APR—that remained pending before the Grievance Committee. In the view of the Tribunal, it was clear that Applicant considered that the decisions

she challenged before the Tribunal were tainted by a pattern of harassment, retaliation and discrimination that also tainted the APR decision.

161. Citing *Ms. C. O'Connor, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2010-1 (February 8, 2010), the Tribunal concluded that to entertain Ms. "GG"'s Application in respect of the "closely allied" claims before the conclusion of the Grievance proceedings and Fund Management's decision on the FY2010 APR issue would fail to serve the "twin goals" of Article V's exhaustion of remedies requirement, namely to provide opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication. *See Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application*), IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66.

162. Accordingly, the Tribunal dismissed Applicant's first Application on the ground of its failure to meet the requirements of Article V, Section 1, of the Tribunal's Statute, which provides that "[w]hen the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review." In the light of that conclusion, the Tribunal did not consider the other grounds for summary dismissal raised by Respondent in its Motion.

163. The Tribunal dismissed the Application without prejudice to Applicant's right to bring a new Application in due course, and without prejudice to Respondent's right to raise in response issues of admissibility not disposed of in that Judgment. Both the instant Application of Ms. "GG" and the Fund's Answer to it do precisely that.

I. Grievance Committee Recommendation and Report on initial Grievance (October 15, 2013)

164. While Applicant's first Application (arising from the dismissal of her second Grievance) was pending with the Tribunal, proceedings in the Grievance Committee continued with respect to her initial Grievance. Following the conclusion of witness hearings in 2012, the Committee considered additional evidentiary motions. (*See* Decision on Grievant's request to call additional witnesses and for additional documents, August 10, 2012.) In May 2013, following the recusal of a member of the Grievance Committee, another member was appointed to complete the panel for Applicant's case. Later in 2013, the parties filed post-hearing and reply briefs.

165. On October 15, 2013, the Grievance Committee issued its Recommendation and Report, recommending that the Grievance challenging Applicant's FY2010 APR decision be denied on the merits. In the view of the Grievance Committee, the APR decision was "based on a comparison of the quality and quantity of her work and was not influenced by the allegedly discriminatory or retaliatory motives harbored by [the Department Director]." The factors leading to the rating decision were based on "legitimate, non-discriminatory and non-retaliatory factors" and the decision did not represent an abuse of discretion. (Grievance Committee Recommendation and Report, October 15, 2013, pp. 57-58.)

166. On November 12, 2013, Applicant was notified that Fund Management had accepted the Grievance Committee's recommendation that her Grievance be denied.

167. On February 10, 2014, Applicant filed the instant Application with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

168. The principal arguments presented by Applicant in her Application, Reply, and additional submissions, may be summarized as follows:

1. Applicant was the object of a pattern of retaliation, harassment, discrimination and a hostile work environment to which the Fund failed effectively to respond.

2. Applicant's Department Director undermined her candidacy for the B List in the 2009 RC meeting.

3. Applicant's non-selection for B-level positions in 2009, 2010, and 2011 was improperly motivated by retaliation, harassment, and discrimination and formed part of a pattern of prohibited conduct. The 2009 decision was influenced by irrelevant factors and taken in violation of fair procedures.

4. Applicant's APR decisions for FY2009 and FY2010 were improperly motivated by retaliation, harassment, and discrimination and formed part of a pattern of prohibited conduct. The decisions were based on factual errors and taken in disregard of Fund rules.

5. Applicant's challenges to individual career decisions are timely because exceptional circumstances excuse her delay in initiating administrative review: (i) the contested decisions form part of a pattern of conduct prohibited by the Fund's internal law; (ii) Applicant did not discover evidence of discriminatory conduct in relation to the 2009 non-selection decision until October 14, 2011, when documentary evidence was disclosed to her through the Grievance Committee process; (iii) the Fund has established an administrative practice of remedying past discrimination; (iv) Applicant gave the Fund timely notice to rectify possible errors and the purposes of administrative review have been satisfied in her case; and (v) filing a formal complaint in 2009 would have placed Applicant at risk of further retaliation.

6. The 2010 non-selection decision was part of a compound decision begun in 2009 when the same vacancy was advertised but not filled. Applicant's challenges to the 2010 and 2011 non-selection decisions are timely pursuant to GAO No. 31, Section 12.02, which extends time limits for submitting a request for administrative review, day for day, for each day the staff member is working on Fund business outside of the duty station or is in recognized leave status.

7. Applicant has standing to challenge the 2010 and 2011 non-selection decisions. She was a candidate for the 2009 vacancy, which was later re-advertised and filled in 2010. As to the 2011 vacancy, she was effectively barred from applying for it because sexual harassment by the Department Director resulted in her "constructive discharge" from the Department.

8. The Fund's 2011 revision to the B1/B2 promotion policy is arbitrary and unfairly discriminates against economist staff.

9. The revised promotion policy was unfairly applied in the circumstances of Applicant's case. The Fund improperly failed to afford her the benefit of the "transitional measure" included in the revised policy.

10. Elements of the administrative review and Grievance Committee processes constituted failures of due process and materially impaired the evidentiary record of the case.

11. Applicant seeks as relief:

    a. revision of her FY2009 and FY2010 APR ratings from "Effective" to "Outstanding" and retroactive application of associated merit increases;

    b. retroactive adjustment of her Grade level to B1 (effective July 2009) and B2 (effective November 2010) and associated salary increases;

    c. compensation for a pattern of discrimination that held back Applicant's career for several years, denying her an "unknown number of forgone career opportunities";

    d. monetary relief for harassment, including sexual harassment, bias against diversity, and for procedural failures;

    e. monetary relief for the Fund's failure to address and contain a breach of the confidentiality of Applicant's Grievance case by a Grievance Committee member and reprisal against her by other staff members; and

    f. compensation for the imputed cost of Applicant's time spent in representing herself in the Tribunal and through the channels of review.

B. Respondent's principal contentions

169. The principal arguments presented by Respondent in its Answer, Rejoinder, and additional submissions may be summarized as follows:

1. Applicant's contentions that the Fund failed to address allegations of harassment, retaliation and discrimination against her in 2009 are not justiciable, were not raised through administrative review, and are without merit.

2. Applicant's complaints about her Department Director's conduct in the 2009 RC meeting are non-justiciable and time-barred.

3. Applicant's challenges to the non-selection decisions of 2009, 2010, and 2011, as well as to her FY2009 APR, are inadmissible because they were not launched within the six-month period required by GAO No. 31, and no exceptional circumstances exist to excuse the delay. In particular: (i) Applicant's contention that she was subject to a pattern of continuing discrimination does not render the claims arising in 2009, 2010, and 2011 admissible; (ii) Applicant had sufficient information in 2009 to raise timely challenges to the 2009 non-selection decision and to her FY2009 APR; (iii) the purposes of administrative review have not been satisfied as to the time-barred claims; and (iv) Applicant's alleged fear of retaliation does not excuse failure to raise her claims in a timely manner.

4. The 2009 vacancy selection process did not constitute an "administrative act" of the Fund that adversely affected Applicant.

5. Applicant lacks standing to challenge the non-selection decisions of 2010 and 2011 because she did not apply for the vacancies in question.

6. Applicant has not met her burden of demonstrating that her FY2010 APR rating of "Effective" was affected by harassment, discrimination or retaliation, or was otherwise improperly motivated. The decision reflected the considered judgment of her direct managers in the proper exercise of managerial discretion and was supported by a reasonable basis. Applicant was not subjected to harassment or a hostile work environment by her Department Director, and Applicant has not shown any causal link between the Department Director's alleged improper conduct and the decision on her FY2010 APR.

7. Applicant's challenge to the 2011 revision to the Fund's B1/B2 promotion policy is not timely under Article VI, Section 2, of the Tribunal's Statute because she did not challenge the regulatory decision "directly" within three months of its announcement or effective date and her challenge is not linked to an individual decision applying the contested policy in her case. In any event, the revision was a rational and non-discriminatory policy change that does not represent an abuse of the Fund's discretionary authority.

8. It was not unfair to deny Applicant the benefit of the "transitional measure" adopted as part of the 2011 revision to the promotion policy. That provision allowed only those economists who were already at Grade B1 as of November

1, 2010 to be considered for promotion to B2 on November 1, 2011. Unlike Applicant, those staff members had relied for 8 months on the expectation that they would be eligible for promotion following 12 months TIG.

9. Applicant's challenges to alleged failures of due process in the administrative review and Grievance Committee processes are not within the jurisdiction of the Administrative Tribunal.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

170. 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.

A. GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 2: Harassment Policy

171. The Fund's policy prohibiting harassment is set out in GAO No. 33, Annex 2, as follows:

Harassment Policy

I. Introduction

1. Employees are expected to treat one another, whether supervisors, peers, or subordinates, with courtesy and respect, without harassment, or physical or verbal abuse. They should at all times avoid behavior at the workplace that may create an atmosphere of hostility or intimidation. Moreover, in view of the international character of the Fund and the value that the Fund attaches to diversity, employees are expected to act with tolerance, sensitivity, respect, and impartiality toward other persons' cultures and backgrounds.

2. Employees of the Fund should not be subjected to harassment in carrying out their work at headquarters, on mission or in any Fund duty station. Employees should be aware that all forms of harassment may constitute misconduct, providing a basis for disciplinary action up to and including termination of employment.

II. What is harassment?

3. Harassment is behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment. It can take many different forms, including intimidation or sexual harassment.

4. ***Intimidation*** includes physical or verbal abuse; behavior directed at isolating or humiliating an individual or a group, or at preventing them from engaging in normal activities. Behaviors that might constitute intimidation include, inter alia:

- degrading public tirades by a supervisor or colleague;
- deliberate insults related to a person's personal or professional competence;
- threatening or insulting comments, whether oral or written--including by e-mail;
- deliberate desecration of religious and/or national symbols; and
- malicious and unsubstantiated complaints of misconduct, including harassment, against other employees.

5. ***Sexual harassment*** is any behavior of a sexual nature that is unwelcome, offensive, or that creates a hostile or intimidating work environment. Sexual harassment includes sexual assault, unsolicited requests for sexual favors, requests for sexual favors linked to implied threats or promises about career prospects, unwanted physical contact, visual displays of degrading sexual images, sexually suggestive conduct, or offensive remarks of a sexual nature. Sexual harassment may occur between persons of opposite sexes or of the same sex. While typically it involves a pattern of behavior, it can take the form of a single incident; and it may be directed toward a group or toward a particular person.

6. The most obvious form of sexual harassment in the workplace is a direct or implicit request for, or offer to provide, sexual favors in exchange for favorable career treatment. A wide range of other types of behavior can, however, also constitute sexual harassment, depending on the circumstances in which they occur. This would include, inter alia:

- the repetition of suggestive comments or innuendos that, while perhaps minor in themselves, gain in offensiveness as they accumulate;
- the exhibition of materials of a sexually oriented nature in the work place;
- the use of crude or obscene language or gestures, or the telling of risqué or obscene jokes or stories;
- repeated and/or exaggerated compliments about a fellow worker's personal appearance, or comments about his or her physical features;
- invitations to social activities or "dates," if they persist after the recipient has made clear that they are not welcome; and

- deliberate and unsolicited physical contact, or unnecessarily close physical proximity.

7. Sexual harassment is particularly abhorrent when it is linked with direct or implied threats or promises about career prospects. This situation typically arises when a more senior person takes improper advantage of his or her rank to try to elicit sexual favors from a subordinate. However, it may also involve peers or other work relationships. Such behavior is wholly unacceptable and, if substantiated, will be dealt with firmly.

8. Close personal relationships of a consensual nature between supervisors and subordinates do not, in themselves, constitute harassment. However, such relationships must be reported under the policy on close personal relationship.

9. In the multicultural environment of the Fund, there is clearly room for one person to be offended by actions that might not be offensive to another person. Therefore, it is important for all staff members to exercise tolerance, sensitivity, and respect in their interactions with others. It is also important for all staff to be familiar with what constitutes harassment and the Fund's policies concerning the conduct of staff members. One important element to consider is that the definition of harassment concerns not only a person's intent in engaging in certain conduct, but also the effect of that conduct on others. Therefore, if a specific action by one person is reasonably perceived as offensive or intimidating by another, that action might be seen as harassment, whether intended or not.

10. Another important element to consider is the extent to which the conduct interferes with the working environment. Mildly offensive comments or behaviors can rise to the level of harassment if they are repeated or become pervasive. At the same time, a single incident will be considered harassment if it is so severe that it poisons the overall working environment.

11. Anyone who has questions about the policy on harassment, or the way it might apply to a particular situation, should seek advice from a supervisor, SPM, HRD, the Ombudsperson or the Ethics Advisor.

III. Conduct that would not be considered harassment

12. It is important to bear in mind that there is a wide range of ambiguous behavior that might offend some people, but not necessarily others. Examples might include comments on clothing,

compliments about improved appearance, and even unintentionally offensive jokes that most people might find reasonable. These types of behavior would not normally be seen as harassment.

13. It is also important to note that, in the course of their work, supervisors have a responsibility to take difficult decisions, e.g., about moving people or changing work assignments. These decisions do not, in themselves, constitute harassment.

14. Also, a negative performance report, as such, is not harassment. Supervisors have a responsibility to give appropriate feedback and to take appropriate corrective action. However, such feedback should be made in a reasonable and constructive manner and should not be used as retaliation.

IV. Harassment on mission

15. Special care needs to be taken on Fund missions, where the mission members are brought together in situations that may result in close personal contact. Evidence suggests that the incidence of harassment, including sexual harassment, in the mission environment is much greater than in the normal circumstances of work at headquarters. No staff member on mission should take advantage of the forced proximity to press unwelcome attentions on another member of the mission. Mission members should avoid all forms of behavior that could constitute, or be interpreted as, harassment. Mission chiefs are expected to act promptly, including through appropriate intervention, when such behavior comes to their attention.

16. Similarly, mission chiefs should be sensitive to the problems caused by behavior on the part of country officials toward members of the mission team that might be interpreted as harassment, including sexual harassment. For example, in some situations, it might be necessary to limit social interaction between the mission member(s) and the official(s) concerned.

17. Staff who feel harassed in the mission environment are encouraged to discuss the matter with their mission chief, or--particularly if the harasser is the mission chief--to contact an official at Fund headquarters, such as a supervisor, SPM, the Ombudsperson or the Ethics Advisor.

V. Role of the Fund

18. The Fund strives for an environment which is free of harassment, and supervisors are expected to support this objective, including stopping harassment in the areas under their supervision.

19. The Fund will provide training for staff and managers on issues related to sexual and other forms of harassment to increase staff awareness of these issues and to promote a work environment that is free from hostility or harassment of any kind. Managers are also expected to ensure that their subordinates are familiar with the Fund's policies on harassment and have received training as necessary and appropriate.

20. The Fund provides a variety of resources for dealing with harassment and has established procedures intended to preserve confidentiality, prevent reprisal, and promptly resolve the problem, while protecting the rights of both the person bringing the complaint and the person against whom the complaint is made. However, there may be circumstances in which it might not be possible to preserve confidentiality. In particular, if an alleged offense becomes the subject of possible disciplinary action, there is an obligation to inform the person accused of the basis of the charges against him or her; if the matter becomes the subject of a Grievance Committee proceeding, the Fund may be required to turn over all relevant documentation and produce all relevant witnesses.

21. Anyone who feels harassed, particularly by a supervisor, is likely to fear reprisal should he or she bring the matter to the attention of those in authority. However, reprisal against anyone who files a complaint in good faith is unacceptable and in itself constitutes misconduct subject to disciplinary action.

22. HR Web includes further guidance on "What to Do if Subjected to Harassment," as well a list of informational videos available through the Staff Development Center.

B. GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 3: Discrimination Policy

172. The Fund's policy prohibiting discrimination is set out in GAO No. 33, Annex 3, as follows:

Discrimination Policy

I. Introduction

Every Fund employee shares responsibility for contributing to a working environment that promotes equal treatment and is free

from discrimination, as the foundation for good institutional and individual performance. It is particularly important that staff in managerial or supervisory roles create and maintain a supportive and encouraging working environment for all employees and take all reasonable actions necessary to prevent and address undesirable or inappropriate behavior.

This policy statement consolidates in one document the policies and safeguards in place to ensure that all employees[1]are treated equitably. To this end, it summarizes the standards expected of employee behavior, defines discrimination in the context of the Fund, and sets out the mechanisms available to employees who are subjected to or accused of discrimination.[2]

This policy is based on the principles in Rule N-1 which provides that "in appointing the staff, the Managing Director shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competency, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible"; and Rule N-2 which provides that "the employment, classification, promotion, and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, creed, or nationality."

II. Policy

Employees of the Fund should not be subjected to discrimination. Employees should be aware that discrimination as defined in section III of this policy statement may constitute misconduct, providing a basis for disciplinary action up to and including termination of employment.

III. What is Discrimination in the Context of the Fund?

In the Fund, discrimination should be understood to refer to differences in the treatment of individuals or groups of employees where the differentiation is not based on the Fund's institutional needs and:

- is made on the basis of personal characteristics such as age, creed, ethnicity, gender, nationality, race, or sexual orientation;
- is unrelated to an employee's work-related capabilities, qualifications, and experience—this may include factors such as disabilities or medical conditions that do not prevent the employee from performing her or his duties;
- is irrelevant to the application of Fund policies; and

- has an adverse impact on the individual's employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment.

Discrimination can occur in various ways, including but not limited to the following:

- basing decisions that affect the career of an employee—such as salary adjustments, assignments, performance evaluations, promotions, and other types of recognition—on grounds other than professional qualifications or merit;
- creating or allowing a biased work environment that interferes with an individual's work performance or otherwise adversely affects employment or career opportunities; and
- applying a policy or administering a program—such as annual leave or staff benefits, or access to training programs—in a manner that differentiates among employees for reasons other than the criteria or factors incorporated in the policy.

Discrimination can be manifested in different ways, for example, by a **single decision** that adversely affects an individual or through a **pattern** of words, behaviors, action, or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.

While the former may be readily identified (e.g., a decision not to convert a fixed-term appointment, a denial of a promotion), the latter may be less obvious, as there is no specific act or decision at issue. Nevertheless, the failure to provide fair and impartial treatment, even if through inaction, can have harmful effects on an employee's career.

IV. Further information

HR Web contains additional information on Addressing Discrimination in the Workplace, and the resources available to employees who wish to seek further advice on the subject.

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[1]The term "employees" includes both members of the staff and persons appointed as contractual employees, including locally recruited employees in overseas offices.

[2]This policy supersedes the prior management statements, "Steps to Achieve Greater Diversity and Address Discrimination Among the Fund Staff," June 1, 1995; "Measures to Promote Staff Diversity and Address Discrimination," 1996; "Fund's Policy on Harassment and Related Guidance Notes," June 21, 1999; and "Discrimination Policy," July 3, 2003. It should be viewed in conjunction with the following current policy statements: [LINKS] 2000 statement discrimination against persons with HIV and AIDS; Diversity Action Plan; Code of Conduct (1998); Mission Code of Conduct (2002); Management Standards (2001).
[3]Article VI, Section 1, IMFAT Statute.

(Emphasis in original.)

C. HR Web: Discrimination Appendices

173. The Fund's policy prohibiting discrimination is further elaborated in the "Discrimination Appendices" provided on the Fund's intranet:

Discrimination Appendices

- **Appendix 1 – Addressing Discrimination**
- **Appendix 2 – Resources**
- **Appendix 3 – Distinguishing Between Discrimination and Nondiscriminatory Conduct in the Fund's Working Environment**

Appendix 1 – Addressing Discrimination

A. If You Believe You Have Been Subjected to Discrimination
Anyone who feels that she or he has been subjected to discrimination may face a number of difficult questions. Oftentimes these questions are painful due to the fear, anger, or damaged self-esteem the experience may have caused. Taking informal or formal action (as described below) at an early stage is crucial—the longer a person lets the situation go on without taking action, the worse its influence on performance or career can become. Employees are recommended to talk with a neutral person (described in the Annex) on the alleged discrimination at an early stage. This is not always possible, however, if discrimination takes the form of a pattern of extended neglect or inaction.

It is important that employees have reasonable grounds supported by documents and other evidence, which may include witnesses, before making a complaint of discrimination. Employees should not use discrimination allegations to address other concerns or disagreements. The Fund will protect an employee against

retaliation for raising a discrimination case, but if an inquiry demonstrates that the accusations are frivolous or malicious, this may be grounds for disciplinary measures.

B. If Accused of Discrimination

An accusation of discrimination should be taken seriously regardless of whether it initially appears to be unfounded. It is useful to discuss the accusation with an objective third party who understands the confidential and sensitive nature of the problem and the characteristics of discrimination. The accused individual may wish to meet and discuss with the accuser to understand her or his rationale and background and to correct any possible misunderstandings or information gaps with respect to decisions made and actions taken. Seeking facts and documentation of events, decisions, and communications is needed as well as identifying any witnesses or evidence to set the record straight. The informal mechanisms described in the Annex are available for all Fund employees in discrimination-related concerns.

Discriminatory behavior by employees, supervisors, or peers toward others is a form of misconduct under the Fund's rules and is punishable as such. As provided in GAO No. 33, the disciplinary action will be commensurate with the severity of the misconduct and may include termination of employment.

C. If Employees Perceive Discrimination

If employees observe or become aware of a situation where a colleague is being subjected to discriminatory actions, they should encourage the affected individual to seek advice from one of the resources listed below under "informal mechanisms" or bring the issue to the attention of the Department Head, departmental Senior Personnel Manager (SPM), or Assistant to the Senior Personnel Manager (ASPM). A peer should also, by her or himself, bring the issue to the attention of the SPM or other resources mentioned in the Annex.

If an employee believes that any Fund policy or program has or may have an unintended discriminatory effect, she or he may bring it to the attention of the Senior Advisor on Diversity or the Director of the Human Resources Department (HRD) either directly or through the Staff Association Committee (SAC).

D. Informal Mechanisms

A variety of resources are available to provide information, guidance, and advice regarding how to address perceived discrimination in the immediate work environment or procedures

for filing a formal complaint. It is recommended that employees discuss concerns with any of the following resources informally before taking formal steps.

- The immediate manager of the employee, the second-level supervisor, Department Head, SPM or ASPM
- A Human Resources Officer (HRO) in HRD or a front office HRD staff member
- Ombudsperson – The Ombudsperson is an independent, neutral resource who can provide confidential advice or assistance through mediation or conciliation to help resolve personal misunderstandings or conflict that may be viewed as discriminatory. In cases where the problem cannot be resolved through mutual agreement, the Ombudsperson may present recommendations for the resolution of the problem to those with authority to implement her recommendations.
- Senior Advisor on Diversity – The Senior Advisor on Diversity provides advice, counseling, and mentoring to groups of employees and individual employees with concerns regarding diversity and discrimination.
- Staff Association Committee – The SAC can provide guidance on the resources and processes available to individual staff and help to raise issues that concern groups of staff.

E. Formal Mechanisms

If employees believe that they have been subjected to discrimination, there are two avenues of formal recourse that may be pursued.

1. If the individual's main objective is to ensure that the discriminatory behaviors cease, a complaint may be addressed to the Ethics Advisor, who will conduct a preliminary investigation into the matter. If, on the basis of the Ethics Advisor's preliminary investigation, the Director of HRD or the Managing Director believes there are grounds for pursuing an investigation of misconduct, the Ethics Advisor will proceed with such an inquiry and report his findings to management or the Director of HRD. If it is concluded that an employee has engaged in misconduct, including discriminatory behavior, disciplinary measures may be imposed on the respondent.

2. If the individual's main objective is to seek redress for the damaging effect that discrimination has had on her/his career (e.g., if a decision affecting the individual is discriminatory, or if the Fund has failed to take adequate measures in response to a

complaint of discrimination), the employee may seek review of the matter through the formal channels of dispute resolution in the Fund. This would normally entail following the procedures for bringing a grievance before the Grievance Committee (including prior administrative review), as set out in GAO No. 31. If following the grievance process the staff member remains dissatisfied with the result, she or he may file an application with the IMF Administrative Tribunal (IMFAT).

If a staff member decides to file a formal complaint, the first step is for the complainant to seek an **Administrative Review** as set out in GAO No. 31. The administrative review has two stages: (i) an initial review within six months of the initial decision by a line manager/supervisor in the staff member's department—in case of matters affecting the staff member's career or work or in case of decisions on benefits or other centrally administered human resources matters, the review would be carried out by a Division Chief/senior staff in HRD within three months; (ii) in the next stage, the complainant has the right to appeal to the Director of HRD within 30 days.

The second step in addressing the complaint or dispute formally is to file a grievance before the **Grievance Committee** as set out in GAO No. 31. The Grievance Committee normally conducts a hearing in order to prepare a report and recommendation to management on whether the Rules and Regulations of the Fund have been correctly applied or interpreted in a given case.

The third step is an application to the **IMFAT**. An application to the IMFAT must be brought within three months after all available channels of administrative review have been exhausted.[3]The Tribunal's judgment on the matter, including any award of compensation, is final and binding.

Contractual employees do not have access to the Grievance Committee procedures under GAO No. 31 or to the IMFAT. Their disputes are subject to administrative review by the Director of HRD and, if the matter remains unresolved, to binding arbitration as provided in the contractual employee's letter of appointment.

If vendor personnel believe that a Fund employee has engaged in discriminatory behavior toward them, they may bring a complaint to the Ethics Advisor, who will look into the matter. Although vendor personnel have no direct legal recourse against the Fund, such discrimination may, depending on the circumstances, give

rise to contractual claims against the Fund by the companies for which they work.

Appendix 2 – Resources

- SPMs or ASPMs for information, advice, and implementation of the policy in the department, including addressing the discriminatory behavior or action when required
- Director of HRD for formal complaints, implementing the policy in the Fund, and ensuring compliance
- Ethics Advisor to undertake preliminary investigations of complaints or formal investigations when requested by management or the Director of HRD
- HROs in the Human Resources Department for respective department for information and advice
- Ombudsperson for confidential advice or assistance through mediation or conciliation
- Senior Advisor on Diversity for information and advice
- The SAC for guidance and advice
- The Joint Bank/Fund Library has books and videos on diversity, discrimination, and harassment

Appendix 3 – Distinguishing Between Discrimination and Nondiscriminatory Conduct in the Fund's Working Environment

The following section identifies some specific circumstances which may arise within the Fund and which could be incorrectly confused with discrimination.

- **Inappropriate workplace behavior**, as such, is not discrimination. However, if this behavior (such as telling offensive jokes or creating a hostile work environment) systematically targets certain individuals or groups of individuals, it may be discriminatory.
- **Harassment, unfair treatment, abuse of power, and favoritism** are also separate from discrimination, but they can all become discriminatory if they develop into a pattern and systematically address certain individuals or groups of individuals and have an impact on employees' performance, development, career opportunities, and career progress.
- Managers have the responsibility to make **business decisions** which are not always favorable to individual employees. It should be recognized that criticism or adverse decisions about performance or work assignments do not of themselves constitute harassment, discrimination, or retaliation.

- **Negative assessment or feedback** on performance, even if it is frequent and long term, or denial of a promotion is not discrimination if it is based on standards applicable to and communicated to all relevant employees. Feedback should also be accompanied by constructive suggestions for corrective actions, and managers should not use criticism to demean or belittle employees in front of others. However, setting disparate standards or giving biased feedback depending on an individual's gender, race, or other irrelevant factors can be a form of discrimination.
- The Fund's **working language** is English; therefore, oral and written English communication skills are crucial performance competencies for all employees. Mastery of language skills is a relevant performance assessment criterion and negative assessment based on language skills alone should not be perceived as discrimination.
- The Fund's **personnel management system** includes elements—such as structured decision making procedures, defined policies and practices for performance assessment, individual objectives, feedback, and merit-based career progress—that some employees may initially have difficulty adapting to. Certain policies and programs—including the Economist Program (EP) and mandatory retirement—require age to be used as one criterion. In addition, due to the international nature of the Fund, the Fund offers certain benefits exclusively to some employee categories, for example, expatriates and employees with spouses or domestic partners. These policies are not in themselves grounds for claims of discrimination. The Fund frequently reviews its policies and practices and makes a special effort to balance diversity considerations with business objectives.
- The Fund is a work environment characterized by **high performance standards**, hard work, merit-based career competition, and frequent travel. The nature of its work and its organizational culture tends to create stress, which can sometimes lead to tension among individuals and groups. This tension, if not managed effectively, may create a perception of bias. However, stressful work is no excuse for unprofessional or discriminatory behavior.

D. GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 6: Retaliation

174. The Fund's policy on retaliation is set out in GAO No. 33, Annex 6, as follows:

Retaliation

Policy Statement

The Fund encourages employees to use the channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution. Staff and managers should be aware that the Fund does not tolerate any form of retaliation against anyone for using any of these channels, or for participating as a witness in an ethics investigation or grievance. Thus, if there were retaliation against a staff member for either raising an ethics complaint or a grievance, or for participating in either type of proceeding as a witness, the retaliation itself would be a form of misconduct which could result in disciplinary action, and any adverse decision motivated by retaliation would be invalid.

See also

- GAO No. 31, Section 9
- GAO No. 33
- SB 08/11

Guidance Points:

- Managers are expected to create an atmosphere where staff will feel free to use existing channels for workplace conflict resolution without fear of reprisal. These channels include managers, ASPMs, SPMs, Department Directors, HRD, the Ombudsperson, the Ethics Advisor, the Integrity Hotline and the formal dispute resolution system (Grievance Committee and Administrative Tribunal).
- Staff are expected to cooperate with the Fund's processes for resolving allegations of misconduct or unethical behavior, and they are also expected to participate, when requested, as witnesses in dispute resolution matters.
- Staff are strongly encouraged to make reports in good faith of suspected misconduct or unethical behavior. Failure to report suspected misconduct is not itself a separate act of misconduct.
- Managers have a duty to act upon, resolve, and/or report ethical concerns that come to their attention.
- Malicious and unsubstantiated allegations of misconduct are viewed as separate acts of misconduct.

E. Staff Bulletin No. 03/27 (Senior Promotions and Appointments in the Fund) (December 19, 2003)

175. Senior Promotions and Appointments in the Fund, and the role of the RC, are governed by Staff Bulletin No. 03/27,[25] which provides in part as follows:

> . . . .
>
> **Review Committee procedures for Deputy Division Chief, Assistant to the Director, and Grades B1/B2 positions that are not limited to candidates from the RC List**
>
> Under the new requirement, departments will provide the RC with a list of the three most qualified candidates in ranked order, together with detailed explanations for the rankings. None of the candidates for the position will be informed of their standing prior to the RC meeting, except for those who not meet the advertised position's minimum requirements and who are not interviewed. The RC will review the background of all shortlisted candidates and come to a view on the department's proposal for the position. If the RC has questions about the relative strength of the first-ranked candidate vis-à-vis others, the department's Senior Personnel Manager (SPM) will be called before the RC to put forward the departmental view and answer any questions. Joint agreement between the RC and the department on a final decision will be actively sought. The RC will advise management on the final decision and seek its approval.
>
> The Committee's intervention earlier in the process will enable the RC to have substantive input in the selection process. The change will help create a level playing field for all candidates and will also help alleviate staff concerns about equitable treatment.
>
> These new requirements apply to all such positions advertised from September 2, 2003.
>
> . . . .

[25] Elements of the promotion policy have been revised, as announced on July 1, 2011. *See infra* B1/B2 Promotion Policy Reform (Memorandum from Deputy Managing Director to Fund Staff, "Management Approval of Promotion Policy Reform," July 1, 2011).

Criteria governing promotion from Grade B1 to Grade B2 of economists holding positions in SCS departments

Several SCS departments have Division Chief/Advisor positions at Grade B1/B2 where an economics background is deemed necessary to meet the business need of the department. As such, these positions are staffed by economists at Grade B1. The current criteria for appointment to Grade B1 and promotion from Grade B1 to B2 are different for staff in economist positions (including specialist economist positions) and those in SCS positions.

These appointments and promotions to Grade B1 and B2 are reviewed by the RC. For promotion to a B-level generalist economist position, only staff on the RC List may apply for positions. Conversely, staff applying for B-level positions in SCS departments and specialist economist departments do not need to be on the RC List, but are considered by the RC at the time of appointment. In order to ensure that the different criteria do not provide a short-cut for promotion of economists from Grade B1 to Grade B2, the RC has provided the following guidelines:

- Division Chief/Advisor positions in SCS departments requiring economist skills will be screened by HRD to determine whether the job content is commensurate with the proposed grade and an economist background is required to perform the functions listed in the position description.

- Staff from the RC List selected for such positions may be promoted to Grade B2 based on the criteria applicable to economist staff. Those not on the RC List, including specialist economists, will be governed by SCS criteria for promotion from Grade B1 to B2.

- All Division Chief/Advisor positions in SCS departments requiring economist skills will be advertised. Vacancy announcements will indicate the skills and experience required for the position and, if applicable, note the criteria that will be applied for promotion to Grade B2.

- If an economist from the RC List is selected for such a position, the position during the incumbency of such an economist will be considered an economist position and, therefore, not be included in the Grades B1–B3 SCS staff count or the ceiling.

- When a position becomes vacant, and if the job content and skills requirements change, the vacancy announcement will reflect the new position requirements.

. . . .

PROMOTION PROCESS

Types of promotions

1. In order to be considered for promotion to managerial positions at Grades A14–B4, candidates must either apply for a vacant position or be promoted within the grade band of their current position.

Promotion to vacant positions

2. All vacant positions starting at Deputy Division Chief/Assistant to the Director at Grade A14 up to Grade B4 [footnote omitted] must be advertised in the Career Opportunities (CO). [footnote omitted] However, management may, in certain situations, exercise discretion not to advertise Director positions at Grades B3 and B4, or other vacancies at Grade B4 where the vacancy is filled by a lateral transfer or from outside the Fund. Positions should be advertised as soon as they fall vacant, unless approval is obtained from HRD to keep a position open for a period of time, which should not exceed six months.

3. Vacancies are advertised in the CO on the Fund Intranet. Candidates proposed to fill a vacancy can be internal candidates from the department with the vacancy or from another department, or external candidates from outside the Fund. **While internal and external candidates can be considered simultaneously, all managerial positions at Grades A14–B4, with the exception for Grades B3 and B4 noted above, must first be advertised internally in the CO before an external candidate can be selected and considered by one of the Review Committees.** Additional information on the vacancy list system is provided in Annex 1.

Promotion within positions that span several grades

4. Division Chief/Advisor positions in the economist career stream are classified at Grades B1–B3. In the SCSs, most Division Chief/Advisor positions are classified at Grades B1–B2. Promotion of incumbents in these positions is based on established criteria governing such promotions and does not necessarily involve a change in the underlying duties and responsibilities of the position.

Since these promotions do not involve vacancies, advertising is not required.

Promotion review

5. All candidates considered for promotion or appointment to managerial positions at Grades A14–B4 must be nominated by their department and reviewed by either the RC (for Grades A14–B2) or the SRC (for Grades B3–B4). The Committees perform an advisory role to the Managing Director, who makes the final decision on every promotion or appointment to a senior position.

Human Resources Department (HRD)

6. HRD screens candidates for promotion or appointment to senior positions to ensure that candidates meet the relevant eligibility criteria. HRD also provides the RC, SRC, and management with summary data required to review candidates.

Review Committee (RC)

7. The RC seeks to ensure high quality in promotions and appointments for managerial positions to foster a mix of skills, experience, and diversity. The RC consists of the Director of HRD (Chairperson) and eight members at Grade B4 appointed by the Managing Director. Committee members serve in their individual capacities and not as representatives of their departments. In appointing Committee members, consideration is given to diversity in terms of nationality, gender, and career streams, and to proven experience and interest in HR matters, including knowledge of the Fund and its staff. Members serve three-year terms. The names of the current members of the RC are listed in Annex II and are updated regularly on the Intranet . . . . HRD serves as the secretariat to the Committee.

8. The RC reviews and advises the Managing Director on the suitability of proposed candidates for appointments and promotions as follows (the RC process is described in Annex III):

    - economist candidates for inclusion on the RC List;

    - candidates for vacancies in specialist economist positions at Grade B1 in functional and SCS departments, and candidates for vacant Grade B1 positions in SCS departments;

    - all external appointments at Grades B1–B2;

- all promotions from Grade B1 to B2;

- internal or external candidates for promotion or appointment to managerial positions at Grades A14/A15 in all career streams; and

- all Resident Representative appointments paying particular attention to proposed promotions for Resident Representatives from Grade A14 to A15;

- all conversions of fixed-term appointees to managerial positions at Grades A14/A15 and Grades B1–B2 in all career streams.

9. The RC List is composed of Grade A15 "fungible" economist staff who are considered ready for advancement to Division Chief and Advisor positions in several departments. The RC identifies these candidates on a Fundwide basis for placement on the List, which is replenished as needed to meet projected B-level vacancies (Box 1). Except for specialist positions, inclusion on the List is a precondition for a Grade A15 economist to apply for a vacant B-level economist Division Chief or advisor position advertised in the CO. Additional information on the RC List is provided in Annex IV.

Box 1. Considerations for Including Candidates on the Review Committee List

- Number of individuals remaining on the List

- Estimated number of Division Chief and Advisor vacancies in the economist career stream over the coming period

- Number and overall quality of the staff being proposed for inclusion on the RC List

- Versatility and fungibility to take up senior positions in several departments

. . . .

Promotion policy

Grades A14–B2

Economist career stream promotion and appointment overview

14. The RC reviews departmental proposals for promotions, appointments, and conversions at Grade A15 (and any Assistant to the Director position filled at Grade A14), Grade B1 (when positions are filled by specialist candidates not on the RC List), and Grade B2 and makes recommendations to management.

15. For all promotions to Deputy Division Chief, Assistant to Director, and Grade B1/B2 positions that are not limited to candidates from the RC List, departments provide the RC with a list of the three most qualified candidates in rank order, together with detailed explanations for the rankings. The RC reviews the background of all shortlisted candidates and comes to a view on the department's proposal for the position.

16. The number of A15 positions in each economic department normally cannot exceed the number of divisions plus one. Additional Grade A15 positions may be approved by HRD under special circumstances, including a shortage of Mission Chiefs or the need to absorb a returning Resident Representative at Grade A15. The need for additional positions is reviewed when these positions become vacant again.

17. In the case of vacancies for economist positions (excluding specialist positions) at Grade B1, the eligibility of Grade A15 staff to apply is limited to those on the RC List. For specialist positions, qualified staff members, including those not on the RC List, may apply. In such cases, departments must follow the procedure set out in paragraph 15. While economists proposed for specialist positions do not need to be on the List, they are assessed using the same criteria applied to other economists with the exception of the fungibility requirement (see Table 1).

18. Grade B1 is primarily a "pass-through" grade for economists in B-level economist positions. Promotion to Grade B2 involves upgrading of the incumbent of a position and does not require the advertising of a vacant position. Candidates proposed for Grade B2 must have performed their functions at a fully satisfactory level. The RC's oversight is primarily intended to ensure that managerial skills, as demonstrated on the job, are strong. This would normally require a Subordinate Assessment of Managers (SAM), or, if a

SAM is not possible, other evidence of strong managerial performance.

. . . .

Specialized career streams (SCS) promotion and appointment overview

20. The RC reviews departmental proposals for promotions and appointments for managerial positions such as Deputy Division Chief and Assistant to the Director positions at Grade A14, and promotions to and appointments at Grades A15–B2.

21. The following ceilings apply for positions in SCS:

- The number of Grade A14 positions normally cannot exceed the number of divisions plus one, except with the approval of HRD.

- The number of A15 positions normally cannot exceed half the number of divisions.

- The number of positions in SCSs graded at B2 is subject to a ceiling of 50 percent of all Grade B1–B3 SCS positions in SCS departments.

22. Specific criteria for promotion to each grade are covered in Table 2. Management has approved specific criteria for promotions to Grade B2.

. . . .

Feedback to unsuccessful internal candidates

31. While the RC and SRC provide feedback to the unsuccessful internal candidates, the discussions and opinions shared among members of the RC and SRC are kept strictly confidential. Each Committee agrees on summary information that is made available to candidates who have been proposed for consideration but not endorsed by the Committee. This information includes reasons why the candidate was not endorsed, prospects for being considered in the future, and steps that the individual might take to strengthen future candidacy. The information is conveyed to the department head or SPM in the staff member's department, who is asked to provide feedback to the individual concerned. Representatives of HRD may also participate in providing feedback.

. . . .

ANNEX I

An Overview of the Vacancy List System

All vacant positions at Grades A15–B4 (as well as Grade A14 Deputy Division Chief/Assistant to the Director positions) must be advertised in the CO. Exceptions to this general provision are limited to Grade B4 vacancies. While most Grade B4 vacancies are advertised internally, Grade B4 vacancies need not be advertised when:

- Management has a firm view about filling a specific Grade B4 vacancy with an external recruit; or

- Management elects to fill a Grade B4 vacancy through the lateral transfer of a staff member already at the Grade B4 level.

All vacancy announcements for Division Chief/Advisor positions in SCS departments requiring an economist background will indicate the skills and experience required for the position and, if applicable, note the criteria that will be applied for promotion to Grade B2.

HRD reviews all applications and forwards to the department advertising the vacancy the names of those staff members who meet the eligibility requirements of the position. The department will also receive:

- Updated biographical information; and

- Copies of the last two Annual Performance Reports (APRs).

Those whose applications are not forwarded to the department will be informed of the reason by HRD.

The department with the vacancy is encouraged to interview the applicants forwarded by HRD. However, if the number of qualified applicants exceeds five, the department may limit interviews to five candidates. Procedures for meeting with applicants may vary somewhat depending on the type and level of the position advertised and will be at the discretion of the Director and/or SPM of the department involved. In the event that a department does not find a suitable candidate among the applicants, the department is free to

contact other staff members who have not applied regarding their possible interest in the position and encourage them to apply. In addition, the department may pursue a search for external candidates at the same time as the internal applicants are being considered. For all promotions to Deputy Division Chief, Assistant to Director, and Grade B1/B2 positions that are not limited to candidates from the RC List, departments must provide the RC with a list of the three most qualified candidates in ranked order, together with detailed explanations for the rankings.

At Grades A14–B4, vacancies advertised in the CO include Deputy Division Chief, Assistant to the Director, Division Chief, Advisor, Senior Advisor, and Deputy Director positions that result in promotion to Grade A14, A15, B1, or B4. Virtually all promotions from Grades B1 to B2 and Grades B2 to B3 involve the reclassification of an incumbent's position to a higher grade and the promotion of the incumbent. Since reclassifications do not normally involve vacancies, they are not advertised.

. . . .

ANNEX III

The Review Committee (RC) Process
Grades A14–B2

The RC reviews and endorses promotions/appointments/ conversions at Grades A14 (Section Chief, Deputy Division Chief or Assistant to the Director) to B2 (including Resident Representatives), candidates nominated for the RC List (see Annex IV), and all Resident Representative positions. The RC meets to consider candidates for the May and November promotion cycles and on an ad hoc basis during the rest of the year to consider candidates for specific positions and to compile the RC List.

Based on the advice of the RC, management makes the final decision and communicates its decision to HRD. Management issues an N-12 notification to inform the Board of promotions to or appointments at the B-level.

Box 4. Review Committee (RC) Process

- **The RC reviews:** biographical information, last two APRs, TIG, Management Development Center (MDC) report, Individual Development Plans (IDP) for those proposed for the RC List or for Grade B1 promotions, SAM, if applicable, and the list of shortlisted and all other applicants.

- **The RC evaluates the candidate's experience in:** (i) analytical and research work; (ii) guiding and influencing policy; (iii) leading missions and project teams; (iv) managing work programs; and (v) guiding staff. The RC also evaluates **the relevant competencies** (see Annex VI).

- In addition, each RC member is assigned the responsibility of **conducting independent inquiries** about candidates proposed for inclusion on the RC List or for promotion. These inquiries are conducted through discussions with the candidate, current and former supervisors, subordinates, and peers who are familiar with the individual's work and managerial and leadership abilities.

- The RC member **undertaking the in-depth review** of the candidate proposed for the RC List completes a worksheet to identify the skills and experience, as well as the gaps against a consistent framework and shares the completed worksheet with the other RC members. The department head or SPM of the nominated candidate(s) may provide additional information to the Committee.

- Based on the information described above, the RC discusses the absolute and relative merits of each candidate, and **advises management** about the promotion decision.

- The RC provides feedback to unsuccessful internal candidates on the RC List (see paragraph 31 of this bulletin). However, the discussions and proceedings of the Committee remain confidential.

ANNEX IV

The Review Committee (RC) List Process

A key part of the RC's role is to help identify, on a Fundwide basis, a group of qualified Grade A15 economist staff who are ready for advancement to Division Chief and Advisor positions. Departments may fill economist vacancies by choosing someone from the RC List who has applied for the position. Candidates for Grade B1 promotions in SCS and for specialist economist positions in functional departments are not required to be on the List.

How the List is prepared

As needed, to meet projected B-level vacancies, nominations of those economist staff deemed ready to assume B-level positions are sought from departments.

The RC reviews each of the candidates (see Annex III for the process). The Committee determines which candidates it considers ready to assume a B-level position immediately and which need further testing. Sometimes, there are more qualified candidates than can be added to the List in a particular round, in which case the Committee has to rank them against each other and decide who is added to the List and who has to wait until a future round.

Box 5. Considerations for Including Candidates on the RC List

- Number of individuals remaining on the List
- Estimated number of Division Chief and Advisor vacancies in the economist career stream over the coming period
- Number and overall quality of the staff being proposed for inclusion on the RC List
- Versatility and fungibility to take up senior positions in several different departments

The Committee's recommendations for replenishing the List are sent to management and the approved List is circulated to departments. Candidates who are not added to the List are provided with feedback on the reason(s) and on any additional developmental steps or further testing the Committee has

recommended for them.

Staff on the RC List

- Staff are eligible to apply for vacant positions at Grades B1/B2 in any department in the Fund.

- To be eligible for promotion within the **current** department, staff must meet the mobility requirement. [footnote omitted]

Length of time on the RC List

- Until promoted, but for a maximum of three consecutive years. Candidates are dropped from the List if not promoted by the end of the third year.

- The name of the candidate can be submitted for re-instatement on the RC List. The resubmission interval is normally a minimum of one year. Re-inclusion on the List is not automatic.

. . . .

(Emphasis in original.)

F. B1/B2 Promotion Policy Reform (Memorandum from Deputy Managing Director to Fund Staff, "Management Approval of Promotion Policy Reform," July 1, 2011)

176. On July 1, 2011, the Fund announced a revision to the policy governing promotions. Among the "key elements" of the new policy, as explained in a Memorandum from the Deputy Managing Director to Fund Staff, are the following:

1. *Replace TIG with promotion criteria, supported by competency frameworks and to be applied in departmental reviews.* The new policy establishes three broad criteria for promotion decisions: performance; experience; and readiness. The new competency frameworks will help departments in assessing candidates' readiness and provide a basis for evaluating skills and abilities. The frameworks will also enhance transparency and consistency and provide a useful basis for career-planning, as well as assist managers in providing more meaningful feedback to staff, key issues that were raised in the 2010 staff survey. Based on the new promotion criteria and the available resources for promotions resulting from the overall budget constraint, departments will select their candidates for A-level promotions in departmental reviews, with guidance and oversight from HRD.

2. *Introduce promotion budgets in the form of a ceiling on the number of A-level growth promotions each department can accommodate.* The total number of promotions will be determined based on the budget for salaries, and the associated envelope for "skills upgrading," in line with the new compensation system approved by the Board. To ensure a fair distribution of promotion space across departments, the ceilings will initially be based on departmental staffing profiles (higher for departments that have more staff with longer tenures in grade), with subceilings for economists, SCS professional staff, and SCS support staff.

3. *Unify the processes for promotion to B2 across career streams.* Candidates for promotion to B2 will continue to be reviewed with focus on managerial performance and competencies; they will have spent at least 18 months at B1 prior to promotion which will ensure that candidates have completed at least one full APR assessment (May to April) prior to their candidacy for promotion to B2, and have had sufficient time to absorb initial feedback and benefit from training and coaching support for new managers. As a transitional measure for the upcoming November 2011 round, the TIG [time-in-grade] for economist promotions to B2 will be maintained at 12 months.

CONSIDERATION OF THE ISSUES

177. The Application of Ms. "GG" presents a range of issues for consideration. First, was Applicant subject to a pattern of retaliation (for reporting misconduct of another staff member), harassment (including sexual harassment), gender discrimination, or a hostile work environment to which the Fund failed effectively to respond? Second, should Applicant's challenges to any of the following career decisions be upheld: Applicant's non-selection for B-level vacancies in 2009, 2010, and 2011, and her APR decisions for FY2009 and FY2010? Third, did the Fund abuse its discretion in adopting the B1/B2 promotion policy of July 2011 and applying it to Applicant? Fourth, did elements of the administrative review and Grievance Committee processes constitute failures of due process or materially impair the record of the case?

178. Since Respondent disputes the admissibility of all of Applicant's complaints, save for her challenge to the FY2010 APR decision, the question of the admissibility of Applicant's challenges must also be considered.

179. The Tribunal begins by addressing the admissibility of Applicant's claim that she was subject to a pattern of retaliation, harassment, discrimination, and a hostile work environment to which the Fund failed effectively to respond. Next the Tribunal considers the merits of that claim. The Tribunal then turns to the question of whether Applicant's challenges to the career decisions are admissible; concluding that only the challenge to the FY2010 APR decision is subject to review, the Tribunal addresses its merits. The Tribunal next considers Applicant's challenge to the 2011 revised promotion policy and its application to her. Finally, the Tribunal

considers Applicant's complaints relating to the administrative review and Grievance Committee processes in her case.

A. Was Applicant subject to a pattern of unfair treatment, constituting a hostile work environment, to which the Fund failed effectively to respond?

180. Applicant's overarching complaint in this case is that she was subject to a "pattern of discrimination, retaliation, and harassment over the years 2007–2010," during which time her Department Director was "actively and aggressively attempting to thwart [her] career." Applicant has characterized this alleged pattern of unfair treatment as a "hostile work environment."[26]

(1) Admissibility of hostile work environment claim

181. Respondent appears to dispute the admissibility of Applicant's generalized complaint that she was subject to a "pattern" of unfair treatment. Although, in the context of answering Applicant's challenge to her FY2010 APR decision, the Fund does respond to the allegation that Applicant's Department Director subjected her to harassment or a hostile work environment, it repeatedly insists that the challenge to the FY2010 APR decision is the "only justiciable, timely claim" that Applicant raises before the Tribunal.

182. The Tribunal accordingly begins by addressing the admissibility of Applicant's complaint that she was subject to a pattern of unfair treatment to which the Fund failed effectively to respond.

183. The Fund's Discrimination Policy expressly recognizes: "Discrimination can be manifested in different ways, for example, by a **single decision** that adversely affects an individual or through a **pattern** of words, behaviors, action, or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment." (GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 3: Discrimination Policy, Section III.) (Emphasis in original.) The Fund's Harassment Policy similarly provides: "Mildly offensive comments or behaviors can rise to the level of harassment if they are repeated or become pervasive. At the same time, a single incident will be considered harassment if it is so severe that it poisons the overall working environment." (GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 2: Harassment Policy, para. 10.)

184. The relationship between the definitions of conduct prohibited by the Fund's policies governing fair treatment in the workplace and the admissibility of claims before this Tribunal has been developed in the Tribunal's jurisprudence, beginning with *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005). Mr. "F" challenged the abolition of his position and also alleged that he had been the object of

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[26] *See supra* CHANNELS OF ADMINISTRATIVE REVIEW.

religious intolerance and workplace harassment over the course of his Fund career; he contended that the abolition of his post was the culminating act in this pattern. Although the Tribunal denied on the merits Mr. "F"'s claim that the abolition decision had been improperly motivated by discriminatory animus, it proceeded to consider ". . . whether Applicant ha[d] shown that he ha[d] been subjected to a '. . . pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.' (Discrimination Policy . . .)" and whether he had been "subjected to a hostile work environment in contravention of the Fund's internal law." *Id.*, paras. 90-91. Answering those questions in the affirmative, the Tribunal awarded relief for the Fund's failure to take "effective measures in response to the religious intolerance and workplace harassment" that had persisted for many years before giving rise to a particular grievance. *See id.*, Decision para. 2(a).

185. The Tribunal subsequently observed that in *Mr. "F"* it had taken "cognizance of a pattern of conduct where separate administrative review had not been undertaken as to each individual act." *Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 120.[27] In *Mr. "O", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), the Tribunal applied the reasoning of *Mr. "F"* to hold that an applicant could raise a claim of discriminatory treatment in his career with the Fund because he had timely challenged his separation from service as *inter alia* a culminating act of racial discrimination:

> As the Tribunal has concluded that Mr. "O"'s complaint that he was impermissibly separated from service with the Fund, an act he challenged in part as a culminating act of discrimination, is not time-barred, it may, on the basis of *Mr. "F"*, likewise consider whether Applicant has put forth evidence that would sustain a claim that he has been the object of discriminatory treatment in his career with the Fund.

Mr. "O", paras. 73-74. The Tribunal denied Mr. "O"'s discrimination claim on the merits, concluding that he had failed to establish evidence in support of it. *Id.*, paras. 98-100.[28]

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[27] In *Ms. "W"*, para. 120, the Tribunal found inadmissible a claim of "continuing" discrimination relating to events that allegedly had taken place following the administrative review process. The Tribunal distinguished *Mr. "F"* on the ground that the discriminatory conduct alleged by him had taken place prior to, rather than following, the initiation of review procedures.

[28] In *Ms. C. O'Connor (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-1 (March 16, 2011), para. 208, the Tribunal took a different approach to the issue of admissibility of an allegation of continuing discrimination, concluding that it "need not decide whether the facts of Ms. O'Connor's case are sufficiently similar to those presented in *Mr. "O"* as to warrant the same approach." Instead, the Tribunal determined that it was "willing to assume the admissibility of the claim of continuing discrimination without formally deciding the question." *Id.* The Tribunal ultimately decided that "[g]iven that there is nothing on this record

(continued)

186. *Mr. "F"* and its progeny establish that acts that may not have been challenged (or may not be challengeable) as separate "administrative acts" (Statute, Article II) may be invoked in support of a claim that the applicant has been the object of a pattern of conduct prohibited by the Fund's policies barring workplace discrimination and/or harassment. Such a claim is admissible before the Tribunal if a later act in the pattern has been timely challenged as part of a good faith assertion that it forms a culminating act in the pattern of allegedly prohibited conduct. The reason for this approach is that a "pattern," by its nature, will take time to accrue. These are the circumstances in which the instant Application arises.[29]

187. A similar approach has been taken by other international administrative tribunals, interpreting the internal law of other international intergovernmental organizations. *See, e.g., Ms. H. L. [WIPO]*, ILOAT Judgment No. 3347 (2014), para. 8 ('"[A]n accumulation of events over time may be cited to support an allegation of harassment' . . . . Where the allegation of harassment is based on an accumulation of events, the date of the last event is the date for the purpose of calculating the relevant time limits."). *See also Q v. Commission of the European Communities* (F-52/05), Judgment of the European Union Civil Service Tribunal (EUCST) (9 December 2008), para. B.2. ("[P]sychological harassment must be understood as a process which

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that establishes a pattern of discrimination or the creation of a hostile work environment, the Tribunal is of the view that the Applicant cannot succeed on those claims." *Id.*, para. 210.

[29] Respondent has stated that "[b]ecause the only claim that is properly before the Tribunal for review is her FY2010 APR, and there is no link between it and the alleged sexual harassment by [the Department Director], these harassment allegations should be disregarded." This approach, however, inverts the logic of the admissibility of a claim of a pattern of unfair treatment. The Grievance Committee in the instant case appears to have been under the same misapprehension. *See* Grievance Committee Recommendation and Report, October 15, 2013, p. 57 ("For the Committee to have jurisdiction over a claim of a pattern of harassment, at least one of the asserted actions, comments, etc. must have occurred inside the jurisdictional period. Once the 2010 APR is removed from consideration [because the Committee found no abuse of discretion with respect to it], the Committee does not find that any of the other allegations of harassment fell within the time period for which the Committee has jurisdiction."). The International Labor Organization Administrative Tribunal (ILOAT) has recently clarified the issue in the following terms:

> [F]or the purpose of determining receivability, the Appeal Board failed to appreciate the distinction between allegations of incidents that cumulatively give rise to the claim of harassment and the merits of the allegations. The Appeal Board first found that there was insufficient evidence to support the claim of a consistent and ongoing pattern of harassment, "especially relating to the continuation of any such harassment into the last year of her service, 2007", and then concluded that the appeal was "several months time-barred". In effect, the Appeal Board conflated the assessment of the merits with the threshold question of receivability. This led the Appeal Board to erroneously conclude that the claim was time-barred. As the request for review was sent to the Director General within the statutory eight weeks from the date of the last incident and the internal appeal from the Director General's review was also filed within the prescribed time limit, the claim was clearly receivable.

Ms. H. L. [WIPO], ILOAT Judgment No. 3347 (2014), para. 9.

necessarily takes place over time and presupposes the existence of repeated or continuous reprehensible conduct."). The IMFAT finds this jurisprudence of its sister tribunals pertinent because the Fund's written rules prohibiting discrimination, harassment, retaliation and a hostile work environment give expression to fundamental principles of workplace fairness, and these principles are to a significant extent shared among international intergovernmental organizations.

188. In *Mr. "F"*, the admissibility of the claim of workplace harassment reaching back over an extended period of time was additionally supported by the fact that the applicant had raised the issue of a pattern of unfair treatment throughout the stages of administrative review. *See Mr. "F"*, para. 39 ("Alleging that the abolition of [his] position was the culmination of a history of religious discrimination, Applicant requested [administrative] review of the abolition decision itself and surrounding issues of discrimination, retaliation and harassment."). The Fund therefore had examined these issues as part of that review process and had denied the claims.[30] Likewise, in *Mr. "O"*, para. 75, throughout the channels of administrative review, the applicant ". . . expressly raised the issue of discrimination, along with the issue of his employment status and separation from service[,] . . . alleg[ing] that the decisions . . . appeared to be 'the culmination of a long history of discrimination against him.'"

189. So too here, throughout the channels of review, Applicant has asserted a pattern of unfair treatment dating back to 2007. Applicant filed a timely challenge to her FY2010 APR and has alleged throughout the channels of review and now before this Tribunal that the APR decision "reflects discrimination that had its causal genesis from 2007" (Appeal to Grievance Committee: Response to Administrative Review, p. 1) and was part of a "four-year pattern of abuse of discretion by [the Department Director] and a hostile work environment." For this reason also, the Tribunal concludes that Applicant has raised an admissible challenge to an alleged pattern of unfair treatment.

(2) Merits of hostile work environment claim

190. Citing the Fund's internal law prohibiting discrimination, harassment, and retaliation, Applicant frames as her principal complaint that the managers of her former Department, in particular the Department Director, engaged in a pattern of retaliation (for reporting misconduct of another staff member), harassment (including sexual harassment), and gender discrimination towards her, which resulted in a failure to credit fully her professional accomplishments and impeded her career advancement.

(a) The governing law

191. The relevant Fund policies are reproduced in their entirety above.[31] The following elements of those policies are particularly pertinent in the context of Applicant's claims.

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[30] In *Mr. "F"*, the Fund did not challenge the admissibility of Applicant's claim of a hostile work environment.

[31] *See supra* RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW.

192. The Fund's Harassment Policy explains that, at its core, "harassment" is "behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment." (Harassment Policy, para. 3.) The Policy also notes that "harassment" can "take many different forms, including intimidation or sexual harassment." (*Id.*) The Harassment Policy additionally signals the special responsibilities of supervisors: "The Fund strives for an environment which is free of harassment, and supervisors are expected to support this objective, including stopping harassment in the areas under their supervision." (*Id.*, para. 18.)

193. The Discrimination Policy prohibits conduct that has an "adverse impact on the individual's employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment." (Discrimination Policy, Section III.) That Policy also recognizes that the "failure to provide fair and impartial treatment, even if through inaction, can have harmful effects on an employee's career." (*Id.*) The Discrimination Policy states: "Every Fund employee shares responsibility for contributing to a working environment that promotes equal treatment and is free from discrimination, as the foundation for good institutional and individual performance." (*Id.*, Section I.) As to the responsibilities of managers, the Discrimination Policy emphasizes: "It is particularly important that staff in managerial or supervisory roles create and maintain a supportive and encouraging work environment for all employees and take all reasonable actions necessary to prevent and address undesirable or inappropriate behavior." (*Id.*)

194. The Fund's policy prohibiting retaliation underscores the importance of fair treatment in the workplace by ". . . encourag[ing] employees to use the channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution." (GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 6: Retaliation.) Retaliation for using these channels is itself a form of misconduct. Furthermore, "[m]anagers are expected to create an atmosphere where staff will feel free to use existing channels for workplace conflict resolution without fear of reprisal." (*Id.*)

195. Among these elements of the Fund's written law, the Tribunal underscores in particular the following propositions: unfair treatment may take the form of inaction as well as action; supervisors carry special responsibility to ensure the fair treatment of staff members; and staff members who raise complaints of unfair treatment are protected from reprisal. The Discrimination and Harassment policies also make clear that even mildly offensive words or behaviors can rise to the level of prohibited conduct when they are repeated and form a pattern, the cumulative effect of which is to deprive the individual of fair and impartial treatment.

(b) Applicant's allegations of a pattern of unfair treatment and the Fund's response

196. Applicant has described in her Application to the Tribunal and throughout the channels of review a series of words, behaviors, actions and inactions, that she alleges form a pattern of retaliation, harassment, and gender discrimination against her and constitute a hostile work environment. Applicant asserts that the Department Director engaged in "repeated and pervasive use of offensive comments and behavior." These allegations may be summarized as follows:

- An environment existed in Applicant's Department in which sexual harassment of women, perpetrated by male senior officials, was tolerated.[32] The Department Director retaliated against Applicant for raising incidents of sexual harassment and racist comments by her immediate supervisor—conduct for which that supervisor was later disciplined but which the Department Director characterized in retrospect as possibly "just ill-judged humor"—by downgrading Applicant's APR and MAR ratings in 2007 and 2008.

- Applicant's FY2009 and FY2010 APR decisions were improperly motivated and formed part of the pattern of unfair treatment.

- In 2009, when Applicant asked the Department Director how she might improve her APR assessments, he advised that she use "charm, humor and personal appeal to him," words that she considered to be sexual harassment. When she raised the matter of alleged sexual harassment by her Department Director with the Fund's Ombudsperson and HRD Director, neither instigated corrective actions.

- Applicant's Department Director sabotaged Applicant's career advancement not only by unfairly diminishing her APR ratings, but by unusually appearing at the 2009 RC meeting at which Applicant and a male colleague from the Department were being considered for inclusion on the B List and by giving the RC reasons why her nomination should not be approved. The male colleague, but not Applicant, was advanced to the B List in 2009.

- When a vacancy arose in the Department shortly thereafter, the Department took steps to manipulate the selection process so as to favor another woman over Applicant because the Department Director preferred giving the opportunity to the other candidate. Eligibility for the vacancy was initially limited to staff members on the B List. Shortly before the vacancy closed, the Department won approval from HRD to open the vacancy to A15 staff members who were not on the B List. Applicant and the favored candidate—neither of whom was on the B List—applied. The Selection Panel unanimously regarded Applicant as superior based on the interview but the other candidate was selected (although the RC representative on the Panel did not agree with that decision) based upon factors that Applicant contends were improper, irrelevant, and pretextual. The RC refused to approve the selection decision, however, holding that only staff already on the B List should have been considered for the vacancy. The vacancy was not re-advertised until 2010. In the interim, the favored candidate or "selectee" was placed in the vacant position on an "in charge" basis.

- The Department Director resisted re-advertisement of the vacancy. By email in early 2010, the SPM inquired with an HRD official: "Do we really have to advertise the . . .

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[32] According to Applicant, these women included subordinate staff members, contractuals, and other women with whom the officials interacted in the course of their work responsibilities.

position again? [The Department Director] is talking about calling [the HRD Director] to argue we shouldn't."

- In early 2010, the RC advanced both Applicant and the "selectee" to the B List. Applicant's Department initially did not plan to renominate Applicant for B List consideration in the 2010 round. However, three RC members had questioned the fairness of Applicant's treatment in the 2009 B List process (and in the selection process for the 2009 vacancy) via a confidential email to the HRD Director. Following the HRD Director's intervention, the Department renominated Applicant for B List consideration in 2010.

- When the vacancy was re-advertised following the B List decisions of 2010, Applicant did not apply for it because she felt that she could not continue working under the Department Director's supervision and, in any event, he had indicated to her that the 2009 "selectee" would be chosen for the position in 2010. (That staff member was indeed selected.)

- Applicant lost hope of advancing in her Fund career if she were to remain in the Department. She successfully applied for a vacancy in another Department and transferred laterally, i.e., at her same grade level. She feared retaliation if she raised complaints of unfair treatment through the formal channels of administrative review. She initiated the review process only after transferring to the new Department. She later was promoted to a B1 position in a third Department.

- Applicant was subjected to "repeated and pervasive use of offensive comments and behavior" designed to undermine her professional standing. These included the Department Director's cutting her off in a Departmental meeting and scheduling another meeting when she could not attend.

197. Respondent, for its part, maintains—in the context of answering Applicant's challenge to her FY2010 APR—that she was not subjected to harassment or a hostile work environment by her Department Director. In particular, the Fund asserts that none of Applicant's allegations, either singly or collectively, manifest prohibited harassment but rather constitute "petty complaint[s]" and demonstrate her "hypersensitivity." Having not demonstrated harassment, maintains the Fund, ". . . *a fortiori* [Applicant] could not have been subject to a hostile work environment." The Fund asserts that in order to constitute a "hostile work environment," offending behavior must be "either severe or pervasive . . . and result in unfair treatment" and that Applicant has not met that test. The Fund instead likens the facts of the case to the supervisor-subordinate "personality clash" considered in *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 90, in which the Tribunal denied a claim of harassment.

(c) The Tribunal's analysis

198. The Fund's Discrimination Policy recognizes that, in contrast to discrimination that may be identified by a "single decision," discrimination manifesting itself as a "pattern" of words, behaviors, action or inaction ". . . may be less obvious, as there is no specific act or decision at

issue. Nevertheless, the failure to provide fair and impartial treatment, even if through inaction can have harmful effects on an employee's career." (Discrimination Policy, Section III.) The Policy suggests that any one of the actions or inactions complained of might not, of itself, rise to the level of prohibited conduct. The Harassment Policy makes that point explicitly: "Mildly offensive comments or behaviors can rise to the level of harassment if they are repeated or become pervasive." (Harassment Policy, para. 10.)

199. Accordingly, in determining whether Applicant has demonstrated that she has been subject to a "pattern" of impermissible conduct to which the Fund failed effectively to respond, the Tribunal necessarily takes a different approach than in deciding whether a single "administrative act," for example, a non-selection decision, represents an abuse of managerial discretion. The Tribunal must look to individual incidents not in isolation but rather with a view to discerning whether Applicant has established a pattern of conduct the "cumulative effect" of which has been to "deprive [her] of [the] fair and impartial treatment" to which she is entitled as a member of the staff of the Fund in such a manner as to constitute a hostile work environment.

200. The Fund's internal law does not define "hostile work environment" as such. The Policy on Harassment states: "Harassment is behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, *hostile*, or offensive *work environment*." (Harassment Policy, para. 1.) (Emphasis added.) The Fund's Code of Conduct, under "Courtesy and respect" requires that staff "should at all times avoid behavior at the workplace that, although not rising to the level of harassment or abuse, may nonetheless create an *atmosphere of hostility* or intimidation." (Fund's Code of Conduct, para. 14.) (Emphasis added.)

201. The Tribunal first gave meaning to the term "hostile work environment" in *Mr. "F"*. In that case, the applicant asserted that he had been subjected to discrimination and harassment on the basis of his religious affiliation, which differed from that of other members of his work unit. The Tribunal asked "whether Applicant ha[d] shown that he ha[d] been subjected to a '. . . pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.' (Discrimination Policy . . .)" and whether he had been "subjected to a hostile work environment in contravention of the Fund's internal law." *Id.*, paras. 90-91.

202. The Tribunal found that the evidence was sufficient to sustain the conclusion that the section in which Mr. "F" worked "suffered from an atmosphere of religious bigotry and malign personal relations" and that Mr. "F" "in particular suffered accordingly." *Id.*, para. 100. "Moreover," the Tribunal held, "there is ground to conclude that Applicant suffered from harassment in the workplace, as that concept is defined in the Fund's Policy on Harassment . . . ." (*Id.*) Accordingly, the Tribunal in *Mr. "F"* concluded that the applicant had been subjected to a hostile work environment, which the Fund did not take adequate measures to rectify.

203. In *Mr. "F"*, the Tribunal used the terms "harassment" and "hostile work environment" largely interchangeably, consistent with the Fund's definition of "harassment" as "behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, *hostile*, or offensive *work environment.*" (Harassment Policy, para. 3.) (Emphasis added.) The Tribunal in *Mr. "F"* also commented that "discrimination and harassment are closely related under the law

of the Fund," although the Fund's prohibition on harassment has a broader focus. *Mr. "F"*, para. 91. The Tribunal found that "an atmosphere of religious animosity was tantamount to harassment that adversely affected the work performance and perhaps health of Mr. "F"" and that "[h]arassment also appear[ed] to have had origins not of a religious kind." *Id.*, para. 101. In its subsequent jurisprudence, the Tribunal has distinguished Mr. "F"'s claim of harassment, which was linked to religious hostility, from allegations of harassment made by other applicants that were not attributed to discriminatory animus.[33]

204. As set out above at para. 196, Applicant alleges that an accumulation of words and conduct created a hostile work environment. To assess whether Applicant has indeed substantiated a pattern of unfair treatment constituting a hostile work environment, the Tribunal will examine the following key allegations: (i) the Department Director engaged in conduct at the February 2009 RC meeting that disfavored Applicant's advancement to the B List; (ii) the process of filling a B-level vacancy in Applicant's Department, for which she applied in 2009 but which was not filled until it was re-advertised in 2010, evidenced unfair treatment; and (iii) the Department Director made sexually harassing comments to Applicant in July 2009 when she raised with him the issue of her APR ratings and career advancement concerns.

(i) The context of earlier sexual harassment in Applicant's work unit and her role in reporting misconduct

205. Applicant's claim arises in the context of her earlier report (made on behalf of her subordinate staff members) of sexual harassment in her work unit.[34] That report contributed to disciplinary action being taken against a senior Department official. These events establish that sexual harassment had been a factor in the environment of Applicant's work unit reaching back to at least 2007. Later, other female staff members of the Department also raised similar allegations.

206. In the Grievance Committee proceedings, the Department Director was questioned about Applicant's report of misconduct by her supervisor and the Director's response to it:

> A: She accused a senior person in the department, to whom she reported directly, of being sexist, and racist, and essentially biased, and of saying things that exhibited either extreme bias or, certainly, very improper language.

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[33] *See Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), paras. 76-77, citing *Mr. "F"*, para. 81 (applicant had "not asserted any link between the allegedly harassing conduct of [her supervisor] and Applicant's gender, race, religion or nationality"; commenting that there is "ground to distinguish harassment without discriminatory animus . . . from that linked to religious intolerance as the Tribunal found in the case of *Mr. "F"*, which . . . is a form of discrimination prohibited by the Fund's internal law as well as by universally accepted principles of human rights."). *See also Mr. "DD"*, para. 70 (applicant did "not attribute alleged harassment to any discriminatory animus").

[34] *See supra* FACTUAL BACKGROUND.

> Q: Do you recall how you reacted to this information?
>
> A: I discussed it with the individual, who was pretty shocked. I discussed it with the deputy managing director, and action was taken, that impended on that individual's APR, discussion, and salary adjustment, and that sort of thing.
>
> . . . .
>
> I might say that the individual concerned was shocked and deeply chagrined that the view was that jokes that probably should not have been made in those circumstances were made, and there was no—it was a poor attempt at humor rather than any deep bias or prejudice. And while at the time I was quite angry, in retrospect, I'm not sure that it wasn't just ill-judged humor, and I suspect there wasn't any real bias.
>
> Q: But it's correct that the management took certain action on your—
>
> A: Oh, yes. Action was taken, and action was appropriate, because whether it was real bias or not, it was really poor judgment. So action was taken.

(9/15/11 Tr. 65-66.)

207. It is not disputed that disciplinary sanctions were imposed on that supervisor. Applicant contends, however, that this action did not put a stop to the misconduct—particularly as it related to sexual harassment—because the Department Director himself did not regard the conduct as problematic and permitted it to persist. (7/9/12 Tr. 50, 54.) Applicant points to the Department Director's testimony that the misconduct for which Applicant's supervisor was disciplined may have been "just ill-judged humor." (9/15/11 Tr. 65-66.)

208. The question arises whether Applicant's effort to ensure conformity in her Department with the Fund's ethical standards affected her subsequent treatment by the Department Director. In *Mr. "F"*, para. 100, the Tribunal referred to the "malign" atmosphere in the work unit from which the applicant "in particular" suffered on account of his religious affiliation. In the instant case, Applicant asserts that the Department in which she worked was affected by an atmosphere of sexual harassment and that she in particular suffered after she reported harassing behavior by one of its senior officials. In the view of the Tribunal, the events of 2007 provide context, as well as possible motive, for the pattern of unfair treatment of which Applicant complains. The Tribunal turns now to examine key elements of that alleged pattern.

(ii) Did the Department Director engage in conduct at the February 2009 RC meeting that disfavored Applicant's advancement to the B List?

209. Applicant alleges that the Department Director unfairly undermined her candidacy for the B List in 2009 by appearing personally before the RC at its meeting of February 2009, which was unusual, and giving reasons why she should not be included on the B List. Respondent, for its part, maintains that Applicant's complaints about her Department Director's actions at the 2009 RC meeting are non-justiciable and time-barred. The Tribunal has decided above that it may examine the allegations relating to the Department Director's conduct at the 2009 RC meeting in assessing whether Applicant has established that she was subject to a pattern of unfair treatment constituting a hostile work environment.

210. The conduct of the Department Director at the 2009 RC meeting is a matter of dispute between the parties. Three of the RC members reported to the HRD Director that the due diligence had shown that Applicant was "very competitive" for the B List but that the Department Director had come to the meeting "(in itself unusual, as the normal practice is for the SPM to come to the RC meeting), and basically gave us a number of reasons why she should NOT be put on the list." (Email from three RC members to HRD Director, November 24, 2009.)

211. The Department Director, for his part, provided the following account in his Grievance Committee testimony: "Obviously, my comments were supportive, because when you take someone to the Review Committee, you're making a pitch for that person to be included on the list. So I'm sure I said a lot of supportive things." At the same time, he commented: "I never gild the lily. I never make the case that the candidate walks on water. All of the candidates have strengths and weaknesses . . . . So I'm quite sure I said a lot of very positive things about [Applicant]. I'm quite sure I also didn't say that she was perfect. And I'm quite sure the other candidate who was there, equally, I didn't say he was perfect, but I'm sure I said a lot of positive things. . . ." He concluded: "[I]t would be very strange to take someone to a Review Committee, to advocate for their promotion, and not to advocate fairly strongly." (9/15/11 Tr. 62-63.) The Department Director additionally testified that he did not recall why he, rather than the SPM, had attended the meeting on behalf of the Department; he conceded that it was unusual for a Department Director to participate. (9/15/11 Tr. 60-61.)

212. The outcome of the February 2009 RC meeting was that Applicant was not advanced to the B List, forestalling her eligibility for promotion to a B-level position. She was informed that she "[s]how[ed] potential but need[ed] further seasoning/development/testing," including to "[e]xpand managerial (including supervision of economists) and mission leadership experience" and to "[s]trengthen diplomacy with supervisors." (Review Committee List Feedback Summary, Committee Date: February 24-25, 2009.)

213. In assessing the credibility of the Department Director's account, Tribunal observes that the outcome of the 2009 B List decision appears to have been at odds with the narrative assessments included in Applicant's APRs for the surrounding rating periods. Those assessments—and the very fact of the Department's nomination of Applicant for the B List—attest to the opinions of her supervisors that she was ready for advancement to B-level positions. Her FY2008 APR reported that Applicant was "an outstanding performer in a number of diverse

areas," including being a "very successful manager who is highly popular with her staff and invariably receives high evaluations." (Applicant's FY2008 APR.) In the FY2009 APR, encompassing the rating period May 1, 2008–April 30, 2009, Applicant's Division Chief opined that ". . . with this array of talents and experience [Applicant] is ready to assume higher levels of management responsibility." On the same evaluation, her SPM confirmed: Applicant is a "very strong economist and an excellent manager. I agree that [Applicant] is ready to take on a B-level position." (Applicant's FY2009 APR.)

214. In assessing Applicant's contention that her Department Director engaged in conduct at the February 2009 RC meeting that disfavored her advancement to the B List, the Tribunal is presented with directly conflicting evidence. On the one hand, a confidential email from three RC members sought the HRD Director's intervention in a "very serious matter of unfair treatment of an apparently high performing A15 woman." (Email from three RC members to HRD Director, November 24, 2009.) On the other hand, the Department Director testified that he was "sure [he] said a lot of positive things" (9/15/11 Tr. 62-63) on behalf of Applicant's candidacy.

215. The Tribunal is persuaded that it is more likely than not that the Department Director's conduct at the February 2009 RC meeting served to impede Applicant's advancement to the B List. In reaching this conclusion, the Tribunal accepts the documentary evidence providing the first-hand observations of three of the RC members as constituting a reliable account of the events at the RC meeting. In reaching this conclusion, the Tribunal notes that the observations of the three RC members accord with the outcome of the process, which was to deny Applicant's inclusion on the B List.

216. On the other hand, the Department Director's testimony before the Grievance Committee did not provide a clear account of his comments at the RC meeting. Instead, his testimony is replete with statements such as "I'm sure I said a lot of supportive things" and "I'm quite sure I also didn't say that she was perfect." The Department Director made few or no statements as to what he actually said at the meeting. He repeatedly stated he was "sure" that he had said things, rather than that he had said something in particular. The Tribunal also notes that the Department Director's asserted lack of recall extended to the question of why he had attended the RC meeting at all. While he admitted that it was unusual for him to attend the RC meeting, he could not explain why he had done so.

217. Given the lack of detail in his testimony as to what he did say at the RC meeting, the Tribunal finds that the Department Director's testimony cannot be accorded substantial weight. Moreover, the Tribunal notes that if the evidence of the three RC members were not to be accepted, and the Department Director's contrary and rather sketchy counter-assertions were to be accepted, there is nothing on the record to explain why Applicant should not have been promoted to the B List. In this regard, the Tribunal notes that the narrative assessments included in Applicant's APRs had confirmed her Department's view that she was ready for advancement to managerial positions.

218. Accordingly, the Tribunal concludes that the conduct of the Department Director at the 2009 RC meeting was a significant factor that led to the decision not to advance Applicant to the B List. This was a critically adverse decision to Applicant's career progression. There is no

evidence on the record that suggests that there was a fair or reasonable basis for the Department Director to have acted in this way. Indeed, three members of the RC perceived it to have been unfair and prejudicial to Applicant. Moreover, it ran counter to the due diligence and to the Department's own assessment of Applicant's readiness for advancement to managerial positions. When considered cumulatively with other words and conduct found in the record of the case, the Tribunal concludes that these actions form part of a pattern of unfair treatment of Applicant that constituted a hostile work environment.

(iii) Did the process of filling a B-level vacancy in Applicant's Department, for which she applied in 2009 but which was not filled until it was re-advertised in 2010, evidence unfair treatment?

219. Applicant alleges that the Department Director's conduct at the 2009 RC meeting was closely related to another incident of unfair treatment, namely the process of filling a B-level vacancy in her Department, which was advertised shortly thereafter but was not filled until it was re-advertised in 2010. Applicant contends that that process was manipulated to disfavor her candidacy in preference to that of another candidate who was supported by the Department Director.

220. The Tribunal holds below that Applicant's challenge to her non-selection for the 2009 vacancy is not admissible as a challenge to a separate "administrative act" of the Fund.[35] Rather, the Tribunal's consideration of the alleged unfair treatment in connection with that vacancy selection process is limited to the question whether it forms part of a pattern constituting a hostile work environment.

221. Initially, neither Applicant nor the purportedly favored candidate was eligible to apply for the vacancy because neither was on the B List. Shortly before the vacancy closed, however, the Department won approval from HRD to open the recruitment to A15 staff members who were not on the B List. Applicant applied immediately, a fact that was noted the next day in an email message from the SPM to the Department Director.

222. As candidates who were not on the B List were now being considered for the vacancy, an RC member was included on the Selection Panel. That RC member was the same individual who had performed the due diligence on Applicant at the time of her nomination for the 2009 B-List decision.

223. Applicant and three other staff members were interviewed for the position. The Selection Panel concluded that all four of the interviewed candidates ". . . had strong records and would likely be successful in the position." The Selection Memorandum stated: "Based solely on the interviews, the panel ranked the candidates in order as [Applicant], [the selectee], [the other two candidates]. However, in examining the two top candidates and taking into consideration factors

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[35] *See infra* Has Applicant raised admissible challenges to the 2009, 2010, and 2011 non-selection decisions, and to her FY2009 APR decision?

beyond the interviews, most of the panel ranked [the selectee] ahead of [Applicant]." On this basis, the Department recommended selection of the other candidate.

224. In an email communication to a small group of senior female economists, the RC member who served on the Selection Panel questioned the fairness of the process: "Of the 4 candidates we interviewed, [Applicant] was heads and shoulders above the rest—this was acknowledged by the panel but they chose their favorite candidate in the write up. I basically told them that I would not go along with their proposal—was reflected in the write up (there are records of all this)." (Email from RC member to five senior women economists, November 24, 2009.)

225. The Tribunal requested from the Fund "any opinion dissenting from the Selection Memorandum." The Fund responded that "[t]here were no such dissenting opinions submitted to HRD." The Fund has, however, produced documentation showing that the RC member on the Selection Panel was provided the opportunity to comment on a draft of the Selection Memorandum before it was finalized. She responded: "It's fine. Please see two small edits." The proposed edits were to enhance the summary of Applicant's experience and qualifications by introducing the phrase "in top academic journals" in the discussion of Applicant's publications and by changing the word "good" to "very strong" in describing Applicant's management and leadership skills. These edits were incorporated into the final Selection Memorandum.

226. In the view of the Tribunal, the fact that the RC member responded that the Selection Memorandum was "fine" did not necessarily mean that she supported its recommendation. Her edits support the view that the Selection Panel did not give Applicant's strengths the weight that the RC member believed they deserved.

227. The Tribunal also requested that the Fund produce "any documentation underlying the Selection Memorandum . . . , including any grids showing the respective ratings of each of the candidates on the various competencies for the position (with names redacted except for those of Applicant and the selectee)." The Fund responded that, following a review of the files and consultation with both the former SPM of Applicant's Department and the Secretary of the RC, it concluded that "no such documents currently exist, if they ever existed." The Fund states that the former SPM "apprised us that there was no formal comparative table of the candidates."

228. Applicant, in her responsive comments, asserts that the lack of formal documentation comparing the candidates demonstrates a lack of proper consideration of the candidates and supports her contention that the decision not to select her "stems from the improper discriminatory and retaliatory motives of the [Department] Director . . . and his personal animosity toward [her]."

229. Applicant additionally contends that a principal reason given for the selection of the other staff member, i.e., that she was a native of the region and spoke a language of the region (*see* Selection Memorandum), was irrelevant, improper, and pretextual. The RC member on the Selection Panel stated: "The only reason I was told as to why [Applicant] did not cut it is because she is not from the region . . . ." (Email from RC member to five senior women economists, November 24, 2009.) The Department Director, for his part, explained the selection decision in his Grievance Committee testimony in the following terms: "It was advantageous to be

connected in [the region] and advantageous to speak some [language of the region]." (9/15/11 Tr. 241-242.) Respondent has not disputed that language skills had not been part of the stated qualifications for the position.

230. After the selection process had been completed, the decision was "not implemented" and the requisition for the vacancy was cancelled. The SPM testified that this was because, after the selection process had been completed, the RC advised HRD that Grade A15 candidates who were not on the B List should not have been considered for the vacancy. (9/6/11 Tr. 356.) Both Applicant and the "selectee" were accordingly disqualified. By the RC member's account: "[I]n the end, the process turned out to be invalid because the person they were rooting for had not gone through the B list, so they withdrew the nomination." (Email from RC member to five senior women economists, November 24, 2009.)

231. Following the non-implementation of the 2009 selection decision, the "selectee" was placed in the position on an "in charge" basis. According to Applicant, the Department Director informed her that this staff member would be nominated for B List consideration at the January 2010 RC meeting, whereas Applicant would not be re-nominated. According to Applicant, at this juncture the Department Director told her that she ". . . could move to another department and get them to support [her] for the Review Committee list." (7/9/12 Tr. 139-140.) Applicant also asserts that the Department Director told her that the "selectee," who was in the position on an "in charge" basis, was expected to be appointed to the vacancy formally in the future. (7/10/12 Tr. 130.)

232. The Fund does not dispute Applicant's assertion that the Department Director had told her that she would not be renominated for the B List. The Tribunal finds that the Department Director's refusal to renominate Applicant for inclusion on the B List constitutes part of the same hostile pattern of behavior that had led him to speak against her inclusion on the B List at the RC meeting in February 2009.

233. However, it is important to note that following the email from three RC members to the HRD Director mentioned above, and the HRD Director's intervention, the Department did renominate Applicant for B List consideration in January 2010.[36] Both she and the other staff member were advanced to the B List at the 2010 RC meeting. Again this outcome suggests that, in the absence of the intervention by the three RC members and the HRD Director, the Department Director would once again have impeded Applicant's advancement to the B List. In the view of the Tribunal, this constitutes further evidence of the hostile work environment in which Applicant was working as the result of the behavior of her Department Director.

234. Following the 2010 B-List decisions, a new requisition was issued for the vacancy. The record shows that the Department Director resisted re-advertisement of the vacancy. By email in early 2010, the SPM inquired with an HRD official: "Do we really have to advertise the . . .

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[36] *See supra* FACTUAL BACKGROUND.

position again? [The Department Director] is talking about calling [the HRD Director] to argue we shouldn't."

235. Applicant did not apply for the vacancy when it was posted in 2010. In the Grievance Committee, she explained: "After hearing [the Department Director]'s statements to me in that meeting of July 2009, I felt that I could not see putting myself in a position of being his direct subordinate. I was by this time making every possible effort to get out of the department, even if that meant moving laterally at A-15 . . ." (7/10/12 Tr. 66.) (Applicant indeed transferred to an A-15 position in another Department in 2010.) As a result of the 2010 vacancy selection process, the same staff member who had been recommended for selection as a result of the 2009 process was appointed to the position.

236. In the view of the Tribunal, the process of filling the B-level vacancy in Applicant's Department, for which she applied in 2009 but which was not filled until it was re-advertised in 2010, has troubling aspects: the vacillation by HRD as to whether staff members not on the B List could apply for the post; the absence of any "formal comparative table of the candidates" as acknowledged by the SPM; and the fact that the "selectee" was preferred over Applicant on the basis of her language skills, something that the Fund admits did not form part of the stated qualifications for the post. Still, Applicant has not established that any of these procedural flaws are part of the pattern of unfair treatment directed at her.

237. On the other hand, the Tribunal does conclude that the conduct of the Department Director in informing Applicant that she would not be renominated to the B List following the cancellation of the 2009 vacancy selection process provides further evidence of the pattern of adverse conduct by her Department Director. When considered cumulatively with other words and conduct found in the record of the case, the Tribunal concludes that these actions form part of a pattern of unfair treatment constituting a hostile work environment.

(iv) Did the Department Director make sexually harassing comments to Applicant in July 2009 when she raised with him the issue of her APR ratings and career advancement concerns?

238. Applicant states that in July 2009 she raised with the Department Director concerns about her APR ratings in the light of her performance accomplishments, including her publication in a leading professional journal. Applicant testified that the Department Director ". . . reacted instantly with anger, saying '[an article in that journal] doesn't mean beans.' So I stayed calm and I asked him, 'Could you please advise me on what I could do, then, to improve my ratings,' and he said I could use *charm, humor and personal appeal to him*." (7/9/12 Tr. 141.) (Emphasis added.) Applicant has repeated this phrase throughout the administrative review process and before the Tribunal. Applicant contends that these remarks constitute "sexual harassment."

239. A former supervisor, who served as an informal mentor to Applicant, testified to Applicant's contemporaneous report that the Department Director had told her to be more "charming." That former supervisor also registered her own reaction to the reported comments: "You told me at the time that you were told that you had to be more charming, which personally I thought was quite outrageous. . . . And when you told me this comment you were obviously extremely upset and, frankly, as a female supervisor, I thought it was an incredible thing to tell

somebody." (7/9/12 Tr. 160-161.) One of the senior women economists with whom Applicant later shared her account of the Department Director's remarks, reacted that she was "aghast" at the comment: '"charm, humor, and personal appeal' indeed!!" (Email exchange of November 23, 2009.)

240. Applicant has stated that the Department Director mentioned on more than one occasion that she should be "charming" to him and that she should "use humor," "tell jokes," and use "personal appeal." In her view, "[t]hese are not collegial behaviors, but flirtatious behaviors, and offensive. . . . [They] reflect discrimination and harassment."

241. In addition to the July 2009 remarks, Applicant also testified to a meeting that took place following the RC's February 2009 decision rejecting her candidacy for the B List. The Department Director called her to his office to discuss the outcome. In Applicant's words, ". . . he essentially launched into a personality diatribe which to me was admitting that he had not been supportive during the Review Committee. And even in this meeting he was saying things to the effect of that I needed to be more charming with him." Applicant testified: "He used the word 'charming,' that I had to be more charming, and he even brought up the possibility or the suggestion that I could tell jokes as a way of being more charming." (7/9/12 Tr. 96.) Applicant also testified that the Department Director commented, "in a flirtatious demeanor," that she looked younger than her age and had plenty of time for promotions. (7/9/12 Tr. 97-98.)

242. The Department Director did not squarely deny making the alleged remarks, nor did he confirm them. (9/15/11 Tr. 184.) He sought to explain that the purport of his interchanges with Applicant relating to her career development was to advise her that she should use "more charm than aggression" (9/15/11 Tr. 71) in advocating her views.

243. When asked directly in the Grievance proceedings whether he had advised Applicant to be more "charming," the Department Director responded as follows:

> [S]he would always focus on her analytic ability, which is strong. And I was always trying to get across that, when you judge people for promotion, you look at a bundle of attributes. You look at the analytics, the ability to write and speak clearly and persuasively, with gravitas, their managerial strengths, which means leadership, intellectual leadership, empathy with colleagues and subordinates, and all of that sort of thing. So I think probably on numerous occasions, I said think of the whole range.

(9/15/11 Tr. 69-70.) The Department Director further testified that Applicant had a "tendency to argue a case - - to flog a dead horse, as it were, to argue a case again, and again, and again," and that what he tried to get across to her was: "[D]on't try and bludgeon people with your view. Try and coax them into your view. You can't just bang away at the same thing repeatedly. You've got to persuade people, coax them into your position rather than just trying to beat them into it." The Department Director testified: "It's a case of using more charm than aggression." He concluded that ". . . it's quite likely we did - - we certainly had a meeting where I was trying to get those points across, because I thought it was essential, if she was going to get on in the Fund, to learn those kinds of skills." (9/15/11 Tr. 70-71.)

244. The question arises whether the Department Director made the allegedly offensive remarks and, if so, whether they constitute sexual harassment or otherwise form part of a pattern of unfair treatment.

245. There were apparently no witnesses to the July 2009 exchange between the Department Director and Applicant. The Tribunal is persuaded of the veracity of Applicant's account, which is supported by her contemporaneous and repeated reports of the alleged comment that she should use "charm, humor and personal appeal to him." The Department Director did not deny having made the alleged comments, stating "I have no recollection of verbatim." (9/15/11 Tr. 184.) In particular, he did not deny using the word "charm" or "charming." He confirmed that he sought to advise Applicant that "[i]t's a case of using more charm than aggression." (9/15/11 Tr. 71.)

246. Applicant and the Department Director may have differed, however, as to the meanings that these words carried. While Applicant alleges that they constituted sexual harassment, the Fund maintains that the Department Director intended to communicate that Applicant "would do well to learn some softer powers of persuasion" in advancing her views among colleagues.

247. The Fund's internal law explains: "[T]he definition of harassment concerns not only a person's intent in engaging in certain conduct, but also the effect of the conduct on others. Therefore, if a specific action by one person is *reasonably perceived* as offensive or intimidating by another, that action might be seen as harassment, whether intended or not." (Harassment Policy, para. 9.) (Emphasis added.) This Tribunal has emphasized: "While conduct need not be intended to harass in order to be violative of the Policy—and therefore the conduct's effect on others may be taken into account in assessing whether it constitutes harassment under the Fund's internal law—that effect must meet a test of 'reasonableness.'" *Mr. "DD"*, para. 124. *See also Mr. E. D. G. [FAO]*, ILOAT Judgment No. 3318 (2014), para. 7 ("There is no need to prove that the perpetrator of these acts intended to engage in harassment . . . , the main factor being the perception that the person concerned may reasonably and objectively have of acts or remarks liable to demean or humiliate him/her.").

248. Accordingly, in assessing whether the Department Director made comments to Applicant in July 2009 that violated her right to fair treatment in the workplace, the inquiry centers on whether Applicant "reasonably perceived" those comments as "offensive or intimidating." (Harassment Policy, para. 9.)

249. The "reasonableness" of a perception of harassment or a hostile work environment will always be a fact-specific inquiry and will be judged in the light of the context in which the events unfold. *See, e.g., Mr. E. D. G.*, para. 8 ("It was entirely predictable that an official, seeing his last chance of being promoted to the D category slipping away, shortly before his retirement, might have this reaction. In this context, his immediate supervisors should normally have been aware that he would be particularly sensitive to any lack of respect shown to him, and they should have tried to avoid making him feel that he was no longer of any use or excluded, compounding this impression with disparaging remarks and making a proposal which they should have known from the outset would be unacceptable to him."). *See also Mr. H. F. [IAEA]*, ILOAT Judgment No. 2553 (2006), para. 6 ("Personal characteristics such as gender, race and ethnicity as well as

the reasonableness of the sensitivities of the alleged victim, must also be weighed . . . . Similarly, any previous history of relations between the alleged victim and the alleged offender may be relevant . . . .").

250. It is clear to the Tribunal that Applicant found the comments of the Department Director to be inappropriate and demeaning of her professional standing. For example, Applicant testified: "[O]n the issue of jokes, I said, 'But, you know, everyone would like to be funny because being funny is popular, but I'm trained as an economist, what can I do.'" (7/9/12 Tr. 97.) Plainly, she did not regard the Department Director's comments as serious career advice about improving her abilities to work collegially.

251. Use of the word "charm" was particularly significant, testified Applicant, because she recalled the Department Director's using the word "charming" to refer to another woman with whom Applicant perceived him to have an inappropriate relationship: "[T]his word 'charm' coming from him particularly in this context I found very offensive, especially because I saw him use it with another woman, flirting with that other woman, how she was always so charming, and especially since that other woman told me he asked her out." (7/9/12 Tr. 34, 142.)

252. It was in this context, according to Applicant's account, that the alleged comments of the Department Director were uttered to her: "It was the information that I was told [as to allegedly inappropriate conduct toward other women] and how that affected the way that I perceived different things that he later said to me." (7/9/12 Tr. 31-35.) In her pleadings before the Tribunal, Applicant emphasizes that the Department Director's allegedly sexually harassing comments to her of July 2009 ". . . occurred against the background of his harassment of other women in [the Department]." In her Grievance Committee testimony, Applicant recounted incidents of sexual harassment experienced by other women in the Department, of which she claimed to have knowledge. (7/9/12 Tr. 34.)

253. The Tribunal has referred above to the context of a history of sexual harassment within Applicant's work unit and her role in reporting earlier misconduct by a former supervisor.[37] That supervisor was disciplined as a result. Applicant contends that the prohibited conduct did not stop after the disciplinary action and that the Department Director's tolerance of the behavior was responsible for its continuance. Applicant testified: "[A]pparently [the Department Director] did not address the sexual harassment because [the official who had been disciplined] continued going after women. . . . We heard many women saying they were uncomfortable with [that official]. So it did not end." (7/9/12 Tr. 50-51.)

254. In the context of the undisputed history of sexual harassment in Applicant's Department, and of Applicant's role in raising that issue with the Department Director, was it "reasonable" for her to perceive his later comments to her as "offensive or intimidating" (Harassment Policy, para. 9) or otherwise violating her right to fair treatment?

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[37] *See supra* The context of earlier sexual harassment in Applicant's work unit and her role in reporting misconduct.

255. Applicant contends that the Department Director's comments to her constituted "sexual harassment." "Sexual harassment" is defined in the Fund's internal law as "any behavior of a sexual nature that is unwelcome, offensive, or that creates a hostile or intimidating work environment." (Harassment Policy, para. 5.) Sexual harassment ". . . includes sexual assault, unsolicited requests for sexual favors, requests for sexual favors linked to implied threats or promises about career prospects, unwanted physical contact, visual displays of degrading sexual images, sexually suggestive conduct, or offensive remarks of a sexual nature." (*Id.*) The Harassment Policy emphasizes: "The most obvious form of sexual harassment in the workplace is a direct or implicit request for, or offer to provide, sexual favors in exchange for favorable career treatment." It elaborates: "Sexual harassment is particularly abhorrent when it is linked with direct or implied threats or promises about career prospects. This situation typically arises when a more senior person takes improper advantage of his or her rank to try to elicit sexual favors from a subordinate." (*Id.*, paras. 6-7.)

256. The Tribunal is not convinced, as Applicant contends, that the Department Director's remarks constituted "sexual harassment" as defined in the Fund's Harassment Policy. They are subject to multiple interpretations. They are not necessarily "sexual" in content. (Harassment Policy, para. 5.) However, in the view of the Tribunal, what the comments do represent is an unwillingness on the part of the Department Director to engage genuinely with Applicant when she sought out his support in advancing her Fund career, following her rejection for the B List in February 2009 and her FY2009 APR decision. In the interchange, Applicant essentially confronted the Department Director with the unfair treatment that was affecting her career progression; his response was implicitly to deny that there had been unfair treatment and instead to place the onus on Applicant to be more "charming."

257. It is recalled that in his Grievance Committee testimony, the Department Director stated that he offered the comments to advise Applicant that she should take a less aggressive approach toward persuading colleagues of her point of view: "You've got to persuade people, coax them into your position rather than just trying to beat them into it. . . . It's a case of using more charm than aggression." (9/15/11 Tr. 71.) In the view of the Tribunal, even if the Department Director's explanation of his comments is accepted, they evidence a gendered approach to providing feedback on job performance and career aspirations. The Department Director faulted Applicant for "bludgeoning people" with her views and for using "aggression" instead of "charm" in order to "coax" others to her point of view.

258. In the circumstances, the Tribunal concludes that Applicant reasonably perceived the Department Director's responses not only as failing to address seriously her concerns about her career development but also as taking impermissible account of her gender in responding to those concerns. In the view of the Tribunal, it was reasonable for Applicant to have perceived the suggestion by a male supervisor to a female subordinate that she should use "charm" to advance her career aspirations to have gendered implications, whatever precisely its intent may have been. There is ground to conclude that an ". . . employer who acts on the basis of a belief that a

woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[38] Gender stereotyping plays a subtle, yet powerful, role in denying equal treatment. For these reasons, the Tribunal concludes that the Department Director's remarks, if intended to advise Applicant to alter her purported manner of communications with colleagues, were related to the fact of her gender, to perceptions about gender roles, and to Applicant's willingness to challenge past misconduct relating to unfair treatment of women.

259. That the Department Director's comments were reasonably perceived to carry gendered meaning is confirmed by the reactions of similarly situated staff members to whom Applicant relayed those comments. Those women economists were "aghast" (Email exchange of November 23, 2009), finding the comments "outrageous" and "incredible," especially from the perspective of a female supervisor. (7/9/12 Tr. 160-161.) They perceived the Department Director's responses to Applicant—in the context of challenging unfair treatment in relation to her career aspirations—as part of a pattern, leading them to conclude that her case represented a "concrete example" of "women plateauing unfairly at A-15." (Email exchange of November 23, 2009.)

260. It is also pertinent to the Tribunal's conclusions that the inappropriate comments arose in the important area of a subordinate's seeking performance feedback from her Department Director. The Fund's policies make clear that ". . . giving biased feedback depending on an individual's gender, race, or other irrelevant factors can be a form of discrimination." (HR Web: Discrimination Appendix 3 - Distinguishing Between Discrimination and Nondiscriminatory Conduct in the Fund's Working Environment.) "Feedback should . . . be accompanied by constructive suggestions for corrective actions . . . . " *(Id.*) Moreover, ". . . feedback should be made in a reasonable and constructive manner and should not be used as retaliation." (Harassment Policy, para. 14.)

261. In evaluating the significance of the Department Director's comments, it is additionally notable that on Applicant's FY2010 APR, her Division Chief praised the effectiveness of her "oral presentation skills," stating that Applicant "speaks clearly, articulately, and persuasively to command attention, establish credibility and gain influence," including "providing strong documentation in support of her arguments." The APR narratives of FY2008, FY2009 and FY2010, which describe a "very successful manager who is highly popular with her staff" (FY008 APR), reveal no evidence that Applicant was seen as lacking in collegiality—save for the difficult relationship she had with the Department Director—or that her oral advocacy skills suffered from a "tendency to . . . flog a dead horse" (9/15/11 Tr. 70-71).

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[38] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). In considering whether refusal to repropose woman for partnership in accounting firm was "because of" sex in violation of U.S. antidiscrimination law, the U.S. Supreme Court referred to the issue of "sex stereotyping" as follows: "[E]ven if we knew that Hopkins had 'personality problems,' this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. . . . We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman." 490 U.S. 228, 258.

262. The Tribunal concludes that Applicant has established that she "reasonably perceived" the Department Director's comments to her of July 2009 as "offensive or intimidating." (Harassment Policy, para. 9.) Although Applicant has not shown that these comments constituted "sexual harassment" as defined by the Fund's internal law, she has established that, when considered cumulatively with other words and conduct found in the record of the case, these comments form part of a pattern of unfair treatment constituting a hostile work environment. The following factors support the Tribunal's conclusion: (a) the history of sexual harassment in the Department and Applicant's particular vulnerability in having earlier raised complaints of sexual harassment on behalf of her subordinate staff members; (b) that the comments were made in the context of Applicant's seeking performance feedback and implicitly challenging the unfair treatment that was affecting her opportunities for career advancement; (c) even if the Department Director's explanation of the comments' purport is accepted, they reveal a gendered approach to responding to a subordinate's career aspirations; and (d) the reasonableness of Applicant's perceptions is supported by the reactions of similarly situated staff members.

(v) The issue of the Fund's alleged failure to respond effectively to the hostile work environment

263. Respondent seeks to interpose as a defense against Applicant's allegations of retaliation, harassment, discrimination and a hostile work environment the argument that an allegation of "nonfeasance" by the Fund is a "non-justiciable" claim, in the light of the limitation of the Tribunal's jurisdiction to review of challenges to "administrative acts."[39] Respondent likewise protests that the issue of "nonfeasance" was not raised through the channels of review. For the reasons set out below, the Tribunal finds these arguments are without merit.

264. In cases alleging discrimination and harassment forming a hostile work environment, it is the Fund's failure to act that is the actionable claim. In *Mr. "F"*, it was the Fund's "failure . . . to take effective measures in response" to the religious intolerance and workplace harassment of which Mr. "F" was an object that supported a finding against the Fund and compensation to the applicant. Pertinently, in *Mr. "F"*, para. 100, the Tribunal found "no evidence in the record that Fund supervisors took effective action to deal with that unacceptable situation." In *Mr. "DD"*, para. 113, the Tribunal framed the issue as whether the applicant experienced impermissible treatment "to which the Fund failed effectively to respond."

265. This jurisprudence is in accordance with the Fund's internal law, which states that prohibited discrimination may be manifested by ". . . action, or inaction (such as the failure to take appropriate action in response to a complaint of discrimination)." (Discrimination Policy, Section III.) In other contexts as well, this Tribunal has awarded relief to an applicant for the Fund's failure to act in accordance with its legal obligations as prescribed in the written law or

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[39] Statute, Article II, Section 1(a), provides: "The Tribunal shall be competent to pass judgment upon any application . . . by a member of the staff challenging the legality of an administrative act adversely affecting him." An "administrative act" is defined as "any individual or regulatory decision taken in the administration of the staff of the Fund." (Statute, Article II, Section 2(a).).

by principles of fair treatment. *See, e.g., Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), paras. 250, 256 (compensation awarded where "actions (and inactions) of the Fund amount[ed] to a serious violation of the Fund's obligation under GAO No. 16" to provide proactive assistance in the reassignment of a staff member whose position had been abolished, as well as for failures of fair treatment in relation to the selection process for a vacancy).

266. The Tribunal's jurisprudence has made clear that the Fund's internal law imposes a duty on Fund officials to respond appropriately to good faith complaints that the work environment has been affected by harassment. This applies whether a staff member files a formal complaint of misconduct with the Ethics Office or brings the matter to the attention of others positioned to assist. Furthermore, the duty to respond appropriately to such complaints inheres whether or not the Tribunal ultimately concludes that the staff member has been the object of impermissible harassment. *See Mr. "DD"*, para. 100 (although Tribunal had concluded that the applicant had not been subjected to harassment, it considered "whether . . . liability may be found on the ground that Fund managers failed to take effective action in response to a supervisory situation that Applicant maintained gave rise to great distress and a threat to his health."). The appropriateness of the response will, of course, be measured by the particular circumstances of the case. For example, in *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 93, the Tribunal concluded that the "responsive actions of the Fund [including providing the applicant the opportunity to report to different supervisors and later to transfer temporarily to another department] mitigate any liability it could be found to have for the inappropriate supervision of Applicant."[40]

267. In the instant case, Applicant took steps to seek resolution of the unfair conduct of which she believed she was a victim. Respondent has not disputed Applicant's account that in July 2009 she raised allegations of sexual harassment on the part of her Department Director with the Fund's Ombudsperson, and that, in October 2009, she brought the same concerns to the attention of the HRD Director. Applicant also testified that she raised with her SPM the Department Director's allegedly disparaging remark about her publication in a prestigious professional journal. (7/10/12 Tr. 30.) Applicant faults the Ombudsperson and HRD Director for failing to request an Ethics investigation at that time. She asserts that the HRD Director's response to her "focused on whether [Applicant] was considering leaving the Fund" and that the HRD Director suggested that "if she experienced something of what [Applicant] was describing to her that she wouldn't work in that kind of environment and that she would leave." (7/9/12 Tr. 152-153.)

268. The Fund disputes Applicant's characterization of her conversation with the HRD Director as "unsubstantiated, implausible on its face, and of questionable veracity." The record supports the Fund's assertion that it was at the initiative of the HRD Director that Applicant's candidacy for the B List was re-proposed for the RC's consideration at its January 2010 meeting.

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[40] The Tribunal had earlier concluded that the ". . . only pertinent question before the Tribunal is whether Applicant shall be granted, in respect of harassment claims, compensation additional to the considerable sum recommended by the Grievance Committee and accepted by the Fund." *Ms. "BB"*, para. 89.

In addition, in response to complaints lodged by Applicant in late 2011, the Fund's Ethics Office launched an investigation, pursuant to GAO No. 33, into alleged misconduct by Applicant's then former Department Director, SPM, and Division Chief. The question is whether these actions amounted to an effective response by the Fund to the pattern of unfair treatment of which Applicant was the object.

269. In the view of the Tribunal, it is untenable for Respondent to assert that undertaking an investigation once a staff member raises a formal complaint of misconduct with the Ethics Office will absolve it of responsibility for the adverse effects of that alleged misconduct on the complainant's conditions of employment. The fact of the Fund's investigating alleged misconduct as part of its Ethics procedures cannot insulate the organization from responsibility for the effect of that conduct. As the Tribunal has observed above,[41] the Ethics Office process for handling misconduct complaints and the employment dispute resolution process leading to review of contested administrative acts by this Tribunal are independent processes that proceed along different paths. Accordingly, undertaking an Ethics investigation will not shield the Fund from responsibility before the Administrative Tribunal for the effect of alleged misconduct on the conditions of employment of other staff members.

270. It is also important to the Tribunal's conclusions in this case that responsibility for the pattern of unfair treatment lies with the Applicant's Department Director. The Fund's internal law looks to the responsibility of managers to refrain from misconduct and to respond effectively to it, "including stopping harassment in the areas under their supervision." (Harassment Policy, para. 18.) "It is particularly important that staff in managerial or supervisory roles create and maintain a supportive and encouraging working environment for all employees and take all reasonable actions necessary to prevent and address undesirable or inappropriate behavior." (Discrimination Policy, Section I.) Additionally, "[m]anagers are expected to create an atmosphere where staff will feel free to use existing channels for workplace conflict resolution without fear of reprisal." (GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 6: Retaliation.) Fund staff must be able to rely on their supervisors and Department Directors to maintain a workplace free of hostile working conditions.

271. Other international administrative tribunals likewise have recognized the special responsibilities carried by managers for ensuring the fair treatment of staff members. *See Mr. E v. Asian Development Bank*, AsDBAT Decision No. 103 (2014), paras. 69-70 (Country Director fell short of fully discharging the '"added responsibility' that managers must exercise to ensure the full implementation of ADB's policy of creating a work environment free of harassment," including "encouraging a positive working environment of dignity and mutual respect, and in which any form of harassment is not tolerated"); *Rendall-Speranza v. International Finance Corporation*, WBAT Decision No. 197 (1998), para. 78 (compensation for "failure of the Bank to react to such behavior described by the Appeals Committee as 'unbecoming a manager'"); *Mr. E. D. G. [FAO]*, ILOAT Judgment No. 3318, para. 8 ("By allowing this situation [of harassment]

[41] *See supra* PROCEDURE: Applicant's request to strike information from the record.

to persist, the [organization] adopted an unacceptably passive stance and therefore failed in its duty of care.").

272. In the view of the Tribunal, the explicit responsibility of Fund supervisors—particularly Department Directors, who occupy the most senior levels of authority—to ensure a workplace free from discrimination, harassment and retaliation means that it is not indispensable to establish precisely what measures other officers of the Fund are required to take by way of rectification. When a hostile work environment arises directly from the conduct of a senior official of the Fund, the Tribunal considers that the Fund's responsibility will ordinarily arise as a matter of course.

273. In any event, the Fund has not disputed that Applicant initiated a meeting with the HRD Director to raise concerns about the conduct of her Department Director. Where a complaint stems from the actions of a senior officer of the Fund, the avenues of recourse are necessarily limited. Furthermore, the risks to the complainant of adverse repercussions are magnified. Applicant's informal approach to the HRD Director demonstrates her effort to seek resolution of an unacceptable supervisory situation by bringing it to the attention of higher authority.

274. The HRD Director responded, but only, it appears, after pressure was brought to bear upon her by three members of the RC in late November 2009. Her response was to approach Applicant's Department to encourage the resubmission of Applicant's candidacy for B List consideration by the RC at its upcoming meeting of January 2010. The record shows that the Department had not planned to resubmit Applicant's name so soon following the unsuccessful nomination of February 2009. Accordingly, it appears that the intervention of the HRD Director contributed to Applicant's advancement to the B List as a result of the 2010 RC meeting. Citing this action by the HRD Director, Respondent asserts that "Applicant's concerns about her career advancement were promptly addressed by [the HRD Director]."

275. In the view of the Tribunal, however, what is significant about these events is that the adverse effects of the hostile work environment upon Applicant's employment relationship with the Fund did not begin to abate until she drew attention to the pattern of unfair treatment by sharing her experiences informally with a group of female senior staff members. That Applicant felt the need to pursue these channels, rather than the formal recourse procedures of the Fund's dispute resolution system, also speaks to the intimidation that Applicant experienced in response to the conduct of the Department Director.

276. The intimidation faced by Applicant in confronting directly the authority wielded by her Department Director, and the risk of additional adverse effects upon her career, is echoed in the responses elicited when Applicant chose to share her story with senior women economists. One stated: "I too wish we could confront him without destroying her—but am not sure that is possible." Another asked: ". . . presumably she should a) talk to ombudsman and b) try to get out of [the Department]?" A third member of the group queried: "What can we advise her? I wonder if she has taken recourse to any of the grievance procedures. My guess is that she has not because crossing Mr. X can be a lethal proposition." (Email exchange of November 23, 2009.) These responses demonstrate the reasonableness of Applicant's actions in the face of unfair treatment by a senior Fund official. They also demonstrate the Department Director's failure to fulfill his duty to ". . . create an atmosphere where staff will feel free to use existing channels for

workplace conflict resolution without fear of reprisal." (GAO No. 33 (Conduct of Staff members) (May 18, 2011), Annex 6: Retaliation.)

277. The question arises whether the response of the HRD Director, and the investigation of misconduct undertaken by the Fund's Ethics Office in response to Applicant's formal complaint, were adequate to meet the Fund's responsibility to act in accordance with its legal obligations to maintain a workplace free from unfair treatment.

278. For the following reasons, the Tribunal concludes that the Fund failed in its responsibility to respond effectively to the hostile work environment. First and foremost, the responsibility for the pattern of unfair treatment in this case lies with the Department Director, a senior official of the Fund. Where there has been an abuse of senior managerial authority, it is clear that the Fund must be held accountable. Applicant reasonably sought out her SPM, the Fund's Ombudsperson, and, most importantly, the HRD Director in order to bring the pattern of unfair treatment to the attention of higher managerial authority. Despite these efforts, it appears that only as a result of informal intervention by other staff members did the HRD Director act to mitigate—partially—the effects of the Department Director's unfair treatment of Applicant in the 2009 B List process. For the reasons set out above, the initiation of an Ethics investigation in response to Applicant's formal Ethics complaint does not absolve the Fund from responsibility for the pattern of unfair conduct.

(3) The Tribunal's conclusions on Applicant's hostile work environment claim

279. A hostile work environment, as prohibited by the Fund's internal law and general principles of international administrative law, may manifest itself in a variety of ways. In *Mr. "F"*, for example, hostile words and conduct were visited upon the applicant when co-workers targeted him principally on the basis of his religious affiliation, which differed from their own, and supervisors failed to stop that reprehensible conduct. In the instant case, the Tribunal holds that a hostile work environment may also exist when a senior staff member takes actions that unreasonably and repeatedly impede a subordinate's opportunities for career advancement on the basis of considerations unrelated to her professional qualifications.

280. Applicant has substantiated on the record before the Tribunal that, at three key junctures, her Department Director engaged in actions that had an unfair and adverse effect on her conditions of employment: (i) the February 2009 RC meeting, at which the Department Director's conduct served to disfavor Applicant's advancement to the B List; (ii) the Department Director's statement to Applicant after the 2009 vacancy selection process that the Department would not renominate her for the B List; and (iii) the Department Director's dismissive and gender-based comments to Applicant when she sought to address with him the unfair treatment affecting her career progression.

281. In examining the evidence to discern whether Applicant has established a "pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment" (Discrimination Policy, Section III), the Tribunal has necessarily taken a different approach than in deciding whether a single "administrative act" of the Fund represents an abuse of discretion. The Tribunal has looked to individual incidents not in isolation but rather

as markers delineating a "pattern" of unfair treatment, which has had an "adverse impact on [Applicant's] employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment." (*Id.*)

B. Has Applicant raised admissible challenges to the 2009, 2010, and 2011 non-selection decisions and to her FY2009 APR decision?

282. Applicant alleges that she was not only subject to a pattern of unfair treatment constituting a hostile work environment, but that a series of individual career decisions—namely, her non-selection for B-level vacancies in 2009, 2010, and 2011, and her APR decisions of FY2009 and FY2010—are vitiated thereby. Respondent disputes the admissibility of Applicant's challenges to each of these individual decisions, with the exception of the challenge to her FY2010 APR decision.[42]

283. Respondent raises multiple arguments on which to ground the inadmissibility of Applicant's challenges to the various career decisions. In the view of the Tribunal, the answers to the following questions are dispositive of the admissibility of Applicant's challenges and, accordingly, it need not reach Respondent's further arguments or Applicant's rebuttals to them. The Tribunal will consider each of these questions in turn: (i) Did the 2009 non-selection decision constitute an "administrative act" that adversely affected Applicant within the meaning of Article II, Section 1(a), of the Statute? (ii) Does Applicant have standing to challenge the 2010 and 2011 non-selection decisions? (iii) Did Applicant raise a timely challenge to her FY2009 APR decision?

(1) Did the 2009 non-selection decision constitute an "administrative act" that adversely affected Applicant within the meaning of Article II, Section 1(a), of the Statute?

284. The Tribunal's jurisdictional competence is limited to challenges to the legality of an "administrative act adversely affecting" the applicant. (Statute, Article II, Section 1(a).) "Administrative act," in turn, is defined as "any individual or regulatory decision taken in the administration of the staff of the Fund." (Statute, Article II, Section 2(a).) Respondent maintains that "[b]ecause no decision was taken on the [2009] recommendation, there is no 'administrative act' within the meaning of the Tribunal's Statute." Applicant, for her part, contends that the 2009 recommendation was part of a "continuous, compound decision process" that resulted in her non-selection for the position.

285. The record shows that the 2009 recommendation of the Selection Panel to appoint the "selectee" and not Applicant to the B-level position in her Department was not implemented. Rather, the vacancy was cancelled, a new vacancy announcement was posted in 2010, and a new

[42] The merits of that claim are taken up below. *See infra* Did the Fund abuse its discretion in assessing Applicant's performance in the FY2010 APR decision?

selection process was launched. It was the 2010 process that resulted in the filling of the position; Applicant did not apply for the vacancy when it was advertised in 2010.

286. In the view of the Tribunal, given that the 2009 vacancy was cancelled by the Fund and the recommendation of the Selection Panel was not implemented, it had no direct legal effect or consequences for Applicant or any other candidate in the process. Whatever "present effect," *see Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 66, it might have had became moot when the decision was made that candidates who were not on the B List should not have been considered for the vacancy and the selection process would therefore be cancelled. Accordingly, the 2009 vacancy selection process did not constitute an "administrative act adversely affecting" Applicant within the meaning of the Statute.

287. The Tribunal accepts that Applicant was adversely affected by the discouragement she experienced in the light of communications to her by the Department Director following the 2009 Selection Panel recommendation, a matter traversed in relation to the hostile work environment claim above. Those communications included the statement by her Department Director that the Department did not plan to nominate her to the B List in 2010. The Tribunal has concluded above that the conduct of the Department Director in impeding Applicant's advancement to the B List formed part of the pattern of unfair treatment to which Applicant was subject and for which she is entitled to a remedy. It does not follow, however, that because the Department Director's conduct in the wake of the cancellation of the selection decision of 2009 contributed to the hostile work environment, the 2009 recommendation of the Selection Panel constitutes a separate "administrative act" that may form the basis of a challenge by Applicant.

288. In the view of the Tribunal, the cancelled 2009 non-selection decision, in itself, did not constitute an "administrative act" that may separately be challenged by Applicant. Accordingly, it is not necessary for the Tribunal to consider whether Applicant launched a timely challenge to that decision.

(2) Does Applicant have standing to challenge the 2010 and 2011 non-selection decisions?

289. Respondent maintains that Applicant lacks standing to challenge the non-selection decisions of 2010 and 2011 because she did not apply for the vacancies in question. In the Fund's view, there was no "decision" to select another candidate over Applicant because she did not apply: "[T]here is no proper decision for the Tribunal to review to consider whether the [Department] management abused its discretion in deciding not to select Applicant for a position over another candidate, when her qualifications were never put in play and were not considered by the decision-makers . . . ."

290. Applicant responds that she has standing to challenge the non-selection decision of 2010 because she was a candidate for the 2010 vacancy when it was initially advertised (but not filled) in 2009. In Applicant's view, the selection decision for that vacancy was a "series of flawed acts, and was not finalized until April 2010."

291. The Tribunal has decided above that the selection processes of 2009 and 2010 were separate processes for purposes of the Tribunal's jurisdictional competence. The question now to be considered is whether, having not applied for the separate 2010 vacancy, Applicant may contest the resulting 2010 non-selection decision.

292. Likewise, as to the 2011 selection decision, Applicant did not apply for a new B-level vacancy that arose in her former Department following her lateral transfer to a different Department. Applicant contends that she was effectively barred from applying for that vacancy because the Department Director's harassment of her resulted in her "constructive discharge" from the Department and the position would have required working under his direct supervision. Applicant asserts: "The Fund had an obligation, based on its own rules and international administrative law, to address the misconduct [in the Department], of which it was aware. It failed to do so and thus effectively barred [her] from employment in [the Department]."

293. The Tribunal observes that the question of "standing" to challenge an administrative act of the Fund before this Tribunal is governed by the requirement of Article II, Section 1(a), of the Statute, which provides: "The Tribunal shall be competent to pass judgment upon any application . . . by a member of the staff challenging the legality of an administrative act adversely affecting him." The Tribunal has explained the "adversely affecting" requirement by referring to the Commentary on the Statute, p. 13: "[A] staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions." *See Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund*, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 61. The Tribunal has emphasized that the ". . . intendment of [the 'adversely affecting'] requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy." *Id.* There are sound prudential reasons for this requirement. These relate to the separation of powers between the Tribunal and the decision-making organs of the Fund, as well as to the essential judicial function of deciding a case upon a record built by the parties. The Tribunal is unable to adjudicate a dispute when there is no record upon which it can decide.

294. In *D'Aoust (No. 2)*, the applicant challenged elements of the process of filling a vacancy without contending that he was necessarily the most qualified candidate. The Tribunal concluded that he had "standing to challenge the elements of the process that resulted in the selection of a candidate for appointment to the . . . position, *for which he was an unsuccessful candidate*." *Id.*, para. 64. (Emphasis added.) The applicant's "stake in the controversy . . . [was] not a hypothetical one," *id.*, para. 65, given that he had applied for the vacancy and that a "staff member *applying for a vacancy* within the Fund has a right to have his candidacy fairly considered in accordance with the internal law of the Fund and general principles of international administrative law." *Id.*, para. 67. (Emphasis added.) By contrast, in the instant case, Applicant did not apply for the vacancies at issue.

295. The question arises in this case whether Applicant may challenge the 2010 and 2011 selection decisions, given that she did not apply for the advertised posts. As Applicant was not a candidate for selection, Applicant's interests were not (and could not have been) taken into account by the decision makers involved in the selection process. Only those who "*appl[y] for a vacancy* within the Fund," *D'Aoust (No. 2)*, para. 67 (emphasis added), have a right to have their

candidacy fairly considered. As the decision makers in the selection process were neither obliged nor entitled to consider Applicant's eligibility for selection, she cannot complain that her interests were adversely affected by their decisions. The Tribunal concludes therefore that Applicant does not have a direct and justiciable interest in the non-selection decisions of 2010 and 2011 and accordingly does not have standing to challenge those decisions.

296. Nevertheless, the Tribunal accepts that Applicant may have been discouraged from applying for the vacancies of 2010 and 2011 because of the hostile work environment created by the Department Director. The Tribunal has found above that Applicant was subject to a pattern of unfair treatment that was marked by impediments to her proper consideration for career advancement. The hostile work environment claim made by Applicant, however, is separate to her challenge to the non-selection decisions and cannot establish, without more, that Applicant has standing in relation to the non-selection decisions.

297. In conclusion, in the view of the Tribunal, an applicant may not challenge a selection decision where he or she has not been a candidate for selection because an applicant will be unable to establish that he or she has been adversely affected by the selection decision. Nevertheless, it will be open to an applicant, as it was in this case, to assert a separate claim for relief in circumstances where he or she has not applied for a post because of a pattern of discrimination, harassment, retaliation and/or a hostile work environment.

298. Since the Tribunal has concluded that Applicant does not have standing to challenge the non-selection decisions of 2010 and 2011, it does not consider Respondent's contentions that these challenges were not timely filed or Applicant's assertions that "exceptional circumstances" excused her delay.

(3) Did Applicant raise a timely challenge to her FY2009 APR decision?

299. GAO No. 31 (Grievance Committee), Rev. 4 (October 1, 2008), Section 6.02, requires that formal challenges to career decisions be initiated "within six months after the challenged decision was made or communicated to the staff member, whichever is later." Applicant did not challenge her FY2009 APR decision until she filed her first request for administrative review on December 8, 2010.

300. This Tribunal has recognized that "exceptional circumstances" may excuse delay in initiating administrative review processes and that it may consider that possibility even when the Grievance Committee has decided to disallow a claim. This is so because the ". . . recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to debar them." *Estate of Mr. "D", Applicant v. International Monetary Fund (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 102; *see also Mr. "O", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), para 48. "If the Tribunal were to be

precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse." *Estate of Mr. "D"*, para. 102.

301. The reasons for the exhaustion requirement of Article V, Section 1,[43] of the Statute are well established. As explained in the Commentary on the Statute, p. 23, "[t]he exhaustion requirement is imposed by the statutes of all major administrative tribunals, presumably for the reason that the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate."

302. The Tribunal has recognized the dual purposes of the exhaustion requirement of "providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication." *Estate of Mr. "D"*, para. 66. These purposes are best served "'when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment.'" *Id.*, para. 95, quoting *Alcartado*, AsDBAT Decision No. 41, para. 12.

303. Given the importance of the purposes served by the requirement of exhaustion of administrative review, the Tribunal has held that these requirements "should not be lightly dispensed with and 'exceptional circumstances' should not easily be found." *Estate of Mr. "D"*, para. 104. In evaluating factors that may excuse failure to initiate administrative review on a timely basis, the Tribunal will consider the "extent and nature of the delay, as well as the purposes intended to be served" by the requirement for exhaustion of administrative remedies. *Id.*, para. 108.

304. Applicant advances the following arguments in support of her contention that "exceptional circumstances" excuse her delay in challenging the FY 2009 APR decision: (a) the contested decision formed part of a pattern of unfair treatment; (b) the Discrimination Review Exercise (DRE) undertaken by the Fund in the 1990s evidences an "administrative practice" of the Fund to remedy discrimination even after deadlines have passed; (c) the purposes of the requirement of exhaustion of administrative review have been fulfilled in the circumstances of her case; and (d) Applicant feared retaliation by her Department Director if she were to initiate the formal dispute resolution process while still working under his supervision. The Tribunal addresses each of these arguments in turn.

(a) Does the allegation that the contested decision formed part of a pattern of unfair treatment constitute "exceptional circumstances" to excuse the late filing of Applicant's challenge to her FY2009 APR decision?

305. Applicant contends that because she has alleged that the contested individual decisions form part of a pattern of unfair treatment, her failure to raise timely challenges to them should be

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[43] Article V, Section 1, provides: "When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review."

excused. The Tribunal has concluded above that Applicant has brought an admissible claim that she was subject to a pattern of unfair treatment constituting a hostile work environment to which the Fund failed effectively to respond. Applicant has prevailed on that claim. The question arises whether the allegation of a "pattern" of unfair treatment excuses failure to initiate a timely challenge to an "administrative act" of the Fund that may form part of that pattern.

306. The Tribunal observes that although in *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005) it took cognizance of a pattern of conduct where separate administrative review had not been undertaken as to each individual act, it did not decide that the individual acts themselves were subject to challenge where they had not been vetted through the requisite review procedures. Rather, the Tribunal decided, as it has in this case, that it had jurisdiction to consider whether the applicant had established a "pattern" of unfair treatment to which the Fund failed effectively to respond.

307. This approach is consistent with the distinction that the Fund draws in its internal law between discrimination that is manifested as a "pattern" of behavior and that which takes the form of a "single decision." The Discrimination Policy gives as examples of a "single decision" a "decision not to convert a fixed-term appointment [or] a denial of a promotion." (Discrimination Policy, Section III.) Accordingly, when a "single decision" is challenged, the fact that a pattern of discrimination or other unfair treatment is alleged does not serve to excuse a failure to launch administrative review of that decision in a timely manner. *See Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 39 (rejecting contention that "pattern or practice" is an "essential element" of a cause of action under the Fund's Harassment Policy; applicant's assertion that she only later understood the non-conversion of her fixed-term appointment as part of a larger pattern of harassment in her work unit did not excuse failure to raise a timely challenge to the non-conversion decision).

308. In the view of the Tribunal, neither the Fund's internal law nor the Tribunal's jurisprudence supports the view that because an administrative act allegedly forms part of a pattern of prohibited conduct an applicant will be excused from filing a timely complaint against the administrative act itself in order to seek relief from its effects. Accordingly, Applicant's allegation that the administrative acts she challenges were part of a pattern of unfair treatment does not, of itself, constitute "exceptional circumstances" to permit a challenge that would otherwise be inadmissible for failure to invoke administrative review procedures on a timely basis.

(b) Does a purported "administrative practice" of the Fund to remedy discrimination after deadlines have passed constitute "exceptional circumstances" to excuse the late filing of Applicant's challenge to her FY2009 APR decision?

309. Applicant's second argument is that the Fund's Discrimination Review Exercise (DRE) undertaken in the 1990s, as well as other policies of the Fund to respond to discrimination in the workplace, evidence an "administrative practice" of the Fund to remedy past discrimination when filing deadlines have passed.

310. The Tribunal has observed on several occasions that the DRE was a one-time exercise to remedy claims of past discrimination in which claimants would not be held to statutes of limitation. *See, e.g., Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 121 ("[I]n view of the conclusion in *Ms. "Y" (No. 2)*, para. 39, that the scope of the Tribunal's review of DRE cases is limited and that the Tribunal may not examine underlying contentions of discrimination raised in the DRE *as if* they had been pursued through the steps required under GAO No. 31 . . . , there can be no ground for the Tribunal to find jurisdiction to review, as part of a challenge to a DRE decision, discrimination claims arising after the DRE process, based upon any theory of 'continuing' discrimination."). (Emphasis in original.) In *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-2 (March 5, 2002), para. 40, the Tribunal rejected the argument that it could examine *de novo* the merits of the underlying claims of discrimination raised through the DRE: "[W]hile the Fund as part of its human resource functions may have created an alternative dispute resolution mechanism to remedy instances of past discrimination stretching beyond statutory bars and not previously raised through administrative review, the Administrative Tribunal, as a judicial body, remains controlled by its Statute."

311. The Tribunal accordingly concludes that the Fund's policies to respond to discrimination in the workplace, including the DRE, do not represent an "administrative practice" of the Fund that gives rise to a right of staff members to launch discrimination claims after the expiration of the requisite deadlines.

(c) Have the purposes of administrative review been fulfilled so as to constitute "exceptional circumstances" to excuse the late filing of Applicant's challenge to her FY2009 APR decision?

312. Applicant contends that the "channels of review have been completely exhausted" in relation to her challenge to the FY 2009 APR, despite the fact that her request for administrative review was not filed in a timely manner. Given that, according to Applicant, the "purpose of time limits is to ensure that administrative review is feasible while witnesses are available and documents close at hand," Applicant argues that there has been full consideration of the decision, an evidentiary record has been built, and accordingly the purpose of exhausting the channels of review has been fully met.

313. In response, the Fund asserts that although Applicant was given "substantial leeway" to provide background evidence from prior years in her testimony before the Grievance Committee, the Fund "did not mount a defense to these individual claims as they were beyond the jurisdiction of the grievance proceedings." (Emphasis in original omitted.) Accordingly, the Fund contends that it would be highly prejudicial for the claims to be reviewed "at this late date on such a one-sided record."

314. The Tribunal has held that in evaluating factors that may excuse failure to initiate administrative review on a timely basis, the Tribunal will consider the "extent and nature of the delay, as well as the purposes intended to be served" by the requirement for exhaustion of administrative remedies. *Estate of Mr. "D"*, para. 108. The Tribunal has also warned that the requirement of exhaustion of remedies "should not be lightly dispensed with and 'exceptional

circumstances' should not easily be found." *Id.*, para. 104. Time limits may not be treated as "guidelines" that may be disregarded. *Id.*

315. The Tribunal has recognized the purposes of the exhaustion requirement of "providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication." *Estate of Mr. "D"*, para. 66. The purposes of administrative review are also set out in GAO No. 31, Section 6.01.1, as follows: "The purposes of administrative review are (1) to determine whether the original decision is valid—that is, whether the relevant policies and procedures were correctly interpreted and applied; (2) to allow the original decision to be amended if it is found not to have been correctly decided; and (3) to give finality to the administrative decision."

316. The question arises whether, as Applicant contends, the purposes of administrative review have been met in relation to the FY2009 APR decision, or whether, as the Fund maintains, it has not had a fair opportunity to present a defense to Applicant's challenge to the FY2009 APR.

317. It is clear that the Grievance Committee afforded Applicant "leeway" in introducing evidence relating to pre-2010 events to support her allegation of improper motive in the FY2010 APR decision. Nevertheless, the Tribunal is unable to conclude on the record that the Fund has fully presented its defense on the merits of the FY2009 APR challenge, given the Fund's assertion that it has not done so. The principle that litigants should be given proper and timely opportunity to know and respond to the case against them is a fundamental principle of fairness, which the Tribunal cannot overlook.

(d) Does fear of retaliation constitute "exceptional circumstances" to excuse the late filing of Applicant's challenge to her FY2009 APR decision?

318. Applicant additionally maintains that raising a challenge through the formal channels of dispute resolution in 2009, while she was still under the supervision of the Department Director, would have put her at risk of retaliation. Applicant asserts that she chose informal avenues to resolve the issue, through consultation with the HRD Director and the Ombudsperson, because she feared that invoking the formal means of dispute resolution in which her managers would be on notice of her complaint would place her at risk of retaliation. Applicant asserts that she filed for administrative review in December 2010, within six months of her transfer to a new Department in May 2010.

319. Applicant asserts that she ". . . could not work in an environment that was so hostile and demeaning and destructive to the ability to carry out my work. I was forced to leave the department, moving laterally at grade A15, in order to escape the hostility of [the Department's] senior staff." Applicant contends: "The Fund had an obligation, based on its own rules and international administrative law, to address misconduct [in the Department] of which it was aware. It failed to do so and thus effectively barred me from employment in [the Department]."

320. In Respondent's view, Applicant's alleged fear of retaliation does not excuse failure to raise her claims in a timely manner. Respondent asserts that to permit fear of retaliation to

excuse the non-timely lodging of claims is "wholly at odds with the effective functioning of the Fund's dispute resolution system."

321. The Tribunal has emphasized above the importance of the robust enforcement of protections against retaliation. It need not reach here the question of whether fear of retaliation will ever excuse a failure to make a timely challenge to an administrative act of the Fund adversely affecting the staff member. Even accepting that there may be circumstances where fear of retaliation excuses a staff member from pursuing the channels of administrative review in a timely manner, it is clear that a staff member should pursue those channels as soon as reasonably possible once the threat of retaliation has diminished. In this regard, the Tribunal notes that Applicant has provided no explanation for why she waited six months following her transfer to another Department before filing her request for administrative review.

322. In concluding above that Applicant was subject to a pattern of unfair treatment constituting a hostile work environment, the Tribunal has recognized the intimidation that Applicant felt in pursuing her complaints through the formal channels of recourse. That intimidation, however, does not excuse her failure to launch timely challenges to the individual career decisions, once she had transferred away from the Department where she felt at risk of retaliation. For these reasons, the Tribunal concludes that Applicant has not established that her fear of retaliation constitutes "exceptional circumstances" that excuse her delay in initiating the administrative review procedure in relation to the FY2009 APR.

(4) The Tribunal's conclusions on the admissibility of Applicant's challenges to the 2009, 2010, and 2011 non-selection decisions and to her FY2009 APR decision

323. The Tribunal concludes that Applicant has not raised admissible challenges to the 2009, 2010, and 2011 non-selection decisions or to her FY 2009 APR decision. First, the 2009 non-selection "decision," i.e., the recommendation of the Selection Panel that was not implemented because the vacancy was cancelled, did not constitute an "administrative act" that adversely affected Applicant within the meaning of the Tribunal's Statute. Second, Applicant does not have standing to challenge non-selection decisions of 2010 and 2011 because she did not apply for the vacancies in question. Third, Applicant did not launch a timely challenge to her FY2009 APR decision and "exceptional circumstances" do not excuse her late filing.

C. Did the Fund abuse its discretion in assessing Applicant's performance in the FY2010 APR?

324. It is not disputed that Applicant has raised an admissible challenge to her FY2010 APR decision. That decision rated Applicant "Effective," i.e., the lowest of three possible ratings on a scale that allowed Departments to rate not more than 15 percent of their staff as "Superior" and another 15 percent as "Outstanding" (the top rating).

325. Applicant contends that her FY2010 APR decision was improperly motivated by retaliation, harassment, and discrimination and formed part of a pattern of unfair treatment. She also contends that it was based on factual errors and taken in disregard of Fund rules.

326. Respondent, for its part, maintains that Applicant has not shown that her FY2010 APR decision was affected by retaliation, harassment, or discrimination, or that it was otherwise

improperly motivated. The Fund maintains that the decision had a reasonable basis and reflected the considered judgment of Applicant's direct managers in the proper exercise of managerial discretion.

(1) What standard of review governs Applicant's challenge to her FY2010 APR decision?

327. As with any challenge to an individual decision taken in the exercise of managerial discretion, a challenge to an APR decision will succeed only if the applicant shows that the 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. The principle of deference to managerial discretion is "particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities," and "administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility." *Id. See Ms. "JJ", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-1 (February 25, 2014), para. 50 and cases cited therein.

328. This Tribunal has held that '"[i]n the absence of clear error or improper motive in the evaluation of performance, the Tribunal will not substitute its judgment for that of supervisors charged with that task.'" *Ms. "JJ"*, para. 51, quoting *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 108. At the same time, the Tribunal has also recognized that ". . . in reviewing discretionary decisions, the degree of scrutiny may '. . . depend[ ] upon such variables as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned,' *Ms. "J"[, Applicant v. International Monetary, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003)], para. 107." *Ms. "BB"*, para. 96 (considering challenge to performance rating on ground that it had been improperly motivated by harassment).

329. In the instant case, the essence of Applicant's challenge to her FY2010 APR decision is that it was improperly motivated by the same pattern of unfair treatment that affected a number of other elements of her conditions of employment. The Tribunal has concluded above that Applicant was subject to a pattern of unfair treatment constituting a hostile work environment.[44] The evidence that forms the basis for that conclusion centers on the actions of the Department Director. Accordingly, in order to decide whether Applicant has established improper motive in the FY2010 APR decision, the Tribunal will consider closely the Department Director's role in the performance assessment process. Additionally, because an allegation of improper motive calls into question the impartiality of the decision-making process, the evidence in the record of a reasonable and observable basis for that decision will be particularly significant.

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[44] *See supra* Was Applicant subject to a pattern of unfair treatment, constituting a hostile work environment, to which the Fund failed effectively to respond?

(2) Has Applicant established a causal link between the hostile work environment and her FY2010 APR decision?

330. To establish abuse of discretion on the ground of improper motive, an applicant must show a "'causal link' between the alleged improper motive and the decision being contested." *Ms. C. O'Connor (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-1 (March 16, 2011), paras. 172, 178 (applicant failed to establish "nexus" between alleged racial discrimination in the allocation of APR and MAR ratings and the decision to reclassify her position; staff undertaking the position audit did not have access to the allegedly tainted ratings). *See also Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 90 (no evidence that those who took decision to abolish Mr. "F"'s position were motivated by the religious hostility that afflicted his work unit).

331. The record shows that the process for awarding APR ratings in Applicant's Department for FY2010 began with an assessment by the Division Chief, who then made a proposal to the front office in a bilateral discussion. (9/16/11 Tr. 257-259.) That bilateral discussion was followed by a Department-wide roundtable "where the ratings of all the staff in the department are decided, again taking into account that there are numerical quotas." (9/16/11 Tr. 414-415.) Both the Division Chief and the SPM confirmed that "we always get more proposals for outstanding and superior ratings than we have available" and the aim of the roundtable discussion is to ". . . have this discussion across divisional lines." (9/16/11 Tr. 259, 283 [testimony of SPM]; *see also* 9/16/11 Tr. 414-415 [testimony of Division Chief].) Inherent in the process is that those staff members, such as Applicant, who are proposed at the outset for an "Effective" rating are not likely to be the subject of much further discussion.

332. Applicant asserts that in the course of the APR process the Department Director had the opportunity to influence directly the award of ratings. Additionally, she contends that the Department Director influenced her rating indirectly because the Division Chief sought to act in conformity with the Department Director's presumed wishes. Applicant alleges that the Division Chief was not an "independent author" of her FY2010 APR but rather was "influenced by" the Department Director.

333. Applicant contends that the Division Chief had a history of being a "team player" and "good soldier" to the Department Director. In his Grievance Committee testimony, the Division Chief explained that he thought "being a good soldier is sometimes an appropriate attribute," given that "[w]e all work as part of teams, and teams are more effective when there is team cohesion." (9/16/11 Tr. 444.) In questioning that related specifically to an earlier APR rating of Applicant, the Division Chief denied that he was under pressure from the Department Director or SPM to change performance ratings. (9/16/11 Tr. 440-441.)

334. The Tribunal is not able to conclude from the record of the case that the Department Director influenced the Division Chief, either directly or indirectly, in appraising Applicant's performance for FY2010. The record shows that Applicant's FY2010 APR decision originated with the Division Chief and that he was its principal author. The SPM confirmed that the Division Chief recommended the "Effective" rating. (9/16/11 Tr. 264.) In making that

recommendation, the Division Chief also received input from another supervisor in assessing Applicant's job performance for the rating year. (*See* below.)

(3) Was there a reasonable and observable basis for Applicant's FY2010 APR decision?

335. As Applicant has alleged that the contested decision was improperly motivated, the cogency of the evidence in the record of a reasonable and observable basis for that decision will be particularly important. *See Ms. "BB"*, para. 108 (concluding that applicant failed to establish that performance evaluation was "tainted by clear error or improper motive, including ill disposition on the part of her supervisors," the Tribunal found "[o]n the contrary, the evidence reasonably supports the evaluation"); *see also Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 41 (concluding that applicant failed to show that non-conversion of fixed-term appointment was taken in retaliation for making sexual harassment complaints; performance assessments supported view that applicant's interpersonal skills fell short of those required for an indefinite appointment to the staff). Where, as here, the Tribunal has sustained Applicant's claim that she was the object of a pattern of unfair treatment and she alleges that the FY2010 APR decision forms part of that pattern, the Tribunal will give particular scrutiny to the question whether there was a reasonable and observable basis for the contested APR rating.

336. The FY2010 APR decision was based on "both *absolute performance* (contributions against objectives and other assignments, plus competencies displayed) and *relative performance* (peer comparisons, complexity/difficulty level of the assignments, impact on division/departmental results and workload)." (APR Form: Applicant's FY2010 APR.) (Emphasis in original.) The Division Chief explained that at arriving at the decision, he relied on Department "guidelines" and "quantitative indicators," and that ". . . at the end of the day, it is a relative ranking." (9/16/11 Tr. 413-414.)

337. The Department Director testified as to how the Department allocated its "highly-rationed" (9/15/11 Tr. 55) "Outstanding" and "Superior" ratings: "[T]here are some people that just simply blow you away. They're just simply outstanding. And year in and year out, they just have these fantastic abilities." He explained that "we try not to give them outstandings every year; we ration them." At the same time, he testified, "we try and hold a number of those outstanding [ratings] . . . for people who might not be in that first category, but people who have really given a lot of blood in a particular year, they've done something really special." (9/15/11 Tr. 55-56.)

338. Applicant asserts that only by comparing her rating (and supporting evidence of her performance) against comparable information about other staff members can she establish improper motive in the contested APR decision. By raising comparisons between her own performance and that of another Division staff member, Applicant seeks to show that her performance merited an "Outstanding" rating. In particular, she contends that she was unfairly treated in respect of receiving additional recognition for a research paper several years following its publication. She also alleges that colleagues with lower work output and other measures of performance received higher APR ratings than she did for FY2010.

339. Respondent, for its part, urges the Tribunal not to undertake a "microscopic" examination of Applicant's performance relative to peers. It frames the issue as "not whether, in the Tribunal's judgment, Applicant was more deserving of the 'Outstanding' rating than [her colleague] in 2010. Rather, the question is whether the evidence reasonably supports her 'Effective' rating, and whether the evaluation was free from improper motive." The Fund maintains that the assessment properly balanced Applicant's "considerable achievements against the expectations associated with her seniority, the relative performance of others in the Division, and Applicant's weaknesses in interpersonal skills."

340. The Division Chief sought to explain Applicant's "Effective" rating as follows. As to strengths, the Division Chief testified to Applicant's "very strong analytical qualities, her consistent record in doing research, which has been recognized in the Fund and outside the Fund, and the ability to help younger members of the division in their research interests—in their research products, giving them good solid advice." (9/16/11 Tr. 418-419.) As to shortcomings, the Division Chief cited the issue of "[h]ow to enroll others in one's views and positions and . . . lateral and upper communication skills and effectiveness." (9/16/11 Tr. 419; *see also* 9/16/11 Tr. 426-427.) The Division Chief also compared Applicant's performance with that of another Division staff member who had received an "Outstanding" rating for FY2010. That staff member, he testified, was performing "above grade level in terms of these criteria, and that's what sort of swayed me." (9/16/11 Tr. 418.)

341. As for Applicant's contention with respect to her disappointment at the lack of additional recognition for published research, she testified as to her research work and publications: "[I]n 2010 itself, I had a new working paper. I had a paper that was accepted. I had a paper that was published, and I had a paper that had been published, which is reprinted and being cited. So I had papers at every possible stage of the process, of the research chain." (9/16/11 Tr. 454-455.) The Department Director testified, however, that she had been rewarded in the past for her publication in a prestigious journal because it was a "special piece of work that she'd done that deserved credit. But that paper was done long before 2010." (9/15/11 Tr. 56.) The Division Chief testified that "we only are allowed to take credit for a piece of work once." (9/16/11 Tr. 421.) (Applicant had received an "Outstanding" for an earlier rating year.)

342. In considering whether there is a reasonable and observable basis for Applicant's FY2010 APR rating, the Tribunal also has the benefit of the Grievance Committee testimony of another B-level member of the Department who supervised Applicant in a portion of her activities and had input into her FY2010 APR decision. With regard to that portion of Applicant's work, the supervisor testified: "I was happy with her work, but that didn't represent any outstanding or exceptional performance on her part, particularly because nothing really new or different or particularly demanding was asked of her in those respects." (9/16/11 Tr. 467.)

343. In addition, the SPM testified to his own view of Applicant's performance: "[S]he was doing research, but compared to the comparators in that year, 2010, it did not seem outstanding. It did not seem superior. But, in any case, for a manager, managerial capabilities are much more important." He cited a mission in early 2010 as having "substantial managerial problems." The SPM concluded: "[I]t seemed to me that the effective rating was correct, and she had already indicated that she was leaving the department. It didn't seem that there was a lot to discuss." (9/16/11 Tr. 314-315.)

344. The Tribunal observes that the narrative comments provided on Applicant's FY2010 APR are strongly positive.[45] In those comments, the Division Chief stated that Applicant had "contributed enormously to maintaining a high standard of analytical excellence in the division." He praised Applicant as an "effective partner" in running the Division, noting that he had "relied on [her] considerable analytical and managerial skills" in helping to plan and deliver the Division's program and that "[s]he is fully capable of running her own division." He additionally noted that Applicant ". . . continued to pursue an active, productive and policy-relevant research agenda that is having an impact within the Fund and in the broader economic policy community." In the section of the APR in which the Division Chief was asked to identify a "developmental area" for the staff member, he responded: "[Applicant] is an accomplished manager. She could benefit from additional, higher-level management training and regular coaching as she assumes the more complex role of leading area department missions."

345. On the one hand, Applicant's FY2010 APR includes highly positive narrative assessments. On the other hand, she did not receive one of the ratings reserved for the top 30 percent of performers for that year. Under the rating system that governed for FY2010, in which at least 70 percent of staff were to be allocated an "Effective" rating, that rating category will necessarily describe a broad spectrum of performance. Multiple factors are to be weighed in assessing both "absolute" and "relative" performance and assigning a particular APR rating. In the case of Applicant, these factors included both analytical and managerial competencies. The Tribunal will ordinarily not be in a position to second-guess managers' assessments of the relative strengths and weaknesses of various staff members.

346. In an environment in which upper ratings are highly rationed, it will be difficult for an applicant to show an abuse of discretion. At the same time, the Tribunal observes that the fact that the "Effective" category covers a broad swath of the Fund's staff should not mean those staff members will not receive guidance on their individual performance strengths and weaknesses through candid narrative assessments. The larger purpose of any performance assessment system is to provide such feedback so that staff may improve their performance in the interests of the both the institution's effectiveness and their own professional development.

(4) The Tribunal's conclusions on Applicant's challenge to her FY2010 APR decision

347. With respect to Applicant's challenge to her FY2010 APR decision, the Tribunal concludes as follows. Although Applicant contends that the APR rating was "influenced by" the Department Director, she has not shown that the Division Chief's rating proposals were "not independent and that he proposed them according to his effort to conform to [the Department Director]'s preferences." The evidence in the record supports the view that there was a reasonable and observable basis for the "Effective" rating, a rating that under the prevailing performance assessment system covered a wide range of performance and was necessarily a product of comparative assessment in the award of the highest ratings. The decision was taken by

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[45] *See supra* FACTUAL BACKGROUND: Applicant's APR for FY2010 (May 1, 2009–April 30, 2010).

those supervisors under whom Applicant worked directly. *See also Ms. "JJ"*, para. 97 (accusation of improper motive in APR process rebutted by the fact that the conclusion that performance was significantly lacking was reached not by one but by three supervisors).

348. For the following reasons, Applicant has not substantiated that her FY2010 APR decision represented an abuse of discretion: (a) there was a reasonable and observable basis for the decision; (b) higher ratings were scarce as a result of the applicable rules and therefore highly rationed by the Department; and (c) Applicant has not shown that the Division Chief, who recommended the contested rating in the first instance, harbored improper motives in taking that decision.

349. Accordingly, although the Tribunal has concluded above that Applicant was the object of a pattern of unfair treatment by the Department Director constituting a hostile work environment, it further concludes that she has not established that the FY2010 APR decision was tainted by that same pattern of unfair treatment. She has not met the burden of showing that the 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. Rather, that decision is supported by the testimony of the responsible supervisors.

D. Did the Fund abuse its discretion in adopting the revised B1/B2 promotion policy of July 2011 and applying it to Applicant?

350. On July 1, 2011, the Fund announced a new policy governing promotions, intended to ". . . build[ ] on the changes introduced in 2010, which initiated the move away from time-in-grade (TIG) to more substantive criteria as the basis for selecting candidates for growth promotions." (Memorandum from Deputy Managing Director to Fund Staff, "Management Approval of Promotion Policy Reform," July 1, 2011.) Another "key element" of the revised policy was to "[u]nify the processes for promotion to B2 across career streams." (*Id.*) It is this element, and its application to her, that Applicant contests before the Tribunal.

351. The announcement to the staff elaborated:

> Candidates for promotion to B2 will continue to be reviewed with focus on managerial performance and competencies; they will have spent at least 18 months at B1 prior to promotion which will ensure that candidates have completed at least one full APR assessment (May to April) prior to their candidacy for promotion to B2, and have had sufficient time to absorb initial feedback and benefit from training and coaching support for new managers.

(*Id.*) The effect of the unification across career streams of the B1/B2 promotion process was that for economist staff the minimum TIG for promotion from Grade B1 to Grade B2 was *increased* (from 12 months to 18 months), whereas for specialized career stream (SCS) staff the TIG was *decreased* (from 3 years to 18 months).

352. The revised promotion policy included the following "transitional measure": "As a transitional measure for the upcoming November 2011 round, the TIG for economist promotions

to B2 will be maintained at 12 months." (*Id.*) In response to a request by the Tribunal, Respondent has stated: "HRD did not apply this transitional measure to any B1 economists other than those who had 12 months time in grade by November 2011." (Affidavit of HRD Deputy Director, September 25, 2014.)

353. The effect of the promotion policy revision on Applicant, whose promotion to B1 took effect between May 1, 2011 and July, 1, 2011, was that the new policy governed. Accordingly, she would not become eligible for promotion to B2 until November 1, 2013, whereas, under the prior policy, she would have become eligible for promotion one year earlier, on November 1, 2012. The Fund rejected requests from the SPMs of two of the Departments in which Applicant had served that she be afforded the benefit of the "transitional measure."

354. Applicant contests the revised policy as arbitrary and discriminatory against economist staff members, and challenges the application of the policy to her as specifically wrongful. Respondent, while disputing the admissibility of Applicant's challenges, asserts that the 2011 revision was a rational and non-discriminatory policy change and that it was not unfair to apply it to Applicant. The Tribunal accordingly is presented with the following questions: (1) Has Applicant raised an admissible challenge to the revised B1/B2 promotion policy and its application to her? (2) Did the Fund abuse its discretion in revising the B1/B2 promotion policy? In particular, (a) was the decision to revise the B1/B2 promotion policy based on an appropriate consideration of relevant facts and reasonably related to the objectives it sought to achieve, and (b) did unifying the B1/B2 promotion policy across career streams discriminate impermissibly against economist staff? (3) Did the Fund abuse its discretion in applying the revised B1/B2 policy to Applicant?

(1) <u>Has Applicant raised an admissible challenge to the revised B1/B2 promotion policy and its application to her?</u>

355. Respondent objects to the admissibility of Applicant's claims relating to the B1/B2 promotion policy. The Fund contends that Applicant's challenge to the policy is not timely under Article VI, Section 2, of the Statute because she did not challenge it directly with the Tribunal as a "regulatory decision" within three months of its announcement or effective date. The Fund additionally asserts that Applicant's challenge is not linked to an individual decision applying the contested policy in her case.

356. It is undisputed that Applicant did not file with the Tribunal a direct challenge to the revised policy within three months of its announcement or effective date. *See, e.g., Mr. E. Weisman, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014- 2 (February 26, 2014), paras. 35-39 (challenging "regulatory decision" directly). Accordingly, she may challenge that policy only if she has raised a timely challenge to an individual decision based upon it. *See* Article VI, Section 2 ("[T]he illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.").

357. In the view of the Tribunal, Applicant's challenge to the revised promotion policy is linked to an admissible challenge to an individual decision taken pursuant to that policy. In her request for administrative review of November 14, 2011, Applicant challenged the "application

of the new revised promotion policy from B1 to B2" and sought as relief "eligibility for promotion to B2 as of November 1, 2012 or earlier." In response, the Acting HRD Director understood her complaint as a request for exception to the rule and denied that request as follows: "While there were some transitional arrangements for the 2011 promotion round, you fell well short of the 12 months of service at B1 that would have allowed you to be promoted in November 2011. With respect to the 2012 promotion round and beyond, the new 18-month minimum requirement applies and I see no basis for making an exception in your case and allow a promotion short of that 18-month requirement." Applicant sought review of that decision by the Fund's Grievance Committee and now before this Tribunal. In her Application here, she has also challenged the policy itself, which would not have been cognizable in the process of administrative review.

358. In parallel with Applicant's request for administrative review, requests for exception to the revised policy were made on Applicant's behalf in July 2011 and July 2012 by the SPMs of two of the Departments in which she served. They cited their understanding that she should have benefited from the transitional measure because her promotion to B1 had preceded the announcement of the new rule on July 1, 2011. HRD's final denial of these requests was made on September 11, 2012.[46] Although Applicant did not make these requests herself, they appear to have been made solely for her benefit. The decisions taken in response—just as that of the Acting HRD Director denying Applicant's own request for exception to the revised policy—are "individual decision[s] taken pursuant to [the] regulatory decision"[47] revising the B1/B2 promotion policy, including its "transitional measure." Applicant was "adversely affect[ed]" by these decisions within the meaning of Article II, Section 1, of the Statute.

359. In these circumstances, the Tribunal concludes that Applicant raises admissible challenges both to the revised promotion policy and its application to her.

(2) Did the Fund abuse its discretion in revising the B1/B2 promotion policy?

360. Applicant contends that the Fund abused its discretion in revising the criteria for promotion from Grade B1 to Grade B2, specifically by increasing the TIG required for economist staff to reach eligibility for such promotions. Applicant argues that the new rule is arbitrary and inconsistent with the overall objectives of the Fund's promotion policy reform and that it impermissibly discriminates against economist staff. Respondent, for its part, maintains that the revised promotion policy announced in July 2011 is a rational and non-discriminatory amendment that falls within the Fund's discretionary authority.

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[46] *See supra* FACTUAL BACKGROUND.

[47] Statute, Article VI, Section 2.

(a) The Tribunal's standard of review in challenges to "regulatory decisions"

361. The Tribunal's deference to the Fund's decision-making authority is "at its height when the Tribunal reviews regulatory decisions (as contrasted with individual decisions) . . . ." *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 105. *See Weisman*, para. 45; *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007), para. 46. Indeed, the Commentary on the Statute, p. 17, states that international administrative tribunals ". . . will not substitute their judgment for that of the competent organs and will respect the broad, although not unlimited, power of the organization to amend the terms and conditions of employment." *See Daseking-Frank et al.*, para. 47.

362. In identifying the constraints on the exercise of the Fund's discretionary authority in adopting "regulatory decisions," this Tribunal has been guided by the oft-cited judgment of the World Bank Administrative Tribunal in *de Merode*, WBAT Decision No. 1 (1981), para. 47, which said this in respect of institutional changes to non-fundamental terms and conditions of employment:

> The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing "the highest standards of efficiency and of technical competence." Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal.

See Weisman, para. 47; *Ms. D. Pyne, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-2 (November 14, 2011), para. 114; *Daseking-Frank et al.*, para. 90; *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 31.

363. Changes to policy must be "based on a proper consideration of relevant facts" and must be "reasonably related to the objective which they are intended to achieve." *de Merode*, para. 47. Additionally, they must not "discriminate in an unjustifiable manner between individuals or groups within the staff." *Id.* In other words, they must not be arbitrary or discriminatory.

(b) History of the B1/B2 promotion policy reform of July 2011

364. The promotion of economists from B1 to B2 was previously governed by Staff Bulletin No. 03/27 (Senior Promotions and Appointments in the Fund) (December 19, 2003). That Staff Bulletin explained that "Grade B1 is primarily a 'pass-through' grade for economists in B-level economist positions." (Staff Bulletin No. 03/27, para. 18.) Although the Staff Bulletin also referred to "evidence of strong managerial performance" as being required for B1 to B2 promotion (*id.*), policy papers underlying the 2009-2011 policy reform observed that "[w]hile formally TIG is just one of several criteria for growth promotions, in practice it has come to dominate most growth promotions for economists up to B2." (Memorandum from Deputy Managing Director to HRD Director, "Promotion Policy Reform—Phase I," September 15, 2009 ("Phase I Memorandum"), p. 4.)

365. Another "key issue" identified at the start of the promotion policy review in 2009 was that the "current policy is viewed as inequitable between economists and SCS, impeding career advancement of SCS staff." (*Id*.)

366. In September 2009, the HRD Director proposed to the Deputy Managing Director a "first set of promotion reforms." (*Id.*, p. 1.) Among the changes proposed for implementation in FY2010 was: "For promotions to Grade B2, replace TIG by a systematic talent review in the Review Committee (RC), based on consistent criteria for economists and specialized career stream staff (SCS). Currently, B1 is de facto a 'pass-through' grade for economists, with one-year TIG, while SCS staff face three-year TIG and, in many cases, additional requirements for promotion to B2." (*Id.*) A footnote stated that growth promotions would "henceforth be considered annually as part of the November round. It is expected that most staff will have at least one year of seasoning at B1. However, in exceptional circumstances, promotion to B2 could occur in less than one year." (*Id.*, note 1.)

367. The proposal to "replace TIG with a systematic talent review" for promotions to B2 did not materialize in FY2010. On the other hand, another element of the Phase I proposals, namely to "[m]ove to an annual cycle for growth promotions (November 1)" was implemented. The purpose of that change was to ". . . help separate career decisions from the annual performance and merit discussions, reduce administrative costs, and bring us in line with the practice in other IFIs." (*Id.*, p. 2.)

368. The Phase I Memorandum also described a "consultation process" in which the proposed changes had been "discussed extensively with Department Heads, the HR Advisory Committee, and SAC [Staff Association Committee]." (*Id.*, p. 3.) The following concerns were said to have surfaced through that process in 2009:

> Concerns raised by departments related mainly to earlier proposals to apply TIG for B1/B2 positions at two years, and SCS departments' strong wish to remove inequalities in treatment between economist and SCS staff. These concerns have been addressed and there is broad consensus on the proposals for Phase I. . . .

> The SAC did not support the move to an annual cycle for growth promotions, and expressed strong concerns about potential slowing of promotions for A-level staff in Phase II. SAC's primary concern is that budget policy appears to be taking precedence over HR policy in this area, and that a slowdown in promotions would have serious consequences for the Fund's ability to hire and retain high-caliber staff. They see a continuing role for TIG as a proxy for experience, and expressed reservations about the complete removal of TIG for any grade level as this could further skew incentives to seek visibility rather than improving performance. These points are well taken and will be taken up in the discussion of Phase II.

(*Id.*)

369. In 2010, the HRD Director proposed to the Deputy Managing Director a "new promotion policy framework for A-level staff, as discussed with management" and summarized the accomplishments of Phase I as follows: "The first phase established one annual promotion cycle (November 1) and eliminated the link between 'outstanding' APR ratings and promotions in minimum TIG, for all staff. In addition, for B-level staff, it replaced TIG with systematic talent reviews, harmonized rules for economists and SCS, and clarified the criteria for advancement to B3." (Memorandum from Deputy Managing Director to HRD Director, "Promotion Policy Reform—Phase II," July 7, 2010 ("Phase II Memorandum"), p. 1.) In fact, some of these proposals were yet to be implemented.

370. Approximately a year later, in June 2011, in a final Memorandum to the Deputy Managing Director titled "Promotion Policy Reform," the HRD Director set out the "new policy for 'growth' promotions up to grade B2," stating that the ". . . policy has been developed in close consultation with departments and SAC, and aligns with the overall framework approved by management last summer."[48] (Memorandum from Deputy Managing Director to HRD Director, "Promotion Policy Reform," June 9, 2011 ("2011 Promotion Policy Reform Memorandum"), p. 1.)

371. The HRD Director identified as the "main objective of the new framework" to "support individual career growth based on staff strengths and institutional needs." (*Id.*) The Memorandum described the "move away from time-in-grade (TIG) to more substantive criteria as the basis for selecting candidates for promotion" and stated that "[t]his final phase of the reform replaces TIG by an assessment of staff competencies and experience, through talent reviews, and integrates promotion decisions with the evolving budget framework." (*Id.*)

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[48] A footnote explained: "While the outlines of the reform were approved by management last year . . . , it has taken another year to develop and reach consensus on the specifics of the new framework." (2011 Promotion Policy Reform Memorandum, note 2.)

372. The 2011 Promotion Policy Reform Memorandum included as "Main Recommendations": "Replace TIG with promotion criteria supported by competency frameworks, which will be applied in departmental talent reviews; Introduce promotion budgets in the form of a ceiling on the number of A-level growth promotions each department can accommodate; Shift to a unified approach for promotions to B2 and harmonize time spent at B1 to 18 months." (*Id.*) The Memorandum accordingly tracks, and elaborates on, the announcement that would be made to the staff on July 1, 2011.[49]

373. The Memorandum emphasized that "[e]xperience has shown that the biggest challenges faced by our B1 staff . . . have typically been in managerial areas, requiring more attention through institutional support, incentives and assessment." (*Id.*, p. 3.) Three sub-points offered strategies to address these challenges, including: "Require that candidates have spent at least 18 months at B1 prior to promotion to B2—this will ensure that candidates have completed at least one full APR assessment (May to April) prior to their candidacy for promotion to B2, and have had sufficient time to absorb initial feedback and benefit from training and coaching support for new managers." (*Id.*)

374. The 2011 Promotion Policy Reform Memorandum described the "review process" from which the revised policy had emerged as "an intense effort of policy development and consensus-building with all departments, staff focus groups, and the SAC," noting that:

> Some departments expressed concern about the lengthening of TIG to 18 months for economist promotions from B1 to B2. However, we believe that the proposed period is reasonable in order to allow a substantive assessment of managerial capacity—particularly after the move from A15 to the B-level which typically entails a significant increase in managerial responsibilities.

(*Id.*, p. 5.)

375. To require B1 staff to complete at least 18 months TIG, thereby making them subject to at least one full APR assessment prior to candidacy for B2, was seen in the Memorandum as a means of addressing concerns about a lack of preparedness for managerial responsibilities. Similarly, the 18-month TIG requirement was to provide candidates for promotion with "sufficient time to absorb initial feedback and benefit from training and coaching support for new managers." This "focus on managerial competence" was framed within a larger policy objective of "increased emphasis . . . on leadership and people management," an issue that was said to have also emerged in the staff survey. (*Id.*, p. 3.)

376. The Memoranda furnished by the Fund also point to a tension between the interests of economist and SCS staff members in regard to career progression, in particular the "frustration

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[49] *See supra* RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW.

among SCS staff about unequal treatment." (*Id.*, p. 5.) They refer to unifying the B1/B2 promotion process across career streams as a "reasonable compromise," while taking note that "fully harmonizing the grading and career progression rules of SCS and economists would not be appropriate given the different compensation levels in comparator markets." (*Id.*)

(c) Was the decision to revise the B1/B2 promotion policy based on an appropriate consideration of relevant facts and reasonably related to the objectives it sought to achieve?

377. Applicant contends that increasing the TIG for economists to attain eligibility for promotion to B2 was arbitrary and inconsistent with broader promotion policy objectives, in particular, the effort to "move away from time-in-grade (TIG) to more substantive criteria as the basis for selecting candidates for promotion." (*See* 2011 Promotion Policy Reform Memorandum, p. 1.) In Applicant's view, "[i]n line with this objective and the other policy changes, the TIG for economist promotions to B2 should have been eliminated, with the promotion decision to be determined by the substantive criteria. Instead, the TIG was extended to 18 months, a move in the opposite direction, which made the promotion decision unduly rigid and bureaucratic." Applicant also asserts that the ". . . consultation process in the Fund had generated consensus and agreement to eliminate TIG requirements at B1" and "inexplicably . . . HRD overturned the earlier consensus agreement and suddenly set TIG for B2 promotion at 18 months" for economists; HRD was not disinterested because the proposal would benefit its own staff.

378. Applicant accordingly contends that the provision she challenges, namely increasing TIG for economists to become eligible for promotion to B2, was not reasonably related to the overall objective of the promotion policy reform, which was to "move away from" TIG as the basis for B1/B2 promotion. As Applicant correctly observes, the 2009 proposal stated: "It is expected that most staff will have at least one year of seasoning at B1. However, in exceptional circumstances, promotion to B2 could occur in less than one year." (Phase I Memorandum, note 1.)

379. The Fund maintains that the shift to an 18-month TIG was not arbitrary, and that it complemented the earlier revision of the promotion cycle from a semi-annual (May 1 and November 1) to an annual (November 1) basis: "The purpose of introducing a minimum 18-month TIG requirement was to ensure that regardless of when a staff member was promoted to Grade B1 during the calendar year, that staff member would have had one full APR cycle in that position—including feedback from *both* supervisors *and* subordinates—before being considered for promotion to Grade B2. In order to be considered for promotion to Grade B2 on November 1st of any given year, this meant that the staff member would need to be promoted on or before April 30th of the preceding year." (Emphasis in original.) The Fund emphasizes that it ". . . had to set a date for triggering the calculation of whether minimum TIG has been satisfied, and given that this was a policy about promotion based on performance, it was perfectly reasonable for Management to use the dates of the Fund's APR year as the framework for establishing that date." The Fund also states that the purpose of the revision of the promotion policy was to place "greater emphasis on managerial performance and competencies," which would be facilitated by having one full APR assessment prior to being considered for promotion to B2.

380. In a series of Judgments, the Tribunal has rejected challenges to regulatory decisions on grounds of arbitrariness where it has found that the policy adopted was the outcome of "extended consideration." *See Mr. "R"*, para. 63. At the same time, it has observed that the process of formulating policy through consultation may result in the rejection of some recommendations and adoption of others. *Daseking-Frank et al.*, para. 100; *Pyne*, paras. 128, 139 (rejecting challenge, where decision taken on "principled basis, based on facts and deliberation" and "supported by evidence and a weighing of policy considerations"); *see also de Merode*, para. 47 (the tribunal will consider the "care with which a reform has been studied").

381. In *Daseking-Frank et al.*, para. 92, the applicants alleged that in enacting a revised compensation system the Fund's Executive Board had '"cast aside"' the findings of a comprehensive review of the compensation system so that the new system failed to '"reflect the outcome of the analysis and discussion that took place within the context of that review"' and '"does not mirror the stated and indeed mandated objectives of adopting a new compensation system."' They maintained that the contested decision of the Executive Board was not based on an appropriate consideration of relevant facts and was not reasonably related to the objectives it sought to achieve—and was therefore arbitrary and an abuse of discretion.

382. In that case, the decision-making process had included an initial review of the compensation system by an outside consulting firm and the Steering Committee's own assessment of the issues; the staff of the Fund, individually and though SAC, exercised multiple opportunities to voice opinions and proffer alternative proposals, as did the Fund's Management, through its Managing Director. The Tribunal examined this process and drew the following conclusion: "The Executive Board's ultimate decision did not mirror precisely any one of these different proposals or points of view, but rather reflected a process of compromise and deliberation. This fact, however, does not mean that the decision failed to take proper account of the relevant facts or that the provisions adopted are not reasonably related to the objectives that they seek to achieve." *Id.*, para. 94. The Tribunal also noted that the record showed that views of the stakeholders themselves had varied over time. *Id.*, para. 95.

383. In other cases, this Tribunal has similarly recognized that the outcome of a deliberative process may well reflect the compromises inherent in the weighing of competing interests. *See, e.g., Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), paras. 45-53 (noting that a Working Group on Expatriate Benefits had assessed five possible bases for allocating expatriate benefits and differing proposals also had been made by SAC and HRD). *See also de Merode*, para 76, quoted in *Daseking-Frank et al.*, para. 98 ("A balance has to be struck among various factors (equity, simplicity, cost) which sometimes contradict one another: rigorous exactness cannot be achieved save at the price of complications; a simple solution can only be achieved at the cost of approximation. On all these questions it was by a reasoned judgment and after a balance of considerations that the competent authorities of the Bank preferred one formula to another, being conscious that none could be perfect in all respects.").

384. "This Tribunal has held that the fact that one decision is recommended to a decision-making authority and a different decision ultimately is taken does not of itself vitiate the reasonableness of that decision." *Daseking-Frank et al.*, para. 100, citing *Mr. "R"*, para. 63 (decision taken "after extended consideration, and rejection of a recommendation by the Director

of Human Resources"). In *Daseking-Frank et al.*, the Tribunal concluded that the fact that the Executive Board's decision reflected compromise among varying positions and did not track all of the recommendations of the Steering Committee did not establish that it was not reasonably taken on the basis of relevant facts.

385. The Fund's policy-making discretion unsurprisingly extends to making choices among reasonable alternatives. *Weisman*, para. 51; *Ms. "G"*, para. 80; *see also Daseking-Frank et al.*, para. 101; *Pyne*, para. 128 ("although there may have been other bases upon which the Fund might have allocated the contested MBP [Medical Benefits Plan] benefit, that fact does not invalidate the distinction drawn by the Executive Board.").

386. With the stated goal to "replace" TIG with promotion criteria, the Tribunal understands the revised promotion policy to mean that TIG *in and of itself* would no longer be dispositive of the question of "readiness" for promotion, as apparently it had been in the past. At the same time, the policy acknowledges that "experience" will be considered, a criterion that may be understood to be measured by TIG. In the view of the Tribunal, this is not evidence of incoherence but the resolution of competing considerations that cannot, without more, be taken as proof of arbitrariness.

387. The Fund persuasively maintains that the decision to retain a TIG requirement and for the TIG to take account of the APR cycle was rationally related to the overall objective of the promotion policy to strengthen people management within the Fund. While phasing out reliance on TIG as the all-but-determinative criterion for advancement from B1 to B2, at the same time the policy extends the minimum time required for economists at B1 from 12 months to 18 months so as to capture a full APR cycle. For these reasons, the Tribunal concludes that setting the relevant benchmark at 18 months was rationally related to the overall purpose of the policy reform to give greater emphasis to performance and readiness for promotion.

388. Moreover, the Fund's Memoranda reveal that a principal stakeholder consulted in the policy revision process, namely the Staff Association Committee, had advocated for ". . . a continuing role for TIG as a proxy for experience, and expressed reservations about the complete removal of TIG for any grade level . . . ." (Phase I Memorandum, p. 3.) The HRD Director commented that this was a point ". . . well taken and will be taken up in the discussion of Phase II." (*Id.*)

389. The Memoranda underlying the promotion policy revision announced July 1, 2011, also lead the Tribunal to observe that the objective of greater emphasis on performance factors was considered best achieved by requiring 18 months TIG at B1 in order that the staff member complete one APR cycle at B1 before attaining eligibility for promotion to B2. Given the goal to strengthen managerial skills within the Fund, the Tribunal concludes that it was not unreasonable of the Fund to have adopted the 18-month TIG rule, even at the cost of extending the 12-month TIG requirement previously in place for economist staff to be eligible for promotion. (*See* below.)

390. Thus the revision of the promotion policy to include a TIG requirement of 18 months before B1 staff would be eligible for promotion to B2 was reasonably related to the objective it sought to achieve of enhancing managerial experience prior to promotion to B2. The fact that the

reform was also broadly intended to "move away from" TIG as the primary basis for B1/B2 promotion is part of the balancing of relevant factors undertaken by the Fund.

391. Having concluded that Applicant has not shown that the revised promotion policy was arbitrary, or lacking proper consideration of relevant facts in reasonable relation to the objectives it sought to achieve, the Tribunal turns to Applicant's allegation that the policy discriminates impermissibly against economists relative to SCS staff.

(d) Did unifying the B1/B2 promotion policy across career streams discriminate impermissibly against economist staff?

392. Applicant contends that the fact that the minimum TIG for promotion from Grade B1 to Grade B2 was increased (from 12 months to 18 months) for economists while it was decreased (from 3 years to 18 months) for SCS staff constituted impermissible discrimination against economists. Respondent counters that the fact that the new policy imposes uniform promotion standards across career streams does not constitute impermissible discrimination. Moreover, the Fund asserts that economists had been at a relative advantage with regard to career advancement and the revised policy sought to correct for this difference.

393. This Tribunal has long recognized as a "well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization." *Mr. "R"*, para. 30; *see Weisman*, para. 48. *See also de Merode*, para. 47 (changes in policy ". . . must not discriminate in an unjustifiable manner between individuals or groups within the staff").[50]

394. The Tribunal has upheld the differential treatment of groups of staff where it has found a "rational nexus" between the purpose of the differentiation and the classification of persons affected, and has recognized that a '"rational nexus' does not require that there be a perfect fit between the objective of the policy and the classification scheme established, and indeed that the categories employed may rest upon generalizations." *Weisman*, para. 54; citing *Ms. "G"*, para. 79, *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010), para. 86, *Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-2 (February 9, 2010), para. 81, *Daseking-Frank et al.*, para. 52.

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[50] The Tribunal draws a distinction between the degree of scrutiny it applies in reviewing contentions of discrimination based on a general principle of equality of treatment, such as those raised by Applicant's challenge to the promotion policy, and those implicating universally recognized principles of human rights which "may be subject to particular scrutiny by the Tribunal." *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 50, 81 (allegation of religious discrimination); *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006), paras. 124, 117 (discrimination against children born out of wedlock).

395. The "rational nexus" test, as first stated in *Mr. "R"*, para. 47, and applied in subsequent cases, is the following:

> Respondent's proffered reasons for the distinction in benefits . . . must be supported by evidence. In other words, the Tribunal may ask whether the decision ". . . could . . . have been taken on the basis of facts accurately gathered and properly weighed." . . . Second, the Tribunal must find a ". . . rational nexus between the classification of persons subject to the differential treatment and the objective of the classification." . . . Thus, the Tribunal may consider the stated reasons for the different benefits and assess whether their allocation to the two categories of staff is rationally related to those purposes.

396. The issue here is thus whether the differential treatment of economists and SCS staff in respect of the change wrought to their respective TIG requirements for eligibility for promotion to B2 is rationally related to the objectives of the change: to augment managerial experience prior to attaining eligibility for promotion to B2, and to undo perceived unfairness in the career progression process.

397. While the Fund emphasizes that it is ". . . inescapable that on their face, the prior promotion policies established more requirements and lengthier time-in-grade for SCS staff as compared to staff in the economist stream," Applicant contends that the facial neutrality of the revised promotion rule masks an unequal approach to the career progression of economists vis-à-vis SCS staff; in Applicant's view, although facially neutral, the rule has an adverse and unjustified impact on economists.

398. The "rational nexus" test articulated in *Mr. "R"* also embraces the more general requirement that "Respondent's proffered reasons for the distinction in benefits . . . must be supported by evidence. In other words, the Tribunal may ask whether the decision '. . . could . . . have been taken on the basis of facts accurately gathered and properly weighed.'" *Mr. "R",* para. 47. This requirement is essentially indistinguishable from the requirement that to avoid arbitrariness an amendment to non-fundamental terms and conditions of employment "must be based on a proper consideration of relevant facts" and "must be reasonably related to the objective which they are intended to achieve." *de Merode*, para. 47.

399. The Fund asserts that the contested policy reform "actually reduces differential treatment among senior managerial staff" and that, after extensive consultation, HRD determined that differential treatment between economists and SCS staff "made little sense at the senior managerial level." According to Respondent, this is because "[i]n the senior 'B-level' positions, the Fund is concerned less with a staff member's technical expertise (whether that be economics or a non-economics field like information technology) and more about the staff member's management and leadership skills." The Fund also observes: "In the typical discrimination challenge, the Fund's policy is attacked as affording differential treatment to groups of staff members. Here, one of the goals of the revised B1/B2 promotion policy was to *reduce* differentiation between the SCS and economist streams, and to harmonize the requirements for promotions at the senior managerial level." (Emphasis in original.)

400. Applicant disagrees. She asserts: "[M]any of the SCS staff receive higher salaries than they would earn outside the Fund by virtue of working in an institution with a unified payline and economics at its core. Given this, there is no reason why SCS and economists should necessarily also have the same speeds of career progression." Applicant additionally contends that the "rigid TIG was improperly applied to economists, because most B1 economist managers are not '"new managers."' Applicant concludes that it is economists rather than SCS staff who are disadvantaged by the Fund's career progression practices and policies.

401. The parties dispute whether it was economists or SCS staff who were favored in the overall process of career progression within the Fund. That is a question on which the Tribunal need not decide in this case. What is clear from the documentation is that a "key issue" that the Fund sought to address in undertaking a review and reform of the promotion process was a perception of unequal treatment that disfavored SCS staff.

402. The evidence shows that consideration of fair treatment between economists and SCS staff members in respect of promotion policies weighed heavily in the process that resulted in the policy choice that Applicant opposes. Although Applicant contends that the revised promotion policy exacerbated rather than ameliorated differences in treatment between the two groups of staff, the Tribunal concludes that the decision to apply the same TIG requirement to both economist and SCS staff in making promotion decisions from B1 to B2 (in the context of various other revisions to the promotion policy) was not an unreasonable one in the light of the articulated considerations.

403. Inherent in unifying the promotion process from B1 to B2 across career streams was that two groups of staff previously differentiated for purposes of eligibility for promotion would now be treated alike, with the result that the group previously advantaged by a shorter TIG requirement would become subject to a lengthier requirement than it had before. Such a change in treatment could result in impermissible discrimination if, for example, there were no rational nexus between the purpose of the policy revision and its differential impact on the two groups, or if the policy itself were lacking a rational basis. Neither of those problems, however, arises here; the differential treatment was directly related to the purpose of the policy revision, in particular to link promotion eligibility to the development of managerial skills and to correct for a perceived inequality in treatment between groups of staff. Accordingly, the differential treatment was directly related to the purpose of the new policy, which the Tribunal has held above was not arbitrary but rather had a rational basis and resulted from consultation with key stakeholders.

404. The Tribunal has concluded that the promotion policy revision was based on an appropriate consideration of relevant facts and was reasonably related to the objectives it sought to achieve, including that of removing perceived inequalities in the treatment of SCS staff. Applicant's assertion that unification of career streams for purposes of B1 to B2 promotion eligibility increases the disadvantage to economists is a disagreement as to the premises of the new policy. In the view of the Tribunal, this is a matter on which reasonable people may differ. Indeed, the documentation underlying the promotion policy revision reflects these differing viewpoints. It is not for the Tribunal to substitute its judgment in such circumstances. *See generally Daseking Frank et al.,* para. 75. Nor will the Tribunal in effect substitute its views of the general premises of administrative reform.

405. What is clear from the record is that throughout the consultative process, policymakers grappled with the issue of how best to accommodate perceived competing interests of economist vis-à-vis SCS staff and the interest in shaping a uniform policy for the organization. That the solution may have been one with which people—including Applicant—may have disagreed does not make it arbitrary or discriminatory.

406. Having concluded that the Fund did not abuse its discretion when it revised its policy governing the TIG requirements for promotion from Grade B1 to Grade B2 by unifying the promotion process across career streams and increasing the TIG required for economist staff to reach eligibility for promotion, the Tribunal now considers Applicant's challenge to the application of that policy in the circumstances of her case.

(3) Did the Fund abuse its discretion in applying the revised B1/B2 promotion policy to Applicant?

407. Applicant raises three alternative arguments as to why the revised promotion policy should not have been applied in the particular circumstances of her case: (i) she was unfairly denied the benefit of the "transitional measure" that had been adopted as part of the policy revision; (ii) the purpose of the revision of policy, namely to strengthen managerial skills before promotion to B2, was not applicable in her case because she was already a seasoned manager before she was promoted to B1; and (iii) had Applicant's career progression not been unfairly delayed as a result of a pattern of discrimination, retaliation, harassment and a hostile work environment, she would already have advanced to B1 before May 1, 2011, and therefore her eligibility for promotion to B2 would have been governed by the earlier (12-month) rule. For reasons set out below, the Tribunal agrees with her first contention and therefore will not need to consider the two others.

408. The decisive issue may be framed thus: was the "transitional measure" arbitrary in applying the benefit of the pre-existing promotion policy only to those staff members who had reached Grade B1 as of November 1, 2010, and not to staff—such as Applicant—who were appointed to Grade B1 after that date but prior to the July 1, 2011, announcement of the revised policy?

409. Applicant's case is that the transitional measure impermissibly disadvantaged staff members, such as herself, whose promotions to B1 took place between May 1 and July 1, 2011. Her argument may be summarized as follows. The transitional measure effectively created three categories of economist staff in respect of satisfying their expectation as to the timing of their eligibility for B2 promotion: (i) those who were already at B1 as of November 1, 2010, for whom the transitional measure served to maintain their 12-month TIG, allowing promotion to B2 on November 1, 2011, and thereby satisfying their expectation of B2 promotion eligibility within 12 months of promotion to B1; (ii) those who were promoted to B1 from November 2, 2010 through April 30, 2011, who irrespective of whether the 12-month or 18-month rule applied would be eligible for promotion to B2 on November 1, 2012; their expectations were not changed by the change in policy; and in fact, no transitional measure was required for them; (iii) those, such as Applicant, who were promoted to B1 between May 1 and July 1, 2011 when the change in policy was announced. At the time of their promotion to B1, these staff members had an expectation that they would be eligible to advance to B2 within 12 months, at the next

promotion round following 12 months of service at B1, i.e., November 1, 2012. The change in policy extended the time until November 1, 2013 for them to become eligible for promotion to B2.

410. Applicant argues: "[E]very economist promoted to B1 before the change in policy on July 1, 2011 was able to satisfy their expectation on the timing of their B2 promotion eligibility, except for [another staff member] and me, as we were promoted to B1 between May 1, 2011 and July 1, 2011." She contends that the failure to make an exception in her case was unfair because the new policy afforded the benefit of a "transitional measure" to staff members whose B1 promotions had preceded the effective date of the new policy, except for those such as herself who were appointed to Grade B1 between May 1, 2011 and July 1, 2011.

411. The question arises whether—in light of the transitional measure afforded to staff members who had reached B1 as of November 1, 2010—the Fund abused its discretion by failing to meet Applicant's expectation at the time of her B1 appointment (in the weeks preceding the July 1, 2011 announcement of the change in policy) that she would become eligible for promotion to B2 as of November 1, 2012.

412. As reviewed above, this Tribunal has in a series of Judgments considered challenges to the allocation of differing employment benefits to different categories of Fund staff. In such cases, it asks whether there is a "rational nexus" between the purpose of the benefit and the category of staff on which the benefit is conferred. *See Weisman*, paras. 49-55 and cases cited therein. The question here is whether the difference in treatment between Applicant and those staff members who did benefit from the transitional measure was reasonably related to the purposes of the policy.

413. The Tribunal accepts Applicant's observation that the "rationale for the transitional measures focused on staff **expectations** for eligibility for their B2 promotion." (Emphasis in original.) The only explanation that the Fund has given for the transitional measure is that it was to protect staff members' expectations. The Fund's Memoranda underlying the reform stated: "To avoid 'moving the goal post' just before selection time, we propose to keep the 12-month TIG for economists and lawyers for the upcoming November 1 promotion round." (2011 Promotion Policy Reform Memorandum, p. 3.)

414. The Fund asserts that these expectations differed based on the length of time they had been held, stating that it ". . . grandfathered those B1 staff members who had held the grade since November 2010, because as of July 1, 2011, they had relied for eight months on the expectation that they could be considered for promotion to B2 on November 1, 2011. Applicant, by contrast, had only been at Grade B1 for less than six weeks when the policy change was announced on July 1." (Emphasis in original omitted.)

415. Respondent has had multiple opportunities to explain the differential treatment of Applicant in respect of satisfying the expectations associated with promotion to Grade B1 prior to the announcement of the revised policy of July 2011: in responding to requests made on behalf of Applicant by her SPMs; in responding to Applicant's request for administrative review; and in its extensive briefing before the Administrative Tribunal. The Fund repeatedly has referred to the expectations associated with reaching B1 prior to the change in policy, while

failing to differentiate Applicant's expectations from those of staff members who had attained B1 status as of November 1, 2010. The Tribunal is additionally troubled that on at least one occasion when a formal request was made to HRD on Applicant's behalf by the SPMs of two of the Departments in which she had served, that request appears to have gone unanswered.[51]

416. Was there a "rational nexus" between the classification of persons subject to the differential treatment and the objective of the classification? In this case, the objective of the transitional measure was to ensure that staff members' expectations of eligibility for promotion from Grade B1 to B2 within 12 months of promotion to Grade B1 were met. This expectation was satisfied until July 1, 2011, when a new policy was announced, extending from 12 to 18 months the period of service at Grade B1 that was required before economist staff would become eligible to advance to Grade B2. There is no evidence in the record that this differentiation was a considered choice, unlike the revised promotion policy as a whole, which had emerged from extended consultations. The Fund has offered as an explanation for the differentiation only that those staff who benefited from the transitional measure had held their expectations for a longer period of time than had Applicant.

417. While the Fund asserts that expectations differed based on the length of the time they had been held, the Tribunal does not find this distinction persuasive. In the view of the Tribunal, the Fund has failed to articulate a rational and sufficient nexus between the purpose of the benefit, i.e., to protect staff expectations, and the cut-off of these expectations that it applied. All economist staff members promoted to B1 before the change in policy increasing the TIG for eligibility for promotion to B2 had similar expectations. The question raised by Applicant's challenge is not whether the Fund was required to protect those expectations but whether, given that it decided to protect the expectations of some, it was arbitrary not to protect the expectations of others. Respondent has not brought to light any sustainable explanation for this difference in treatment. It has not explained why the length of the expectation should matter in relation to the need to satisfy it. Moreover, the Tribunal notes that staff members who were appointed to Grade B1 by the end of April 2011 would have their expectations met, whereas Applicant, who had held her expectation only a short time less than those staff members, would not.

418. In the view of the Tribunal, it was arbitrary of the Fund not to apply the same transitional measure to Applicant, whose promotion to Grade B1 became effective after November 1, 2010 but before the announcement of the new policy on July 1, 2011. Although the Fund met the expectations of some staff members who had already reached Grade B1 before July 1, 2011, it unreasonably excluded that category of staff of which Applicant was a member. Accordingly, the Tribunal concludes that the Fund abused its discretion in implementing the transitional measure announced to the staff on July 1, 2011.

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[51] *See supra* FACTUAL BACKGROUND: Revision of B1/B2 promotion policy and requests for exemption on Applicant's behalf.

(4) The Tribunal's conclusions on Applicant's challenge to the B1/B2 promotion policy and its application to her

419. As to Applicant's challenge to the B1/B2 promotion policy announced on July 1, 2011, the Tribunal concludes as follows. Applicant has not shown that the Fund abused its policy-making discretion in extending from 12 months to 18 months the TIG required before economists at Grade B1 would become eligible for promotion to Grade B2. That decision was reasonably based and taken after consultation and consideration of diverse viewpoints of pertinent stakeholders. Although another resolution might have been reached to the questions of what criteria should determine eligibility for promotion and how the treatment of promotion eligibility should be aligned across different categories of staff, this policy decision was not arbitrary, capricious or discriminatory so as to vitiate the decision. In particular, Applicant has not shown that the change in policy discriminated impermissibly against economist staff vis-à-vis staff in other career streams.

420. At the same time, the Tribunal concludes that Applicant's challenge to the application of the policy in the circumstances of her case must be sustained. In affording a transitional measure to protect the expectations of staff members whose promotion to Grade B1 had taken place before the change in policy, the Fund arbitrarily excluded staff members such as Applicant whose promotions became effective in the period between May 1 and July 1, 2011. What is decisive is not whether a transitional measure should have been included but, given that it was, whether it drew an unsupportable distinction between categories of staff. Even when brought to its attention, the Fund has failed to provide any sustainable basis for not providing the same benefit to all staff whose promotions to B1 had preceded the revision of policy as of July 1, 2011. Accordingly, Applicant prevails on her claim that the Fund abused its discretion in not affording her the benefit of the transitional measure.

E. Did elements of the administrative review and Grievance Committee processes constitute failures of due process or materially impair the record of the case?

421. Applicant alleges that elements of the administrative review and Grievance Committee processes constitute failures of due process and materially impair the evidentiary record of the case. These allegations include: (i) HRD failed to complete the administrative review within the time limits set by GAO No. 31; (ii) HRD failed to interview a key witness as part of the administrative review process; (iii) the Grievance Committee wrongly decided that the identity of Applicant's witnesses who gave testimony could be provided to supervisors accused of improper conduct; (iv) the Fund improperly disclosed names of Applicant's witnesses to Fund witnesses; (v) the Grievance Committee wrongly denied Applicant's requests to call several witnesses; (vi) the Fund failed to address and contain breaches of the confidentiality of Applicant's Grievance case by a member of the Grievance Committee; (vii) the Fund fails to provide in the channels of review for a mechanism to "summon" or "subpoena" witnesses who are unwilling to participate in the dispute resolution system; and (viii) the Fund fails to ensure that the formal dispute resolution system provides a "level playing field" for staff, protects confidentiality, protects against retaliation, and generates the confidence of staff such that witnesses are willing to cooperate with requests for participation.

422. Respondent, for its part, maintains that Applicant's challenges to alleged failures of due process in the administrative review and Grievance Committee processes are not within the jurisdiction of the Administrative Tribunal and, in any event, are without merit.

423. Article V, Section 1, of the Tribunal's Statute provides that applicants must exhaust administrative remedies before coming to the Tribunal. This defines the relationship between the Grievance Committee and the Tribunal. Beginning with *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17, the Tribunal has made clear that it does not "function[ ] as an appellate body from the Grievance Committee because the Tribunal's competence is not limited as it would be if it were a court of appeal; e.g., it makes findings of fact as well as holdings of law." At the same time, the Tribunal ". . . may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee" and is "authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *Id.*

424. The Tribunal consistently has held that the Grievance Committee's decisions as to the admissibility of evidence and production of documents are not subject to review by the Administrative Tribunal. *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 164; *Ms. "Z", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 119. These decisions, like the final recommendation of the Grievance Committee on the merits of a grievance are not "administrative acts" within the contemplation of Article II of the Tribunal's Statute. Rather, they rest exclusively within the authority expressly granted to the Grievance Committee under its constitutive instrument GAO No. 31. *Mr. "DD"*, para. 165; *Mr. M. D'Aoust (No. 2), Applicant v, International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), paras. 171-172. As the Tribunal has demonstrated through its evidentiary rulings in this case,[52] the ". . . proceedings of the Grievance Committee are not dispositive of matters before the Tribunal." *Mr. "DD"*, para. 168. Accordingly, the Tribunal ". . . consistently has insulated the other elements of the Fund's dispute resolution system from the adjudicatory role served by the Administrative Tribunal." *Id.*

425. Furthermore, the Tribunal has recognized that because it makes findings of fact as well as holdings of law, ". . . any lapse in the evidentiary record of the Grievance Committee may be rectified, for purposes of the Tribunal's consideration of the case, through the Tribunal's authority, pursuant to Article X of its Statute and Rules XVII and XIII of its Rules of Procedure to order the production of documents, to request information and to hold oral proceedings." *Mr. "DD"*, para. 166, citing *Ms. "Z"*, para. 120, *D'Aoust (No. 2)*, para. 172, *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 135.

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[52] *See supra* PROCEDURE: Applicant's requests for production of documents and information; Applicant's requests for oral proceedings.

426. In the instant case, Applicant availed herself of the opportunity to seek production of documents and oral proceedings before the Tribunal. The disposition of those requests has been considered above.[53]

427. At the same time, the Tribunal has recognized that because it is "authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it," *D'Aoust*, para. 17, it may "consider whether there is any cause to discount that record in the weighing of the evidence before the Tribunal." *D'Aoust (No. 2)*, para. 176; *Ms. "Z"*, paras. 121-122. In the light of Applicant's allegations in this case, the Tribunal considers that question as follows. The Tribunal notes that the Grievance Committee gave Applicant considerable leeway to present evidence, even while deciding that it had jurisdiction only over her challenge to the FY2010 APR decision. The Grievance Committee's decisions on numerous evidentiary issues are part of the record before the Tribunal; without reviewing the merits of those decisions, the Tribunal observes that they reveal a reasoned decision-making process. Having perused, as is its usual practice, the extensive record of the Grievance proceedings, the Tribunal finds no ground to hold that the record in this case should be given any less weight than the Tribunal ordinarily accords to such record. The Tribunal thus cannot uphold Applicant's assertion that the administrative review and Grievance Committee processes have materially impaired the evidentiary record in her case.

428. The Fund's internal law speaks to the integrity of the dispute resolution system: "The Fund encourages employees to use the channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution." GAO No. 33 (Conduct of Staff Members) (May 18, 2011), Annex 6: Retaliation. Furthermore, "[s]taff and managers should be aware that the Fund does not tolerate any form of retaliation against anyone for using any of these channels, or for participating as a witness in an ethics investigation or grievance. Thus, if there were retaliation against a staff member for either raising an ethics complaint or a grievance, or for participating in either type of proceeding as a witness, the retaliation itself would be a form of misconduct which could result in disciplinary action, and any adverse decision motivated by retaliation would be invalid." (*Id.*) In addition, "[m]anagers are expected to create an atmosphere where staff will feel free to use existing channels for workplace conflict resolution without fear of reprisal, . . . includ[ing] . . . the formal dispute resolution system (Grievance Committee and Administrative Tribunal)." (*Id.*) Staff are also ". . . expected to cooperate with the Fund's processes for resolving allegations of misconduct or unethical behavior, and they are also expected to participate, when requested, as witnesses in dispute resolution matters." (*Id.*)

429. The integrity of the administrative review and Grievance Committee processes has a direct bearing on the work of the Administrative Tribunal. For most types of "individual decisions" that may be challenged before the Tribunal, exhaustion of the administrative review

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[53] *See supra* PROCEDURE: Applicant's requests for production of documents and information; Applicant's requests for oral proceedings.

and Grievance Committee processes is a Statutory prerequisite.[54] Although the Tribunal's ". . . review authority fully penetrates the layer of administrative review provided by the Grievance Committee, the Tribunal, in making its findings and conclusions, draws upon the record assembled through the review procedures." *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 96. Accordingly, the Tribunal has recognized the "utility of the administrative review process" to its own decision making, *id.*, noting that the Grievance Committee "produc[es] a detailed factual and legal record which is of great assistance to consideration of a case by the Administrative Tribunal." *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42.

430. For these reasons, the Tribunal observes that it is essential to the robustness and integrity of the Fund's dispute resolution system that all steps in the administrative review and Grievance Committee processes are fair to staff members. Duties of confidentiality should be strictly observed. To the extent that questions have been raised about fairness in the administrative review and Grievance Committee processes, it is important for the Fund to take all appropriate steps to ensure the robustness and integrity of these dispute resolution processes.

431. In sum, as to Applicant's challenges to elements of the administrative review and Grievance Committee processes in her case, the Tribunal concludes that it finds no ground to give the record of those processes any less than their usual weight. Insofar as Applicant's challenges raise systemic issues relating to the Fund's dispute resolution system, it is the province of the policy-making organs of the Fund to address such issues, in the light of the Tribunal's observations above.

CONCLUSIONS OF THE TRIBUNAL

432. For the reasons elaborated above, the Tribunal has concluded:

433. First, Applicant has raised an admissible claim that she was subject to a pattern of unfair treatment constituting a hostile work environment. Applicant launched a timely challenge to her FY2010 APR decision, which she alleged was a culminating act in that pattern.

434. Second, the Tribunal has concluded that Applicant was subject to a hostile work environment to which the Fund failed effectively to respond. That hostile work environment was marked by a pattern of unfair treatment in which Applicant's opportunities for career advancement were unreasonably impeded for reasons unrelated to her professional competence. Applicant reasonably perceived the Department Director's conduct and remarks toward her as offensive and intimidating. The Fund failed to respond effectively to the pattern of unfair treatment.

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[54] Challenges to "individual decisions" arising through the Staff Retirement Plan (SRP) are exhausted through the Administration Committee of the SRP. Challenges to "regulatory decisions" may be challenged in the Tribunal directly, within three months of the later of their announcement or effective date.

435. Third, although Applicant has brought a timely challenge to a pattern of unfair treatment, she has failed to raise admissible challenges to several separate career decisions that she contends formed part of that pattern, in particular, the non-selection decisions of 2009, 2010, and 2011 and her FY 2009 APR decision. The Tribunal has concluded: (i) the 2009 non-selection "decision," i.e., the recommendation of the Selection Panel that was not implemented because the vacancy was cancelled, did not constitute an "administrative act" that adversely affected Applicant within the meaning of the Tribunal's Statute; (ii) Applicant does not have standing to challenge non-selection decisions of 2010 and 2011 because she did not apply for the vacancies in question; and (iii) Applicant did not launch a timely challenge to her FY2009 APR decision and "exceptional circumstances" do not excuse her late filing.

436. Fourth, Applicant has not shown that the Fund abused its discretion in taking her FY2010 APR decision. Although Applicant has established that she was subject to a pattern of unfair treatment constituting a hostile work environment, she has not met the burden of showing that the contested APR decision was improperly motivated by that same pattern of impermissible treatment. She has failed to show a causal link between her Department Director's conduct and the APR decision.

437. Fifth, Applicant's challenge to the 2011 revision of the B1/B2 promotion policy, and to its application to her, fails in part and succeeds in part. Applicant has not established that the unification of B1/B2 promotion criteria across career streams was arbitrary or discriminatory. The evidence shows that the policy decision was based on a proper consideration of relevant facts and was reasonably related to the objectives it sought to achieve. The differential effect on economist vis-à-vis SCS staff members of the change in TIG required to reach eligibility for B2 promotion was directly related to the purpose of the policy revision; that revision was rationally based and resulted from consultations with key stakeholders. Nonetheless, Applicant succeeds in her contention that the revised promotion policy should not have been applied in the circumstances of her case. In implementing a "transitional measure" designed to protect the expectations of staff members who had been promoted to B1 before the change in policy in July 2011, the Fund arbitrarily excluded Applicant because her promotion to B1 became effective in the period May 1–July 1, 2011. The Fund has failed to articulate a rational and sufficient nexus between the purpose of the transitional measure, i.e., to protect staff expectations, and the cut-off of those expectations that it applied.

438. Sixth, as to Applicant's challenges to elements of the administrative review and Grievance Committee processes in her case, the Tribunal finds no ground to give the record of those processes any less than their usual weight. Insofar as Applicant's challenges raise systemic issues relating to the Fund's dispute resolution system, it is the province of the policy-making organs of the Fund to consider such issues to ensure the integrity of the system.

439. The Tribunal now addresses an "observation" that Applicant has raised in her final pleading in the case, namely, that in its briefs the Fund ". . . repeatedly writes invectives against [her], stating that [her] arguments are 'self-serving.'" Such language, asserts Applicant, is ". . . not intended as a legal argument at all, but is intended instead as a tactic of character assassination to yet again distract attention away from the real issues." The Tribunal recalls another recent case in which an applicant protested what he characterized as "inflammatory mischaracterizations" in the Fund's pleadings and sought anonymity in part because he feared

that these particular comments might be repeated in the Tribunal's Judgment. *See Mr. E. Weisman, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-2 (February 26, 2014), paras. 6, 11.

440. The Tribunal encourages every litigant to formulate pleadings in a manner that shows courtesy and respect both for adversaries and the adjudicatory process. *See Mr. F v. Asian Development Bank,* AsDBAT Decision No. 104 (2014), paras. 80-84 (responding to applicant's allegation that his claims had been treated with a lack of respect by the Bank). In the instant case, the Tribunal is especially troubled by the Fund's repeated suggestions in its pleadings that there was something inappropriate in Applicant's pursuing particular claims before the Tribunal that were related to complaints filed with the Fund's Ethics Office. The Fund, in its argumentation, also appears to admonish Applicant for seeking review by the Administrative Tribunal following her lack of success before the Grievance Committee. In the words of Respondent: "Applicant has used every possible avenue of the dispute resolution system to pursue her vendetta against the Fund."

441. As elaborated above, the Fund has established multiple avenues for addressing those forms of alleged misconduct that may also be perceived to have had an adverse effect on a staff member's work or career.[55] These avenues serve differing purposes and access to one does not preclude access to another. Exercising the right to review of administrative acts through the channels established for the resolution of staff disputes, up to and including the review provided by this Tribunal, is a fundamental right of international civil servants.[56] Exercise of that right is not to be equated with the pursuit of a "vendetta," save for in the exceptional circumstances dealt with by Article XV[57] of the Statute. Disparagement of rightful recourse to the Fund's dispute resolution procedures will not be countenanced by this Tribunal.

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[55] *See supra* PROCEDURE: Applicant's request to strike information from the record.

[56] *See AK v. International Bank for Reconstruction and Development*, WBAT Decision No. 408 (2009), paras. 31, 34 ("availability to staff members of an impartial adjudicator of claims of non-observance of contracts of employment and terms of appointment constitutes an essential condition of employment"; awarding compensation for management practices that justified staff members' conclusion that they would be at risk if they exercised their rights of access to the Bank's internal grievance mechanisms); *de Merode*, WBAT Decision No. 1 (1981), para. 21 (right of recourse to WBAT "forms an integral part of the legal relationship between the Bank and its staff members").

[57] Article XV, Section 1, provides:

> The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:
>
> > a. the application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification, or reversal of existing law; or
> >
> > b. the applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.

(continued)

REMEDIES

442. Applicant has prevailed on two claims: (i) her principal claim that she was subject to a pattern of unfair treatment constituting a hostile work environment to which the Fund failed effectively to respond; and (ii) a secondary claim, that in implementing the B1/B2 promotion policy of July 2011 the Fund unfairly denied her the benefit of the transitional measure designed to protect the expectations of staff members whose promotions to Grade B1 had pre-dated the amendment of the promotion policy. The Tribunal now turns to the question of how to remedy each of these breaches of the Fund's legal obligations.

A. The Tribunal's framework for the award of remedies

443. The Tribunal's remedial authority is found in Article XIV, Section 1, of the Statute, which provides:

> If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

444. The Tribunal's jurisprudence reflects that its remedial powers fall broadly into three categories: (i) rescission of a contested decision, together with measures to correct the effects of the rescinded decision through monetary compensation or specific performance;[58] (ii)

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[58] *See Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-2 (March 13, 2013) (rescission of "regulatory decision" barring re-employment of former staff members who separated voluntarily pursuant to 2008 Fund-wide downsizing program, and notification thereof to affected former staff members and Fund hiring personnel; rescission of "individual decision," taken on basis of "regulatory decision," denying applicant eligibility to compete for contractual vacancy in his former department and payment of compensation for intangible injury incurred in being wrongfully deemed ineligible for vacancy for which he made efforts to apply); *Ms. V. Shinberg (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-5 (November 16, 2007) (order to pay attorney's fees incurred in separate proceeding to maintain workers' compensation coverage); *Dr. "M" and Ms. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006) (order to give effect to child support orders pursuant to pension plan provision); *Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004) (rescission of decision denying payment of residential security costs indirectly incurred in overseas assignment; order that such costs be paid); *Ms. "K", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-2 (September 30, 2003) (rescission of decision denying disability pension; order that disability pension be granted retroactive to retirement date); *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003) (rescission of decision denying disability pension; order that disability pension be granted retroactive to retirement date); *Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001) (rescission of decision to escrow disputed portion of pension; order to give effect to division of marital property order pursuant to pension plan provision).

compensation for intangible injury to correct the effects of procedural failure in the taking of a sustainable decision;[59] and (iii) compensation to correct the effects of intangible injury consequent to the Fund's failure to act in accordance with its legal obligations in circumstances where there may be no decision to rescind.[60]

445. The Tribunal's jurisprudence shows that, in all three categories, the Tribunal has had occasion to compensate applicants for "intangible injury." Intangible injury ordinarily arises when the Fund fails through inaction to discharge a duty imposed by its written law or by general principles of international administrative law, such as the obligation to take decisions in accordance with fair and reasonable procedures. Compensation for intangible injury responds to staff members' legitimate expectations that the Fund will act in accordance with the rule of law. *See generally Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012), para. 151. When the Fund fails to observe its legal obligations in a manner that adversely affects a staff member, the Tribunal may make an award of compensation for intangible injury to remediate the harm to the staff member.

446. Intangible injury, by its nature, will be difficult to quantify. In assessing the quantum of compensation to be awarded, the Tribunal seeks to apply a scheme that will foster coherence in its jurisprudence and afford some measure of predictability for parties to future disputes. The Tribunal accordingly will identify the injury and assess its nature and severity, giving due weight to factors that may either aggravate or mitigate the degree of harm to the applicant.

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[59] *See Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012) (compensation for non-compliance in applicant's case with rules governing Fund's right of refusal of volunteers in 2008 Fund-wide downsizing program; not rescinding contested decision refusing applicant's request for benefits of voluntary separation pursuant to that program); *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012) (compensation for multiple failures of fair process in selection process for promotion, while sustaining contested non-selection decision; compensation for failure, in breach of Fund rules, to provide proactive assistance to applicant in seeking re-assignment following abolition of her position, while sustaining contested abolition decision); *Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010) (compensation for breach of due process for Fund's failure to seek any account from applicant of her version of facts relevant to decision to place her on paid administrative leave pending investigation for misconduct; sustaining administrative leave decision); *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997) (compensation for procedural irregularities in taking decision not to convert applicant's fixed-term appointment to regular staff; sustaining contested non-conversion decision).

[60] *See Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005) (compensation for Fund's failure to take effective measures in response to religious intolerance and workplace harassment of which applicant was an object). The Tribunal has also awarded compensation where the Fund's failure to act in accordance with its legal obligations is not manifested in the process of taking a decision but rather in related obligations, such as giving reasonable notice of the abolition of a post, *see Mr. "F"*, or providing proactive assistance to an applicant in seeking re-assignment following abolition of her position, *see Sachdev*.

B. Remedy for pattern of unfair treatment constituting a hostile work environment to which the Fund failed effectively to respond

447. The Tribunal has observed above that in cases alleging a pattern of unfair treatment constituting a hostile work environment, it is the Fund's failure to act that is the actionable claim.[61] When an applicant prevails on such a claim, the Tribunal is able to "correct the effects" of that inaction by awarding compensation for the consequent intangible injury. *See Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 121-122 and Decision, para. 2.

448. Compensation for intangible injury responds not only to a staff member's legitimate expectation that the Fund will adhere to its legal obligations but also to the nature of the particular obligation that has been breached. *See, e.g.*, *Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), paras. 193, 266 and Decision (having referred to "dignity interest" of staff member in being afforded opportunity to present her version of the facts before decision is taken to place her on paid administrative leave pending investigation for misconduct, the Tribunal compensated applicant for "significant procedural irregularity" in the "fair procedures that must govern misconduct proceedings").

449. As the Tribunal has observed above, the Fund's written rules prohibiting discrimination, harassment, retaliation and a hostile work environment give expression to fundamental principles of workplace fairness, principles that are shared to a significant extent among international intergovernmental organizations.[62] Breach of these fundamental principles of workplace fairness will necessarily constitute a serious injury.

450. Accordingly, in this case, the hostile work environment that the Tribunal has found to have affected Applicant may only be remedied by an award of compensation for intangible injury. The Tribunal notes that inevitably Applicant's sense of wellbeing has been harmed by the hostile work environment, and, moreover, that a hostile work environment is antithetical to the principles of the Fund, which seeks to protect employees from harassment, discrimination and retaliation. A finding that a staff member has been subject to a pattern of unfair treatment constituting a hostile work environment is therefore a finding of a serious nature that warrants significant compensation.

451. Applicant seeks monetary compensation for a "pattern of discrimination that held back [her] career for several years, thus denying [her] . . . an unknown number of forgone career opportunities" and for "suffering harassment, including sexual harassment, for bias against diversity (gender in [her] case), and for procedural flaws." Applicant invokes the Tribunal's remedy in *Mr. "F"*, stating that she requests "$100,000 in line with the Tribunal award to Mr.

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[61] *See supra* CONSIDERATION OF THE ISSUES: The issue of the Fund's alleged failure to respond effectively to the hostile work environment.

[62] *See supra* CONSIDERATION OF THE ISSUES: Admissibility of hostile work environment claim.

"F", plus any additional sum the Tribunal may consider fitting given that [she] suffered at the hands of [Department] supervisors rather than peers and did not contribute to the hostile environment."

452. In *Mr. "F"*, the Tribunal awarded the applicant compensation in the (undifferentiated) total of $100,000 for the Fund's failures (a) to take effective measures in response to the religious intolerance and workplace harassment of which Mr. "F" was an object, and (b) to give him reasonable notice of the abolition of his post. In that case, the hostile work environment, which persisted for many years, manifested itself in hostile words and conduct directed at the applicant by co-workers who targeted him principally on the basis of his religious affiliation, which differed from their own; supervisors failed to stop that hostile treatment.

453. In the instant case, Applicant was adversely affected by a hostile work environment manifesting itself as a pattern of unfair treatment by her Department Director that unreasonably impeded her opportunities for career advancement and subjected her to conduct and remarks that she "reasonably perceived as offensive or intimidating" (Harassment Policy, para. 9). The "cumulative effect" of this pattern was to "deprive [Applicant] of fair and impartial treatment" (Discrimination Policy, Section III), which had an "adverse impact on [her] employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment." (*Id.*)

454. In assessing the nature and severity of the intangible injury to be remedied in this case, the following are salient factors: (i) the hostile work environment arose directly from the conduct of a senior official of the Fund; Fund managers carry substantial responsibility under the Fund's internal law for ensuring a workplace free of unfair treatment; the responsibility of the Fund inheres in the abuse of senior managerial authority; (ii) the Department Director placed an unfair brake on Applicant's opportunities for career advancement by impeding her advancement to the B List and engaging in behavior that discouraged her application to vacancies within his direct supervision; (iii) inappropriate comments were made in the context of a subordinate's seeking performance feedback from her Department Director, feedback that the Fund's internal law makes clear must be given free of bias and in a "reasonable and constructive manner" (Harassment Policy, para. 14); (iv) when Applicant confronted the Department Director with the issue of her career progression, his response was implicitly to deny that there had been unfair treatment and to place the onus on her to be more "charming"; (v) Applicant reasonably felt intimidation in challenging the Department Director and initially chose to pursue informal channels rather than the formal recourse procedures of the Fund's dispute resolution system; (vi) although Applicant sought out assistance in addressing her situation, in particular by approaching the HRD Director, the situation was not fully addressed; and (vii) the hostile work environment endured over a significant period of time.

455. The Tribunal has also concluded that Applicant reasonably perceived the Department Director's comments not only as failing to address seriously her concerns about her career development but also taking impermissible account of her gender in responding to these concerns. Insofar as his remarks were intended to advise Applicant to alter her purported manner of communications with colleagues, the Tribunal considers that these comments were related to the fact of Applicant's gender, to perceptions about gender roles, and to her willingness to challenge past misconduct relating to unfair treatment of women raised on behalf of her

subordinate staff members. Having raised these complaints, Applicant became especially vulnerable to her Department Director's unfair treatment.

456. At the same time, it is also significant in assessing the degree of the harm in this case that the Tribunal has not concluded that Applicant has made out a case either of sexual harassment or of retaliation. Nor has Applicant shown that she was unfairly denied specific job opportunities.[63]

457. Having regard for these factors, the Tribunal sets the compensation to correct the effects of the Fund's failure to respond effectively to a pattern of unfair treatment constituting a hostile work environment adversely affecting Applicant at $60,000.

C. Remedy for failure to afford Applicant the benefit of the transitional measure included in the B1/B2 promotion policy revision

458. Applicant has also succeeded on her claim that in implementing the B1/B2 promotion policy of July 2011 the Fund unfairly denied her the benefit of the transitional measure designed to protect the expectations of staff members whose promotions to Grade B1 had pre-dated the amendment of the promotion policy. The Tribunal accordingly rescinds the individual decision, taken pursuant to the regulatory decision, that no exception would be made to the application of the revised promotion policy in the circumstances of Applicant's case.[64]

459. In order to "correct the effects" (Statute, Article XIV, Section 1) of the rescinded individual decision, the Tribunal considers the nature and severity of the intangible injury Applicant has incurred as a consequence of that unlawful decision, along with any aggravating or mitigating factors.

460. In the view of the Tribunal, the injury to Applicant is two-fold. First, she has incurred the intangible injury that results from the Fund's failure to uphold a staff member's legitimate expectation that it will take its decisions consistently with its legal obligations. Second, the Tribunal considers the nature of the particular obligation and the consequences of its breach.

461. The consequence of the failure to afford Applicant the benefit of the transitional measure was that she was not considered for promotion at the November 1, 2012 round but instead was required to wait until November 1, 2013 to become eligible for such consideration. It is not possible to know what the outcome of the decision would have been, had Applicant been considered eligible for promotion in 2012. *See Mr. B. Tosko Bello, Applicant v. International*

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[63] Having held inadmissible Applicant's challenges to a series of non-selection decisions, the Tribunal considers that Applicant's requests for relief in the form of retroactive adjustments to her grade and salary are not appropriate in the circumstances of this case.

[64] The Tribunal additionally observes that "[i]n cases where the tribunal concludes that an individual decision is illegal by virtue of the illegality of the regulatory decision pursuant to which it was taken, the judgment would not invalidate or rescind the underlying regulatory decision, nor would it invalidate or rescind other individual decisions already taken pursuant to that regulatory decision." Commentary on the Statute, p. 36.

Monetary Fund, Respondent, IMFAT Judgment No. 2013-2 (March 13, 2013), para. 91 (compensation for intangible injury in being wrongfully deemed ineligible to compete for vacancy for which applicant had made efforts to apply).

462. At the same time, the Tribunal cannot say, based on the record of the case, that the Fund acted in bad faith or with malice in taking the rescinded individual decision. *See Negrete*, para. 149. Nor are the material consequences of the lapse, namely, delayed eligibility for consideration for promotion, especially severe in nature. *Id.*

463. Having regard for these factors, the Tribunal sets the compensation for the Fund's failure to afford Applicant the benefit of the transitional measure included in the B1/B2 promotion policy revision at $10,000.

D. Applicant's request that monetary relief be awarded on a net-of-tax basis

464. Applicant requests that the Tribunal award her monetary relief on a net-of-tax basis, "consistent with the Fund practice of ensuring that Americans are treated on an equal footing with non-Americans." Applicant apparently refers to the Fund's policy of providing a tax allowance to staff members in relation to income from the Fund that, as a consequence of the law of the jurisdiction(s) in which the staff member is subject to taxation, must be included in the staff member's taxable income.

465. Respondent has not availed itself of the opportunity to comment on Applicant's request in its various pleadings before the Tribunal.

466. This Tribunal has not adopted a practice of stating that the compensation it awards is on a net-of-tax basis, although it is aware that such practice has been followed by some other international administrative tribunals, either as a rule or in particular cases.[65] In the view of the Tribunal, it is for the Fund to decide in the first instance whether (and, if so, how) the tax allowance of an applicant is to be adjusted to take account of the Tribunal's award of monetary compensation. Should a staff member dispute such decision, it would be subject to review in the usual manner through the Fund's dispute resolution system.

467. The Tribunal itself is not in a position to take account in its monetary awards of their potential tax consequences in the various jurisdictions in which Fund staff may be subject to

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[65] *See, e.g., AS v. International Bank for Reconstruction and Development*, WBAT Decision No. 416 (2009) and *AS (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 468 (2012) (challenge to manner in which Bank implemented WBAT's decision that relief in applicant's case be paid on a net-of-tax basis). *See also* Statute of the Administrative Tribunal of the Inter-American Development Bank Group, as amended February 27, 2013, Article IX, para. 4: "Where the corresponding regular compensation or pension is payable to the Applicant on a net-of-tax basis, the Bank or Corporation shall also provide the Applicant with a reimbursement of national taxes, in accordance with the policies of the respective Institution, payable on compensation awarded by the Tribunal in Articles IX(1) through IX(3) above."

taxation. The Tribunal accordingly denies Applicant's request that it prescribe that the monetary relief awarded in this case be made on a net-of-tax basis.

E. Applicant's request to be compensated for the imputed cost of her time spent representing herself in the proceedings

468. Article XIV, Section 4, of the Statute provides:

> If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

469. Applicant seeks compensation for the "imputed cost" of her time spent in representing herself in the Tribunal and through the prerequisite channels of review: "I have not incurred legal costs. However, I would welcome compensation for the imputed cost of my time in representing myself and preparing this case (countless hours over more than four years already), of a magnitude the Tribunal considers reasonable." Applicant has not provided any quantification or documentation of such costs.

470. Respondent has not availed itself of the opportunity to comment on Applicant's request in its various pleadings before the Tribunal.

471. Applicant's request raises the question whether the reference in Article XIV, Section 4, to the "reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel" may encompass time devoted by a non-attorney applicant to presenting her own case to the Administrative Tribunal and through the channels of review.

472. In *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2006-6)*, IMFAT Order No. 2007-1 (January 24, 2007), the Tribunal considered a related—but different—question, namely, whether Article XIV, Section 4, encompassed the imputed cost of representation by an attorney applicant in a case brought on behalf of her child in a successful action to give effect to child support orders pursuant to the Fund's Staff Retirement Plan. There was no contention that the child ever paid or was obligated to pay for the legal services rendered. Nonetheless, the Tribunal concluded that the applicants had "incurred" a cost in the ". . . expenditure of [the parent]'s time and skill as an attorney over a period of years, time which she otherwise could have devoted to other remunerative work." *Id.*, para. Second.

473. The Tribunal's award in *Ms. "M" and Dr. "M"* was narrowly drawn to respond to a request for legal fees from an applicant who was a practicing attorney. It emphasized that the applicants in that case "incurred" the costs of representation by counsel, albeit indirectly, through the attorney applicant's forgoing "other remunerative work" and the expenditure of her "time and skill as an attorney." In this case, it is clear that Applicant has not incurred the costs of

representation by counsel. May the imputed cost of her efforts as a non-attorney applicant in preparing her own case be compensated as "reasonable costs incurred by the applicant in the case" (Article XIV, Section 4)?

474. While the Tribunal appreciates that self-represented applicants often expend considerable time and effort in preparing their cases before the Tribunal and in the prerequisite channels of review, and that Applicant has done so in this case, the Tribunal finds no ground to conclude that a non-attorney applicant in preparing her own case has "incurred" a cost compensable under the Statute's remedial provisions, in circumstances where the applicant has not established that any out-of-pocket expenses have been incurred. The Tribunal accordingly denies Applicant's request.

DECISION

FOR THESE REASONS

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

1. Ms. "GG" was subject to a pattern of unfair treatment constituting a hostile work environment to which the Fund failed effectively to respond. For that breach of the Fund's rules and general principles of international administrative law, the Fund shall pay Ms. "GG" compensation in the sum of $60,000.

2. The regulatory decision announced on July 1, 2011, increasing from 12 months to 18 months the time-in-grade required before Grade B1 economists become eligible for promotion to Grade B2, is sustained.

3. The individual decision, taken on the basis of the above regulatory decision, to deny Ms. "GG" the benefit of the transitional measure included in the revised promotion policy is rescinded. To correct the effects of the rescinded individual decision, the Fund shall pay Ms. "GG" compensation in the sum of $10,000.

4. Ms. "GG"'s challenges to the non-selection decisions of 2009, 2010, and 2011 and to her FY2009 APR decision are dismissed as inadmissible.

5. Ms. "GG"'s challenge to her FY2010 APR decision is denied on the merits.

6. Ms. "GG"'s challenges to elements of the administrative review and Grievance Committee processes are denied.

7. Ms. "GG"'s request that she be compensated for the imputed cost of her time spent preparing her case before the Tribunal and through the channels of administrative review is denied.

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.
December 29, 2015