REGISTRY'S SUMMARY[1]: ***Ms. "PP", Applicant v. International Monetary Fund,***
IMFAT Judgment No. 2021-1 (May 20, 2021)

MISCONDUCT – CODE OF CONDUCT FOR EMPLOYMENT OF G-5 EMPLOYEES – "ADMINISTRATIVE ACT" (STATUTE, ARTICLE II) – RELATIONSHIP BETWEEN FUND AND HOST GOVERNMENT – FUND'S REQUEST FOR REASONABLE COMPENSATION FROM APPLICANT (STATUTE, ARTICLE XV)

Applicant, a staff member holding G-4 visa status, challenged the Fund's decision that she had engaged in misconduct in violation of the Fund's Code of Conduct for the Employment of G-5 Employees by failing to afford "fair and reasonable treatment" to a G-5 household employee and engaging in conduct that "reflected adversely on the Fund." The Fund had imposed a three-year, formal, written reprimand as a disciplinary sanction.

The Tribunal reaffirmed in *Ms. "PP"* that it applies heightened scrutiny to the review of disciplinary decisions. This heightened scrutiny responds to the gravity of a finding of misconduct, both to the individual staff member and to the institution itself. Citing its earlier decision in *Ms. "J"*, Judgment No. 2003-1, para. 99, the Tribunal also recalled that the "degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker." In the case presented by Applicant, the nature of the legal framework governing the alleged misconduct proved pertinent to determining the appropriate degree of deference. "[I]n view of the sensitive diplomatic relationships inherent in decisions taken in relation to the G-5 visa program," said the Tribunal, it "will afford a measure of deference to the HRD Director's expertise in considering what conduct will constitute 'fair and reasonable treatment' and what conduct will 'reflect adversely on the reputation of the Fund.'" (Para. 79.) The Tribunal also observed that the risks associated with the G-4/G-5 employment relationship, both to the fair treatment of G-5 employees and to the Fund's reputation, give rise to heightened obligations on the part of G-4 staff members who choose to be G-5 employers.

Having reviewed the record of the case, the Tribunal concluded that it was able to sustain the misconduct finding against Applicant not for each of the reasons that the HRD Director cited in her decision but because the Fund had established the existence of facts that, in the estimation of the Tribunal, allowed the HRD Director to conclude that Applicant failed to afford "fair and reasonable treatment" to the G-5 employee and engaged in conduct that "reflected adversely on the Fund" in violation of the Code of Conduct for the Employment of G-5 Employees. The Tribunal noted that although the parties had presented conflicting accounts of some of the facts, the finding of misconduct against Applicant could be upheld on the basis of conduct in which she indisputably had engaged. Furthermore, said the

[1] 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 and Orders are available at: www.imf.org/tribunal.

Tribunal, the Fund could take a "holistic approach" in determining whether a staff member had met the governing standards. (Para. 95.) In the view of the Tribunal, the factual record established that Applicant's conduct showed "insensitivity to the needs and circumstances of the complainant G-5 employee" (para. 98) and demonstrated "disregard for the importance of adherence to the governing law of the Fund, which in the case of the Code of Conduct for the Employment of G-5 Employees echoes the law of the host country" (para. 99). Accordingly, the Tribunal sustained the finding that Applicant had engaged in misconduct in contravention of the Fund's internal law.

The Tribunal additionally rejected Applicant's regulatory challenge to Fund rules that governed her case. In particular, Applicant contended that the requirements to afford "fair and reasonable treatment" and not to engage in conduct that "reflected adversely on the Fund" were, in Applicant's words, "abusively subjective" (para. 86). The Tribunal concluded that, although the governing standards were expressed in open-ended terms, they were not so vague or overbroad as to be unfair. Moreover, the Fund's detailed rules regulating how G-5 household employees should be treated provided adequate guidance to staff members as to the content of their obligations.

The Tribunal also found that Applicant's allegation that the Fund had failed to afford her due process in the disciplinary proceedings was without merit. The Tribunal observed that Applicant had open to her—and availed herself of—multiple opportunities to present her own account of disputed facts through the Investigation conducted by the Office of Internal Investigations (OII) and later directly to the HRD Director. The disciplinary proceedings tracked the terms of the Fund's law governing misconduct cases and were consistent with general principles of notice and fair hearing that underlie those regulations. The Tribunal additionally sustained the Fund's decision to impose a three-year formal, written reprimand as a disciplinary sanction in the case. In the view of the Tribunal, that sanction was proportionate to the offence and had been determined in accordance with applicable Fund regulations.

In addition to challenging the finding of misconduct and the disciplinary sanction of a three-year formal, written reprimand, Applicant challenged another decision, characterized by the Fund as an administrative decision, which the HRD Director had conveyed to Applicant along with the disciplinary decision. The HRD Director stated that she had initially decided to impose—in addition to the three-year formal, written reprimand—a second disciplinary measure in the form of a four-year bar on the Fund's support of new G-5 applications on behalf of Applicant, as permitted by the Fund's regulations. However, '"[d]ue to the position communicated to [the Fund] by the State Department,"' the HRD Director stated that she was '"obliged to make the following decisions in the interests of the Fund,"' that is, that Applicant end the employment of a different G-5 employee who was at the time employed by Applicant and that the Fund would not be able to support applications made by Applicant for G-5 visas in future. (Para. 120.)

The Fund responded to Applicant's challenge by asserting that the Tribunal lacked jurisdiction over the contested decision barring Applicant's utilization of the G-5 visa program, contending that the decision was taken by the U.S. Government and not by the Fund. Alternatively, the Fund maintained that if the Tribunal decided that the bar on Applicant's utilization of the G-5 visa program resulted from Fund actions that were subject to Tribunal review, it should deny the challenge on its merits because the Fund acted reasonably and in keeping with its responsibilities vis-à-vis both the U.S. Government and Applicant.

The Tribunal observed that it is undisputed that a decision of the U.S. Government does not fall within the jurisdiction of the Tribunal. The question was whether the HRD Director's decision to defer to the U.S. State Department's communications concerning Applicant's access to the G-5 visa program was an "administrative act" of the Fund in terms of Article II of the Tribunal's Statute. The Tribunal concluded that when the HRD Director decided to forgo as a disciplinary measure a four-year bar on Fund support for G-5 visas for Applicant in favor of deferring to the more stringent terms communicated by the State Department, that was a "decision taken in the administration of the staff of the Fund" (Statute, Article II). The Fund's decision affected the terms and conditions of Applicant's employment, by depriving her of the Fund's sponsorship of the access she ordinarily would have had to hire household employees through the G-5 visa program.

Turning to the merits of Applicant's challenge, the Tribunal concluded that the Fund did not abuse its discretion in deciding to defer to communications from the U.S. State Department in relation to Applicant's utilization of the G-5 visa program. "Given the sensitive character of the relationship between the Fund and the host government, and given the Fund's decisions regarding Applicant's treatment of the G-5 employee, the Tribunal cannot conclude that the Fund abused its discretion in following the views expressed directly to it by the State Department in the context of Applicant's case." (Para. 130.)

In *Ms. "PP"*, Judgment No. 2021-1, the Tribunal additionally addressed a question it had reserved in an earlier Order in the case.[2] The Fund sought "reasonable compensation" for the cost of responding to Applicant's second request for provisional relief, maintaining that the request had been "manifestly without foundation" in terms of Article XV of the Tribunal's Statute. The Tribunal observed that its authority to award compensation against an applicant pursuant to Article XV is one that it will exercise sparingly. Before the Tribunal will exact from an applicant compensation to the Fund for exercising the right to seek redress before the Tribunal it will require the Fund to meet the stringent test set by Article XV and elaborated in the associated Commentary on the Statute. In light of the Statutory commitment

[2] *See Ms. "PP", Applicant v. International Monetary Fund, Respondent (Applicant's Second Request for Provisional Relief)*, IMFAT Order No. 2020-1 (January 13, 2020), para. 20.

of access to justice and the novel circumstances in which Applicant's second request for provisional relief arose, the Tribunal decided that the test had not been met. Accordingly, the Fund's Article XV request was denied.

Accordingly, the Application of Ms. "PP" was denied, as was the Fund's request for "reasonable compensation" under Article XV.