

REGISTRY'S SUMMARY<sup>1</sup>: *Mr. "OO", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-2 (December 17, 2019)

NON-CONVERSION OF FIXED-TERM APPOINTMENT – STANDARD OF REVIEW – “PERFORMANCE” DISTINGUISHED FROM “CAREER POTENTIAL” – B-LEVEL DIVERSITY HIRING INITIATIVE – FAIR TREATMENT – REMEDY FOR INTANGIBLE INJURY

Applicant challenged the non-conversion of his fixed-term appointment to an open-ended appointment. The governing Fund law during the relevant period (GAO No. 3, Rev. 7, and the Guidelines for Conversion of Fixed-Term Appointments) required that three criteria be satisfied for conversion, namely, that the appointee meets “performance” requirements, the appointee demonstrates “career potential” with the Fund, and there is a “staffing need” on the part of the Fund.

The Fund grounded the non-conversion of Applicant’s appointment on the latter two criteria. Applicant challenged the Fund’s reliance on those criteria, given the context of his recruitment through the Fund’s B-Level Diversity Hiring Initiative (Initiative). The Initiative provided central funding for a limited number of three-year, fixed-term appointments at the B-Level for staff members recruited from underrepresented regions of the world. The central funding covered the cost to a department of employing, for three years, an Initiative recruit in a job that was not part of the department’s complement of full-time equivalent (FTE) positions.

The Tribunal began by addressing Applicant’s contention that the Initiative, and/or the terms of his recruitment through the Initiative, meant that the Fund could not ground the non-conversion decision on either of its stated reasons. After reviewing the arguments of the parties and the record of the case, the Tribunal concluded that the Fund’s discretionary authority to decide whether to convert Applicant’s fixed-term appointment to an open-ended appointment was not constrained by his recruitment through the Initiative, either as a matter of Fund law or as a matter of expectation created. Accordingly, the Fund could rely on the usual criteria for conversion of fixed-term appointments.

The Tribunal next considered whether the non-conversion decision represented an abuse of the Fund’s discretion. The Tribunal noted that Applicant’s case was the first to come before it in which the Fund had not based the contested non-conversion decision on failure to meet “performance” requirements. The Tribunal accordingly had to decide how to apply the abuse of discretion standard in deciding a challenge to a non-conversion decision taken on the ground that the fixed-term appointee, although meeting “performance” standards, had failed to demonstrate “career potential.” The Tribunal contrasted the assessment of

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<sup>1</sup> This summary is provided by the Registry to assist in understanding the Tribunal’s Judgment. It does not form part of the Judgment. The full Judgment of the Tribunal is the only authoritative text. The Tribunal’s Judgments are available at: [www.imf.org/tribunal](http://www.imf.org/tribunal).

“performance,” which will necessarily be a backward-looking exercise, with the assessment of “career potential,” which requires managers to project the fixed-term appointee’s future trajectory. “To the extent that the assessment of ‘career potential’ will rely in part on the evaluation of the individual’s ‘performance’ to date,” said the Tribunal, “that aspect of the assessment is reviewable under the standards applicable to other performance-based decisions.” (Para. 142.) Insofar as the projection of “career potential” calls upon managers to make a judgment about the staff member’s likely future contribution to the Fund, “it will be informed by managerial expertise, including knowledge of the institution. As such, it will be entitled to a considerable degree of deference by the Tribunal.” (*Id.*)

Applying that standard of review, the Tribunal considered whether Applicant had established that the Fund had failed to provide him with (a) assignments that afforded a fair opportunity to demonstrate “career potential” and (b) adequate notice of alleged shortcomings that would figure in the assessment of his “career potential” and opportunity to remedy them. In assessing whether a fixed-term appointee has been given adequate notice of “performance” shortcomings that will reflect adversely in an assessment of “career potential,” said the Tribunal, “what is important is that the fixed-term appointee is given notice (a) of observed shortcomings and (b) that these may figure in the decision whether the appointment will be converted to open-ended status.” (Para. 169.) The Tribunal found that this had been done in Applicant’s case. The Tribunal also decided that, in taking the measure of Applicant’s “career potential,” it was not unreasonable for managers to have considered Applicant’s possibilities for future promotion. Furthermore, although Applicant’s “performance” was deemed to fall within the “Effective” range, it was within managers’ discretionary authority to make a considered determination that his “career potential” fell short of that required for conversion of his fixed-term appointment. In the view of the Tribunal, Applicant’s fixed-term performance monitoring identified a pattern of shortcomings relating to competencies in managerial leadership and initiative that reasonably could have led managers to conclude that Applicant lacked potential for a career with the Fund. Accordingly, the Tribunal concluded that the Fund did not abuse its discretion in taking the non-conversion decision on the ground that Applicant did not demonstrate “career potential” with the Fund.

Having sustained the non-conversion decision on the ground of lack of “career potential,” the Tribunal did not find it necessary to decide whether the decision might also be sustained on the basis of lack of “staffing need.” (The Fund had described the two criteria as independently sufficient bases for the non-conversion decision.)

The Tribunal additionally decided that Applicant had not established that the non-conversion decision was improperly motivated by bias or discrimination.

The Tribunal next considered whether the Fund had treated Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative. The Fund

had explained that the Initiative was to “provide top candidates entrée to the Fund from which they could learn the institutional culture, build networks, and make themselves more competitive for B-Level vacancies as they arose.” Recruitment through the Initiative differed from the usual fixed-term appointment process in that it provided funding for Applicant’s B-Level position for a three-year term without any provision for continuation of the position at the conclusion of the term. Accordingly, said the Tribunal, supervisors’ usual responsibilities, including to provide “suitable assignments, clear expectations, appropriate guidance, and timely feedback” (Guidelines for Conversion of Fixed-Term Appointments), were heightened by the uneasy fit between the Initiative and the usual fixed-term appointment process, as well as by the obligation under the Initiative to “facilitate . . . integration” of Initiative recruits into the Fund. Having reviewed the record of the case, the Tribunal concluded that the challenges faced as an Initiative recruit were amplified in Applicant’s case by managerial lapses in integrating him into the work of his Department. In particular, following the departure of the senior Departmental official who had championed Applicant’s recruitment, the official’s successor did not initially demonstrate support for incorporating Applicant in the work of the relevant part of the Department. In the view of the Tribunal, the purposes of the Initiative and fairness to Applicant required that the new manager be advised of Applicant’s program and undertake proactive measures to support its success. As managers had failed to meet this obligation, the Tribunal concluded that the Fund failed to treat Applicant fairly in relation to his appointment under the Initiative, given the purposes of the Initiative.

In sum, Applicant did not prevail on his chief complaint, namely, that the Fund abused its discretion in deciding not to convert his fixed-term appointment to an open-ended appointment. He did prevail, however, in showing that the Fund did not treat him fairly in relation to his appointment under the Initiative, given the purposes of the Initiative. Pursuant to the remedial authority granted by its Statute, the Tribunal awarded Applicant compensation to correct the effects of the intangible injury consequent to that failure of fair treatment. The Tribunal set the amount of compensation at the sum equivalent to nine months of Applicant’s salary at the time of the lapse of his fixed-term appointment. The Tribunal additionally ordered the Fund to reimburse Applicant fifty percent of the total amount of his legal fees and costs.