ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2017-2

Ms. "NN", Applicant v. International Monetary Fund, Respondent

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INTRODUCTION

1. On November 13-14, 2017, the Administrative Tribunal of the International Monetary Fund, composed for this case, pursuant to Article VII, Section 4 of the Tribunal's Statute, of Judge Catherine M. O'Regan, President, and Judges Andrés Rigo Sureda and Edith Brown Weiss, met to adjudge the Application brought against the International Monetary Fund by Ms. "NN", a former limited-term staff member of the Fund. Applicant was represented in the proceedings by Mr. Peter C. Hansen and Mr. J. Michael King, Law Offices of Peter C. Hansen, LLC. Respondent was represented by Ms. Diana Benoit and Ms. Melissa Su Thomas, both Senior Counsels in the IMF Legal Department.

2. Applicant challenges the selection process for a vacancy for which she applied, a position that was similar in substance to the one she was then occupying on a limited-term appointment. In particular, Applicant contests the failure to afford her a pre-screening interview, allegedly in contravention of Departmental procedures, the effect of which was to bar any further consideration of her candidacy for the position. Applicant also alleges that she was subjected to an abusive written comment by one of her managers when she raised concerns of bias in the selection process. Applicant further contends that the Fund should have provided her special consideration in her job search.

3. Applicant additionally challenges the Fund's failure to award any relief following the Grievance Committee's consideration of her case. The Committee, although faulting some elements of the selection process as deviating from Departmental guidelines and potentially being perceived as unfair, concluded that these failings did not materially affect the outcome of the selection process. The Committee decided that it was not within its authority to recommend relief in such circumstances, and the Fund accepted the Committee's recommendation. Applicant argues that relief for intangible injury in cases of procedural failure is well established in the Tribunal's jurisprudence, that it was warranted by the circumstances of her case, and that the Grievance Committee and Fund Management should have followed Tribunal precedents.

4. Applicant seeks as relief: (a) rescission of the decision to deny Applicant a pre-screening interview; (b) granting Applicant "internal" status for purposes of applying to future Fund vacancies for which she meets the basic requirements; (c) granting Applicant "incumbent" status for any future applications to Fund positions substantially resembling the limited-term position she had held; (d) 3 years' salary as moral and intangible damages; and (e) legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4 of the Statute, if it concludes that the Application is well-founded in whole or in part.

5. Respondent, for its part, maintains that the vacancy selection process challenged by Applicant represented a reasonable exercise of managerial discretion. The Fund asserts that a pre-screening interview was not required in the circumstances of Applicant's candidacy, and, in any event, Applicant has not shown that the decision not to afford her a pre-screening interview unfairly prejudiced the outcome of the selection process. The difficulty Applicant encountered, submits the Fund, stemmed not from any fault in the selection process but rather from the fact that the hiring manager already had knowledge about Applicant's suitability for the position in question, based on his observations as her direct supervisor. The Fund also maintains that Applicant has not demonstrated that she suffered any abuse by managers. Nor, submits the Fund, was Applicant entitled to any special consideration in her job search.

6. As to Applicant's requests for relief, the Fund maintains that even if there were a procedural fault in the selection process, it would not provide an automatic basis for granting compensation in the absence of harm to Applicant, and that the nature and severity of any procedural error here is minimal as compared with other cases in which the Tribunal has awarded compensation for intangible injury. The Fund further asserts that it was within Management's discretion to accept the reasoned recommendation by the Grievance Committee to deny relief in Applicant's case.

PROCEDURE

7. On June 6, 2017, Applicant filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on June 8, 2017. On June 12, 2017, pursuant to Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

8. On July 14, 2017, Respondent filed its Answer to the Application, which was supplemented on July 18, 2017, pursuant to Rule VIII, para. 4. On August 17, 2017, Applicant submitted her Reply. The Fund's Rejoinder was filed on September 18, 2017. By letter of November 6, 2017, one week before the oral proceedings in the case, Applicant sought to "register, for purposes of both the hearing and her Application" a complaint that had not previously been raised before the Tribunal. Having considered Applicant's letter and the Fund's response, as well as having afforded the parties an opportunity to address the matter briefly in the oral proceedings, the Tribunal decided it would not be appropriate to consider the complaint, given that it had not been given any measure of prior review through dispute resolution channels.

A. Applicant's request for provisional relief

9. In her Application, Applicant requested provisional relief "[p]ursuant to Article VI(4) of the Tribunal's Statute," asserting that "[a]s a result of the Fund's challenged decision, [she will] suffer irreparable injury—as 'irreparable' is defined in the Fund's official Commentary on Article VI(4)—in the form of mandatory departure from the United States." Applicant requested the Tribunal to "order the Fund to maintain her G-4 visa status during the pendency of her case, and for at least a reasonable time thereafter."

10. After making her request in her Tribunal Application, Applicant received—in response to a parallel request she had made directly to the Fund—written assurance from the Fund's Human Resources Department (HRD) that her administrative leave without pay would be extended until December 31, 2017, to "allow time within which the Tribunal can be expected to make a decision on this request." (Email from Special Advisor to HRD Director to Applicant, July 10, 2017.) Applicant was advised that ". . . if the Tribunal indicates that it does not consider administrative leave to be warranted, your leave may be ended before December 31. Otherwise your leave may be extended if the Tribunal so directs or if, in the absence of a direction from the Tribunal, [the HRD Director] considers additional leave is justified under the terms of the rule." (*Id*.)

11. In its pleadings before the Tribunal, the Fund opposed granting Applicant's request for provisional relief. In its Answer, the Fund maintained that Applicant's circumstances differ from those addressed by Staff Handbook, Chapter 5.01, Section 17.2 (Administrative Leave without Pay Pending Decision on an Appeal of Termination of Appointment) because Applicant is "not challenging the termination of her employment, and she is not seeking reinstatement." Furthermore, maintained the Fund, Applicant had not shown why she would need a G-4 visa in order to pursue her case before the Tribunal.

12. In her Reply, Applicant re-asserted her request to maintain her G-4 visa status until her Application has been finally adjudicated by the Tribunal. "The Fund," stated Applicant, "should at a minimum maintain the visa until the end of 2017, as [Applicant] has a reasonable expectation that the Fund will do so based on its assurance" of July 10, 2017. In its Rejoinder, filed September 18, 2017, the Fund asked the Tribunal to "issue a decision on Applicant's request for provisional relief urgently, so that there is no enduring ambiguity that may be delaying Applicant from taking steps in her own best interest, concerning her visa status."

13. In seeking provisional relief, Applicant invoked Article VI, Section 4, of the Tribunal's Statute and the accompanying Commentary on the Statute. Article VI, Section 4, states the general rule that the "filing of an application shall not have the effect of suspending the implementation of the decision contested." At the same time, the associated Commentary on the Statute, p. 27, allows that the "statute would not preclude the tribunal from ordering such measures if warranted by the circumstances of a particular case." The Tribunal understands the Commentary to mean that "if an applicant could show that, in the absence of interim measures, implementation of the contested decision would cause him or her irreparable harm during the period between the filing of an application and the rendering of the Tribunal's Judgment, the Tribunal could grant provisional relief." *Mr. "LL", Applicant v. International Monetary Fund, Respondent (Suspension of the Pleadings and Denial of Provisional Relief)*, IMFAT Order No. 2016-1 (June 28, 2016), para. 12 (denying provisional relief where applicant failed to show irreparable harm); *Mr. "KK", Applicant v. International Monetary Fund, Respondent (Requests for Provisional Relief)*, IMFAT Order No. 2015-1 (November 13, 2015) (denying requests for provisional relief where requests did not seek suspension of any decision contested in the Tribunal because challenges to those decisions had not been exhausted through the Fund's dispute resolution system).

14. On September 22, 2017, having considered the facts of the case and the applicable law, the Tribunal concluded that Applicant's request for provisional relief was premature, given the Fund's discretionary decision of July 10, 2017, to extend her administrative leave without pay and, consequently, her G-4 visa status until December 31, 2017. In the circumstances, the Tribunal decided that it was inappropriate to render a decision on Applicant's request for provisional relief at that juncture. The parties were so notified.

B. Applicant's request for oral proceedings

15. Applicant requested oral proceedings "(1) to testify about her legitimate expectations as well as about the various forms of damage she has suffered (as noted in her submissions); and (2) to answer any questions which the Tribunal may have for her or her counsel." Respondent maintained that oral proceedings were not necessary "in light of the well-developed evidentiary record" compiled during the Grievance Committee proceedings.

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

17. In determining whether oral proceedings will be "useful" (Rule XIII, para. 1), the Tribunal "'. . . consistently has taken account of the sufficiency of the written record of the case.'" *Mr. "KK", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-2 (September 21, 2016), para. 39, quoting *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 48. The sufficiency of the written record is particularly pertinent in deciding requests for witness testimony, given that the Tribunal will ordinarily have the benefit of the transcript of oral hearings of the Fund's Grievance Committee, in cases emerging from that channel of review.

18. In *Mr. "KK"*, para. 40, the Tribunal denied the applicant's request to appear as a witness before the Tribunal to "'answer any questions that the Tribunal may have about his experiences at work, the challenges he faced, and his physical and mental conditions as they relate to his claims.'" The Tribunal stated: "Given the structure of the Fund's dispute resolution system and the exhaustion requirement of Article V, Section 1, of the Tribunal's Statute, it will be rare for the Tribunal to admit witness testimony in cases arising through the Grievance Committee, in the absence of a showing that such testimony would be useful to clarify a material point at issue before the Tribunal." *Mr. "KK"*, para. 42; *see also Ms. "GG" (No. 2)*, para. 59.

19. In the instant case, the transcript of the Grievance Committee hearings includes the testimony of the following persons: Applicant; the Senior Personnel Manager (SPM) of Applicant's Department, the Assistant SPM (ASPM); Applicant's former Division Chief; the Acting Division Chief; Applicant's Section Chief (who was the hiring manager for the vacancy); and a Human Resources Officer from the Human Resources Department (HRD). The Tribunal is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

20. In her request for oral proceedings before the Tribunal, Applicant sought to give testimony as to her "legitimate expectations" and "damage she has suffered (as noted in her submissions)." The Tribunal decided, given the record before it, that the additional testimony Applicant sought to offer would not be useful to clarify a material point at issue before the Tribunal. For this reason, Applicant's request to testify as a witness before the Tribunal was denied.

21. As for Applicant's request for oral proceedings in order to "answer any questions which the Tribunal may have for . . . her counsel," the Tribunal recalled its decision in *Mr. "KK"*, para. 43, that "[i]n the light of that request and the benefit that the Tribunal has recognized of providing parties a forum in which to present their cases through oral argument even when the evidentiary record is complete (Rule XIII, para. 6), the Tribunal decided that oral proceedings would be held, limited to the legal arguments of the parties' counsel." In the resulting Judgment, the Tribunal observed that it found the oral proceedings useful in "clarifying the legal issues and in providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record of the case." *Mr. "KK",* para. 44.

22. In light of the foregoing considerations, on September 22, 2017, the Tribunal notified the parties that: (1) Applicant's request for oral proceedings was denied insofar as she sought to testify as a witness before the Tribunal; and (2) Applicant was requested to provide further clarification as to whether, given that decision, she continued to maintain her request for oral proceedings, which would be limited to the oral arguments of the parties' counsel. On October 3, 2017, following confirmation that Applicant continued to maintain her request, the Tribunal notified the parties that it deemed it "useful" (Rule XIII, para. 1) to hold oral proceedings and that the proceedings would be limited to the oral arguments of the parties' respective counsel. The Tribunal also decided that the oral proceedings would be "held in private," per Article XII of the Statute and Rule XIII, para. 1,[1] as the Tribunal had taken a provisional decision to grant Applicant's request for anonymity. (*See* below.)

23. Oral proceedings were held on November 13, 2017. Each party was allotted a fixed period for counsel to present its case, followed by questioning by the Tribunal. As in *Mr. "KK"*, the Tribunal found the oral proceedings useful in clarifying the legal issues and in providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record of the case.

[1] Article XII of the Statute and Rule XIII, para. 1, of the Rules of Procedure provide: "Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private."

C. Applicant's request for anonymity

24. As noted, the Tribunal took a provisional decision on Applicant's request for anonymity in connection with its decision to hold oral proceedings. In the light of its further review of the issues and evidence of the case and the facts to be brought out in this Judgment, the Tribunal takes a final decision to grant Applicant's request for anonymity. The reasons for this decision are elaborated below.

25. In her Application, Applicant seeks anonymity pursuant to Rule XXII[2] on the ground that "good cause for such exists given that Applicant's performance was: (1) wrongfully questioned by Fund officials as well as by the Grievance Committee; and (2) was made a factor in the challenged decision."

26. The Fund opposes anonymity for Applicant in this case. Respondent submits that Applicant's concern that evidence relating to her performance will be revealed in the Tribunal's Judgment does not meet the "good cause" standard required for shielding an applicant's identity: "The focus of the present case is Applicant's challenge to the Fund's decision to deny her a pre-screening interview. *While the Fund relied on its assessment of the Applicant's performance in determining that she was not well-suited for the role*, the issue that is central to the case is whether the hiring manager had sufficient information about Applicant such that it was reasonable for the Fund to forego a pre-screening interview in her case." (Emphasis added.) In the view of the Fund, Applicant "fails to identify any matter of personal privacy at stake . . . sufficient to overcome the 'value of public justice.'"

27. In her Reply, Applicant counters that the Tribunal "cannot evaluate the merits in a published judgment without referring to the managers' alleged views of her performance, or to the parties' respective arguments and presentations of evidence on these points. For such reason and good cause, anonymity should be granted."

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[2] Rule XXII (Anonymity) provides:

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

28. In *Mr. "HH", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-4 (October 9, 2013), para. 43, the Tribunal concluded: "Given that key evidence in this case relates to the assessment of performance, it is not possible to protect the confidentiality of the performance review process without concealing Applicant's identity. Were the Tribunal not to grant Applicant's anonymity request, the process of performance reviews going forward would inevitably be affected by the perceived risk of disclosure in future cases." In that Judgment, the Tribunal recognized that the applicant's challenge "focuse[d] on alleged procedural defects in the decision-making process" leading to the non-conversion of his fixed-term appointment; at the same time, it noted that the "core of the evidence . . . relates to Applicant's job performance, which, in the view of his managers, fell short of that required for conversion to a career appointment with the Fund." *Id.*, para. 42. The Tribunal in subsequent Judgments has reaffirmed that protecting candor in the performance evaluation process is a ground for granting anonymity to applicants. *See Ms. "JJ", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-1 (February 25, 2014), paras. 8-14; *Mr. "KK"*, para. 16.

29. The same principle governs here. Although Applicant's annual performance reviews are not themselves at issue in the case, the perception of Applicant's performance is a key factual element underpinning the Fund's arguments that (a) it was not necessary for Applicant to be afforded a pre-screening interview when she applied for a position similar to one she had occupied because the hiring manager, who was also her supervisor, was already acquainted with her work performance, and (b) on the basis of his opinion of that performance, any error in denying her a pre-screening interview did not affect the outcome of the selection process. Accordingly, the essential factor in the decision to grant anonymity in *Mr. "HH"*, namely, to protect candor in the performance assessment process going forward, applies equally in the circumstances of the instant case.

FACTUAL BACKGROUND

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

A. Applicant's employment history with the Fund

31. In November 2010, Applicant was appointed to a three-year "limited-term" appointment to the staff of the Fund, pursuant to GAO No. 3, Rev. 7, Section 3.02.2, which provided that "[l]imited-term appointments shall be for a period of up to three years and may be extended once up to a cumulative period of five years in that position." Under the employment framework that prevailed at the time of Applicant's appointment, staff members were hired on either (i) "limited-term" appointments, which carried no expectation of conversion to "open-ended" appointments or (ii) "fixed-term" appointments, which could be converted after three years to "open-ended" appointments upon meeting specified criteria. (Staff appointments are to be distinguished from contractual appointments, which are governed separately.) *See generally Ms. D. Hanna, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-1 (March 11, 2015), paras. 45-48. As considered below, effective May 2015, the Fund revised its employment framework as a result of a review of the categories of employment.

32. As permitted by the governing GAO, at the conclusion of Applicant's first three years with the Fund, her limited-term appointment was extended for a further two years, up to the maximum of five years in the position. At the three-year mark, supervisors were reluctant to extend the appointment. (Tr. I, p. 184.) The Senior Personnel Manager (SPM) of the Department, however, regarded Applicant as a "very engaged, very invested colleague." (Tr. I, p. 63.) Although she characterized Applicant's performance as at the "very bottom of the entire division," the SPM also perceived Applicant as "open to feedback" and "wanting to improve" (Tr. I, p. 63-64) and persuaded these managers to renew Applicant's limited term to the maximum five-year total. Accordingly, Applicant's appointment was to expire by its terms in November 2015.

33. Throughout her five years as a limited-term staff member, Applicant was consistently rated "Effective" on her Annual Performance Reports (APRs). Nonetheless, the record shows that Applicant's managers harbored concerns about elements of her job performance. The former Division Chief testified that comments on Applicant's APRs represented a "pretty strongly-worded message that there's some work to be done." (Tr. I, pp. 216-217.)

34. Applicant undertook efforts to improve her skills. Although supervisors observed some improvement, they continued to see her performance as problematic. The Section Chief, for his part, testified that several different areas needed improvement and that he conducted monthly mentoring sessions with Applicant to "give her feedback on the progress she's making and on what . . . still needs to be worked on." (Tr. II, p. 90.) The Acting Division Chief recalled the nature of the performance difficulties, including "communications and listening skills," which had caused the management team to consider not extending Applicant's appointment at the end of her first three-year term. Later, he observed "some improvement" but noticed that there were "still gaps and still issues." (Tr. II, pp. 186-187, 215, 238.) He also testified that Applicant's performance ranked in the lower third of staff in the Division, which was consistent with the view of the SPM. (Tr. II, pp. 239-240.)

35. Some nine months in advance of the conclusion of her fifth year in the limited-term appointment, Applicant's managers met with her and, shortly thereafter, "communicat[ed] formally there [was] no plan to extend [Applicant] beyond the date of [her] agreement." (Email from Acting Division Chief to Applicant, cc: Section Chief, February 9, 2015.) This meeting was memorialized as follows by the Acting Division Chief in an email communication to Applicant of February 9, 2017:

> . . . . The discussion focused on reiterating your limited-term position ends on November 13, 2015. This is approximately 9 months from today. The Fund is obliged to inform you 6 months in advance of your end date and, to that end, I am communicating formally there is no plan to extend you beyond the date of your agreement.
>
> We should post a . . . position vacancy in July – August timeframe. You are eligible to apply (and you can apply for other positons between now and your contract end date as well). However, please

> keep in mind we discussed that you have applied for other positions within the Fund and have not been selected. Given that your term is up in November I advised you to consider other options outside the Fund as well.
>
> As a separate part of the conversation you asked about the rules related to conversion of staff to "open ended" before and after May 1st. I understand there is a difference but that difference is there for all new hires at the point in time they are hired—whether they are coming from outside or from contractual or limited term positions within the Fund. I urge you to follow-up with [Department] HR.
>
> The important thing to understand is that you need to be selected for a position at the Fund before November 13 or you need to find career opportunities outside the Fund . . . .

(*Id.*)

B. Revision of Fund's Categories of Employment (COE) and Restructuring of Applicant's Department

36. The 2015 expiration of Applicant's limited-term appointment and the vacancy selection process she contests took place amidst the crosscurrents of two separate initiatives that had begun a year earlier, namely, the revision of the Fund's categories of employment (COE) and the restructuring of functions within Applicant's Department.

37. The revision of the COE was to promote "greater flexibility in staff appointments and to reduce reliance on contractual appointments." (Staff Paper, "Categories of Employment," October 2, 2014, p. 2, attached to EBAP/14/89 (October 3, 2014).) A principal effect of that revision was to replace fixed-term and limited-term staff appointments with a single "term" appointment for all new staff, which would carry the possibility of conversion to open-ended status. (*Id.*, p. 1.) At the same time, "[d]ecisions to offer open-ended appointments would be more rigorous under the proposed framework." (*Id.*, p. 14.) (The Staff Paper noted that "up to 97 percent" of fixed-term appointments were converted to open-ended appointments under the then existing framework. (*Id.*, p. 11, Box 2.))

38. The Staff Paper anticipated transitional issues associated with implementation of the new employment framework, noting that "[i]n principle, appointments of current staff and contractual employees who were brought on board prior to May 1, 2015 will be governed by the existing terms and conditions." The Staff Paper stated that "[s]ubject to that general principle," the following transitional provision applied:

> **For limited-term appointments that expire on or after May 1, 2015**, where the Fund wishes to continue the employment relationship, and where the function is determined to be neither temporary nor rotational, the incumbent would be offered a three-

> year term appointment under the new framework. However, for these appointments, if the staff member would be carrying out functions that are *substantially similar*[9] to the functions performed under his or her limited term appointment, departments would need to decide whether to allow the term appointment to expire or whether to nominate the staff member to an open-ended appointment at the end of the term appointment. If the department does not nominate a staff member for an open-ended appointment, no renewal would be allowed, and the term appointment would expire.
>
> [9] The hiring department, in consultation with HRD, would determine whether the function to be performed under a new term appointment is substantially similar or different. Staff members would be advised of this determination when offers for term appointments are made, and would have an opportunity to accept or reject the conditions of term appointments as stated therein at that time.

(*Id.*, p. 23.) (Emphasis in original.) The record of the case reveals little about how and when staff and managers were notified of the revision of the employment framework and of transitional arrangements for staff members, such as Applicant, whose appointments overlapped the old and new regimes.

39. As noted, under a transitional provision, where a limited-term position was deemed to be "neither temporary nor rotational" and the "Fund wishe[d] to continue the employment relationship," the incumbent would be offered a three-year term appointment under the new framework. That provision also states that if the staff member would be carrying out functions substantially similar to the functions performed under the limited-term appointment, "departments would need to decide whether to allow the term appointment to expire or whether to nominate the staff member to an open-ended appointment at the end of the term appointment." It is not clear to the Tribunal precisely how the transitional provisions were intended to operate. In any event, the Fund apparently did not invoke transitional arrangements pursuant to the revised COE for continuing Applicant's employment.

40. It also is not clear from the text of the written notification to Applicant of February 9, 2015, whether in "communicating [to Applicant] formally there is no plan to extend you beyond the date of your agreement," Applicant's managers took a decision in terms of the COE transitional provisions or whether their communication simply reflected a practice of the Fund to advise limited-term appointees of the upcoming expiration of appointment. The communication indicates that Applicant had inquired about some aspect of the revision of the COE and was directed to Department HR with her question.

41. An exchange between the ASPM and the Acting Division Chief referred to Applicant's query about the revised COE as follows: "The sharing of transition arrangements to staff appointment chart during the recent HR Exchange session does describe the way forward and we have blocked a time to meet with all divisions . . . this month to further share and dialogue with staff." (Email from ASPM to Acting Division Chief, February 4, 2015, re [Applicant].) At the

same time, the ASPM emphasized: "What is important is for [Applicant] to understand that her L-T will lapse and it does not guarantee a conversion to a permanent position (typically we can inform at least 6 months before their term ends). Even when we post the position, she can apply and compete with no guarantee of her being selected and *there are no restrictions in her applying to any other positions posted* (she has been applying)." (*Id.*) (Emphasis added.)

42. In addition to replacing limited-term and fixed-term staff appointments with term staff appointments, a second concern addressed by the revised employment framework was the practice of contractual employees' "performing core work that is not temporary." (Staff Paper, p. 1.) Accordingly, the revised COE clarified that contractual employees are to be engaged only to meet "temporary needs (i.e., not exceeding four years)" or to perform "ongoing work that does not require deep institutional knowledge (i.e., rotational work)." (*Id.*, p. 2.) In furtherance of this initiative, departments, in consultation with HRD, were tasked with surveying their contractual positions to determine which were appropriately categorized as contractual and which should be replaced by staff appointments. (*Id.*, p. 19.) In Applicant's Department, this process resulted in the reclassification of fourteen contractual positions as term staff appointments. (SPM, Tr. I, p. 69; ASPM, Tr. I, p. 235.) Contractual employees occupying those positions were permitted to compete for the new staff appointments.

43. Concurrently with the implementation in 2015 of the Fund-wide revised COE, Applicant's Department was engaged in a substantial restructuring exercise. In connection with that restructuring, recruitment for Applicant's expiring limited-term appointment—which would become a term staff appointment under the new COE when Applicant vacated it in November—was put on hold while Department managers considered how the position would fit within the restructured Department. Thus, although Applicant had been advised in February that the vacancy would be posted in the "July – August timeframe," it was not posted until spring 2016, some six months after Applicant had left active employment with the Fund. (ASPM, Tr. I, p. 233.) Applicant did not apply for that vacancy.

44. While recruitment for the position that Applicant would be vacating was delayed, another vacancy was posted in Applicant's Section in spring 2015, as a result of the decision—pursuant to the COE assessment—that a contractual position substantially similar to Applicant's would be replaced by a staff appointment. This vacancy, in the words of the Fund, "represented an almost identical role to her own." Both Applicant and the contractual incumbent of the position applied for the vacancy, along with 130 other external candidates.

C. Vacancy selection process

45. According to Fund-wide policy, "[o]nce a vacancy closes, HRD sends the hiring department a preliminary list of candidates who meet the eligibility requirements for the position. . . . Departments may use various methods to shortlist and select (e.g., tests, one-on-one interviews, panel interviews)." (HRD "Screening and Selection," intranet posting.) In her Grievance Committee testimony, an HR Officer explained that the "department conducts its own recruitment. What we do is we facilitate . . . ." (Tr. II, p. 257.) "They [i.e., Departments] can have a testing to further short list the internal candidates that come over; they can choose to

interview all the internal candidates, that is also a choice; or they can use any means of pre-screening that they wish to establish their short list." (Tr. II, pp. 261-262.)

46. Applicant's Department, as part of an "employee engagement initiative" undertaken in response to staff survey results (Tr. I, p. 71) had adopted an "Internal Vacancy Selection Process" designed for "Staff + Contractuals with over 2 years of service" in the Department. ("[Department] Recruitment Process Workshop," p. 6.) An essential element of the Department's vacancy selection process was that "[a]ll eligible [Department] internal applicants who meet the requirements of the advertised position are interviewed." (*Id.*) This "half-hour pre-screening mechanism [was] to at least give [Department] staff the opportunity to go in front of a hiring manager and present themselves," the SPM explained. (Tr. I, p. 72.) In addition, "[a]ll internal applicants are given feedback on interview performance and test results once the process has closed." ("[Department] Recruitment Process Workshop," p. 6.)

47. The Department's vacancy selection process was described in a Departmental workshop presentation as follows:

> **How do the Pre-Screening and Panel Interview work?**
>
> ***Step 1: Pre-screening***
>
> - 15-30 min. limit pre-screen of all eligible* [Department] applicants (e.g., 10 applicants) to determine the short-list
> - Pre-screen conducted by Hiring Manager & HR Team
> - Non-selected candidates for a panel interview will be notified accordingly
>
> ***Step 2: Panel Interview***
>
> - Final short-list – pick 3 to 4 candidates for a panel interview including [Department] and non-[Department] candidates (based on pre-screen and other paper credentials)
> - 60 min. panel interview + DDI Selection Assessment + Writing and or Technical Assessment
>
> *Eligibility includes all structural HR policy criteria have been met + minimum qualifications in job standards have been met (degree + years of relevant experience)

(*Id.*, p. 11)

48. In their testimony before the Grievance Committee, Applicant's managers confirmed that when a Department staff member who met the minimum eligibility criteria applied to a vacancy

within the Department the ordinary practice was to afford that person a pre-screening interview. The SPM testified that the pre-screening interview was "something that was automatic for [Department] staff" (Tr. I, p. 72) and was "specific for that position each and every time" (Tr. I, p. 77). When queried, the SPM agreed that a Department member was entitled to the pre-screening "[e]ven if the manager didn't think he should have that position." (Tr. I, p. 174.) Applicant's former Division Chief explained: "[I]t was a standard practice, if an internal candidate applied for a position, to do what we called pre-screening, to give them an opportunity. *Even if we didn't think they were necessarily going to be the right candidate for the position . . .* ." (Tr. I, p. 194.) (Emphasis added.) The former Division Chief explained that it was "really a staff morale thing, if nothing else, and to make sure you weren't missing out on somebody. . . . You know them by reputation or by your experience, but you may not know they learned another skill before they ever got here. So we wanted to make sure we didn't miss out on opportunities for staff as well." (Tr. I, p. 195.)

49. The effect of the Departmental guidelines was to create two pathways for vacancy selection, one applicable to candidates "internal" to the Department (i.e., Department employees on staff appointments and contractuals with at least 2 years' experience) and the other applicable to all other candidates (known as "external" candidates). All internal candidates who met the minimum eligibility criteria for the position were given pre-screening interviews; however, only selected external candidates would be pre-screened. Based on the outcome of the pre-screening, some candidates would progress to the short list. Persons not pre-screened could not be short-listed. (Tr. I, pp. 75-76.) Short-listed candidates were subjected to further assessment, including by panel interviews, and a finalist was selected.

50. In total, 132 persons applied for the vacancy that gives rise to the dispute in this case. The parties agree that Applicant met the eligibility requirements for the position and that she was the only "internal" candidate to apply for it. (The contractual incumbent was considered an "external" candidate in terms of the Department vacancy selection guidelines because he had been employed in the Department for less than two years.) The contractual incumbent and eleven other "external" candidates were invited to participate in pre-screening interviews. (*See* Email from Section Chief to Applicant, October 20, 2015.) Applicant, however, was not pre-screened and therefore was not considered for shortlisting. She was eliminated from the competition without consideration of her candidacy beyond HRD's confirming that she had met the minimum eligibility requirements.

51. Following the pre-screening phase, three candidates—including the contractual incumbent—were shortlisted for further assessment. That assessment consisted of standardized testing, blind-graded written exercises, and panel interviews. The Section Chief (who was the "hiring manager" for the position), the Assistant Senior Personnel Manager (ASPM), and two other Department staff members comprised the selection panel.

52. The record shows that the ASPM and the contractual incumbent had a personal relationship that extended to the ASPM's seeking out the contractual incumbent's assistance in efforts to find employment for a close family member. (Email from ASPM to contractual incumbent, January 9, 2015.) It is not disputed that this relationship was not disclosed by the ASPM to the other members of the selection panel.

53. The contractual incumbent was selected to fill the vacancy. As a "result of the interview and scores on the multiple assessments," wrote the Section Chief in the Selection Memorandum, "it is clear that [the contractual incumbent] stood out as the best among the candidates and should be appointed." The Selection Memorandum also noted that the selectee had "performed the role exceptionally well" over the preceding year and that the "feedback from clients and colleagues at all levels are very positive," reflecting the "breadth and depth of his experience and competencies."

54. The question of how, why, and by whom the decision was taken that Applicant would not be afforded a pre-screening interview is a matter of controversy. Applicant contends that the ASPM alone took that decision. The ASPM referred to it as a "collective" decision, taken together with the hiring manager (i.e., the Section Chief) and in consultation with HRD. (Tr. I, p. 249; Tr. II, p. 5.) The Section Chief, for his part, testified that he did not think he had the authority to make a decision regarding pre-screening of Applicant and that he proceeded from the list of external candidates provided by HRD. (Tr. II, pp. 109-110.) His testimony was that he had "concurred" with the decision not to pre-screen Applicant based on the ASPM's consultation with an HR Officer. (Tr. I, pp. 128-129, 141.) Neither the SPM nor the Acting Division Chief recalled having been consulted on the matter of Applicant's candidacy. (Tr. I, pp. 73, 90-91, 116; Tr. II, pp. 197-198.)

55. In her Grievance Committee testimony, the HR Officer offered her account of the ASPM's consultation with her. He had asked whether, in the case that a " . . . person had been already interviewed many times or a number of times in the department for a similar position, a same position, do we have to re-interview that person?" (Tr. II, p. 263.) According to the HR Officer, she told the ASPM: "'Well, the only thing I can tell you is really guidelines and what other best practices, what other departments do.' And what other departments do is that: Often if the person has been interviewed many times within the last six months, then that person is already known to the department, and maybe there is no need to re-interview that person, as long as you give the feedback." (*Id.*) The HR Officer further testified: "I also added in this case: I was aware that they have a pre-screening methodology in [the Department], which is their own and . . . at HRD we don't influence that, we think it's a good idea. I did tell [the ASPM], I said, 'The only thing . . . is some departments choose indeed not to interview a person because that person has been seen, but how does it fit with your practice within your department?' And that is a question that he would have to answer." (Tr. II, pp. 263-264.)

56. It is not disputed that Applicant was not informed of the decision to exclude her from the competition for the vacancy. In October 2015, as the scheduled expiration of her limited-term appointment approached, Applicant inquired with her managers as to why she had not been offered a pre-screening interview for the vacancy. In a follow-up email, Applicant wrote to the Section Chief: "After the meeting yesterday I am still very unclear about the answer to my question why I was not pre-screened. Could you explain to me again what really was involved." (Email from Applicant to Section Chief, October 8, 2015.) The Section Chief replied: "A decision not to pre-screen was based on your situation where you applied for a similar job in the same Section and Division and your term was not extended." (Email from Section Chief to Applicant, October 20, 2015.)

57. The Section Chief's response to Applicant apparently followed his consultation with the ASPM as to why they "did not do any internal pre-screening as the recruitment process called for." (Email from Section Chief to ASPM, October 16, 2015.) The ASPM responded: "[T]he only reason we did not prescreen [Applicant] was on the basis of the decision we had made about her L-T and furthermore this position is in the same division and the same team and similar role . . . [T]he internal [candidate] (which was only [Applicant]) was whom we spoke about separately and we did agree collectively that it made no sense as her case was atypical." (Email from ASPM to Section Chief, October 16, 2015.)

58. In his Grievance Committee testimony, the ASPM explained the rationale for not pre-screening Applicant in similar terms: "We had actually informed of her that which is going to lapse [i.e., her limited-term appointment]. Now, keeping in mind, this particular position . . . is actually from the same division, it is from the same section, it is from the same hiring manager, and the position is also of similar nature of what [Applicant] was doing." (Tr. I, pp. 248-249.) "But," he added, "we did not deter [Applicant] from applying to other positions, which I believe she did." (Tr. I, pp. 250.)

59. The Section Chief in his testimony allowed that the decision not to pre-screen Applicant was "atypical, meaning it's not really standard practice, but it might be a special case." (Tr. II, p. 128.) The SPM, for her part, testified that she could understand why Applicant had not been pre-screened, given that Applicant "wasn't an unknown quantity" and because she "carried out the same function and her performance had already been viewed." (Tr. I, pp. 73-74, 100.)

60. Following the October 7, 2015 meeting, Applicant circulated a summary to the Section Chief, Acting Division Chief, SPM and ASPM, in which she noted responses to various questions she had raised relating to her non-selection for the vacancy and the denial of the pre-screening interview, including possible bias in the selection process. She noted that the ASPM had refused to respond to one of her questions. On the copy circulated to the ASPM, he wrote that he "refused to respond simply because we have gone off topic and responding to someone who is not thinking straight and disturbed." Applicant has not disputed the Fund's assertion that this notation was not forwarded to her and came to light as part of the Grievance Committee discovery process. In his Grievance Committee testimony, the ASPM said he thought the question, which seemed to suggest personal favoritism on his part toward the selectee, was "uncalled for" and "not right." (Tr. II, p. 48.) The ASPM's notation gives rise to Applicant's complaint of "written abuse."

61. Applicant's limited-term appointment concluded on November 13, 2015. Thereafter, she was placed on special administrative leave without pay for the duration of the Grievance Committee proceedings. That status was extended in July 2017 until December 31, 2017.[3]

[3] *See supra* Applicant's request for provisional relief.

CHANNELS OF ADMINISTRATIVE REVIEW

62. Applicant pursued administrative review up to the level of the HRD Director and, thereafter, filed a Grievance with the Fund's Grievance Committee in which she challenged her non-selection for the vacancy. The Committee considered the Grievance in the usual manner, on the basis of oral hearings and the briefs of the parties.

63. In its Recommendation and Report, the Grievance Committee identified several irregularities in the selection process and "disagree[d]" with the Fund's contention that the "decision to exclude Grievant from consideration for [the vacancy] was not violative of any obligation it had to Grievant." (Grievance Committee's Recommendation and Report, January 7, 2017, p. 19.)

64. The Committee found nothing in the Departmental hiring guidelines that permitted the denial of a pre-screening interview to Applicant. The Committee concluded:

> There was no obligation in Fund law to create a hiring process that required pre-screening interviews. Nor is it inherently unfair to eliminate a candidate early in the hiring process who is already known to the hiring manager and other supervisors as someone who is not up to the job. However, once a Department creates and publicizes a hiring process, it should abide by its own rules.

(*Id*., p. 20.)

65. The Committee also found that the Department had failed to meet another of its guidelines with respect to Applicant's candidacy, which was that "[a]ll internal applicants are given feedback on interview performance and test results once the process has closed." The Committee found that when Applicant was removed from consideration for the position, she was not advised as to why she was not being interviewed or even of the fact that she would not be interviewed. (*Id.*, pp. 20-21.)

66. The Committee accordingly concluded that the "procedures devised by [the Department] for its selection process were not followed with respect to Grievant's application" and that the Department had prematurely removed her from the vacancy selection process in a way that was '"in violation of applicable procedures,'" quoting Staff Handbook, Chapter 11.03, Section 5.10, governing the Committee's standard of review. (*Id.*, pp. 21-22.)

67. The Grievance Committee also found fault with another element of the selection process. The Committee "strongly disapprove[d] of [the ASPM]'s involvement in [the contractual incumbent]'s selection without having disclosed their personal relationship" because it raised an appearance of a conflict of interest. At the same time, the Committee rejected a contention that the selection decision was tainted by ethnic or nationality discrimination or other improper motive. (*Id.*, pp. 24-25.)

68. Turning to the question of relief, the Committee invoked its standard of review, which provides in part: "The Grievance Committee shall . . . uphold the challenge only if it finds that the challenged decision was: . . . ; or iv. taken in violation of applicable procedures in a manner that affected the outcome." (Staff Handbook, Chapter 11.03, Section 5.10.) Although the Committee had identified several irregularities in the process of filling the vacancy, it decided that none of these had "affected the outcome." "When all of the evidence is considered," said the Grievance Committee, "Grievant would not have been selected for [the vacancy], even if she had been pre-screened with an interview and assessments prescribed by the Departmental guidelines." (*Id.*, p. 30.) The Committee accordingly concluded that there was no ground to rescind the non-selection decision.

69. As to Grievant's request for relief in the form of monetary compensation for *inter alia* "loss of her rightful opportunity to compete," the Committee referred to its remedial authority:

> If the Committee concludes that a complaint concerning a decision, as provided in paragraph 5.6, is well-founded, the Committee in making its recommendation to the Managing Director should assess the relief needed to correct the detrimental effects of the decision, taking into account the particular facts of the case. Such remedy may include monetary relief, but may not be punitive in nature.

(Staff Handbook, Chapter 11.03, Section 5.20.1.) The Committee expressed the following view: "Although loss or injury may be either tangible or intangible (e.g., emotional distress), if a prevailing party is awarded monetary relief in the absence of proof of loss or injury, then the award is punitive." (*Id.*, p. 33.) In the Committee's opinion, Grievant had failed to prove loss or injury and therefore no compensation was warranted.

70. The Committee also referred to differences between its approach to relief and that of the Administrative Tribunal, observing that the Tribunal has awarded monetary relief for procedural derelictions even when it found that the deviations from fair process did not affect the outcome. The Committee commented:

> Of course, the Tribunal has its own statute and, within the confines of that statute, the authority to set policy for the Fund. However, the Grievance Committee is limited in its jurisdiction and must abide by the instruction in Section 5.20.1 of Chapter 11.03 of the Staff Handbook that it may not recommend monetary relief that is punitive. *An award of damages simply because the Fund has deviated from its own procedures, without proof of injury or compensable suffering, amounts to a punitive award.* Because the Committee does not find evidence proving tangible or intangible harm in this case, an award of damages would transgress Section 5.20.1. The Committee therefore recommends that the request for monetary relief be denied.

(*Id.*, p. 34.) (Emphasis added.)

71. On January 7, 2017, the Grievance Committee recommended that Applicant's Grievance be denied in its entirety. On March 6, 2017, Fund Management notified Applicant that it had accepted the Grievance Committee's recommendation.

72. On June 6, 2017, Applicant filed her Application with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

73. The principal arguments presented by Applicant in the Application and Reply may be summarized as follows:

1. Applicant was wrongfully denied the opportunity to compete for a vacancy closely matching the position she had been occupying on a limited-term appointment, when she was denied a pre-screening interview in contravention of Department vacancy selection guidelines.

2. Applicant is entitled to relief because material violations of staff procedural rights are inherently damaging and Applicant suffered concrete, identified harm as a result of the vacancy selection process.

3. The Fund improperly denied Applicant relief after the Grievance Committee's findings of procedural violations in the vacancy selection process. The Grievance Committee and Fund Management should have followed Tribunal precedents awarding relief for intangible injury in cases of procedural failure.

4. Applicant was entitled to special consideration in her job search in light of the Departmental reorganization.

5. Applicant was subjected to an abusive written comment, to which managers failed to respond, when she raised concerns of bias in the selection process.

6. Applicant seeks as relief:

    a. rescission of the decision to deny her a pre-screening interview;

    b. granting Applicant "internal" status for purposes of applying to future Fund vacancies for which she meets the basic requirements;

    c. granting Applicant "incumbent" status for any future applications to Fund positions substantially resembling the limited-term position she had held;

    d. 3 years' salary as moral and intangible damages to "compensate [Applicant] for the Fund's denial of her rights, the wrongful truncation of

her valid application [for the vacancy], [the ASPM]'s unpunished abuse, and all harms that followed"; and

e. legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4 of the Statute, if it concludes that the Application is well-founded in whole or in part.

B. Respondent's principal contentions

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

1. The Fund's decision not to grant Applicant a pre-screening interview for the vacancy to which she applied was appropriate in the circumstances.

2. The vacancy selection decision was a reasonable exercise of managerial discretion, which followed proper Fund-wide processes and was not tainted by bias or other improper factors.

3. If the Tribunal concludes that there was a procedural fault in the selection process, no relief is appropriate in this case because Applicant has not shown that she experienced any harm as a result.

4. The decision of Fund Management to accept the Grievance Committee's recommendation was reasonable.

5. Applicant was not entitled to special consideration in her job search.

6. Applicant's claim of "abuse" is unfounded.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

75. 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. 3 (Employment of Staff Members), Rev. 7 (May 1, 2003), Section 3

76. GAO No. 3, Rev. 7, Section 3, governed the types of appointments to the staff of the Fund during the period of Applicant's employment. These were superseded as a result of the categories of employment (COE) initiative.[4] Applicant held a "limited-term appointment," as described by Section 3.02.2:

[4] *See supra* FACTUAL BACKGROUND.

Section 3. Types of Staff Positions and Appointments

This section sets forth the Fund's employment framework and the policies governing (a) staff positions, (b) staff appointments, and (c) benefits entitlements for the different categories of employment.

3.01 *Types of Staff Positions*

Staff members may be appointed to fill either a regular staff position or a term position.

3.01.1 *Regular positions*. Regular positions are for an indefinite period.

3.01.2 *Term positions*. Term positions are positions for a limited period of time and are subject to a sunset clause. They shall be designated by management, on the advice of the department concerned, and in consultation with the Human Resources Department and the Office of Budget and Planning.

3.02 *Types of Staff Appointments*

3.02.1 *Open-ended appointments*

3.02.1.1 Open-ended appointments are for:

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

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

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

(b) that require institutional knowledge and continuity.

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

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

. . . .

3.02.2 *Limited-term appointments*

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

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

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

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

budget positions are authorized for a limited period (term positions).

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

. . . .

B. Staff Handbook, Chapter 11.03, Section 5

77. The Grievance Committee's standard of review and the remedies it may recommend to Fund Management are governed by Staff Handbook, Chapter 11.03, Section 5, as follows:

5.10 Standard of Review

The Grievance Committee shall review the decision being challenged to determine whether it was consistent with applicable Fund rules and regulations, and uphold the challenge only if it finds that the challenged decision was:

i. taken by an authority or organ that did not have authority to take the decision;
ii. inconsistent with applicable Fund rules or regulations or otherwise based on an error of law;
iii. based on erroneous facts or in disregard of essential facts; or
iv. taken in violation of applicable procedures in a manner that affected the outcome.

And, when the decision challenged was taken in the exercise of discretionary authority, the decision was

i. improperly influenced by irrelevant factors, including bias, discrimination or ulterior motive; or
ii. based on a manifestly erroneous assessment of the information to be properly considered.

. . . .

5.20.1 Remedies

If the Committee concludes that a complaint concerning a decision, as provided in paragraph 5.6, is well-founded, the Committee in making its recommendation to the Managing Director should assess the relief needed to correct the detrimental effects of the decision, taking into account the particular facts of the case. Such remedy may include monetary relief, but may not be punitive in nature.

C. Staff Handbook, Chapter 5.01, Section 17

78. Staff Handbook, Chapter 5.01, Section 17, which governs administrative leave without pay pending decision on an appeal of termination of appointment, was referenced by the parties in relation to Applicant's request for provisional relief:

17.2 Administrative Leave without Pay Pending Decision on an Appeal of Termination of Appointment

In special circumstances where the staff member is at risk of irreparable harm (e.g., to preserve visa status or to avoid deportation), a staff member who has been notified that his or her appointment will be terminated and who initiates the grievance process concerning that decision as provided in "Grievance Committee", not later than the effective date of termination, may be placed on administrative leave without pay pending the outcome of the process. Any such period shall end on the last day of the month in which the Managing Director notifies the staff member of his or her final decision in the matter. If, during the period of administrative leave, the staff member requests an extension of such leave for the purpose of filing an application with the Administrative Tribunal, such extension may be granted for a period of three months or, if an application is filed in a timely manner with the Tribunal, until the date of the Tribunal's final judgment in the matter.

D. [Department] vacancy selection guidelines

79. The vacancy selection process at issue in this case was governed by guidelines particular to Applicant's Department and described as follows in a Departmental workshop presentation:

How do the Pre-Screening and Panel Interview work?

Step 1: Pre-screening

- 15-30 min. limit pre-screen of all eligible* [Department] applicants (e.g., 10 applicants) to determine the short-list

- Pre-screen conducted by Hiring Manager & HR Team

- Non-selected candidates for a panel interview will be notified accordingly

Step 2: <u>Panel Interview</u>

- Final short-list – pick 3 to 4 candidates for a panel interview including [Department] and non-[Department] candidates (based on pre-screen and other paper credentials)

- 60 min. panel interview + DDI Selection Assessment + Writing and or Technical Assessment

*Eligibility includes all structural HR policy criteria have been met + minimum qualifications in job standards have been met (degree + years of relevant experience)

CONSIDERATION OF THE ISSUES

80. The Application presents the following principal issues for consideration by the Administrative Tribunal: (1) Did the Fund abuse its discretion by denying Applicant the opportunity to compete for a position substantially similar to her expiring one, when it failed to afford her a pre-screening interview, thereby precluding the further consideration of her candidacy? (2) Did the Fund abuse its discretion in accepting the Grievance Committee's recommendation not to award relief to Applicant after the Committee found procedural faults in the vacancy selection process? (3) Was the Fund required to provide Applicant special consideration in her job search in light of the Departmental reorganization? (4) Has Applicant shown that she was subjected to abusive written comment, to which managers failed to respond, when she raised concerns of bias in the selection process? (5) If the Tribunal concludes that the Application is well-founded in whole or in part, what relief shall it prescribe?

A. <u>Did the Fund abuse its discretion by denying Applicant the opportunity to compete for a position substantially similar to her expiring one, when it failed to afford her a pre-screening interview, thereby precluding the further consideration of her candidacy?</u>

(1) <u>What standard of review governs Applicant's challenge to the decision not to afford her a pre-screening interview?</u>

81. In cases involving the review of individual decisions taken in the exercise of managerial discretion, this Tribunal consistently has invoked the following standard set forth in the Commentary on the Statute:

> [W]ith respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown

> to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.

Commentary on the Statute, p. 19.

82. In relation to challenges to selection decisions, the Tribunal has recognized that ". . . selection of a staff member to fill a vacancy, like other decisions that involve weighing the suitability of a staff member to perform particular functions within the organization, is the province of the decision-making officials." *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 72; *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), para. 98. Accordingly, "in reviewing selection decisions, the Tribunal may not substitute its own assessment of candidates' merits for that of the competent Fund officials." *D'Aoust (No. 2)*, para. 73; *Sachdev*, para. 100.

83. The Tribunal has also recognized 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." *D'Aoust (No. 2)*, para. 67. This is so even if the applicant does not claim to have been the candidate best suited to fill the post. *See D'Aoust (No. 2)*, para. 64 (applicant was "adversely affected" within the meaning of Article II of the Statute to challenge elements of vacancy selection process in which he was an unsuccessful candidate, without contending that he was the candidate best suited for selection). *See also Mr. I.K.M.*, ILOAT Judgment No. 2959 (2011), Consideration 3 ("rights of employees of international organisations to impugn decisions regarding appointments do not depend on their chances of successful appointment"); *D'Aoust (No. 2)*, para. 68 (collecting ILOAT cases).

84. Accordingly, when an applicant challenges the integrity of a selection process for a vacancy for which he or she has been an unsuccessful candidate, this Tribunal will test that process against the requirements of the Fund's internal law and practice, as well as general principles of international administrative law. In *D'Aoust (No. 2)*, the applicant raised a series of allegations of procedural irregularity, ranging from the initial eligibility screening, to the shortlisting of candidates by the Selection Panel, to the subsequent endorsement by the Department Head, and, finally, to the assessment and recommendation by the Review Committee. The Tribunal reviewed the facts of the case against the requirements of the internal law and concluded that the applicant had not established abuse of discretion in relation to the vacancy selection process. *D'Aoust (No. 2)*, paras. 75-132. Accordingly, no relief was granted.

85. By contrast, in *Sachdev*, paras. 150, 251-256, the Tribunal ordered monetary compensation where it concluded that an applicant's non-selection for a senior position in a joint IMF/World Bank undertaking was marked by a series of procedural faults. These included: failure to notify the applicant (who by reason of her then current position "had a unique interest in the vacancy") of the adoption of a new process for filling the position; failure to inform her of the manner and extent to which that process was to differ from the Fund's written rules; failure to post the advertisement for the vacancy on the Fund's intranet site; and failure to demonstrate

compliance with the obligation under Fund rules governing senior appointments to provide her meaningful feedback following non-selection. Although the Tribunal in *Sachdev* found compensable failures of fair process in the selection process, it sustained the non-selection decision itself.

86. In the instant case, the decision contested by Applicant is the decision not to afford her a pre-screening interview, as prescribed by the Department's vacancy selection guidelines. Although the Fund seeks to show that the "selection *decision* . . . was a reasonable exercise of managerial discretion" (emphasis added), Applicant emphasizes that the "question is not whether [Applicant] should have been selected on the merits, but whether she had a right to compete." She asserts that she was "wrongfully denied an opportunity to compete for a job closely matching her expiring one, and for which she was qualified. This was the injury." Furthermore, she states: "The dispute in this case is over the integrity of the selection process. [Applicant] is not claiming a right to be hired, or even to be shortlisted. She is instead arguing . . . that she was wrongfully denied her legal right to make her case in person to the hiring manager . . . that she should be shortlisted." Applicant identifies "[r]escission of the Fund's decision to deny her a 'pre-screening' interview"—rather than rescission of the non-selection decision itself—as among the forms of relief she seeks.

87. Accordingly, the question for the Tribunal is whether the decision to deny Applicant a pre-screening interview, thereby excluding her from further competition for the vacancy, 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.

(2) Did the Fund abuse its discretion by denying Applicant the opportunity to compete for a position substantially similar to her expiring one?

88. Applicant's chief complaint is that she was wrongfully denied the opportunity to compete for the vacancy because, as an "internal" candidate (i.e., a Department staff member) who met the eligibility requirements for the position, she was entitled to a pre-screening interview in accordance with the Department's vacancy selection guidelines. The necessary result of failing to afford Applicant a pre-screening interview was to eliminate her from the competition altogether, as pre-screening was a prerequisite to a candidate's advancing to the shortlist.

89. Respondent, for its part, maintains that a pre-screening interview was not required in the circumstances of Applicant's case, and, in any event, Applicant has not shown that the decision not to afford her a pre-screening interview unfairly prejudiced the outcome of the selection process. Respondent maintains that the decision not to grant Applicant a pre-screening interview was "appropriate in the circumstances," given that the position she applied for was essentially identical to the position she then occupied and that she would be working under the direct supervision of the same manager, who was the hiring manager for the position. "[T]he reason for her non-selection," states the Fund, "was the same as the reason for the non-extension of her current position: that is, her supervisor's assessment on the basis of her performance in the role."

90. It is clear that the Department's vacancy selection guidelines, by their terms, applied to Applicant and prescribed that, as an internal candidate who met eligibility requirements, she was

entitled to the benefit of a pre-screening interview before a decision was made as to which candidates would be shortlisted for the vacancy. Accordingly, the only question is whether, as Respondent asserts, the rule did not apply in the circumstances of Applicant's case.

91. The Fund advances three arguments in support of its position: (i) the Department's practice of conducting pre-screening interviews of all Department candidates does not amount to a Fund policy that was mandatory in every case; (ii) the purpose behind the pre-screening interview did not apply in the circumstances of Applicant's candidacy because she had already had the opportunity to demonstrate to the hiring manager her suitability for the position by carrying out a substantially similar job under his direct supervision; and (iii) the failure to afford Applicant a pre-screening interview did not prejudice the outcome of the selection process.

92. In support of its first argument, the Fund emphasizes that departments are given "wide latitude to determine the methods by which to shortlist and select candidates." The Fund seeks to justify the decision not to afford Applicant a pre-screening interview on the ground that the Department's practice of conducting pre-screening interviews did not amount to a "Fund recruitment policy that was mandatory in every case."

93. The Fund-wide policy, according to an HRD intranet posting included in the record of the case, provides that "[o]nce a vacancy closes, HRD sends the hiring department a preliminary list of candidates who meet the eligibility requirements for the position. . . . Departments may use various methods to shortlist and select (e.g., tests, one-on-one interviews, panel interviews)." The testimony of the HR Officer confirmed that a "department conducts its own recruitment" and may choose among various methods to establish a shortlist. (Tr. II, pp. 257, 261-262.)

94. Accordingly, the record shows that the Fund-wide policy was that departments were given discretion to fashion their own selection processes. In the view of the Tribunal, once Applicant's Department exercised that discretion and adopted a process that included pre-screening interviews for all internal candidates—a policy that managers testified was consistently applied—it was bound to abide by that process. An "organization is bound to observe the elements of its internal law governing selection decisions . . . ." *Sachdev*, para. 101; *D'Aoust (No. 2)*, para. 74, citing *In re Pinto*, ILOAT Judgment No. 1646 (1997), Consideration 6 ("When an organisation chooses to hold a competition it must abide by its written rules and by the general principles set forth in the case law, particularly insofar as they govern the formal side of the process.").

95. This is so because a transparent, rules-based vacancy selection process protects against arbitrariness and discrimination. It also creates expectations among Fund staff members that their applications for vacancies will be fairly considered in accordance with those rules. The Tribunal has held that the Fund constrains its discretionary authority when it communicates to staff members that particular rules will govern the employment relationship. *See Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-2 (March 13, 2013), para. 77; *Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012), para. 138. *See also Sachdev*, para. 111 ("As a Fund staff member vying for the position, Applicant reasonably could have expected that the

Fund's rules would have applied to the selection process or that she would have been informed of any departure from those rules.").

96. The record also shows that Applicant was not informed of the decision to exclude her from the competition and, accordingly, she did not receive feedback on her non-selection. This was in direct contravention of the guidelines, which stated: "Non-selected candidates for a panel interview will be notified accordingly." The failure to provide Applicant with any feedback—or even to let her know what had happened to her application for a vacancy for which she indisputably met the eligibility criteria—did not comport with the Department guidelines or general principles of international administrative law. *See Sachdev*, para. 149 (importance of giving feedback in cases of non-selection, especially where such feedback is prescribed by the written internal law).

97. For the foregoing reasons, the Tribunal concludes that Respondent's argument that the Department's practice of conducting pre-screening interviews of all internal candidates did not represent a "Fund recruitment policy" does not succeed in excusing the failure to afford Applicant a pre-screening interview in this case.

98. The Fund's next two arguments—that the purpose of the pre-screening interview, which was to give job applicants a chance to "go in front of a hiring manager and present themselves" (SPM, Tr. I, p. 72) was not pertinent in the circumstances of Applicant's candidacy, and that the lapse of the pre-screening procedure did not prejudice the outcome of the selection process—may be considered together. These arguments suggest that the reason Applicant was not pre-screened was not simply because the hiring manager already knew her but because a decision had already been made that she would not be selected for the vacancy. Was it fair in the circumstances to prejudge the suitability of a candidate for the position without subjecting her to the process prescribed for making that decision?

99. When Applicant queried her managers about the reason why she was not pre-screened, the Section Chief consulted the ASPM. The ASPM indicated to the Section Chief that the "only reason we did not prescreen [Applicant] was on the basis of the decision we had made about her L-T and furthermore this position is in the same division and the same team and similar role." (Email from ASPM to Section Chief, October 16, 2015.) The Section Chief then relayed this explanation to Applicant, maintaining that the decision was "based on [her] situation where [she] applied for a similar job in the same Section and Division and [her] term was not extended." (Email from Section Chief to Applicant, October 20, 2015.) *See also* Grievance Committee testimony of ASPM, Tr. I, pp. 248-249 (explaining decision in terms of non-extension of limited-term appointment and similarity of vacancy to Applicant's expiring position).

100. In his Grievance Committee testimony, the Section Chief said he "concurred" with the decision made by the ASPM and that the decision not to pre-screen Applicant was "atypical, meaning it's not really standard practice, but it might be a special case." (Tr. II, pp. 128-129, 141.) The SPM said she could understand why Applicant had not been pre-screened, given that Applicant "wasn't an unknown quantity" and because she "carried out the same function and her performance had already been viewed." (Tr. I, pp. 73-74, 100.)

101. These explanations may be contrasted with the testimony of Department managers that the pre-screening interview was "something that was automatic for [Department] staff" and was "specific for that position each and every time." (SPM, Tr. I, pp. 72, 77.) It was a "standard practice, if an internal candidate applied for a position," and it applied "[e]ven if we didn't think they were necessarily going to be the right candidate for the position . . . ." (former Division Chief, Tr. I, p. 194.) Respondent in its pleadings emphasizes that Applicant was afforded pre-screening interviews for each of the other vacancies within the Department to which she applied.

102. The following questions arise. Did the Fund's February 2015 decision that Applicant would not be offered the opportunity to continue in the Fund's employment after the expiration of her limited-term appointment (without competing and being selected for a position) justify her exclusion from the competition for a vacancy that arose when a contractual position substantially similar to her own was re-categorized as a staff appointment? Did the decision in relation to Applicant's limited-term appointment negate her legitimate expectation that she would be afforded a pre-screening interview for the vacancy to which she applied?

103. The Tribunal has held that the "decision to allow a limited-term appointment to expire without extension is not . . . primarily a 'performance-based decision'" and that the "question whether a limited-term appointment should be extended will thus, in most circumstances, depend on whether there is a need for the appointment to continue." *Hanna*, paras. 76, 78. Hence, the fact that Applicant was told that her limited-term appointment would expire by its terms would not ordinarily be dispositive of her suitability for other Fund employment. The question is, in the context of the revised COE and its transitional provisions, did the Fund take a decision in February 2015 that absolved the Department of its ordinary obligation to afford Applicant a pre-screening interview for the vacancy? For the reasons set out below, the Tribunal concludes that it did not.

104. When the Fund communicated to Applicant that there was "no plan to extend [her] beyond the date of [her] agreement" (Email from Acting Division Chief to Applicant, cc: Section Chief, February 9, 2015), it did not advise her that there would be any adverse consequence of that decision in terms of her ability to compete for other vacancies. To the contrary, she was told that she could apply to other vacancies, including the one which would arise when her own appointment expired. When a vacancy soon arose that "represented an almost identical role to her own," it was inconsistent with that communication to preclude her competition for the vacancy by denying her a pre-screening interview. Accordingly, the Tribunal concludes that it was not fair of Applicant's managers to justify her summary elimination from that competition on the basis that they had earlier decided that she would not be assured of continued employment following the expiration of her limited-term appointment.

105. It is settled law 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." *D'Aoust (No. 2)*, para. 67. The question here is whether Applicant's candidacy was fairly considered in all of the circumstances of the case. On the one hand, Applicant's Department had adopted a policy of affording a pre-screening interview to any Department staff member who applied, and met the eligibility requirements for, a vacancy posted within the Department. On the other hand, the Fund argues that its managers,

including the Section Chief who was Applicant's direct supervisor and the hiring manager for the vacancy, had concluded that Applicant's work performance in a substantially similar position did not merit the continuation of her employment under the categories of employment transitional arrangements upon the expiration of her limited-term appointment.

106. The Fund maintains that the pre-screening interview would not have served the purposes of that practice in Applicant's case, given that the hiring manager was well-acquainted with Applicant's work in a substantially similar job. In the view of the Tribunal, the question is not whether supervisors' concerns about Applicant's performance in her expiring position were well-founded or whether such concerns could be taken into account in deciding whether or not to shortlist or select her for the vacancy. The question is whether—in light of the Departmental vacancy selection guidelines and the individual assurance Applicant had been given that she could apply to vacancies as they arose—it was fair to Applicant to exclude her from the competition altogether so that her strengths and weaknesses would not be assessed as would those of any other internal candidate who might have applied.

107. The Tribunal concludes that it was fundamentally unfair of the Fund to prejudge Applicant's suitability as a candidate for a vacancy without subjecting her to the established process for making the selection decision. By their terms, the Departmental vacancy selection guidelines assured Applicant, as an internal candidate meeting eligibility requirements, of the benefit of a pre-screening interview before a decision was taken as to which candidates would be shortlisted for the vacancy. The rule itself does not admit of any exceptions. Nor does the evidence bear out Respondent's assertion that the circumstances of Applicant's candidacy were exceptional such that the rule should not apply in her case.

108. In the view of the Tribunal, the decision not to grant Applicant a pre-screening interview violated two sets of expectations legitimately held by Applicant: (i) that her application for the vacancy would be considered in accordance with the guidelines established by the Department; and (ii) that the fact that she had not been offered a further appointment to follow the expiration of her limited-term appointment did not prevent Applicant from applying to other vacancies, including for her own job (or, by implication, a substantially similar one) once it was posted.

109. The Tribunal additionally notes Applicant's allegation that the decision not to pre-screen her for the vacancy was improperly motivated to favor another candidate. Applicant submits that denying her a pre-screening interview demonstrates the ASPM's concern that Applicant might, in fact, prevail in the competition. The inference of improper motive, Applicant argues, is compounded by the fact that Applicant was not informed that she had been excluded from the competition, effectively impeding her opportunity to protest. Respondent, for its part, maintains that the evidence does not show that the ASPM manipulated the recruitment process to favor the selection of the contractual incumbent.

110. In light of its decision that the Fund acted unfairly in not affording Applicant a pre-screening interview, given the terms of the Department's vacancy selection guidelines and Applicant's legitimate expectations, the Tribunal finds it unnecessary to decide the question of improper motive. The Tribunal is necessarily troubled, however, that rather than simply proceeding with the pre-screening of Applicant and allowing the selection process to run its

course, the ASPM decided to expend time and effort to decide that pre-screening was not required. The Tribunal is satisfied on the record before it that it was the ASPM who made that decision in the first place, then sought out consultation with HRD, and lastly conveyed the decision to the Section Chief who concurred in it. The ASPM's efforts to make exception to the ordinary rule in Applicant's case, along with his failure to disclose his personal relationship with the contractual incumbent, and the fact that Applicant was not informed of the decision that she would not be pre-screened, when taken together raise a warning light as to the reason behind the challenged decision. What is clear is that the decision was not an oversight but a considered decision in contravention of the required procedures.

111. For the following reasons, the Tribunal concludes that Applicant was not treated fairly in relation to the selection process for the vacancy. First, the Department's policy and practice of providing all internal candidates meeting eligibility requirements with a pre-screening interview gave Applicant reason to expect that her candidacy would be treated in the same manner as that of any other "internal" candidate. Second, the expectation that she could make viable applications to vacancies was reinforced by the individualized assurance she had been given by her managers in February 2015. When a vacancy arose for a position substantially similar to her own, the Department instead of following its routine procedures took pains to make exception to the usual practice, seeking to justify Applicant's exclusion on the ground that her limited-term appointment would not be extended. Finally, when managers decided to exclude her from any consideration for the vacancy, Applicant had a right to be informed of that decision promptly, in good time to attempt to resolve the controversy.

112. For the foregoing reasons, the Tribunal concludes that the Fund abused its discretion when it decided not to afford Applicant a pre-screening interview, thereby excluding her from the competition for the vacancy.

B. Did the Fund abuse its discretion in accepting the Grievance Committee's recommendation not to award relief to Applicant after the Committee found procedural faults in the vacancy selection process?

113. In addition to seeking relief on the basis that the Fund abused its discretion in denying Applicant a pre-screening interview, Applicant also asks the Tribunal to decide that the Fund should have awarded her relief at an earlier stage of the dispute resolution process, that is, after the Grievance Committee found that procedural irregularities marked the vacancy selection process. As detailed above,[5] the Committee concluded that these procedural faults did not affect the outcome of the selection process. Applying the provisions of the Fund's internal law governing the Committee's standard of review and the remedies it may recommend, the Committee concluded that it was not appropriate to recommend any relief in the circumstances of Applicant's case. Fund Management accepted that recommendation.

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

114. Applicant contends that the Tribunal has a duty to ensure that: "(1) the Tribunal's interpretations of Fund law are applied throughout the Fund—including at the Grievance Committee; (2) the Fund does not endorse or pursue the development of a competing body of Fund law, such as here on the question of damages; and (3) justice is done in a timely and fair manner in disputes raised by staff members against the Fund, particularly where (as here) violations are established."

115. Respondent, for its part, maintains that (i) the Grievance Committee's recommendation is not itself an "administrative act" that is capable of review under the Tribunal's Statute, (ii) the recommendation was consistent with the provisions of the Fund's internal law governing the Committee's standard of review and authority to recommend remedies, (iii) awarding relief in this case would not be consistent with Tribunal precedents and accordingly no issue arises of lack of a unified body of Fund law, and (iv) it was within Management's discretion to accept a reasoned recommendation of the Grievance Committee, and Management had every reason to do so in the interest of supporting the efficiency and credibility of the Fund's dispute resolution system.

116. Insofar as Applicant alleges that the Fund abused its discretion in accepting the Grievance Committee's recommendation not to award relief in her individual case, the question arises whether the acceptance by Fund Management of a Grievance Committee recommendation in a particular case is an "administrative act" of the Fund in terms of Article II of the Statute. The Tribunal has held that the Grievance Committee's recommendations themselves do not constitute such "administrative acts." *D'Aoust*, para. 17. The Tribunal has also observed that the Grievance Committee is "advisory to management [and] the Fund's management is free to reject its recommendations, although it has made a practice of accepting them." *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 64. In the view of the Tribunal, even assuming that the Fund's acceptance of the Grievance Committee's recommendation is an "administrative act" justiciable by the Tribunal, it was not unreasonable for the Fund to accept the recommendation in the instant case given the Grievance Committee's standard of review and the fact that the "Committee's work is a component part of a process for the settlement of disputes rather than that of an adjudicatory body." *Id.* Applicant, in any event, does not seek separate relief on this ground.

117. The Tribunal considers that the essential issue raised by Applicant's challenge to the Fund's acceptance of the Grievance Committee's recommendation in her case is that the Grievance Committee and the Administrative Tribunal have taken differing approaches to the question of remedies for intangible injury, especially in relation to failures of fair process. As noted, the Grievance Committee's standard of review, as prescribed by Staff Handbook, Chapter 11.03, Section 5.10, states in pertinent part: "The Grievance Committee shall . . . uphold the challenge only if it finds that the challenged decision was: . . . ; or iv. taken in violation of applicable procedures *in a manner that affected the outcome*." (Emphasis added.) The Tribunal, in applying the remedial provisions of its own Statute, and consistent with the practices of other international administrative tribunals, has held that it has "authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision." *Ms. "C",*

Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44. (The question of what relief the Tribunal shall order in this case is treated below.[6])

118. It is notable that although Applicant has framed the argument principally as a challenge to the "Fund's agreement with [the] Grievance Committee Recommendation against relief" in her individual case, she also notes, citing Article II, Section 2(b), of the Tribunal's Statute, that the "Tribunal is empowered to order even major changes to the Grievance Committee's method as a matter of regulatory review." The Tribunal's jurisdiction extends to challenges to "regulatory decisions" of the Fund, which are defined by Article II, Section 2(b), as "any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund." Respondent, for its part, does not address Applicant's complaint as a challenge to a "regulatory decision."

119. In the view of the Tribunal, Applicant has not clearly raised, either in written pleadings or at oral argument, a challenge to the "regulatory decision" governing the Grievance Committee's standard of review. Nor is rescission of that "regulatory decision" a form of relief she seeks. In the circumstances, it is not appropriate for the Tribunal to address such a challenge.

120. At the same time, the Tribunal notes Applicant's assertions that "Fund staff are entitled to a unified body of Fund law and rights" and that the Fund's approach ". . . will force future grievants to the Tribunal's door to obtain justice under the Tribunal's doctrines"; Applicant contends that such an approach is "not consistent with a 'robust' dispute resolution system," which is '"fair and seen to be fair."' (Quoting *Ms. K. Abu Ghazaleh, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2015-2 (November 11, 2015), para. 53.) In the view of the Tribunal, in interpreting the Fund's internal law, it is important to bear in mind the desirability of coherence within the Fund's dispute resolution system. To the extent possible, the Tribunal considers it would be desirable were the Grievance Committee, in interpreting its own mandate, to strive to decide matters consistently with the jurisprudence of the Administrative Tribunal.[7]

121. The Tribunal additionally notes with concern that the Grievance Committee in its Recommendation and Report in Applicant's case not only has concluded that it is beyond its own

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[6] *See infra* REMEDIES.

[7] In respect of its own decision-making process, the Tribunal has observed that when "presented with a question of interpretation of the Fund's internal law, the Tribunal will seek to interpret the various rules of the Fund in a manner that ensures they are consistent with one another," *Mr. E. Verreydt, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-5 (November 4, 2016), para. 70, and that in case of conflict among provisions of the law, where there is a "clear hierarchy of norms," the higher norm will prevail, *Mr. J. Prader, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-1 (March 15, 2016), para. 65.

remit to recommend relief when it decides that a failure of fair process has not "affected the outcome" but also has characterized the Tribunal's awards of compensation for procedural failure as tantamount to "punitive damages." The Committee attempts to contrast Staff Handbook, Chapter 11.03, Section 5.20.1 (which provides that the remedies the Committee may recommend may "include monetary relief, but may not be punitive in nature") with the practices of the Administrative Tribunal.

122. The Tribunal underscores that it is its practice to award compensation for intangible injury, which may arise in a number of circumstances. The purpose of such compensation is to make applicants whole, especially where a failure of fair process or other intangible injury does not warrant the rescission of the decision contested or where there is no decision to rescind.[8] The Tribunal emphasizes that its remedial practices are rooted in principles of compensation and not punishment.

123. As to Applicant's argument that the Fund's dispute resolution system is lacking in coherence with respect to its approach to remedies, the Tribunal recalls it observations in *Ms. "GG" (No. 2)*, paras. 430-431: "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. . . . 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."

C. Was the Fund required to provide Applicant special consideration in her job search in light of the Departmental reorganization?

124. Applicant contends that she was entitled to special consideration, including preferential treatment vis-à-vis the contractual incumbent, in her quest for continued employment with the Fund. Applicant submits that because the Departmental reorganization delayed the posting of the job she would be leaving at the conclusion of her limited term, a "reduction in strength was at least temporarily pursued by the Fund." Applicant accordingly seeks to invoke the provisions of the Fund's internal law governing separation of staff members in cases of reduction in strength, abolition of position or change in job requirements. *See* GAO No. 16, Rev. 6, Section 12.

125. The Fund responds that the Departmental reorganization did not entitle Applicant to any special consideration in her search for further Fund employment because "Applicant's own position simply expired in accordance with its terms." Under the governing law, GAO No. 3, Rev. 7, Section 3.02.2.2, "[l]imited-term appointments shall not carry any expectation of conversion to open-ended appointments in the position." Respondent maintains that "Applicant had no claim to further employment beyond that period, and no right to special consideration—

[8] *See infra* REMEDIES; Monetary compensation for intangible injury.

along the lines set out in GAO 16 for the redundancy context—in her efforts to secure a subsequent position."

126. The Tribunal has observed, with respect to the employment framework that prevailed during the period of Applicant's employment, that a "limited-term appointment is a distinct category of employment designed to provide the Fund with flexibility to structure its workforce in response to evolving needs," and that "[w]hen a staff member accepts such an appointment, the staff member is on notice that the appointment will conclude by its terms unless an extension is offered." *Hanna*, para. 94.

127. In the case of *Hanna*, it was not disputed that the position occupied by the applicant during her limited-term appointment would cease upon the expiration of her appointment and the functions she performed would be assigned to other employees. *Id.*, para. 98. The Tribunal nonetheless rejected the view that GAO No. 16, Rev. 6, Section 12, would apply: "Persons separating from the Fund as a consequence of the expiration of a limited-term appointment do not benefit from the same entitlements as those separating as a consequence of abolition of position. Although such entitlements may apply when a limited-term appointment is cut short before the end of the term," said the Tribunal, "they do not apply when abolition of the position coincides with the expiration of the limited-term appointment." *Id.*, para. 101. Because the "purpose of the reassignment assistance provision of GAO No. 16, Rev. 6, Section 12, is to avoid separation of a staff member holding an expectation of continued employment," that provision is "inapposite in the circumstance of the expiration of a limited-term appointment." *Id.*, paras. 102-103.

128. Is there something in the circumstances of the instant case that requires a different conclusion here? Applicant asks the Tribunal to infer that she held an expectation of continued employment because there were plans to convert her position to a term position as a consequence of the revised COE, following the expiration of her limited-term appointment. Applicant asserts that "she had—until the freezing of the position—the prospect of converting to a permanent version of her limited-term position, which nearly everyone in her situation was allowed to do" and that "[h]ad the position been reinstated earlier, she would almost certainly have occupied it and continued on in the Fund's service."

129. The record of the case, however, tells a different story. Not only was Applicant's appointment to expire by its terms, but Applicant's managers had taken the additional step of advising her nine months earlier that no further Fund employment would automatically be afforded to Applicant. Although Applicant was told that she could apply to the position she had occupied once the vacancy was posted, as well as to other positions, she was also reminded of her lack of success at other job applications within the Department and was warned that she should seek out other opportunities including outside the Fund. (Email from Acting Division Chief to Applicant, cc: Section Chief, February 9, 2015.) Applicant has not disputed the Fund's assertion that she did not apply to the vacancy created by the expiration of her appointment once it was posted in spring 2016, after she had left active employment with the Fund.

130. Applicant has not brought to light evidence that anything in the circumstances surrounding the expiration of her limited-term appointment, including the reorganization of the

Department or the revision of the Fund's categories of employment, created any expectation of her continuing in the Fund's employment past the expiry of her limited-term appointment. To the contrary, Applicant was expressly notified that she would not be extended beyond the end of that appointment.

131. Accordingly, the Tribunal concludes that the Fund was not obliged to give Applicant any special consideration in connection with her job search.

D. Has Applicant shown that she was subjected to abusive written comment, to which managers failed to respond, when she raised concerns of bias in the selection process?

132. Applicant's claim that she was subjected to "written abuse" refers to the ASPM's notation on the summary Applicant had circulated to the Section Chief, Acting Division Chief, SPM and ASPM of their meeting of October 2015, in which she had raised various questions relating to her non-selection for the vacancy and denial of the pre-screening interview, including possible bias in the selection process. Applicant had noted that the ASPM had refused to respond to one of her questions. On the copy circulated to the ASPM, he wrote that he "refused to respond simply because we have gone off topic and responding to someone who is not thinking straight and disturbed." Applicant has not disputed the Fund's assertion that this notation was not forwarded to her and came to light as part of the Grievance Committee discovery process. In his Grievance Committee testimony, the ASPM said he thought that Applicant's question, which seemed to suggest personal favoritism on his part toward the selectee, was "uncalled for" and "not right." (Tr. II, p. 48.)

133. Applicant characterizes as an "aggressive smear" the ASPM's written notation that she was "not thinking straight and disturbed." Applicant contends that the ASPM launched a "vehement personal attack" against her "without rebuke" from the management team.

134. Respondent maintains that a document that was not circulated to Applicant and was discovered only through the course of litigation cannot support a cause of action for "written abuse," and, in any event, the notation of which Applicant complains does not rise to the level of prohibited conduct. The Fund submits that the ASPM's Grievance Committee testimony explains that his comment merely reflected his offense at Applicant's accusation that he had not been objective in his assessment of the candidates in the vacancy selection process.

135. In the view of the Tribunal, the single notation cited by Applicant is insufficient to substantiate a claim of "abuse" by the ASPM. *See generally Ms. "GG" (No. 2)*, paras. 191-195, 279-281 (awarding relief where supervisor's pattern of hostile conduct had an unfair and adverse effect on the applicant's conditions of employment). The Tribunal concludes that although the written comment may have been inappropriate, Applicant has not established that it constituted actionable workplace hostility to which managers failed to respond.

CONCLUSIONS OF THE TRIBUNAL

136. For the reasons elaborated above, Applicant has prevailed on her claim that the Fund abused its discretion in deciding not to afford her a pre-screening interview—thereby excluding

her from the competition for the vacancy—in contravention of Departmental vacancy selection guidelines and individual assurances that she could apply for vacancies for which she met the eligibility criteria. Furthermore, the Fund failed to notify Applicant that she had been excluded from the competition. These acts were in breach of the Fund's rules and Applicant's legitimate expectations.

137. The Tribunal has also concluded that the following additional complaints of Applicant are not sustained: (a) that the Fund abused its discretion in accepting the Grievance Committee's recommendation not to award Applicant relief after the Committee found procedural faults in the vacancy selection process; (b) that the Fund was required to provide Applicant special consideration in her job search in light of the Departmental reorganization; and (c) that Applicant was subjected to abusive written comment to which managers failed to respond.

REMEDIES

138. Applicant seeks as relief: (a) rescission of the decision to deny her a pre-screening interview; (b) granting her "internal" status for purposes of applying to future Fund vacancies for which she meets the basic requirements; (c) granting her "incumbent" status for any future applications to Fund positions substantially resembling the limited-term position she had held; (d) 3 years' salary as moral and intangible damages to "compensate [Applicant] for the Fund's denial of her rights, the wrongful truncation of her valid application [for the vacancy], [the ASPM]'s unpunished abuse, and all harms that followed"; and (e) legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4 of the Statute, if it concludes that the Application is well-founded in whole or in part.

139. The Fund responds that the alleged procedural fault in the selection process does not create an automatic basis for compensation in the absence of harm to Applicant and that the nature and severity of any procedural error here is minimal as compared with other cases in which the Tribunal has awarded compensation for intangible injury.

140. 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.

141. The Tribunal has observed that its jurisprudence reflects that its remedial powers fall broadly into three categories: (i) rescission of the contested decision, together with measures to correct the effects of the rescinded decision through monetary compensation or specific performance; (ii) compensation for intangible injury resulting from procedural failure in the taking of a sustainable decision; 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. *Ms. "GG" (No. 2)*, para. 444; *Mr. E. Verreydt*,

Applicant v. International Monetary Fund Respondent, IMFAT Judgment No. 2016-5 (November 4, 2016), para. 112. In all three categories, the Tribunal has had occasion to compensate applicants for "intangible injury." *Ms. "GG" (No. 2)*, para. 445.

142. In this case, the Tribunal has concluded that the Fund abused its discretion when it decided not to afford Applicant a pre-screening interview, thereby excluding her from the competition for the vacancy, and failed to notify her of that decision. The question is how to correct the effects of these breaches of the Fund's rules and Applicant's legitimate expectations.

143. In the view of the Tribunal, it would not be practicable to rescind the decision denying Applicant a pre-screening interview. Nor does the Tribunal accept that in order to correct the effects of the Fund's abuse of discretion it is necessary to grant Applicant's requests for relief in the form of affording her (i) "internal" status for purposes of applying to future Fund vacancies for which she meets the basic requirements or (ii) "incumbent" status for future applications to Fund positions substantially resembling the limited-term position she had held. In this regard, the Tribunal notes that Applicant availed herself of multiple opportunities to seek further employment with the Fund, which she pursued without success. Applicant has not disputed the Fund's assertion that she was granted pre-screening interviews for each of the other vacancies for which she applied within the Department. Nor has she disputed that she did not apply, after having left active employment with the Fund, for the vacancy created by the reclassification of her former job as a "term" appointment.

A. Monetary compensation for intangible injury

144. In the circumstances of the case, the appropriate means of correcting the effects of the Fund's breaches of its rules and of Applicant's legitimate expectations is to award her monetary compensation for intangible injury. The Tribunal has observed that 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." *Ms. "GG" (No. 2)*, para. 445, citing *Negrete*, para. 151.

145. The Tribunal has also recognized that intangible injury, by its nature, will be difficult to quantify. *Ms. "GG" (No. 2)*, para. 446. The Tribunal has not required applicants to offer proof of harm. Rather, the Tribunal's approach in such cases is to "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." *Id.* This is because "[c]ompensation 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." *Id.*, para. 448.

146. Where an applicant succeeds in a challenge to the integrity of the selection process for a vacancy for which she was an unsuccessful candidate, she will have incurred some measure of injury. The right to relief in such cases is a corollary of the recognition of standing to pursue such claims. If an applicant has standing to raise an allegation that he has been denied fair treatment in the selection process for a vacancy, even without contending that he was the

candidate best suited to fill the post, *see D'Aoust (No. 2)*, para. 64, then he is entitled to relief if he prevails on such claim.

147. Here, the essence of the harm is found less in the loss of an opportunity and more in the breach of Applicant's expectation of fair treatment. The nature of the particular obligation that has been breached was to treat Applicant as any other Department staff member seeking to apply to a Department vacancy for which she met minimum eligibility requirements, that is, to afford her a pre-screening interview irrespective of the likelihood of her ultimate success in the competition. A second obligation that has been breached was to give Applicant timely notification that her candidacy would not go forward, that is, of her non-selection for the shortlist by virtue of the denial of the pre-screening interview.

148. In setting an award of monetary compensation for intangible injury, the Tribunal will also look to any aggravating or mitigating circumstances. *Ms. "GG" (No. 2)*, para. 446. In this case, aggravating circumstances include that the decision was a considered choice and that the circumstances surrounding that decision raise questions as to the reason for the decision. Evidence that Applicant had a relatively slim likelihood of success in the application for the vacancy does, however, serve to mitigate the harm.[9]

149. Having regard for these factors, the Tribunal sets the compensation to correct the effects of the Fund's failure to afford Applicant a pre-screening interview, thereby excluding her from the competition for the vacancy, as well as to notify her of that decision, at $7,500.

B. Legal fees and costs

150. 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.

151. In accordance with Rule IX, para. 5, of the Tribunal's Rules of Procedure, Applicant included with the Reply the amount and supporting documentation of requested legal fees and costs incurred as of that date. Following the oral proceedings, as requested by the Tribunal,

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[9] In this regard, it is worth noting that the International Labour Organization Administrative Tribunal (ILOAT) has awarded modest compensation for non-material harm for the violation of the right to compete for a post where a complainant's candidature lacked "any real prospect of success." *See Mr. I.K.M.*, ILOAT Judgment No. 2959 (2011), Consideration 9.

Applicant submitted a Supplementary Request for Costs on November 20, 2017. The Fund has responded to Applicant's requests in its Rejoinder and its Response of November 29, 2017.

152. Applicant seeks legal fees and costs totaling $33,867.83, of which $684.84 (invoice covering September 2017) relates to a complaint that has not been considered by either the Grievance Committee or the Tribunal.[10] Applicant seeks "[r]eimbursement of all fees and costs incurred by [Applicant] in this litigation, including for the Grievance Committee stage, in light of the Committee's refusal to apply Tribunal doctrines, or to award costs for her well-founded grievance."

153. Respondent, for its part, asks the Tribunal to apply a principle of proportionality to any fee award, such that it "fairly represents the extent to which the Applicant prevailed on her claims for relief, and the effort associated with the building [of] the record for any such claim." In the Fund's view, the case "did not pose any complex legal questions or require development of a complex factual record." The Fund also submits that "Applicant has employed a scattershot approach to her argumentation as this case has evolved, occasionally launching new lines of attack as she formulated the theory of her case." Additionally, the Fund objects to Applicant's claim for legal fees and costs that relate to a complaint that the Grievance Committee and Tribunal did not consider.

154. In *Ms. "C", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1)*, IMFAT Order No. 1997-1 (December 22, 1997), the Tribunal established principles guiding its awards of legal fees and costs. These include that compensable fees and costs include those incurred for representation in the channels of administrative review that must be exhausted before the filing of an application with the Tribunal; that a "measure of proportionality" will apply, based on the degree to which an applicant is successful in the context of her total claims; and that in determining compensable costs, there is "no legal relationship between the amount of compensation awarded to Applicant and the costs of legal representation."

155. It is "settled jurisprudence that this Tribunal may award attorney's fees and costs for representation in proceedings antecedent to the Tribunal's review." *Tosko Bello*, para. 99; *Sachdev*, para. 258. Applicant's request for "all fees and costs . . . in this litigation, including for the Grievance Committee stage," is predicated in part on the theory, rejected by the Tribunal, that the Fund abused its discretion in accepting the Grievance Committee's recommendation not to award relief to Applicant after the Committee found procedural faults in the vacancy selection process. The Tribunal accordingly denies Applicant's request that *all* of the costs she incurred at the Grievance Committee stage should be borne by the Fund. Instead, those costs will be subject to the same principle of proportionality to be applied to costs incurred before the Administrative Tribunal.

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[10] *See supra* para. 8.

156. Where, as here, an applicant has prevailed in part on her application, the Tribunal will weigh the "relative centrality and complexity" of the various claims and their "ultimate disposition" by the Tribunal. *Mr. "F", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2005-1)*, IMFAT Order No. 2005-1 (April 18, 2005). In setting an award of legal fees and costs, the Tribunal will also take into account the record assembled by Applicant's counsel; in *Mr. "F"*, Order No. 2005-1, the Tribunal concluded that the "record assembled and argued by Applicant's counsel in pursuit of [the principal but unsuccessful] claim was indispensable to the Tribunal's award to Applicant of substantial relief on other substantial counts [such that] the Fund should bear the great majority of Applicant's legal costs."

157. In this case, Applicant has prevailed on her chief complaint, namely, that the Fund abused its discretion when it decided not to afford Applicant a pre-screening interview, thereby excluding her from the competition for the vacancy, and failed to notify her of that decision. The Tribunal has concluded above that although that abuse of discretion was in breach of Applicant's expectation of fair treatment, it had little in the way of material consequence. In addition, the Tribunal observes that Applicant's counsel expended considerable time and effort, up to and including in the oral proceedings before the Tribunal, in pursuing several non-meritorious claims. At the same time, the Tribunal also considers that Applicant has raised a significant issue relating to the coherence in the remedial measures provided by the Fund's dispute resolution system, and it is mindful that the ". . . purpose of Article XIV, Section 4 is to provide for cost-shifting in favor of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members." *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 138.

158. Having considered the representations of the parties, and the criteria set out in Article XIV, Section 4, of the Statute, the Tribunal concludes that Applicant shall be awarded 50 percent of the total amount of legal fees and costs incurred by Applicant in this case (after excluding legal fees and costs incurred in relation to a complaint not considered by either the Grievance Committee or Administrative Tribunal). That sum is $16,591.50.

DECISION

FOR THESE REASONS

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

1. Ms. "NN" has prevailed on her claim that the Fund abused its discretion when it decided not to afford her a pre-screening interview—thereby excluding her from the competition for the vacancy—in contravention of Departmental vacancy selection guidelines and individual assurances that she could apply for vacancies for which she met the eligibility criteria. Furthermore, the Fund failed to notify Ms. "NN" that she had been excluded from the competition.

2. For these breaches of the Fund's rules and her legitimate expectations, Ms. "NN" is awarded $7,500 as compensation.

3. The following additional complaints of Ms. "NN" are not sustained:

    a. that the Fund abused its discretion in accepting the Grievance Committee's recommendation not to award Ms. "NN" relief after the Committee found procedural faults in the vacancy selection process;

    b. that the Fund was required to provide Ms. "NN" special consideration in her job search in light of the Departmental reorganization; and

    c. that Ms. "NN" was subjected to abusive written comment to which managers failed to respond.

4. The Fund shall also pay Ms. "NN" $16,591.50, being 50 percent of the total amount of legal fees and costs incurred by Ms. "NN" in this case (after excluding legal fees and costs incurred in relation to a complaint not considered by either the Grievance Committee or Administrative Tribunal).

Catherine M. O'Regan, President

Andrés Rigo Sureda, Judge

Edith Brown Weiss, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
December 11, 2017