ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2021-3

Mr. "SS", Applicant v. International Monetary Fund, Respondent

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INTRODUCTION

1. On October 19-21, 2021, 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 Nassib G. Ziadé, met to adjudge the Application brought against the International Monetary Fund by Mr. "SS", a staff member of the Fund. Applicant was represented by Mr. Adam Augustine Carter, The Employment Law Group PC. Respondent was represented by Ms. Juliet Johnson, Senior Counsel, and Mr. Cassandro Joseney, Counsel, IMF Legal Department.

2. In light of the COVID-19 pandemic, consequent restrictions on travel, and the Fund's work-from-home directive, the Tribunal decided to hold its session by electronic means, in accordance with Article XI of the Statute. The session, including the oral arguments of the parties, was held by videoconference coordinated by the Tribunal's Registry.

3. Applicant's claims in this proceeding arise from the time period from October 2, 2017 to October 29, 2018. The parties have stipulated that Applicant has a hearing impairment that constitutes a disability within the meaning of the Fund's policies prohibiting disability discrimination and providing for the reasonable accommodation of disabilities within the workplace. Applicant alleges that the Fund (i) denied him reasonable accommodations for his disability, including with respect to work meetings and deadlines, social events, and building safety arrangements; (ii) discriminated against him in other ways based on his disability, including with respect to his FY2018 Annual Performance Review (APR), his work on a book project for which he had been expected to provide two chapters (the "Book Project"), and the relocation of his office; (iii) retaliated against him for seeking reasonable accommodations, alleging discrimination, and raising ethics complaints through various channels; (iv) breached terms of a partial mediation agreement relating to the accommodation of his disability; (v) subjected Applicant to a pattern of substantively unfair treatment, including through stereotyping and micro-inequities; and (vi) subjected him to procedural unfairness in the Administrative Review and Grievance Committee proceedings.

4. Applicant seeks as relief: (i) creation by the Fund of a Disability Coordinator position with expertise in disability and reasonable accommodations; (ii) implementation of changes to APRs, including Applicant's FY2018 APR, such that persons with disabilities "only be held accountable for areas that are within their control" and that reviews "reflect the performance that could have been achieved without the negative impact of retaliation, discrimination (failure to accommodate) and unfair treatment"; (iii) removal from Applicant's personnel record of "any reports . . . related to his disabilities . . . to eliminate any reputational harm from his disabilities

and his requests for accommodation"; (iv) compensation for career and reputational damages, including due to non-publication of Applicant's second chapter for the Book Project; (v) revision of the online version of the resulting book to include Applicant's second chapter and three months' net salary as compensation for unfair treatment in respect of that chapter; (vi) work responsibilities corresponding to the job standards for Applicant's position and three months' net salary as compensation for career and reputational prejudice; (vii) compensation for emotional distress in the amount of $100,000, to be transferred to a charity of the Applicant's choice; and (viii) 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, denies each of Applicant's allegations and asks the Tribunal to deny all relief. Respondent asserts that the Fund provided Applicant with accommodations for his disability above and beyond what the Health Services Department (HSD) recommended as medically necessary, what the parties agreed in mediation, and what safety considerations warrant. According to Respondent, Applicant suffered no discrimination, retaliation, or unfair treatment in any respect. Rather, the Fund made extraordinary efforts to support Applicant. Respondent contends that the actions that Applicant mischaracterizes as biased and unfair – including the comments he challenges in his FY2018 APR, the decision to drop his second chapter, and the relocation of his office away from his supervisor – were simply the result of his own poor performance and aggressive insubordination.

PROCEDURE

6. On July 31, 2020, Applicant filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on August 5, 2020. On August 13, 2020, pursuant to Rule IV, para. (f), of the Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

7. On September 21, 2020, Respondent filed its Answer on the merits of the Application. On October 23, 2020, Applicant submitted his Reply. Respondent filed its Rejoinder on November 30, 2020.

8. At the Tribunal's request, both parties subsequently filed additional submissions regarding certain procedural issues as noted below. The Tribunal also requested that each of the parties produce certain additional documents, for the sake of completeness of the record.[1]

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[1] By decision letter of August 27, 2021, the Tribunal asked Applicant to provide a copy of the Fund's May 1, 2020 decision to accept the Grievance Committee's recommendations, as should have been attached to the Application under Rule VII(5) of the Tribunal's Rules of Procedure. Applicant submitted the document on September 8, 2021. By further decision letter of October 7, 2021, the Tribunal asked Respondent to produce all versions of specified Staff Handbook provisions regarding harassment, discrimination and accommodations, and retaliation as were in effect for the period of the case, with the exception of those documents already in the record. This request was made pursuant to Rule XVII(3) of the Rules of Procedure. Respondent submitted the additional documents on October 12, 2021.

A. Request of another staff member

9. Following circulation of the Registrar's August 13, 2020 notice summarizing the issues in the Application, another staff member of the Fund requested that the Registrar convey their name and email address to Applicant. The staff member stated that they believe they have had a similar experience to that alleged by Applicant, as summarized in the Registrar's notice.

10. The request posed a novel issue concerning communications between the Registrar and an applicant before the Tribunal. Following consultation with the President of the Tribunal, and without disclosing the identity of the other staff member, the Registrar invited Applicant and Respondent to file their views simultaneously on the question whether the Registrar should accede to the request of the other staff member.

11. After reviewing the parties' submissions, the Tribunal on September 11, 2020 communicated its decision that the Registrar should not accede to the other staff member's request to convey their name and email address to Applicant. The Tribunal observed that there is nothing in Rule IV(f) of the Rules of Procedure, or in any other provision of the Tribunal's Statute or Rules of Procedure, that contemplates that the Registrar will serve as an intermediary between another staff member and an applicant in a case or will facilitate the gathering of evidence outside of the process prescribed by the Statute and Rules of Procedure. The Registrar, in carrying out his or her functions, is obliged to safeguard the confidentiality of the proceedings and to remain neutral vis-à-vis the parties. In addition, the Tribunal's Statute and Rules of Procedure provide two channels by which an individual may request to bring information or views to the attention of the Tribunal in a case: Rule XIV (Intervention) and Rule XV (Amicus Curiae). Finally, the Tribunal noted that if the other staff member believes that they have experienced discrimination, harassment, retaliation or other conduct prohibited by the Fund's internal law, they are encouraged to avail themselves of the Fund's various formal and informal channels for dispute resolution as well as the Office of the Ethics Advisor and the Office of Internal Investigations (OII).

B. Applicant's request for oral proceedings with further testimony

12. Article XII of the Tribunal's Statute provides in full: "The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private." Rule XIII, para. 1, of the Rules of Procedure provides that such proceedings shall be held "if . . . the Tribunal deems such proceedings useful." Per Rule XIII, para. 6, "The Tribunal may limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate."

13. In his Application, Applicant requested "the opportunity for oral argument and the presentation of additional sworn testimony of facts set forth above that this Tribunal may believe needs additional evidentiary support." Noting the extensive record of testimony and documents, Respondent opposed Applicant's request as unnecessary, burdensome, and more likely to confuse rather than clarify matters.

14. As the Tribunal recently stated in *Ms. "PP", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-1 (May 20, 2021), at para 25:

> The Tribunal's recent practice has been to hold oral proceedings where they have been expressly requested by applicants, limiting such proceedings to the oral arguments of counsel. The Tribunal has recognized the benefit of such proceedings, even when the evidentiary record is complete, for the purposes of clarifying legal issues and providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record.

15. By decision letter of August 27, 2021, the Tribunal granted Applicant's request for oral proceedings, limited to arguments of counsel in accordance with Rule XIII, para. 6. Oral proceedings were held on October 20, 2021, by videoconference in accordance with amended Article XI of the Tribunal's Statute.

C. Respondent's request for anonymity for all persons concerned

16. In its Answer, Respondent requested anonymity for "all concerned in this case," including Applicant, pursuant to Rule XXII[2] of the Tribunal's Rules of Procedure. According to Respondent, the case presents each of the three types of circumstances that the Tribunal has previously concluded would warrant anonymity: a challenge to a performance assessment, allegations of staff misconduct, and health issues. In particular, Respondent asserts that it is essential to anonymize Applicant in order to protect his immediate supervisor (the "Supervisor") and other managers whom he has accused of misconduct.

17. In his Reply, Applicant stated that he "recognizes the right of the Fund to request anonymity but contests its unjustified attempt to force him to remain anonymous." Applicant asserts that while he previously sought to keep his disability private in order to avoid stereotyping and micro-inequities, the mistreatment he faced prior to and during the grievance process has rendered his privacy concerns moot.

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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.
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> 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.
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> 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.
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> 4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual.

18. By decision letter of August 27, 2021, the Tribunal provisionally granted Respondent's request for anonymity for all persons concerned. Accordingly, the oral proceedings of October 20, 2021, were held in private.

19. This case presents the first instance in which the Tribunal considers whether to accord anonymity to an applicant over the applicant's objection. In making a final determination on Respondent's request, the Tribunal must scrutinize carefully the appropriate balance between privacy and transparency, with due regard to the parties' submissions and relevant Tribunal jurisprudence.

20. Before the Tribunal's adoption of Rule XXII, the Tribunal "ordinarily accorded anonymity to all applicants." *Mr. "HH", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-04 (October 9, 2013), para. 16. In 2004, the Tribunal adopted Rule XXII, which provides at para. 4: "The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual." Since then, the Tribunal has stated that ". . . anonymity operates as an 'exception to the general rule of making public the names of parties to a judicial proceeding' and the burden rests with the party seeking anonymity to show 'good cause.'" *Mr. "HH",* para. 16 (quoting *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13).

21. To date, the Tribunal has found "good cause" to grant anonymity in three main types of circumstances. As summarized in *Mr. "KK", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-2 (September 21, 2016), para. 16, these circumstances include cases "challenging performance assessments, so as to protect the candor of the assessment process"; cases "involving allegations of staff misconduct, including harassment and retaliation"; and cases "in which the health of the applicant is at issue."

22. Here, the Tribunal considers that even if Applicant may decline to protect the privacy of his own health information, the Fund retains valid interests in protecting the privacy of staff whom Applicant has accused of discrimination, retaliation, and other misconduct; and in preserving the integrity of performance assessment processes, such as the APR at issue in this case, which rely on candid feedback. Were Applicant to be identified by name, it would be impossible to protect the identity of the Supervisor and other managers whom he has accused of misconduct. Similarly, Applicant's public identification would expose those who gave candid feedback for his challenged FY2018 APR and discourage candor in future performance assessment processes.

23. The Tribunal finds that these institutional considerations in favor of privacy provide "good cause" (Rule XXII, para. 4) to protect the identity of all persons concerned in this matter, including Applicant. This is notwithstanding Applicant's assertion that he no longer sees a need to keep his disability and accommodation concerns private – which position, it may be noted, appears to be in tension with his pending request for, among other types of relief, the removal of any reports in his personnel record that relate to his disabilities so as "to eliminate any reputational harm from his disabilities and his requests for accommodation." The Tribunal

therefore grants Respondent's request for anonymity for all persons concerned, including Applicant.

D. Applicant's request for production of documents

24. Pursuant to Rule XVII[3] of the Tribunal's Rules of Procedure, Applicant requested additional documentation to counter Respondent's defense to one of his retaliation claims. In its Answer, Respondent suggested that the Supervisor's challenged actions of March 29, 2018, could not have been motivated by retaliation for Applicant's mediation request of earlier that month because the Supervisor was not informed of his mediation request until after the alleged retaliation. In his Reply, Applicant asserted that this defense could be undercut by a March 30, 2018 email between the Supervisor and the Fund's Mediator, which Respondent had inadvertently produced and then withdrawn during the Grievance Committee proceedings. According to Applicant, the email reveals that the Supervisor knew of Applicant's mediation request before the challenged actions of March 29, 2018. To the extent the email may not be used because it is a confidential mediation communication, Applicant requested that Respondent instead produce calendar information to show when the Supervisor met with the Mediator in his case. In its Rejoinder, Respondent opposed Applicant's request for "further discovery" as belated and unnecessary to resolve his retaliation claim.

25. By decision letter of August 27, 2021, the Tribunal requested that Respondent provide (i) the applicable version of the Mediation Rules, which include provisions on the confidentiality of mediation communications; and (ii) for the Tribunal's *in camera* review, the email of March 30, 2018. Respondent submitted these materials on September 10, 2021. The parties were informed on October 7, 2021, that the Tribunal would reserve decision on Applicant's document request until after the oral proceedings.

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[3] Rule XVII (Production of Documents) provides:

> 1. The Applicant, pursuant to Rule VII, Paragraph 2(h), may request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund. The request shall contain a statement of the Applicant's reasons supporting production accompanied by any documentation that bears upon the request. The Fund shall be given an opportunity to present its views on the matter to the Tribunal, pursuant to Rule VIII, Paragraph 5.
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> 2. The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of deciding on the request, the Tribunal may examine *in camera* the documents requested.
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> 3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order.

26. The Tribunal recognizes the importance of protecting the confidentiality of mediation proceedings in general, consistent with the provisions of the Mediation Rules.[4] It is particularly essential to protect the strict confidentiality of substantive bilateral communications between each party and the Mediator. The parties must feel free to express views and explore possibilities for resolution privately with the Mediator, without fear that such views may be revealed or used against them in the course of the mediation or subsequent proceedings.

27. At the same time, the Tribunal notes that Section 4.05.2 of the Mediation Rules recognizes certain exceptions to mediation confidentiality, including when the parties agree to waive confidentiality or when – as here – one party seeks to enforce a mediation agreement. In considering the possible scope of any exceptions in this case, the Tribunal shall consider the potential relevance and probative value of the specific information that Applicant has requested. As the Tribunal stated in *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 12:

> [I]f the Tribunal cannot say that the evidence requested is "irrelevant to the issues of the case," it ordinarily will not have a basis to reject the request unless compliance with it would be unduly burdensome or would infringe on the privacy of individuals. In interpreting the requirements of Rule XVII, para. 2, the Tribunal has considered the record of the case as a

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[4] Upon the Tribunal's request, Respondent provided the Mediation Rules as approved June 5, 2012 and amended June 12, 2017, with the provision regarding the mediator's term amended in May 2018. Section 4.05 of the Mediation Rules provides in relevant part:

> 4.05. *Confidentiality*
>
> 4.05.1 The fact of participation in a mediation and the proceeding of the mediation – including any written submissions, positions taken by the parties, views expressed, and admissions or suggestions made by the parties or the Mediator in the course of the mediation – shall be strictly confidential. Positions taken by the parties during any stage of the mediation process shall also be strictly confidential and may not be disclosed or used for any other purposes, including a formal dispute proceeding (e.g., an arbitration, Grievance Committee hearing, Administrative Tribunal hearing), except with the consent of the other party and the Mediator. . . .
>
> 4.05.2 Exceptions to the above confidentiality rules are:
>
> . . .
>
> - When the parties explicitly agree that otherwise confidential information may be shared.
> - When a party needs to share the content of the Memorandum of Understanding [which memorializes the parties' mutually acceptable resolution] for the purpose of obtaining legal advice before signing, or on its enforcement or implementation.
>
> . . . .

> whole and weighed the probative value of requested information against the burden posed by its production and the privacy interests of other staff members.

28. Both parties admit on the record the fact that a mediation took place and neither has argued that the fact of the mediation should be protected by confidentiality. The Tribunal considers that in these circumstances, the parties have in effect accepted that the fact of the mediation is not to be treated as confidential in these proceedings. Moreover, the Tribunal notes that Applicant asserts that the timing of the Supervisor's awareness of Applicant's mediation request is materially relevant to his retaliation claims. The Tribunal also notes that its review of the record of the case as a whole does not reveal any other evidence probative of the timing issue.

29. Accordingly, the Tribunal determines that the March 30, 2018 email shall be admitted into the record in redacted form, solely for the purpose of establishing the timing of the Supervisor's awareness of Applicant's mediation request. All other content in the email is redacted and excluded from the record of this case. Redacted copies of the email have been provided to the parties for information.[5]

E. Respondent's request to strike documents from the record

30. In its Rejoinder at Table 3, Respondent identified over a hundred documents submitted by Applicant in this proceeding that were not part of the Grievance Committee record. Respondent flagged fourteen of these documents as either "emails between Applicant and HSD [that] were objected to by the Fund at the [Grievance Committee] hearing, and [as to which] the Grievance Committee sustained the Fund's objection," or "other confidential communications that should not be part of this proceeding (e.g., with Office of Internal Investigator, Ombudsperson, and bilateral conversations between Applicant and the Mediator)." However, Respondent did not make an explicit request in its Answer or Rejoinder that the Tribunal strike specific documents from the record.

31. Upon the Tribunal's request for clarification, Respondent stated on September 10, 2021, that it sought to strike three of the flagged documents, which contain substantive information regarding Applicant's outreach and communications with HSD (Exhibit 30), OII (Exhibit 190), and the Mediator (Exhibit 263).

32. At the Tribunal's invitation, Applicant submitted comments on September 23, 2021. While opposing Respondent's motion to strike the three documents, Applicant offered stipulations as to the import of those documents in lieu of using those materials.

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[5] When the Tribunal decides based on *in camera* review to grant a request for production of documents, then as a matter of due process, "the documentation ordinarily will be transmitted to the applicant who will be offered an opportunity to comment on it." *Ms. "GG" (No. 2)*, para. 24. In this instance, however, Applicant had previous access to the document in question and has already commented on its relevance to the timing issue.

33. Invited to respond further by October 5, 2021, Respondent declined Applicant's proposed stipulations and affirmed its motion to strike the three documents in question. Respondent clarified that while it seeks to strike the entirety of Exhibits 190 and 263, which consist of Applicant's correspondence with OII and the Mediator, respectively, it seeks to strike only those portions of the HSD correspondence in Exhibit 30 that show Applicant's private communications with HSD.

34. The parties were informed on October 7, 2021, that the Tribunal would reserve decision on Respondent's motion to strike until after the oral proceedings. In considering Respondent's motion to strike, the Tribunal considers the nature of the documents in question and their relevance to the issues in the case. The Tribunal addresses each of the three documents in turn below.

35. With respect to the HSD correspondence in Exhibit 30, the Tribunal notes that Applicant may waive the confidentiality of his own health information for purposes of these proceedings, which necessarily take into account the nature of Applicant's disability and his discussions with HSD as to potential accommodations. The Tribunal thus declines to strike any portion of Exhibit 30, the import of which the Tribunal will consider in the context of the record as a whole.

36. With respect to the OII correspondence at Exhibit 190, the Tribunal notes that the fact and timing of Applicant's complaint to OII are relevant to Applicant's present claim that he suffered retaliation due to his OII complaint. The Tribunal therefore declines to strike Exhibit 190, which the Tribunal may consider as evidence of Applicant's protected activity. Whether Applicant has presented sufficient evidence of the other required elements of a retaliation claim, including an adverse action taken because of the protected activity, is a separate matter.

37. With respect to the mediation correspondence at Exhibit 263, the Tribunal reiterates its view that it is essential to protect the strict confidentiality of substantive bilateral communications between each party and the Mediator. As reflected in Section 4.05.2 of the Mediation Rules, this confidentiality cannot be waived by one party alone. Rather, both parties must "explicitly agree that otherwise confidential information may be shared." The Tribunal therefore grants Respondent's request that Exhibit 263 be struck from the record in its entirety.

FACTUAL BACKGROUND

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

A. Applicant and the Book Project

39. Applicant, who served in the relevant time period for this case in one of the Fund's divisions (the "Division"), states that he was diagnosed with moderate to severe hearing loss in both ears in August 2015. He began wearing personal hearing aids full-time in September 2015.

40. In Fall 2016, Applicant's supervisor circulated outlines for the Book Project that Applicant was expected to lead with two junior Division staff and an outside collaborator. This

was a high-profile project for the Division and a key deliverable for Applicant's department (the "Department"). Applicant's role was to lead work on the book overall, write two chapters himself, and supervise and coordinate work on the other chapters.

41. The Supervisor had concern from early on about Applicant's progress on the Book Project. In May 2017, the Supervisor asked him for a timeline, requesting that he "[p]lease come up with a schedule for not later than the first week of September" since "[t]he first draft book has to be ready by the fall." Applicant did not provide a detailed timeline, but responded that "we can aim to have seven draft chapters . . . by mid-September." In September 2017, the Supervisor received two draft book chapters from the junior staff on the team, but neither of the two chapters due from Applicant.

42. In mid-September 2017, Applicant first apprised the Supervisor that he had hearing issues. He did not seek disability certification or any accommodations at that time.

B. Confirmation of hearing loss and need for accommodations

43. On October 2, 2017, Applicant's follow-up hearing test reportedly established a "permanent but stable" level of hearing loss. When he informed the Supervisor verbally of the test results, he stated that his hearing aids would have to be sent away for reprogramming and that his audiologist recommended he use a white-noise machine in his office.

44. On November 8, 2017, Applicant submitted medical documentation to HSD regarding his hearing loss and requested accommodation of his disability. Later that day, HSD certified that Applicant had a disability that should be accommodated, and suggested that Applicant get in touch with the Corporate Services and Facilities Department (CSF) officer who served as a contact point for workplace accommodations (the "CSF Officer").

45. On November 13, 2017, the CSF Officer met with Applicant and shared a table of five suggested action items. These included giving him a white-noise machine, which was done immediately; turning off the "VAV" air flow motor in his office, which was done later that day; adding an emergency light near his office; speaking with the Department's Senior Personnel Manager ("SPM") and Office Manager ("OM") about accommodations for meetings; and providing accommodations for "[Department] or IMF type events." After their meeting, Applicant thanked the CSF Officer for "our discussion, the summary of our meeting and the prompt follow-up," stating that "these are all very helpful!"

46. On the same day, November 13, the CSF Officer wrote to the SPM and OM to inform them that Applicant "has been diagnosed with hearing loss in both ears and requires accommodation." She suggested that the Department consider letting Applicant use his listening "pen" (a type of wireless personal microphone shaped like a pen that transmits sound directly to the hearing aids; also referred to as a "smart pen") in larger meetings and limit music or videos at Department events. The SPM responded to the CSF Officer that day, raising questions about the proposed accommodations and asking whether the matter could be shared with the Supervisor. The next day, November 14, the CSF Officer responded to the SPM that these were "merely suggestions" while they awaited HSD's final review and recommendations; and that the matter

was fine to discuss with the Supervisor, "with the stipulation" that Applicant was continuing to work with HSD.

47. On November 15, 2017, Applicant wrote to the CSF Officer to thank her again for her follow-up and confirm that the VAV motor had been turned off on November 13, which in combination with the white-noise machine "appears to be helpful." In response to Applicant's observation that the emergency light had not yet been installed, the CSF Officer explained that it "will take some time to put up as we need to run some electrical to the area."

48. On November 20, 2017, Applicant met again with HSD to discuss specific accommodations to facilitate his participation in work meetings. HSD noted that, in addition to the technical workstation adjustments suggested by the CSF Officer, other accommodations to explore for work meetings could include physical plus dial-in participation; use of his smart pen; auditory training to increase Applicant's visual-auditory comprehension; and white-noise software on Applicant's laptop. Applicant thanked HSD for the "very helpful advice, suggestions and references," and stated that he was following up with the CSF Officer on them. Applicant's email to the CSF Officer that day reiterated that he had met with HSD that morning "to discuss my hearing loss issues and received some very helpful advice from [HSD], including on meeting participation"; and asked for a follow-up meeting the following week.

49. On November 27, 2017, the CSF Officer met with Applicant as requested to discuss the HSD meeting. The CSF Officer then wrote to the SPM to share that HSD had provided the Applicant "with some suggestions for dealing with meetings; however, some of the technology needed will not be available until after completion of the new conference rooms in HQ2. In the meantime, [HSD] suggests that [Applicant] use his listening 'pen' during meetings. . . . If you could pass on this information to his manager, it would be appreciated." The CSF Officer noted that "other accommodations, such as adding in emergency lighting, [have] been taken care of by facilities." The SPM relayed the information as requested to the Supervisor that day.

50. On December 4, 2017, Applicant again thanked the CSF Officer for the information about connecting his hearing aids to the audio-visual systems once renovations were complete, noting that his audiologist had confirmed that his listening pen would work for this purpose.

C. Continued work on the Book Project

51. After Applicant did not meet his mid-September 2017 target for the first book draft, the Supervisor pressed him to share his first draft chapter, even if incomplete. Applicant submitted a first draft of the first chapter in installments between October 13-26, 2017. Although Applicant suggested deferring discussion on the chapter until his last section was complete, the Supervisor provided extensive feedback on Applicant's work along the way, both orally and in writing. Starting upon her receipt of his first section, the Supervisor raised fundamental structural and thematic questions about the first chapter, and provided specific line edits on Applicant's drafts.

52. On October 24, 2017, the Supervisor asked Applicant to prepare an updated timeline for delivery of first drafts of all chapters and noted that she was "leaning towards dropping [Applicant's second chapter] at this stage." On October 26, 2017, Applicant promised to have his

first chapter re-written by November 20, and committed to deliver his second chapter by mid-December 2017. According to Applicant, the Supervisor informed him in a meeting later that day that he would no longer have a leading role on the Book Project or manage the junior staff working on it. Instead, his further role would be limited to the two chapters that had been assigned to him.

53. Although Applicant had committed to deliver his second chapter by mid-December 2017, he sent a first draft to the Supervisor three months later, on March 12, 2018. On March 22, the Supervisor provided written feedback, including high-level comments as well as edits on the first twenty pages, and offered to explain further in person.

54. On several occasions, the Supervisor expressed her concern about the quality of Applicant's book chapters directly to Applicant, who disagreed with her views. Their encounter on March 29, 2018, was particularly contentious. The discussion began in Applicant's office, then continued when Applicant followed the Supervisor back to her office uninvited. It culminated in the Supervisor's statement that Applicant could no longer enter her office without scheduling a meeting in advance.

55. After further work on the delayed Book Project over the summer of 2018, the Supervisor informed Applicant that they could either drop his second chapter or have it co-authored by a colleague to get it ready for publication. Applicant declined to indicate a preference between the two possibilities, instead challenging the options presented. On August 17, 2018, the Supervisor informed Applicant that his second chapter would be dropped; and asked for Applicant's "urgent response regarding progress on the [first] chapter."

D. Shelter-in-place drill

56. On March 15, 2018, the Fund had a shelter-in-place drill that led to various safety complaints from Applicant. Applicant received the automated text and email alerts for the drill. Two fire wardens also came to his office to make sure that he was aware of the drill and asked him to go to the shelter-in-place location with them. Applicant refused to go with them. Afterward, Applicant complained to the CSF Officer, with copy to the Supervisor, that no one from outside the Division had come to check on him; and that the emergency strobe light in front of his office had not turned on.

57. The CSF Officer responded immediately and followed up on Applicant's concerns with the Fund's Security Office as well as the OM, the SPM, and the Department's Senior Security Manager ("SSM"). On March 20, 2018, the CSF Officer explained to Applicant that the strobe light would not be expected to turn on for a drill, as opposed to an actual event.

58. On March 26, 2018, Applicant wrote to the SPM and the SSM to complain that the Department failed to make sure that he was not left behind in his office. He forwarded his email to the Supervisor for her information the next day.

59. On May 3, 2018, the Fund's Fire and Life Safety Manager visited Applicant's office. He clarified for Applicant the protocol for shelter-in-place drills; confirmed that Applicant should

not require an escort since he was not mobility impaired; recommended a new office set-up to maximize his visual awareness, including reconfiguration of his workstation as well as clearing out the files stacked in his office; gave extra instructions for several fire wardens to assist Applicant; and, given Applicant's expressed concerns, offered to explore even more notification options for him.

60. At the Grievance Committee hearing, Applicant confirmed that he does not require an escort, and that "I can exit the building without any problem." Applicant also confirmed that while the Fire and Life Safety Manager told him on May 3, 2018 that he needed to clear stacks of boxes from his office as a safety measure to improve his visual awareness of happenings outside his office, Applicant did not begin to move his boxes until July 2018 and did not finish until August 2018.

E. Mediation

61. On March 14, 2018, Applicant met with the Fund's Mediation Office to initiate a mediation process with the SPM and the Supervisor regarding his accommodations. Joint mediation sessions began on April 30, 2018.

62. A partial mediation agreement was reached on May 16, 2018, and finalized in writing for signature by all parties on May 25, 2018 (the "Partial Mediation Agreement"). The twelve points of agreement read as follows:

> 1. Fire Life Safety . . . is assisting [Applicant] with installing emergency lighting at his desk and with appropriate additional safety arrangements when there is a shelter-in-place or evacuation.
>
> 2. [Applicant] has scheduled a regular six-month appointment with his audiologist and with HSD in early June and will discuss possible new accommodation measures for meetings, such as sitting at the table during senior management meetings to support his engagement and participation in meetings or using a self-provided table-placed microphone during meetings, whichever is recommended to be more convenient and most effective. [The Department] is open to either of these approaches.
>
> 3. [Applicant] will inform [the Supervisor] if he is unable to participate in a meeting due to technology issues ahead of the meeting so that alternative arrangements can be explored.
>
> 4. Following his meeting with HSD, [Applicant] will share what information he considers appropriate with his colleagues regarding his hearing loss.
>
> 5. [The Supervisor] will encourage at the beginning of divisional meetings the use of good meeting etiquette, such as one person

speaking at a time and, where appropriate, suggest that questions be saved until the end of formal presentations. These guidelines should not, however, unreasonably limit or change the dynamics of group discussion and brainstorming.

6. [Applicant] agrees to ask colleagues to repeat information or to ask questions during meetings if he is unable to understand or follow the discussion.

7. To assist [Applicant], a summary of the meeting and brainstorming ideas will be shared orally or when necessary in writing at the conclusion of meetings.

8. [Applicant] will inform [the Supervisor] when he wishes to join an off-site division social event and will pass on any requests for accommodations to be communicated by the social event organizer to the venue. The social event organizer will make reasonable efforts to identify an available venue (including requesting suggestions from [Applicant]) that can accommodate [Applicant's] requests. Venues may include the HQ2 rooftop and public parks. For events held in public places (e.g., bars and restaurants), the social event organizer will pass [Applicant's] request for accommodations to the venue in advance. [Applicant] recognizes that the ADA does not require public places to grant a requested accommodation if doing so results in a fundamental alteration in the nature of the service they provide their customers or in an undue financial or administrative burden. If a particular venue for these reasons is unable to accommodate [Applicant's] requests, and if a reasonable alternative venue cannot reasonably be found, the social event may have to go ahead at the venue originally contacted.

9. [Applicant] will inform the event organizer when he wishes to join an in house social event and pass on any request for accommodation. [Applicant] finds that background music makes it difficult for him to engage in conversations with colleagues. It is therefore agreed that, at in-house social events organized by his division, music will be turned off for a reasonable period. Recognizing that music is also appreciated by the team, it is agreed that a reasonable period would normally be for about 30 minutes during an event expected to last for around an hour.

10. [Applicant] previously requested that the deadlines for his work on two book chapters be extended as an accommodation, including due to the need to attend medical appointments related to the hearing loss and to prepare for and engage in the interactive process in the wake of his reasonable accommodation request. An extension has been granted as

a reasonable accommodation. [Applicant] understands and accepts that lowering production standards (e.g., by extending the time in which a staff member at his grade is expected to complete a task) is not normally considered an accommodation that an employer is required to grant, unless standards are similarly lowered for other staff for other (i.e., non-medical condition) reasons. [Applicant] agrees to complete the [second] book chapter in four weeks, which is approximately June 18th. Once [Applicant] receives feedback on the [first] book chapter from [the Department Director], he will give [the Supervisor] a timeline of when he expects to complete that chapter. At this point, the book is significantly behind schedule and [Applicant] recognizes that any further delay beyond the agreed timelines is likely to lead to significant disruption of the work program.

11. An editor will be assigned to assist with the editing of the book chapters [Applicant] is currently working on once the chapters have been completed. The editor will assist with the broader book project.

12. A follow-up mediation session may be scheduled at the end of June, once [the Supervisor] has had an opportunity to review the [second] chapter. The session could review updated HSD accommodation recommendations (as per item 2.).

63. Additional joint mediation sessions took place on June 28 and July 30, 2018. Following the final session, the Mediator sent a "notice of case closure" on July 30, 2018, noting the Partial Mediation Agreement as previously concluded by the parties and summarizing "additional points of agreement" from the July 30, 2018 discussion. On the following day, July 31, 2018, Applicant made "minor suggestions" on the text of the Mediator's summary. As revised by Applicant, the four "additional points" then read in full:

- [Applicant] shared that the Ombudsman is assisting him with getting the necessary safety arrangements in place, as well as following up with [HSD] regarding meeting etiquette in [the Department], and in other meetings at the Fund. The Ombudsman will share best practices and information received from [HSD] with [the Department] and HRD.

- [Applicant] will inform [the SPM] of the upcoming change in ~~one of the~~ Fire Warden~~s~~ *in his division*. ~~The~~ n*N*ew Fire Warden*s from outside the division* should be instructed to inform [Applicant] if and when they move to ensure that appropriate briefings are provided whenever there is a new Fire Warden. This matter may also be addressed by the Ombudsman with Fire Safety Services.

- [Applicant] agreed that he would inform [the Supervisor] by mid-August whether he would work with a colleague in [the Department]

> to complete the [second] chapter. If [Applicant] is agreeable, this colleague would help develop questions and restructure the chapter with the information and input provided by [Applicant] in order to meet the November 2018 deadline.
>
> - Both [Applicant] and [the Supervisor] agreed ~~that~~ on the importance of professional and respectful communication. Going forward, their communication will be primarily by email. [The Supervisor] is amenable however, to speak by phone or in person with [Applicant] in the event of more urgent issues, such as a safety concern*s*. [The SPM] and the HR team members are also available resources for [Applicant].

(Strikethrough in original showing Applicant's deletions; italics added to show Applicant's additions).[6]

F. FY2018 Annual Performance Review

64. Applicant's FY2018 Annual Performance Review ("APR") gave rise to additional conflict and dissatisfaction on Applicant's part. At the end of the workday on June 22, 2018, the Supervisor sent Applicant a draft of his written evaluation. The draft APR recognized various accomplishments and characterized Applicant's performance in FY2018 as "Effective" overall. His "Comparative Strengths" were identified as "Technical expertise, planning and organization, delegation." Under "Comparative Developmental Areas," the draft read, "[Applicant] could work on strengthening his open communication skills and receiving feedback."

65. Upon receiving his draft APR, Applicant immediately approached the Supervisor in her office to object to what he perceived to be a discriminatory and insensitive reference to his communication skills. This was another contentious encounter, with raised voices reported on both sides. As reflected in the Supervisor's contemporaneous correspondence and subsequent testimony, the Supervisor was particularly shaken by what she perceived as Applicant's agitated and threatening demeanor when he entered her office uninvited. The Supervisor asked Applicant to leave and called for help from a nearby Research Assistant in the Division. In an email to the Department Director that evening, she described Applicant's "menacing and rude" demeanor, stated that she was worried for her safety, and said "I strongly believe that some form of disciplinary action is warranted."

66. After the June 22, 2018 incident, both Applicant and the Supervisor requested that a third party attend their scheduled oral discussion for the APR. On June 27, 2018, the SPM wrote to Applicant to confirm that he was entitled to bring an independent witness or other colleague to

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[6] Subsequent to the time period at issue in this case, Applicant asked the Mediation Office on November 19, 2018, for its consent to disclosure of the May 2018 Partial Mediation Agreement, "in the context of an ongoing formal dispute proceeding," in his effort "[t]o facilitate the implementation of the understandings on reasonable accommodation." On March 7, 2019, Applicant and the SPM reached a Mediation Implementation Agreement addressing issues regarding safety and security, Department meetings and social events, and the FY2018 APR.

the APR discussion. The SPM's email reiterated that the draft APR's reference to "open communication skills" related not to his hearing loss, but rather to the Supervisor's assessment that "you have not always communicated openly and in a timely way when your work was delayed." The SPM offered alternative language to clarify the reference. The SPM also stated that the Supervisor "will make herself reasonably available to meet with you about concerns you may have, but she would like you to make an appointment during office hours because she has felt intimidated and unsafe due to the way she has perceived your demeanor and the level of your voice on two occasions, including last Friday."

67. The APR discussion took place on July 3, 2018, with Applicant, the Supervisor, the SPM, and an independent witness requested by Applicant. Following the APR discussion, the SPM and Supervisor continued engaging with Applicant to seek to finalize the APR in a way that would address his main concerns. Instead of referring to "open communication skills," the revised text of the APR as signed by the Supervisor and SPM in early August 2018 read, "[Applicant] should ensure that he communicates with his supervisor in a timely way when work is delayed. He would also benefit from efforts to demonstrat[e] openness to feedback on his performance."

G. Office relocation

68. Following their contentious encounters, including the June 22, 2018 incident, the Supervisor had expressed concern about her personal safety with Applicant in an immediately adjacent office. The Fund's Ethics Advisor and Chief of Security agreed at the end of June 2018 "that the Fund should consider relocating [Applicant's] office away from [the Supervisor] based on the concerns she had raised, if the concerns could not otherwise be addressed." Their hope was that "the continuation of mediation and the passage of time would remedy the situation."

69. On August 15, 2018, the Fund's Ethics Advisor recommended, "based on [the Supervisor's] continued unease, and [Applicant's] reported behavior," that Applicant's office be relocated away from the Supervisor "as soon as practicable." The Fund's Chief of Security "concur[red] wholeheartedly" with the Ethics Advisor's recommendation.

70. The SPM informed Applicant in person on August 28, 2018, with confirmation in writing on August 31, 2018, of the Department's decision, based on the Supervisor's safety concerns and "following a recommendation by the Ethics Office and Security," to move Applicant's office to a new space replicating his existing workstation accommodations.

71. Applicant's office relocation was complicated by the lack of available external window offices suitable for his grade level. It ultimately involved two moves. Applicant reported that the first new office, to which he moved in late October 2018, failed to replicate safety improvements from his original office primarily because it reduced his window space to the corridor by more than ten inches, thereby decreasing his visual awareness of the environment. Applicant requested a move to a second new office without "reduced window exposure to the corridor." Applicant chose to stay in the first new office until the second new office could be modified for him, declining the offer of a "fire/emergency watch" or other special arrangements for his safety in the interim.

CHANNELS OF ADMINISTRATIVE REVIEW

A. Request for Administrative Review

72. Applicant first submitted a request for Administrative Review on August 14, 2018, and informed the Supervisor that he had done so on the same day. Applicant requested review of his FY2018 APR, among other decisions; and alleged retaliation, discrimination, and failure to provide reasonable accommodations. As the request was initially directed to the Department's Director, who had been involved in the Book Project and Applicant's FY2018 APR, Applicant was advised to resubmit the request to the HRD Director. On August 20, 2018, Applicant resubmitted his request for Administrative Review to the HRD Director.

73. On September 5, 2018, Applicant filed an amended Request for Administrative Review. The amended Request expanded on his concerns about the FY2018 APR and asserted further retaliation in the decision to relocate his office, as communicated to him on August 28, 2018.

74. The Administrative Review was carried out by the HRD Deputy Director, rather than the HRD Director, upon Applicant's request that the latter be recused. For purposes of the review, the HRD Deputy Director and/or his staff spoke with Applicant four times between October 2 and November 13, 2018.

75. On December 27, 2018, the HRD Deputy Director met with Applicant to explain his decision in person. On January 17, 2019, HRD closed the Administrative Review with a detailed written memorandum finding no violations of Fund law by Management. The memo concluded that Applicant's managers had "generally granted [Applicant's] requests for accommodations and that their decisions have been based on relevant evidence [and] proper business reasons, and made without improper motive."

B. Grievance Committee proceedings

76. After filing and then supplementing a Grievance in October 2018, Applicant filed an amended Grievance with the Fund's Grievance Committee on February 22, 2019. Applicant's Grievance challenged his FY2018 APR and alleged retaliation, discrimination, and failure to provide reasonable accommodations, as well as hostile work environment in violation of the Fund's Harassment Policy.

77. The Grievance Committee considered Applicant's Grievance on the basis of the briefs of the parties and weeklong oral proceedings. The Grievance Committee received testimony from fifteen individuals. These included Applicant, the Supervisor, the SPM, the Department Director, various Division staff including the two junior staff involved in the Book Project, and other Fund staff involved in implementing Applicant's accommodations. Rather than present expert medical testimony, the parties agreed to stipulate that Applicant "has a hearing impairment that requires reasonable workplace accommodations by the Fund."

78. On March 19, 2020, the Grievance Committee issued its Report and Recommendation, concluding that Applicant had not substantiated his challenge to the FY2018 APR or his other

claims of retaliation, discrimination, lack of accommodation, or hostile work environment. Accordingly, the Grievance Committee recommended the Grievance be denied.

79. On May 1, 2020, Fund Management notified Applicant that it had accepted the Grievance Committee's recommendations in full.

80. On July 31, 2020, Applicant filed his Application with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

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

1. The Fund has failed to engage proactively in an effective interactive process to reasonably accommodate Applicant's disability with respect to meetings, events, Book Project deadlines, and building safety arrangements.

2. The Fund has discriminated against Applicant based on his disability. This includes direct discrimination through disparate treatment on the Book Project; and indirect discrimination through disparate impacts in relation to his FY2018 APR, office location, and safety arrangements.

3. With respect to Applicant's retaliation claims, the Tribunal's review should take into account not only the Fund's retaliation policy as in effect during the relevant time period, but also the Fund's more detailed retaliation policy as later adopted in February 2019; the "authoritative and helpful" laws and policies of the United Nations and World Bank; and the "highly instructive" laws of the United States and the District of Columbia.

4. Regardless of which retaliation policy the Tribunal applies, the "striking pattern of protected activities followed closely in time by adverse actions" shows that Applicant suffered retaliation for raising ethics complaints on numerous occasions.

5. The Fund breached the Partial Mediation Agreement by failing to observe proper meeting etiquette, failing to provide meeting summaries, and dropping Applicant's second chapter for the Book Project.

6. The Fund is liable for subjecting Applicant to a pattern of unfair treatment, which need not rise to the higher level of proof for a hostile work environment claim. The pattern included substantive unfairness through stereotyping and micro-inequities, violations of Applicant's legitimate expectations regarding his chapters for the Book Project, and application of an outdated retaliation policy. Applicant also suffered procedural unfairness in the Administrative Review and Grievance Committee proceedings.

7. Applicant seeks as relief:

   a. creation by the Fund of a Disability Coordinator position with expertise in disability and reasonable accommodation matters, with specified duties to include launching awareness initiatives, training managers and staff, implementing accommodations, and observing and counteracting retaliation;
   b. implementation of changes to APRs, including Applicant's FY2018 APR, such that persons with disabilities "only be held accountable for areas that are within their control" and reviews "reflect the performance that could have been achieved without the negative impact of retaliation, discrimination (failure to accommodate) and unfair treatment";
   c. removal from Applicant's personnel record "of any reports . . . related to his disabilities, including any medical files still held outside HSD, to eliminate any reputational harm from his disabilities and his requests for accommodation";
   d. compensation for "career and reputational damages," including damages caused by the non-publication of Applicant's second chapter for the Book Project;
   e. revision of the online version of the Fund's publication resulting from the Book Project so as to include Applicant's second chapter, and three months' net salary as compensation for unfair treatment in respect of that chapter;
   f. work responsibilities, including managerial responsibilities, corresponding to the job standards for Applicant's position and three months' net salary as compensation for career and reputational prejudice;
   g. compensation for emotional distress in the amount of $100,000, to be transferred to a charity of Applicant's choice; and
   h. reimbursement of legal fees and costs incurred by Applicant (totaling $356,944.43 as of the date of the Reply and to be supplemented thereafter).

B. Respondent's principal contentions

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

1. The heart of this case is not Applicant's disability, but rather his poor work product, resentment, and aggression toward the female Supervisor who took the lead on the Book Project that Applicant considered to be "his."

2. The Fund has worked tirelessly to provide reasonable accommodations for Applicant's disability, consistent with HSD recommendations, the parties' mediation agreement, and safety considerations.

3. Contrary to Applicant's claims, Applicant suffered no discrimination with respect to the Book Project, from which Applicant's second chapter was dropped based on quality concerns and Applicant's unwillingness to work with a co-author; his office assignment, which was based on availability and Applicant's grade level; or

use of the Fund's standard "open communication skills" competency in his FY2018 APR, which refers not to a physical ability to hear, but to emotional intelligence and openness to other views.

4. With regard to Applicant's retaliation claims, the controlling law is the Fund's own retaliation policy in effect for the time period of this case (October 2017 to October 2018) and Tribunal precedents interpreting that policy. There is no basis for Applicant's suggestion to retrospectively apply later, substantial amendments to the Fund's policy – which in any event would not assist Applicant with his grievances.

5. There was no retaliation against Applicant, as there was no causal link between the few protected activities on his part and any adverse actions by the Supervisor or others.

6. There was no breach of the Partial Mediation Agreement on the Fund's part, either with respect to meeting accommodations or its handling of the Book Project.

7. Applicant was not subjected to a hostile work environment, as he alleged in the Grievance Committee proceeding. Nor was he subjected to any unfair treatment, as he now alleges, either substantively in terms of stereotyping and micro-inequities, the Book Project, or failure to apply a later Retaliation Policy; or procedurally with respect to the conduct of the Administrative Review and Grievance Committee proceedings.

8. No relief should be granted, as Applicant's claims are meritless. In addition, certain types of relief requested by Applicant are beyond the Tribunal's jurisdiction, as such remedies would go beyond Applicant's individual claims now at issue and intrude on the Fund's policy-making and editorial discretion. Finally, Applicant's request for $357,000 in attorneys' fees and costs is "wildly excessive" and unjustified.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

83. 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.[7]

84. As previously noted, Applicant's claims span the time period from October 2, 2017, to October 29, 2018. The Staff Handbook was updated twice during this time, with the June 2017 version applicable at the start of the case revised in January 2018 and again in July 2018. The

[7] The Tribunal's practice is to reproduce the relevant provisions of the Fund's internal law that governed the issues of the case. The Fund's internal law changes over time and the provisions reproduced herein will not necessarily be those in force as of the time of the Judgment in this matter.

parties did not originally provide all applicable versions of the relevant rules for the time period. By letter of October 7, 2021, the Tribunal asked Respondent to provide all versions of the relevant Staff Handbook provisions in effect from October 2017 to October 2018, to the extent not already in the record, so as to permit verification of the applicable provisions for the entire time period at issue. The requested materials, which Respondent provided on October 12, 2021, reflect that the key Staff Handbook provisions relevant to the issues in this case, as set out below, remained consistent throughout the time period of the case.

A. Discrimination and reasonable accommodation provisions

(1) Staff Handbook, Ch. 11.01, Section 5

85. Staff Handbook, Ch. 11.01 (Standards of Conduct), Section 5, sets out the Fund's general antidiscrimination standards and duty to provide reasonable accommodations. It reads in full:

> Section 5: Discrimination and Reasonable Accommodation
>
> **5.1 Prohibition of Discrimination**
>
> Subject to the Fund's institutional needs, including the paramount importance of securing the highest standards of efficiency and technical competence, the employment, classification, promotion and assignment of staff members shall be made without discriminating against any person because of age, creed, disability, ethnicity, gender, nationality, race or sexual orientation.
>
> **5.2 Staff Members' Responsibility**
>
> Staff members share responsibility for contributing to a working environment that promotes equal treatment and is free from discrimination. To this end, they must comply with all applicable policies concerning discrimination (Annex 11.01.3: Discrimination Policy), including the supplementary policy statement (2000) on discrimination against persons with HIV/AIDS.
>
> **5.3 Provisions of Reasonable Accommodations**
>
> The Fund will provide reasonable accommodation for personnel with a disability, at their request, to enable them to perform the essential functions of their job. An accommodation will not be considered reasonable if it causes undue hardship for the Fund (i.e., significant and disproportionate expense or difficulty). In providing an accommodation, the Fund may decide between one or more reasonable options.

(2) Staff Handbook, Annex 11.01.3 (Discrimination Policy)

86. Staff Handbook, Annex 11.01.3 contains the Fund's detailed Discrimination Policy, which provides a definition and examples of discrimination. It includes two appendices with further information on ways to address potential discrimination and to distinguish between discriminatory and nondiscriminatory conduct at work. Annex 11.01.3 reads in full:

GAO 11 – Annex 11.01.3: Discrimination Policy

I. INTRODUCTION

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

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

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

II. POLICY

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

III. WHAT IS DISCRIMINATION IN THE CONTEXT OF THE FUND?

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

- is made on the basis of personal characteristics such as age, creed, ethnicity, gender, nationality, race, or sexual orientation;

- is unrelated to an employee's work-related capabilities, qualifications, and experience – this may include factors such as disabilities or medical conditions that do not prevent the employee from performing her or his duties;

- is irrelevant to the application of Fund policies; and

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

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

- basing decisions that affect the career of an employee – such as salary adjustments, assignments, performance evaluations, promotions, and other types of recognition – on grounds other than professional qualifications or merit;

- creating or allowing a biased work environment that interferes with an individual's work performance or otherwise adversely affects employment or career opportunities; and applying a policy or administering a program – such as annual leave or staff benefits, or access to training programs – in a manner that differentiates among employees for reasons other than the criteria or factors incorporated in the policy.

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

While the former may be readily identified (e.g., a denial of a promotion), the latter may be less obvious, as there is no specific act or decision at issue. Nevertheless, the failure to provide fair and impartial

treatment, even if through inaction, can have harmful effects on an employee's career.

IV. FURTHER INFORMATION

Appendix 1 to this Annex contains additional information on Addressing Discrimination in the workplace, and the resources available to employees who wish to seek further advice on the subject.

Appendix 1

ADDRESSING DISCRIMINATION

A. If Employees Believe They Have Been Subjected to Discrimination

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

It is important that employees have reasonable grounds supported by documents and other evidence, which may include witnesses, before making a complaint of discrimination. Employees should not use discrimination allegations to address other concerns or disagreements. The Fund will protect an employee against retaliation for raising a discrimination case, but if an inquiry demonstrates that the accusations are frivolous or malicious, this may be grounds for disciplinary measures.

B. If Accused of Discrimination

An accusation of discrimination should be taken seriously regardless of whether it initially appears to be unfounded. It is useful to discuss the accusation with an objective third party who understands the confidential and sensitive nature of the problem and the characteristics of discrimination. The accused individual may wish to meet and discuss with the accuser to understand his or her rationale and background and to correct any possible misunderstandings or information gaps with respect to decisions made and actions taken.

Seeking facts and documentation of events, decisions, and communications is needed as well as identifying any witnesses or evidence to set the record straight. The informal mechanisms described in Section D below are available for all Fund employees in discrimination-related concerns.

Discriminatory behavior by employees, supervisors, or peers toward others is a form of misconduct under the Fund's rules and is punishable as such. As provided in Chapter 11.02, "Misconduct and Disciplinary Procedures," the disciplinary action will be commensurate with the severity of the misconduct and may include termination of employment.

C. If Employees Perceive Discrimination

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

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

D. Informal Mechanisms

A variety of resources are available to provide information, guidance, and advice regarding how to address perceived discrimination in the immediate work environment or procedures for filing a formal complaint. It is recommended that employees discuss concerns with any of the following resources informally before taking formal steps.

- The immediate manager of the employee, the second-level supervisor, Department Head, SPM or ASPM

- Ombudsperson

  The Ombudsperson is an independent, neutral resource who can provide confidential advice or assistance through mediation or conciliation to help resolve personal misunderstandings or conflict that may be viewed as discriminatory. In cases where the problem cannot be resolved through mutual agreement, the Ombudsperson may

present recommendations for the resolution of the problem to those with authority to implement his or her recommendations.

- Senior Advisor on Diversity

The Senior Advisor on Diversity provides advice, counseling, and mentoring to groups of employees and individual employees with concerns regarding diversity and discrimination.

- Staff Association Committee

The SAC can provide guidance on the resources and processes available to individual employees and help to raise issues that concern groups of staff.

E. Formal Mechanisms

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

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

2. If the individual's main objective is to seek redress for the damaging effect that discrimination has had on his or her career (e.g., if a decision affecting the individual is discriminatory, or if the Fund has failed to take adequate measures in response to a complaint of discrimination), the employee may seek review of the matter through the formal channels of dispute resolution in the Fund. For employees who are not staff members, the available formal mechanisms will depend upon the terms of their employment contracts. For staff members, formal recourse would normally entail following the procedures for bringing a grievance before the Grievance Committee (including prior administrative review), as set out in Chapter 11.03, "Dispute Resolution." If at the end of the grievance process the staff member remains dissatisfied with the result, he or she may file an application with the IMF Administrative Tribunal (IMFAT).

Appendix 2

DISTINGUISHING BETWEEN DISCRIMINATION AND NONDISCRIMINATORY CONDUCT IN THE FUND'S WORKING ENVIRONMENT

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

Inappropriate workplace behavior, as such, is not discrimination. However, if this behavior (such as telling offensive jokes or creating a hostile work environment) systematically targets certain individuals or groups of individuals, it may be discriminatory.

Harassment, unfair treatment, abuse of power, and favoritism are also separate from discrimination, but they can all become discriminatory if they develop into a pattern and systematically address certain individuals or groups of individuals and have an impact on employees' performance, development, career opportunities, and career progress.

Managers have the responsibility to make **business decisions** which are not always favorable to individual employees. It should be recognized that criticism or adverse decisions about performance or work assignments do not of themselves constitute harassment, discrimination, or retaliation.

Negative assessment or feedback on performance, even if it is frequent and long term, or denial of a promotion is not discrimination if it is based on standards applicable to and communicated to all relevant employees. Feedback should also be accompanied by constructive suggestions for corrective actions, and managers should not use criticism to demean or belittle employees in front of others. However, setting disparate standards or giving biased feedback depending on an individual's gender, race, or other irrelevant factors can be a form of discrimination.

The Fund's **working language** is English; therefore, oral and written English communication skills are crucial performance competencies for all employees. Mastery of language skills is a relevant performance assessment criterion and negative assessment based on language skills alone should not be perceived as discrimination.

The Fund's **personnel management system** includes elements – such as structured decision making procedures, defined policies and practices for performance assessment, individual objectives, feedback, and merit-based career progress – that some employees may initially have difficulty adapting to. Certain policies and programs – including the Economist Program (EP) and mandatory retirement – require age to be used as one

> criterion. In addition, due to the international nature of the Fund, the Fund offers certain benefits exclusively to some employee categories, for example, expatriates and employees with spouses or domestic partners. These policies are not in themselves grounds for claims of discrimination. The Fund frequently reviews its policies and practices and makes a special effort to balance diversity considerations with business objectives.
>
> The Fund is a work environment characterized by **high performance standards**, hard work, merit-based career competition, and frequent travel. The nature of its work and its organizational culture tends to create stress, which can sometimes lead to tension among individuals and groups. This tension, if not managed effectively, may create a perception of bias. However, stressful work is no excuse for unprofessional or discriminatory behavior.

B. Retaliation provisions

(1) Staff Handbook, Ch. 11.01, Section 11.1

87. Staff Handbook, Chapter 11.01, Section 11.1 sets out the Fund's general prohibition of retaliation. It reads in full:

> **11.1 Prohibition of Retaliation**
>
> As set out in the Annex 11.01.6: Retaliation Policy, any retaliation against a staff member for either raising an ethics complaint in good faith or filing a grievance, or for participating in either type of proceeding as a witness, shall constitute misconduct, and any adverse decision motivated by retaliation shall be invalid.

(Internal footnote omitted).

(2) Staff Handbook, Annex 11.01.6 (Retaliation Policy)

88. Staff Handbook, Annex 11.01.6 contains the Fund's detailed Retaliation Policy, which expands upon the Fund's basic prohibition of retaliation and includes "Guidance Points" for handling potential retaliation. The version in effect during the time period of the case reads in full:

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

a grievance, or for participating in either type of proceeding as a witness, the retaliation itself would be a form of misconduct which could result in disciplinary action, and any adverse decision motivated by retaliation would be invalid.

Guidance Points:

Managers are expected to create an atmosphere where staff will feel free to use existing channels for workplace conflict resolution without fear of reprisal. These channels include managers, ASPMs, SPMs, Department Heads, HRD, the Ombudsperson, the Ethics Advisor, the Integrity Hotline and the formal dispute resolution system (Grievance Committee and Administrative Tribunal).

Staff are expected to cooperate with the Fund's processes for resolving allegations of misconduct or unethical behavior, and they are also expected to participate, when requested, as witnesses in dispute resolution matters.

Staff are strongly encouraged to make reports in good faith of suspected misconduct or unethical behavior, including through the Integrity Hotline (Annex 11.01.7). However, failure to report suspected misconduct is not itself a separate act of misconduct.

Managers have a duty to act upon, resolve, and/or report ethical concerns that come to their attention.

Malicious and unsubstantiated allegations of misconduct are viewed as separate acts of misconduct.

C. Mediation provisions

(1) Mediation Rules

89. The Mediation Rules governing the conduct and confidentiality of the parties' mediation, and the enforcement of their Partial Mediation Agreement, read in relevant part:

1. Objectives and Principles of Mediation

The objective of mediation is to assist parties in reaching mutually acceptable solution[s] to workplace disputes, as an alternative to the formal dispute resolution process.

Mediation is guided by three key principles:

- Voluntariness: Participation in the process is entirely voluntary on the part of both parties.

- Confidentiality: The mediation proceedings are confidential and positions taken by the parties during the mediation process may not be disclosed to a third party or used in litigation without the consent of the other party.

- Informality: There are no formal hearings or rules of discovery. This informality allows the process to be flexible.

. . . .

4. Mediation Process

4.01 *Requests for Mediation*. Request[s] for mediation shall be made in writing to the Mediator. A request for mediation may be made by the staff member or contractual employee [or] by a representative of the Fund. The request may be made either jointly by the parties or individually by one of the parties.

4.02 *Disputes That May Be Mediated*

4.02.1 Upon receiving a request for mediation, the Mediator shall evaluate whether the matter is appropriate for mediation. As a general guideline, disputes which may be mediated are those which would fall within the jurisdiction of the Grievance Committee for staff or, for contractual employees, the arbitrator ("Grievable Matters"). In addition, a matter may be mediated if, in the Mediator's judgement, it is appropriate for mediation. This may include interpersonal disputes, communication issues, and workplace respect concerns that may escalate to a grievance if not addressed at an earlier stage in the conflict. Matters which may not be mediated include regulatory decisions, pension decisions addressed under the Staff Retirement Plan framework, the coverage of treatment under the Medical Benefits Plan, and issues involving violence or a threat of violence.

4.02.2 If the Mediator determines that the matter is appropriate for mediation, the Mediator shall establish a schedule for conducting the mediation that may include timelines for submission of any written materials and the dates for the conduct of the mediation itself. If the Mediator determines that the matter is not appropriate for mediation, he or she shall so inform the parties in writing.

. . . .

4.05 *Confidentiality*

4.05.1 The fact of participation in a mediation and the proceeding of the mediation – including any written submissions, positions taken by the parties, views expressed, and admissions or suggestions made by the parties or the Mediator in the course of the mediation – shall be strictly confidential. Positions taken by the parties during any stage of the mediation process shall also be strictly confidential and may not be disclosed or used for any other purposes, including a formal dispute proceeding (e.g., an arbitration, Grievance Committee hearing, Administrative Tribunal hearing), except with the consent of the other party and the Mediator. Statements by the parties during mediation accordingly do not serve as notice to the organization of alleged wrongdoing or misconduct and will not trigger a disciplinary process against a party or any other individual. However, the Mediator may refer individuals to the appropriate place where formal notice can be made.

4.05.2 Exceptions to the above confidentiality rules are:

- When the Fund representative needs to consult with LEG, HRD, or the department's HR team for purposes of obtaining permission to participate in mediation, to gain access to information, or to explore the viability of mediation resolution options. Any information shared in such circumstances will be treated as strictly confidential (i.e., only shared on a strict need-to-know basis).

- When the parties explicitly agree that otherwise confidential information may be shared.

- When a party needs to share the content of the Memorandum of Understanding for the purpose of obtaining legal advice before signing, or on its enforcement or implementation.

- When there appears to be imminent risk of serious harm. Whether this risk exists is a determination to be made by the Mediator.

4.05.3 The Mediator shall destroy his or her notes at the conclusion of each mediation.

4.05.4 The Mediator may not act as a witness in any other Fund dispute resolution proceeding in relation to the mediated claim.

4.06 *Conclusion of the Mediation*

4.06.1 Mediation may be concluded in one of the following ways:

- The parties come to a mediated agreement.

- One or more of the parties withdraws from mediation.

- The Mediator closes the case. The Mediator may end a mediation at any time when, in his or her sole discretion, the case ceases to be appropriate for mediation.

4.06.2 The Mediator shall document the conclusion of a mediation and shall notify the parties in writing of the case's conclusion.

4.07 *Memorandum of Understanding*

4.07.1 If the parties agree to a mutually acceptable resolution, the agreement shall be memorialized in a Memorandum of Understanding (MoU) to be prepared by the Mediator which sets out in detail the agreement of the two parties. Before the MOU may be concluded, manage[ment] or its delegate must confirm its approval on behalf of the Fund. The MoU is binding once it has been signed by both parties.

4.07.2 *Enforcement*. If a party is of the view that the MoU has been breached, the party may seek the enforcement of the MoU through the normal dispute resolution channels (i.e., the Grievance Committee or arbitration, as applicable). However, the party may choose, first, to request the assistance of the Mediator to resolve the issue.

. . . .

6. Protection Against Reprisal

Any adverse action taken against an individual in retaliation for his or her pursuit of, or participation in, mediation may be grounds for a finding of misconduct and the imposition of disciplinary measures per Chapter 11.03, Section 8 of the Staff Handbook.

D. Unfair treatment provisions

90. Provisions relevant to Applicant's claims of unfair treatment may be found in the Fund's Discrimination Policy, as set out *supra* at Paragraph 86, and the Fund's harassment provisions as set out below.

(1) Staff Handbook, Ch. 11.01, Section 4

91. Staff Handbook, Chapter 11.01, Section 4 sets out the Fund's general standards for respectful behavior and prohibition of harassment. It reads in full:

> **Section 4: Harassment**
>
> **4.1 Behavior towards Colleagues**
>
> Staff members are expected to treat one another, whether supervisors, peers, or subordinates, with courtesy and respect, without harassment or physical or verbal abuse. They should at all times avoid behavior at the workplace that may create an atmosphere of hostility or intimidation. Moreover, in view of the international character of the Fund and the value that the Fund attaches to diversity, employees are expected to act with tolerance, sensitivity, respect, and impartiality toward other persons' cultures and backgrounds.
>
> **4.2 Prohibition of Harassment**
>
> Employees of the Fund should not be subjected to harassment in carrying out their work at Headquarters, on mission or in any Fund duty station. To ensure a harassment-free workplace for all Fund employees, staff members must comply with all applicable policies concerning harassment, including sexual harassment (Annex 11.01.2: Harassment Policy) and the Mission Code of Conduct.

(Internal footnote omitted).

(2) Staff Handbook, Annex 11.01.2 (Harassment Policy)

92. Staff Handbook, Annex 11.01.2 contains the Fund's detailed Harassment Policy, which includes a definition and examples of harassment. It reads in relevant part:

> Annex 11.01.2: Harassment Policy
>
> Section 1: Introduction
>
> **1.1 General Principles**
>
> Employees must treat one another, whether supervisors, peers, or

subordinates, in a professional manner with courtesy and respect, without harassment, or physical or verbal abuse . . . . They should at all times avoid behavior at the workplace that may create an atmosphere of hostility or intimidation, including when working under stressful circumstances.

. . . .

Section 3: What is Harassment?

3.1 Harassment

Harassment is behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile or offensive work environment. Harassment may be directed at an individual or a number of people, it may be initiated by a peer, supervisor, or subordinate. Depending on the circumstances, harassment may involve a pattern of behavior, or it may take the form of a single incident. In determining whether conduct constitutes harassment, the effect of the conduct on others is paramount. Accordingly, a determination of harassment will involve a consideration of whether the behavior was reasonably perceived as offensive or intimidating by another, and whether it had a demonstrably negative effect on the other person. Harassing behavior is especially egregious if it involves an abuse of authority or is motivated by a discriminatory or retaliatory reason.

. . . .

3.2 Harassment can take many different forms, including but not limited to bullying, mobbing, sexual harassment and the creation of a hostile work environment:

. . . .

3.2.4 Hostile Work Environment

Hostile work environment refers to a situation created by a pattern of words, action, or inaction, or otherwise innocuous behavior, the cumulative effect of which is to deprive a Fund employee of fair treatment in his/her employment or deliberately preclude the employee from performing his/her duties effectively.

3.3 Feedback from Supervisors and Colleagues

Supervisors are expected to provide feedback in a reasonable and constructive manner. The mere expression of disagreement or professional criticism as part of a feedback process regarding work performance,

> conduct or related issues, within a supervisor/supervisee relationship, shall not be considered harassment.
>
> . . . .
>
> **3.5 Examples of Harassment**
>
> This list is illustrative only and not exhaustive of examples of behavior that may constitute harassment:
>
> i. Denigrating comments (oral or written), gestures or physical actions;
>
> ii. Behavior that demeans, belittles or causes personal humiliation or embarrassment;
>
> iii. Degrading public tirades by a supervisor or colleague;
>
> iv. Deliberate insults related to a person's personal or professional competence;
>
> v. Threatening or insulting comments, whether oral or written – including by email . . . .

(Internal footnote and links omitted).

CONSIDERATION OF THE ISSUES

93. The Application presents the following principal issues for the Tribunal's decision: (a) Did the Fund discriminate against Applicant on the basis of his disability, by failing to provide reasonable workplace accommodations or otherwise? (b) Did the Fund retaliate against Applicant for seeking reasonable accommodations, alleging discrimination, and raising ethics complaints through various channels? (c) Did the Fund breach its Partial Mediation Agreement with Applicant? (d) Did the Fund subject Applicant to a pattern of unfair treatment? (e) Were the Administrative Review and Grievance Committee proceedings in Applicant's case undertaken in accordance with fair and reasonable procedures?

94. With respect to the Tribunal's scope of review in relation to Grievance Committee proceedings, "[t]his Tribunal has emphasized . . . that the [Grievance] Committee only makes recommendations and the Tribunal reexamines all issues *de novo*." *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 168.

95. Under the Tribunal's general standard of review for individual decisions taken in the exercise of managerial discretion, an applicant's challenge will succeed only if the applicant shows that the decision was "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."

(Commentary on the Statute,[8] p. 19). In determining the standard of review for a particular matter, the Tribunal has recognized that "an important factor . . . may be the nature of the underlying decision-making process that is subject to the Tribunal's review." *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 123 (quoting *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 110) (applying heightened scrutiny for review of disciplinary decision).

A. Did the Fund discriminate against Applicant on the basis of his disability, by failing to provide reasonable workplace accommodations or otherwise?

96. The Tribunal has long recognized that certain types of discrimination violate not only the internal law of the Fund, but also universal principles of human rights. The Tribunal applies heightened scrutiny to such claims. In *Mr. "F"*, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), for example, the Tribunal described religious prejudice as a form of "discrimination prohibited by the Fund's internal law as well as by universally accepted principles of human rights," para. 81 (internal footnote omitted), and as "a serious charge that may be subject to particular scrutiny by the Tribunal," para. 50. In *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006), the Tribunal similarly observed that discrimination against children born outside of marriage would contravene both the Fund's nondiscrimination standards and universally accepted principles of human rights, paras. 132-133, and stated that "[t]he very nature of this grave complaint requires a greater degree of scrutiny over the Fund's exercise of its discretion," para. 117.[9]

97. The Fund's antidiscrimination policies recognize that discrimination based on disability is on a par with religious bias and other serious types of discrimination. See Staff Handbook, Chapter 11.01, Section 5.1 (prohibiting discrimination "because of age, creed, disability, ethnicity, gender, nationality, race or sexual orientation"). Discrimination based on disability violates not only the Fund's internal law, but also universally accepted principles of human rights. Accordingly, the Tribunal shall apply heightened scrutiny to allegations of discrimination based on disability. This applies not only to claims of discriminatory actions taken against staff with disabilities, but also to claims that the Fund has through its inaction failed to provide the types of reasonable accommodations that are needed to level the playing field for disabled staff.

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[8] The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Reports of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009 and 2020).

[9] Other types of discrimination claims, in contrast, may be viewed as "of a distinctly different and less serious type." See *Mr. "F"*, para. 81 (noting past cases challenging the Fund's treatment of economists versus non-economist staff, overseas Office Directors versus Resident Representatives, and Legal Permanent Residents versus G-4 visa holders).

98. In the present case, Applicant alleges that the Fund (a) failed to fulfill its responsibility to provide reasonable workplace accommodations for his disability and (b) also subjected him to other discriminatory acts on the basis of his disability. The Tribunal considers each of these claims in turn below.

(1) Did the Fund fail to provide reasonable accommodations for Applicant's disability?

99. The first issue presented is whether the Fund satisfied its duty to provide reasonable accommodations for Applicant's hearing disability in the period between October 2, 2017 and October 29, 2018. As noted earlier, Applicant contends that the Fund failed to engage proactively in an effective interactive process and provide reasonable accommodations for his disability with respect to meetings, events, Book Project deadlines, and building safety arrangements. Respondent, for its part, contends that the Fund has worked tirelessly to provide reasonable accommodations for Applicant's disability, consistent with HSD recommendations, agreements reached by the parties in mediation, and safety considerations.

(a) Standards applicable to Applicant's reasonable accommodations claim

100. This case presents the first instance in which the Tribunal is asked to interpret the Fund's written policy on disability accommodations as set out in the Staff Handbook, Chapter 11.01, Section 5.3. Respondent states that the Fund first promulgated Section 5.3 in February 2017, "[h]aving due regard to the Tribunal's guidance in [*Mr. "KK"*, para. 200] on the need to establish a transparent policy on reasonable accommodations." Under the provisions of Section 5.3, as set out *supra* at Paragraph 85, the Fund was obliged to provide reasonable accommodations, at Applicant's request, to enable him to perform "the essential functions" of his job. The Fund had the discretion to decide between "one or more reasonable options" where available. The Fund was not obliged to provide accommodations that would cause "undue hardship for the Fund (i.e., significant and disproportionate expense or difficulty)."

101. In his Application, Applicant also invokes procedural standards set out in HR guidance on "Accommodation of Disabilities" as published on the Intranet in September 2018. Most of the guidance addresses the mechanics of submitting initial requests for accommodations. The guidance also requires that supervisors and HR teams engage in certain consultations before denying an accommodation request; and states that "[i]n appropriate cases, the Fund will engage in an interactive process to try and identify a reasonable accommodation." As discussed *infra* at Paragraph 130, the parties agree that an interactive process was in fact essential to develop reasonable accommodations for Applicant's disability. Beyond that, however, the Tribunal will not consider the HR guidance as applicable in this matter. As Respondent notes, HR issued this guidance near the end of the time period of this case, long after Applicant's accommodations plan was in place and under implementation.

102. While this is the first accommodations case presented to the Tribunal arising under Section 5.3, the Tribunal finds it useful to refer to its analysis of reasonable accommodations in *Mr. "KK",* paras. 179-202, which pre-dated Section 5.3. In *Mr. "KK"*, the applicant alleged that the Fund had failed to fulfill its duty to modify his work schedule as recommended by HSD due to a health condition. *Mr. "KK"*, paras. 93, 179. While the Fund at that time lacked a written

protocol for handling reasonable workplace modifications necessitated on health grounds, *see id.*, para. 199, Respondent asserted in the Tribunal's proceedings that the Fund in fact "has a policy of giving reasonable accommodation to medical needs," *id.*, para. 192.

103. In its analysis of the facts in *Mr. "KK"*, the Tribunal noted that the applicant's managers had taken steps, even before HSD's involvement, to lighten his workload so as to address his perception that it was excessive. *Id.*, para. 181. The Tribunal also took into account the record of interactions among the applicant, the SPM, his Division Chief and Deputy Division Chief, and his principal supervisor, showing that they had periodically discussed and coordinated amongst each other and with the applicant to address his workload issues. *Id.*, paras. 182-187. Finally, the Tribunal noted that while the applicant contended "that managers made demands on him that either caused him to work beyond the 40-hour limit or put him in the position of having to remind them of the requirement," he admittedly did not share his own detailed time records with his managers to alert them to such circumstances. *Id.*, para. 193. Given the applicant's use of flexible work arrangements including telework, and the nature of his work responsibilities with multiple reporting relationships, the Tribunal considered that his managers could not be faulted for failing to address any substantial work schedule deviations that the applicant had not raised. *Id.*, para. 194. On this record, the Tribunal found no grounds to support the applicant's claim of inadequate accommodations. *Id.*, paras. 194-195.

104. The Tribunal also finds it instructive to consider decisions of the World Bank Administrative Tribunal (WBAT) interpreting the "reasonable accommodations" standard codified in the World Bank's internal written law. In *BY (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 481 (2013), the WBAT noted that the Bank had accepted a duty to engage in a good-faith interactive process to identify reasonable accommodations; and found that this duty had been satisfied based on the record of "numerous discussions" between the applicant, HSD, the Vice President for the applicant's region, and HR. *Id.*, para. 54. The WBAT stated that it "considers it necessary to evaluate the reasonableness of an accommodation on a case-by-case basis, having regard to the specific facts of each case." *Id.*, para. 60. The WBAT further observed that since "the obligation is to provide a reasonable accommodation based on medical need, not on the employee's personal preference," the Bank was "under no obligation to continue offering other" options once the applicant had rejected an accommodation that was "reasonable in the circumstances of the case." *Id.*, para. 63. Finally, the WBAT expressed concern that the Bank took six months to first offer an accommodation, and emphasized that "reasonable expeditiousness is an implicit requirement in the provision of a reasonable and effective accommodation." *Id.*, para. 66.

105. In *FM v. International Bank for Reconstruction and Development*, WBAT Decision No. 643 (2020), the WBAT reiterated that the duty to provide reasonable accommodations should be "based on medical need, not on the employee's personal preference," para. 114; and that "reasonableness would be assessed on a case-by-case basis," para. 115. The WBAT also stressed that "the Bank is required to act with fairness and follow a proper process in its interactions with staff members", *id.*, para. 114. Thus the Bank has a broader obligation to "explore various options," *id.*, para. 117; and cannot discharge its duty to provide reasonable

accommodations "by simply claiming that . . . a particular proposal . . . does not meet the business need of that particular unit," *id.*, para. 116.

106. The Tribunal observes that, in his pleadings, Applicant cites at length other legal standards, including reasonable accommodation requirements of United States law (primarily the Americans with Disabilities Act). The Tribunal does not find it instructive to refer to these other standards in interpreting the Fund's law in this case. The Fund's law is sufficiently clear to resolve Applicant's claims, particularly as considered in the light of relevant precedents from this Tribunal and the WBAT as cited *supra*. Moreover, the other standards invoked by Applicant appear in some respects to be differently formulated to the Fund's own law.[10]

(b) Analysis of Applicant's reasonable accommodations claim

107. As detailed below, the record reflects extensive engagement between Applicant and the Fund to identify and implement accommodations that would support Applicant's core work on the Book Project, facilitate his participation in meetings and social affairs of the Division, and provide him with multiple extra safeguards in case of emergency.

(i) Initial accommodations in late 2017

108. Applicant asserts that he first requested accommodations on October 2, 2017, when he verbally apprised the Supervisor of his audiology test results. However, the record does not reflect a clear request for specific accommodation upon which the Supervisor could have been expected to act at that time, beyond allowing him to use a white-noise machine in his office. Applicant testified that the Supervisor "was fine with" his use of the machine. The record also reflects that Applicant informed the Supervisor later that month that he would not attend certain in-person meetings while his hearing aids were being repaired. He did not ask for any accommodations from the Fund's side to enable him to attend, however. For example, when he informed the Supervisor on October 17, 2017, that he would not attend the next day's Department retreat, he told her that he hoped to get "additional tools to participate in conversations with background noise" from his next visit with his own audiologist.

109. It was only on November 8, 2017, that Applicant sought to certify his disability and thereafter initiate the process of seeking formal accommodations. The record shows prompt responses from various parts of the Fund, including HSD, which gave a same-day certification of his disability; the CSF Officer, who met with Applicant five days later, identified five suggested action items, completed several items the same day, and initiated action on the others; and the SPM, who responded immediately to the CSF Officer's outreach.

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[10] For example, Applicant asserts that the Americans with Disabilities Act requires employers to provide accommodations not only for the essential functions of an employee's job, but also to ensure that disabled employees "enjoy the same benefits and privileges of employment as non-disabled employees enjoy," such as "parties or other social functions."

110. When Applicant met with HSD to discuss his accommodations on November 20, 2018, with an emphasis on exploring meeting accommodations beyond the technical workstation adjustments suggested by CSF, the Fund was again quick to follow up. HSD provided same-day documentation of the meeting with Applicant, listing several options for meeting accommodations per their discussion, including use of his listening pen. The CSF Officer accepted Applicant's request that they meet the following week; then followed up immediately after their meeting to ensure that the SPM, OM, and Supervisor were on board with the accommodations that they could provide immediately – mainly, allowing Applicant to use his listening pen in meetings as needed. As the CSF Officer noted, certain other technical options (such as physical plus dial-in meeting participation) would not be available until completion of the new HQ2 conference rooms.

111. While Applicant now asserts that this process and the Fund's resulting accommodations were inadequate, contemporaneous correspondence as noted *supra* at Paragraphs 45-50 shows that he was fully engaged in those accommodation discussions and characterized them as helpful and workable at the time. He did not propose any additions, changes, or corrections to the written summaries of proposed accommodations from HSD or the CSF Officer. If Applicant had any reservations at the time, it was incumbent upon him to raise such concerns in a timely fashion. For example, Applicant now asserts in these proceedings that use of his listening pen was ineffective for meetings, and in any case could not be construed as an accommodation because it is a personal device. Yet the record reflects that he participated in and endorsed the very discussions that identified use of the pen as a key meeting accommodation in November 2017. Moreover, as reflected in his emails to the CSF Officer on June 11, 2018, to the Supervisor on July 2, 2018, and to the SPM on January 24, 2019, Applicant continued to characterize use of his listening pen as an essential meeting accommodation through the remainder of the time period of the case and even thereafter.

112. On this record, the Tribunal finds that the Supervisor, SPM, and Department cannot be faulted for proceeding on the basis of the accommodation plans that Applicant himself agreed with HSD and the CSF Officer in November 2017. It was entirely reasonable for the Supervisor and SPM to rely upon such accommodations as having been vetted as medically appropriate and responsive to Applicant's needs. Indeed, they had no other option, as they were neither privy to the confidential details of Applicant's disability, nor qualified to assess what accommodations might be medically necessary.

(ii) Further accommodations in 2018

113. The record reflects that the Fund continued engaging intensively with Applicant through the remainder of the case period ending October 2018. This included addressing various safety concerns expressed by Applicant, as further discussed *infra* at Paragraphs 136-138. More broadly, the Fund agreed to participate in mediation proceedings to resolve Applicant's continued concerns on various fronts; and the parties were successful in reaching a number of points of agreement. The Partial Mediation Agreement of May 25, 2018, addressed a range of issues including accommodations for Division meetings and events as well as further extensions for Applicant's work on the Book Project. The parties subsequently took part in follow-up

mediation discussions as planned from June 28, 2018, with a final joint mediation session of July 30, 2018 identifying additional points of agreement and resulting in case closure.

114. The record shows that the Fund provided accommodations as agreed in mediation:

- With respect to safety issues, contemporaneous emails reflect that the Fire and Life Safety Manager oversaw installation of an extra alarm at Applicant's desk and provided further instructions for several fire wardens to assist Applicant.

- As the SPM and Supervisor confirmed, the Department was amenable to Applicant's use of his listening pen or taking a seat at the table at senior management meetings.

- According to testimony from the Supervisor and another senior Division colleague, the Supervisor encouraged good meeting etiquette, including having one person speak at a time, while retaining a sense of camaraderie in the Division.

- Summaries of meetings were shared orally and in writing when warranted. In particular, summaries of Division brainstorming sessions were noted on flipboards during the sessions and then circulated and saved to a shared drive afterward. Although Applicant complains that he was not always provided a written summary, the Partial Mediation Agreement recognized that written summaries would be provided only "when necessary," which Applicant would have to raise.

- As the Supervisor and another Division colleague testified, and as Applicant's own notes confirmed, the Division enforced quiet periods without music at their events. In addition, the Division staff responsible for organizing social events sought to use Applicant's preferred venues where possible, taking into account capacity limits and honoree preferences as well as Applicant's advance requests.

- On the Book Project, Applicant received further extensions as agreed, and was given the opportunity to indicate by mid-August 2018 whether he would accept working with a co-author to complete the second chapter.

115. In contrast, the record indicates that it was Applicant who declined to follow up on various accommodations as agreed and documented through the mediation. Despite Items 2 and 6 of the Partial Mediation Agreement, for example, Applicant generally declined to take a seat at the table or use his listening pen as proposed in senior management meetings, or to ask colleagues to repeat points or clarify the discussion. He also declined to share appropriate information about his hearing loss with colleagues, as had been envisioned under Item 4 of the Partial Mediation Agreement. While this reticence was appropriately within his personal discretion, it limited the ability of the Division and Department to take other measures that Applicant had sought – such as requiring that all speakers maintain eye contact with Applicant in meetings.

116. Finally, Applicant declined to comply with the last two points of additional agreement reached at the close of mediation on July 30, 2018. Applicant refused to confirm with the

Supervisor by mid-August 2018, as he had committed to do, whether he would work with a colleague to complete the second chapter. He also complained when the Supervisor abided by their final point of agreement, which provided that they would communicate primarily by email.

(iii) Asserted deficiencies in the Fund's accommodations

117. Applicant nevertheless maintains that the Fund failed its duty to provide reasonable accommodations in several respects, which the Tribunal addresses in turn below.

i. Alleged denial of meaningful feedback

118. Applicant contends that he was deprived of "the reasonable accommodation that he needed to receive feedback meaningfully and to participate in discussions of his performance." For example, he asserts that he should have received, but did not receive, written summaries of the Supervisor's December 6, 2017 feedback on his first book chapter; his mid-year APR discussion of January 18, 2018; and the "difficult conversations" regarding his second chapter on March 13 and March 22, 2018.

119. Applicant does not cite to any evidence to show that he required such feedback. Instead, he asserts that he was not obliged to request specific written summaries for two reasons. First, he points to his general request for oral or "when necessary" written summaries under the Partial Mediation Agreement of May 25, 2018. That agreement, however, post-dated the specific discussions he cites from December 2017 to March 2018. Second, he asserts that he did not need to request specific written summaries because "Fund policies determine when a written summary is needed." The latter assertion seems to relate to Applicant's argument that, separate from any issue of individual accommodations, as a matter of the Fund's performance management policies he should have received written summaries of any meetings in which issues of allegedly unacceptable behavior arose.

120. Respondent asserts that both the Supervisor and the SPM did convey their concerns about Applicant's behavior to him in writing. Apart from such written feedback, Applicant's own detailed testimony shows that he was fully aware of the Supervisor's immediate discomfort with the manner in which he approached her in her office in both March and June 2018. Moreover, the record reflects that Applicant received detailed written feedback on both of his book chapters, including two sets of tracked edits for his first chapter in December 2017; that he understood his in-person exchanges with the Supervisor, which he often documented for himself afterward; and that he understood, but did not accept, the Supervisor's guidance on the Book Project.

ii. Alleged delay or denial of accommodations for social events

121. Applicant complains that the Fund's provision of accommodations for Department and Division social events was inadequate and/or untimely. At the outset, the Tribunal considers to what extent the Fund was obligated to provide any accommodations for social events as a matter of Fund law.

122. Applicant argues that "unless [the Fund] can show undue hardship," "the Fund must provide" reasonable accommodation for social events so as "to allow disabled employees equal benefits and privileges as similarly situated employees without disabilities." Section 5.03, however, requires that the Fund "provide reasonable accommodation for personnel with a disability, at their request, to enable them to perform *the essential functions of their job*." (Emphasis added). The question then is whether participation in social events may constitute an "essential function" so as to require reasonable accommodation.

123. In the oral proceedings in this case, Respondent asserted that the core functions of Applicant's job were conducting research, writing, and managing junior staff. At the same time, Respondent recognized that social events can be important opportunities for interacting and bonding with colleagues, but suggested that the Fund should have more flexibility in seeking to accommodate staff for such events.

124. The Tribunal agrees that a fair approach, consistent with the touchstone of "reasonableness" embodied in Section 5.3, is to recognize that the Fund should make efforts to facilitate disabled employees' participation in social events proportionate to the significance of such events to building work effectiveness in a team environment. In making such efforts, the Fund may consider that not all staff need to participate in every social event. Moreover, venue options may be limited; and the preferences of staff being honored at farewell events or other celebrations may legitimately merit priority.

125. On the record presented, Applicant fails to show any shortcomings or delays in the Fund's provision of reasonable accommodations under either Section 5.3 or the specific terms of the Partial Mediation Agreement. The record shows that Applicant repeatedly opted out of events at the last minute, rather than express interest in attending and request accommodations in advance. The November 20, 2017 accommodation plan that Applicant developed with HSD, which according to the CSF Officer superseded her initial suggestions, did not address any need to modify social events based on Applicant's disability. According to Applicant's own testimony, Tr. 94-95, even when he met with the SPM and Supervisor on December 13, 2017, to discuss what still needed to be done to give full effect to his accommodation plan and to facilitate his participation in Department social events as well as meetings, "there was not really any discussion of very specific measures" beyond use of his listening pen.

126. Once the Division was aware of Applicant's interest in taking part in social events with certain accommodations, the Division took appropriate actions to implement reasonable accommodations where possible. As noted *supra* at Paragraph 114, the Division enforced quiet periods without music at their events and sought to use Applicant's preferred venues where possible, taking into account capacity limits and honoree preferences as well as any advance requests from Applicant. The Tribunal finds that the Fund's efforts in this regard were proportionate and reasonable.

iii. Treatment of Applicant's delays on the Book Project as a performance issue

127. Applicant complains that the Supervisor raised his delays on the Book Project as a performance issue, thereby undermining the effectiveness of the extensions that he had received

as an accommodation under the Partial Mediation Agreement of May 25, 2018. The Tribunal notes that the Partial Mediation Agreement referred to unspecified past requests for extensions. However, it focused on extensions from that point forward, memorializing the parties' agreement to a four-week extension to mid-June 2018 for the second chapter. It did not purport to excuse all prior delays on Applicant's side or suggest that the Book Project was well on track. To the contrary, the Partial Mediation Agreement emphasized, "At this point, the book is significantly behind schedule and [Applicant] recognizes that any further delay beyond the agreed timelines is likely to lead to significant disruption of the work program."

128. The record shows that Applicant's delays on the Book Project had been a concern from at least May 2017 – i.e., months before Applicant raised hearing issues as a potential impediment to his work on the Book Project or sought any type of accommodation. In his testimony before the Grievance Committee, Applicant did not convincingly explain how his hearing disability prevented him from carrying out his main tasks of conducting written research, producing timely drafts, or addressing the Supervisor's written feedback on his chapters. On this record, Applicant fails to show any impropriety in the Fund's reference to prior delays on the Book Project as a performance issue.

iv. Alleged failure to engage proactively in an effective interactive process

129. Applicant complains at length that the Supervisor, SPM, and CSF Officer failed "pro-actively to engage in an effective interactive process," and that the burden fell on him to follow up on accommodations with various offices in the absence of a central accommodation coordinator.

130. Section 5.3 does not speak to any requirement for an interactive process, let alone require managers' proactive engagement in such process. As discussed *supra* at Paragraph 101, this case is not subject to HR's September 2018 guidance, which states that, "In appropriate cases, the Fund will engage in an interactive process to try and identify a reasonable accommodation." Nevertheless, the parties both acknowledged in the course of the Tribunal's oral proceedings that an interactive process is in fact important to identify and implement reasonable accommodations for purposes of Section 5.3.

131. The Tribunal accepts that both sides must engage in an interactive process. Identifying, refining, and applying appropriate accommodations based on individual disabilities is an inherently iterative process that requires active engagement from both staff and management. Contrary to Applicant's suggestion, the Tribunal does not find that the Fund must be the more "proactive" party in that process. Rather, the need to tailor accommodations to the individual employee, based on the employee's confidential health conditions, requires a mutually interactive process that is largely employee-initiated and employee-led. Indeed, Section 5.3 specifies that the Fund's duty to provide reasonable accommodations only arises "at the[] request" of the employee. The employee must pursue accommodations in the first place and identify when further adjustments may be needed.

132. The record here contains ample evidence to establish the Fund's good-faith engagement in an interactive process of reasonable accommodation of Applicant's disability. Once Applicant

sought to certify his disability and initiate the reasonable accommodations process in November 2017, the record shows precisely the type of discussion and coordination among Applicant, the SPM, and the Supervisor (as well as others including HSD, the CSF Officer, the Fire and Life Safety Manager, and various other Department staff) as the Tribunal took into account in finding reasonable accommodations in *Mr. "KK"*, paras. 182-187. See also *BY (No. 2)*, para. 54 (noting "numerous discussions" between the applicant, HSD, management, and HR in finding that the World Bank had satisfied its requirement of a good-faith interactive process).

133. Credible and detailed testimony cited by Respondent speaks to the extraordinary level of engagement of multiple Fund offices to accommodate Applicant. For example, the SPM, who oversaw personnel matters for several hundred staff, estimated that she spent 60-70% of her time for individual cases on Applicant's case alone. The CSF Officer described how she went "above and beyond" to support Applicant, compared to the support provided to other hearing-impaired staff. The Fire and Life Safety Manager observed, "We've gone through a lot more steps for [Applicant] to make him comfortable in his office space, more than any other staff member since I've been here" in the past five years. The Chief of Security testified that the level of effort extended to Applicant, as compared to other individuals on the impaired staff list, was "considerably more than we have ever given anyone not only on the current list, but in my 16 and a half years at the Fund. . . . More than we've given anyone."

134. As Applicant particularly criticizes the Supervisor for what he characterizes as her failure to support him as his direct supervisor, the Tribunal finds it worthwhile to highlight the testimony of the Research Assistant. The Research Assistant, who assisted with various office and safety arrangements for Applicant, noted his good working relationship with both Applicant and the Supervisor, and provided even-handed testimony about their interactions that the Grievance Committee found persuasive. Asked whether he had conversations with the Supervisor about accommodating Applicant's hearing impairment, the Research Assistant testified:

> . . . I've already mentioned that I was checking with [Applicant] before having volume on the television [which] was one of the things that [the Supervisor] had asked me to do. But aside from that, . . . I think [the Supervisor] was quite proactive in having me follow up with the security team, making sure – you know, she said . . . did they get this done yet? You know, maybe see what's going on. . . . [S]he seemed to care and asked me to follow up and make sure that I worked with [Applicant] on this. And she asked me to work with [Applicant] on this and make sure that we can try and meet his needs to the best of our abilities.

135. On this record, the Tribunal finds that the Fund fully met the requirements for an appropriate interactive process.

v. <u>Alleged safety issues including shelter-in-place protocols</u>

136. Applicant raises a number of perceived safety lapses in the Fund's shelter-in-place protocols and other emergency measures. As noted earlier, the concerns appeared to arise from

his misunderstanding of the Fund's alert system and protocols in relation to a shelter-in-place drill on March 15, 2018. The record reveals that the Fund's four-pronged emergency notification system for all staff – which relied on a combination of fire wardens, audible alarms, automated texts to Fund phones, and automated messages to personal email accounts – in fact worked correctly in alerting Applicant of the March 15 drill and shelter-in-place steps. While Applicant complained about the lack of an appropriate personal escort, he was in fact offered two escorts from within the Division but refused to go with them. More to the point, as a hearing-impaired but not mobility-impaired staff, he never needed an escort.

137. Despite the fact that Applicant's concerns were apparently unfounded, the record shows that the Fund still made extra efforts to address his requests for more personalized alerts on top of the redundancies built into the Fund's four-pronged system. For example, in addition to having the Division's two fire wardens come to Applicant's office to offer a personal escort, the Fire and Life Safety Manager also asked a third fire warden adjacent to the Division to check on Applicant.

138. On the facilities side, the CSF Officer undertook to add an interior strobe light to Applicant's office as a matter of his personal request. This was not required under his initial accommodations plan or under building code, given the size of his office. Also due to Applicant's concern, the CSF Officer explored the possibility of adding a light on Applicant's phone. This was ultimately not pursued, as it would have required changing the Fund's entire phone system. While the record indicates that the two extra lighting options took time to pursue, the Tribunal observes that they were offered to assuage Applicant's concerns rather than to meet a recognized medical or safety need. Consistent with Section 5.3, the Fund retains the discretion to choose between multiple reasonable options for accommodation, and had no obligation to pursue accommodations that would entail undue hardship (such as a systemwide phone change).

139. In conclusion, the Tribunal finds no merit to Applicant's claims that the Fund failed its duty to provide reasonable accommodations for his disability. To the contrary, the record amply demonstrates that the Supervisor, SPM, CSF Officer, Fire and Life Safety Manager, and others acting on behalf of the Fund engaged exhaustively and in good faith to accommodate his disability.

(2) Did the Fund otherwise discriminate against Applicant based on his disability?

140. Applicant alleges that the Fund discriminated against him not only by denying him reasonable accommodations, but also in dropping his second chapter for the Book Project; inappropriately referring to "open communication skills" in his FY2018 APR; and reassigning him to an office in a remote location with ambient noise. Respondent asserts impartial rationales for each of the challenged actions and denies any form of discrimination.

(a) Standards applicable to Applicant's other discrimination claims

141. As set out *supra* at Paragraph 85, the Staff Handbook at Chapter 11.01, Section 5.1 prohibits discrimination "against any person because of . . . disability." Section 5.2 requires that all staff comply with the Fund's Discrimination Policy at Annex 11.01.3.

142. As set out in full *supra* at Paragraph 86, the Fund's Discrimination Policy (Staff Handbook, Annex 11.01.3) "consolidates in one document the policies and safeguards in place to ensure that all employees are treated equitably." To this end, the policy "summarizes the standards expected of employee behavior" and at Section III "defines discrimination in the context of the Fund."

143. Section III of the Discrimination Policy provides that, in the context of the Fund, "discrimination should be understood to refer to differences in the treatment of individuals or groups of employees" where the differentiation "is made on the basis of personal characteristics" rather than "based on the Fund's institutional needs"; "is unrelated to an employee's work-related capabilities, qualifications, and experience" and "is irrelevant to the application of Fund policies"; and "has an adverse impact on the individual's employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment." Section III notes that discrimination "can occur in various ways." This includes "basing decisions that affect the career of an employee – such as salary adjustments, assignments, performance evaluations, promotions, and other types of recognition – on grounds other than professional qualifications or merit." It also includes "creating or allowing a biased work environment that interferes with an individual's work performance or otherwise adversely affects employment or career opportunities; and applying a policy or administering a program . . . in a manner that differentiates among employees for reasons other than the criteria or factors incorporated in the policy."

144. Significantly, Appendix 2 to the Discrimination Policy recognizes that "some specific circumstances . . . could be incorrectly confused with discrimination." For example, "Managers have the responsibility to make **business decisions** which are not always favorable to individual employees. It should be recognized that criticism or adverse decisions about performance or work assignments do not of themselves constitute harassment, discrimination, or retaliation." (Bold in original). In addition, "**Negative assessment or feedback** on performance, even if it is frequent and long term, . . . is not discrimination if it is based on standards applicable to and communicated to all relevant employees." (Bold in original).

145. The Tribunal notes that Applicant's discrimination claims include both disparate treatment and disparate impact. The Tribunal assumes, consistent with its previous jurisprudence, that the Fund's duty not to discriminate prohibits both direct discrimination through disparate treatment as well as indirect discrimination through disparate impact. See *Ms. "GG" (No. 2)*, paras. 397, 403 (in considering the applicant's claim that a "facially neutral" revised promotion policy "has an adverse and unjustified impact on economists," stating that "[s]uch a change in treatment could result in impermissible discrimination if, for example, there were no rational nexus between the purpose of the policy revision and its differential impact on the two groups, or if the policy itself were lacking a rational basis"); *Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 36 (stating that "[c]ases of alleged discrimination may arise in two distinct ways," namely, when "a classification may expressly differentiate between two or more groups of staff members" or where "a policy, neutral on its face, may result in some kind of consequential differentiation between groups").

146. As the Tribunal observed in *Ms. "GG" (No. 2)*, "This Tribunal has long recognized as a 'well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization.'" *Ms. "GG" (No. 2)*, para. 393 (quoting *Mr. "R"*, para. 30); see also *Mr. "DD",* para. 139 (citing *Mr. "F",* para. 81). As set out *supra* at Paragraphs 96-97, the Tribunal applies heightened scrutiny to claims of certain types of discrimination, such as discrimination on the basis of disability, that would violate not only the internal law of the Fund but also universal principles of human rights.

147. The burden of proof is on the applicant to establish that he or she experienced discriminatory working conditions. In *Mr. "OO", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-2 (December 17, 2019), for example, the Tribunal rejected a challenge to a non-conversion decision because "Applicant has not established on the record of the case that 'improper motive' in the sense of 'taking account of factors not relevant to the assessment of the staff member's professional competencies' . . . affected the non-conversion decision." *Mr. "OO",* para. 194 (quoting *Mr. "KK"*, para. 103). As the Tribunal stated in *Mr. "KK"*, where the applicant alleged that his APRs were improperly motivated by discrimination, harassment, and retaliation: "To establish abuse of discretion on the ground of improper motive it is essential that the applicant show a 'causal link' between the alleged improper motive and the decision being contested." *Mr. "KK"*, para. 109 (quoting *Ms. "GG" (No. 2)*, para. 330). See also *Ms. "GG" (No. 2)*, paras. 349, 436 (applying the "causal link" standard to dismiss an APR challenge where the applicant "has not met the burden of showing that the contested APR decision was improperly motivated by that same pattern of impermissible treatment" that the Tribunal had concluded constituted a hostile work environment).

(b) Analysis of Applicant's other discrimination claims

148. The Tribunal now considers whether, on the record presented, Applicant has shown impermissible discrimination on any of the three grounds alleged.

(i) Treatment of Applicant's second chapter for the Book Project

149. Applicant first alleges that the Supervisor directly discriminated against him by dropping his second chapter based on her unsupported claim that he had caused delays on the Book Project. According to Applicant, "Here there is clear disparate treatment in [the Supervisor's] dropping the [second] chapter written by [Applicant] who has a disability and saying that he is delaying the Book Project, as compared to [a different] chapter written by [a junior colleague] and [the Supervisor] who are not disabled, and that chapter would not be ready for another 5-6 months." In his Reply, however, Applicant appears to concede that the Supervisor did not evince any discriminatory intent against him personally in this regard: "[Applicant] does not claim that [the Supervisor] attached lower priority to the [second] chapter because she harbored discriminatory animus against him because of his hearing disability."

150. Respondent cites Applicant's concession as to the Supervisor's lack of animus as proof that his discrimination claims are unfounded. Respondent asserts that the Department "took a

business decision to drop the chapter 'because of' the poor quality of Applicant's work and his uncooperative behavior – not 'because of' his disability."

151. Considering the parties' representations and evidence, the Tribunal finds that Applicant fails to meet his burden of proof. As Applicant declines to suggest any discriminatory animus against him, he cannot show the requisite "causal link" between any discriminatory intent and an adverse decision, as needed for a disparate treatment claim. Moreover, Respondent has made a persuasive showing that the Department's treatment of the second chapter was based not on Applicant's disability, but on genuine concern that his work was significantly delayed and poorly written. The record contains evidence that both the Supervisor and the Department Director had concerns about the quality of writing and presentation in both of the chapters written by Applicant; that they had particular concern about the amount of work needed to "rescue" his second chapter; and that the ultimate decision to drop that chapter was taken based on his unwillingness to work with a co-author to restructure the material for publication. While Applicant claims disparate treatment insofar as a colleague was given additional time to complete a different chapter, the record shows that that chapter was substantially broadened in scope midway through the Book Project. It was not comparable to Applicant's chapters, which retained the same narrower scope throughout.

(ii) Reference to "open communication skills" in Applicant's draft FY2018 APR

152. Applicant alleges that he was subjected to indirect discrimination in the June 22, 2018 draft of his FY2018 APR, which briefly identified "open communication skills" as his primary area for development. Applicant asserts, "Uniform application of Fund standards on 'open communication skills' has a disparate negative impact on staff with hearing loss. Hearing loss inherently reduces an employee's ability to participate in verbal communication." Applicant argues that even if the open communications competency is understood to measure a staff member's cognitive ability, rather than physical hearing ability, this would still have a disparate impact on Applicant. According to Applicant, "Hearing-impaired listeners have to engage additional cognitive resources in their attempt to understand speech and as a result suffer from listening fatigue and reduced attention."

153. Respondent counters that the open communications competency should be understood not as a matter of physical ability to hear, or even cognitive ability (as Respondent originally referenced in its Answer), but rather as a matter of "emotional intelligence, and the ability of a person to reflect on and accept other people's views." (Internal footnote omitted). This focus on interpersonal skills is evident in the checklist of behaviors for "Creating Open Communications" in the Fund's Economist Development Guide:

- ☐ Explains clearly and with appropriate detail
- ☐ Listens attentively for full understanding
- ☐ Shares information/keeps others up-to-date
- ☐ Asks clarifying questions
- ☐ Encourages candid, two-way communication.

154. This intended meaning was more directly articulated in the revised version of Applicant's FY2018 APR from early August 2018, which replaced the "open communication skills" reference with the comment that "[Applicant] should ensure that he communicates with his supervisor in a timely way when his work is delayed. He would also benefit from efforts to demonstrat[e] openness to feedback on his performance." Multiple sources supported this feedback. The Supervisor's Grievance Committee testimony, as well as her contemporaneous correspondence, reflected that Applicant was not forthcoming about his progress on the Book Project. In addition to the Supervisor, the Department Director and other colleagues who worked with Applicant on the Book Project recognized that he was resistant to feedback and could be dismissive of competing views.

155. Respondent also refers to Applicant's past APRs from FY2007 and FY2010, as well as a Management Development Center ("MDC") report from 2004, as evidence that Applicant's weaknesses in open communications have been a longstanding issue recognized by multiple other reviewers, pre-dating and entirely separate from his hearing loss. The MDC Report, for example, identified "Creating Open Communication" as "the competency area where you would benefit most from development." It also cited "Adaptability and Resourcefulness" as a development area because "[i]n general, you showed a tendency to stick too closely to your initial assumptions and positions and not invite or consider others' views and ideas." In his testimony, Applicant conceded that "open communication skills" was a standard Fund competency of which he had been aware for many years, and which he had never challenged before.

156. On this record, the Tribunal is persuaded that the use of the Fund's standard "open communications" competency with respect to Applicant was neither intended to be, nor in effect, discriminatory. The record indicates that Applicant's apparent challenges in sharing information and accepting feedback were a separate and pre-existing issue distinct from any physical hearing impairment. The critical feedback that Applicant received in this regard was well supported and appropriately communicated. As the Discrimination Policy recognizes, negative feedback is not necessarily evidence of discrimination or other impropriety. This is particularly true where, as in *Mr. "KK"*, the disputed evaluation reflected the input of multiple reviewers, *id.*, para. 154; bore no indicia of irrationality or arbitrariness, *id.*, para. 132; and the "key elements of the shortcomings identified in the contested APRs are consistent with Applicant's evaluations over the course of his Fund career," *id.*, para. 131.

(iii) Applicant's office location and safety arrangements

157. Applicant alleges that he was subject to indirect discrimination at the office in two other respects. First, he complains that he was moved on October 22, 2018, to a new office that "was at the edge of the divisional office space and was exposed to ambient noise. This office location had a disparate negative impact for an employee with hearing loss because it exacerbated his social isolation and interfered with his use of hearing aids." Without challenging whether the Fund had a legitimate reason to relocate him, Applicant asserts "there is no justification for [the Department's] choice of the particular location of the new office."

158. Applicant also alleges that the Fund's Life Safety Plan and Emergency Warden Program indirectly discriminate against hearing-impaired persons because their emergency provisions include specific instructions only for mobility-impaired staff. He does not allege that he has suffered specific harm from this alleged lack of equal treatment, but asserts generally that "[t]his arrangement has a disparate negative impact on staff with some other impairments, including hearing loss."

159. Respondent first counters Applicant's assertion that there was "no justification" for the Department's choice of office location. Respondent states that Applicant's new office location was not a deliberately malicious choice. Rather, the assignment was based on availability and Applicant's grade level. As a relatively senior employee, Applicant was entitled to an office with an external street-side window. Respondent also stresses that, "With respect to safety, the office selection had been fully vetted by Facilities, and the Fire & Life Safety team as compliant with Applicant's needs with respect to his disability."

160. An email from the OM during the office search is pertinent here. It shows that the choice of office was indeed constrained by space limitations, as the Department had no free offices within its footprint and the preference was to keep Applicant within his Division's area. The search was also limited to exterior window offices, consistent with Applicant's grade. The OM's email also reflects a third consideration: that the new office "should be further away from the hub of the division where he is currently located, and therefore in theory more quiet." In other words, the hope was to mitigate ambient noise issues for Applicant, not to marginalize or disadvantage him.

161. Finally, the Tribunal recalls that the purpose of the move, as recommended by the Ethics Officer and the Chief of Security, was precisely to put more distance between Applicant and the Supervisor given Applicant's reportedly aggressive behavior. As the Chief of Security advised, the Supervisor should be "as far from [Applicant] as practicable." Accordingly, the Tribunal considers that the Fund had legitimate, non-discriminatory reasons to relocate Applicant to the office in question, despite what he characterizes as its "remote" location or other deficiencies.

162. In terms of the alleged disparate impact from his new office assignment, Applicant does not present any evidentiary support for his claim of damage from isolation or ambient noise. Both the CSF Officer and the OM testified that they perceived Applicant's objections to the new office to be based on status and window size, rather than noise or safety issues. Moreover, Applicant was offered an immediate move when he raised complaints on his first morning in the new office. Applicant expressed dissatisfaction with the new office on Monday, October 22, 2018 at 8:04 a.m. By 10:25 a.m. that day, the CSF Officer had responded to him twice by email and offered to move him "now" to an alternative office with wider windows, but no extra strobe yet in place. Applicant accepted the alternative office assignment, but he chose not to move immediately and declined any special safety arrangements in the interim.

163. As for Applicant's assertion of inadequate measures for hearing-impaired staff under the Life Safety Plan and Emergency Warden Program, Respondent argues that the Fund's safety framework with its multiple alert systems is more than adequate to protect all staff, hearing-impaired or not. Respondent also asserts that because Applicant has failed to articulate any harm

to him from those procedures, he fails to meet the requirement of Article II(1)(a) of the Tribunal's Statute that a staff member may only challenge the legality of an administrative act "adversely affecting" him.

164. On the facts presented, the Tribunal finds no merit to Applicant's challenge to the Fund's Life Safety Plan and Emergency Warden Program. The use of special emergency provisions for mobility-impaired staff appears appropriate in matters requiring evacuation or relocation, and cannot be construed as presumptive evidence of discrimination against other staff. In Applicant's case, the record reflects that both the March 15, 2018 shelter-in-place drill and an August 15, 2018 fire drill worked as planned. Applicant's own email to the SPM after the fire drill stated that "this morning's evacuation exercise has gone smoothly for me. [The Research Assistant] and [the SSM] have been very helpful." Applicant provides no basis now for his present complaints.

165. For the reasons set out above, the Tribunal concludes that Applicant has failed to show that he suffered any form of discrimination based on his disability.

B. Did the Fund retaliate against Applicant for seeking reasonable accommodations, alleging discrimination, and raising ethics complaints through various channels?

166. With respect to Applicant's various retaliation claims, the Tribunal considers the parties' arguments and the Fund's law, which sets out the three basic elements of a retaliation claim: (i) a protected activity by the party who allegedly suffered retaliation, (ii) an adverse action against that party, and (iii) a causal link between the protected activity and the adverse action.

167. Applicant asserts that a "striking pattern of protected activities followed closely in time by adverse actions" shows that he suffered retaliation for raising ethics complaints on numerous occasions. Respondent denies any retaliation, arguing that Applicant cannot show a causal link between any protected activities on his part and any adverse actions thereafter.

(1) Standards applicable to Applicant's retaliation claims

168. The Tribunal first considers the scope of "protected activities" under Fund law. As set out *supra* at Paragraph 87, Chapter 11.01, Section 11.1 speaks specifically to retaliation against complainants or witnesses in ethics or grievance proceedings. It reads in full: "As set out in the Annex 11.01.6: Retaliation Policy, any retaliation against a staff member *for either raising an ethics complaint in good faith or filing a grievance, or for participating in either type of proceeding as a witness*, shall constitute misconduct, and any adverse decision motivated by retaliation shall be invalid." (Emphasis added; internal footnote omitted). According to Respondent, the wording of Section 11.1 shows that retaliation is prohibited only in relation to formal ethics investigations or grievance proceedings. By Respondent's reading, retaliation would not be prohibited where a staff member informally raises an ethics concern and faces reprisal as a result.

169. In the view of the Tribunal, Section 11.1 must be read together with the Retaliation Policy at Annex 11.01.6 (full text *supra* at Paragraph 88), which states in relevant part:

> *The Fund encourages employees to use the channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution. Staff and managers should be aware that the Fund does not tolerate any form of retaliation against anyone for using any of these channels, or for participating as a witness in an ethics investigation or grievance*. Thus, if there were retaliation against a staff member for either raising an ethics complaint or a grievance, or for participating in either type of proceeding as a witness, the retaliation itself would be a form of misconduct which could result in disciplinary action, and any adverse decision motivated by retaliation would be invalid.
>
> **Guidance Points:**
>
> Managers are expected to create an atmosphere where staff will feel free to use existing channels for workplace conflict resolution without fear of reprisal. *These channels include managers, ASPMs, SPMs, Department Heads, HRD, the Ombudsperson, the Ethics Advisor, the Integrity Hotline and the formal dispute resolution system (Grievance Committee and Administrative Tribunal).*
>
> . . . .

(Emphases added).

170. The Retaliation Policy's wording makes clear that the Fund's prohibition against retaliation protects not only complainants and witnesses in formal ethics and grievance proceedings as referenced in Section 11.1, but also "anyone" who uses "any of" the "channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution." As explained in the Guidance Points under the Retaliation Policy, the "channels" to be used without fear of reprisal "include managers, ASPMs, SPMs, Department Heads, HRD, the Ombudsperson, the Ethics Advisor, the Integrity Hotline and the formal dispute resolution system (Grievance Committee and Administrative Tribunal)." Thus the Fund broadly protects all staff who "speak up" or "raise ethical concerns," either formally or informally, with managers or through other workplace conflict resolution channels.[11]

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[11] Respondent also quotes from Chapter 11.03, Section 8.1, to support its proposition that the only activities protected from retaliation "concern a staff member's utilization of the Fund's dispute resolution channels, such as the Ethics Advisor, the Internal Investigator, the Ombudsman, the Grievance Committee and Administrative Review." The provision that Respondent excerpted reads in full: "No individual shall be subject to adverse action of any kind because of pursuing the channels of dispute resolution *set out in this Chapter* or for assisting another staff

(continued)

171. The Tribunal notes Applicant's contention that the Tribunal's review should take into account not only the Fund's Retaliation Policy in effect during the relevant time period, as addressed *supra*, but also the Fund's more "specific and comprehensive" February 2019 amendment of that policy. In particular, Applicant asks that the Tribunal, under the doctrine of *in pari materia*, use the February 2019 policy's definition of "protected activity" and explanation of "adverse action" to interpret the previous policy, which lacked definitions for those concepts. Applicant also asks the Tribunal to apply the February 2019 policy to "shift the burden of proof to the Fund to show by clear and convincing evidence that the same adverse action would have been taken, for separate and legitimate reasons, even in the absence of the complainant's protected activity."

172. Respondent asserts that the controlling law is the Fund's Retaliation Policy in effect for the time period of this case, and Tribunal precedents interpreting that policy. Respondent maintains that there is no basis for applying retrospectively the substantial amendments to the Fund's policy, which were adopted after the close of the time period of this case and after Applicant had filed for Administrative Review. In any event, Respondent asserts, the later policy would not assist Applicant with his retaliation claims.

173. The Tribunal agrees with Respondent that the present case must be decided under the version of the Retaliation Policy in place during the relevant time period, not by the subsequent amendments of February 2019.

174. This Tribunal's precedents provide further guidance as to the requisite elements of a retaliation claim. In decisions such as *Mr. "KK"*, the Tribunal has made clear that "[t]o establish abuse of discretion on the ground of improper motive it is essential that the applicant show a 'causal link' between the alleged improper motive and the decision being contested." *Mr. "KK"*, para. 109 (quoting *Ms. "GG" (No. 2)*, para. 330). The burden is thus on Applicant to show a "causal link" between the retaliatory motive that he alleges on the part of the Supervisor or others in this case, and the adverse decisions that he contests. Respondent, on its part, may counter with evidence of a "reasonable and observable basis" for those decisions. In *Ms. "GG" (No. 2)*, for example, where the applicant alleged that her APR was "improperly motivated by retaliation, harassment, and discrimination and formed part of a pattern of unfair treatment," para. 325, the Tribunal observed that "because an allegation of improper motive calls into question the impartiality of the decision-making process, the evidence in the record of a reasonable and observable basis for that decision will be particularly significant," para. 329.

175. Applicant contends that the Tribunal's review of his retaliation claims should also take into account the "authoritative and helpful" laws and policies of the United Nations and World

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member in pursuing those channels." (Emphasis added). The full quote makes clear that Section 8.1 refers to retaliation only in the context of such dispute resolution options because that is the subject matter of Chapter 11.03: "Dispute Resolution." Similarly, the language cited by Respondent from *Mr. "DD"*, para. 177, refers to retaliation protections specifically in the context of formal grievances or complaints because that is the context in which the applicant's retaliation claim arose in that case. These sources do not contradict the Retaliation Policy's stated broader coverage.

Bank; and the "highly instructive" laws of the United States and the District of Columbia. The Tribunal does not find it instructive in this instance to refer to such other sources in applying the Fund's own retaliation provisions, which are authoritative and sufficiently clear for purposes of deciding Applicant's claims in this case.

(2) Analysis of Applicant's retaliation claims

176. The Tribunal now considers whether Applicant has met his burden to show for each of his retaliation claims that (i) he engaged in a protected activity, (ii) he suffered an adverse action, and (iii) there was a causal link between his protected activity and the adverse action.

177. Applicant asserts that, "Regardless of which retaliation policy this Tribunal seeks to enforce, the fact is that [Applicant] suffered adverse actions for 'raising an ethics complaint' on several different occasions." He describes "the three most clear-cut examples" of retaliation as taking place on (i) March 29, 2018, when the Supervisor "imposed a restriction on [Applicant] coming to her office without an appointment" after he had initiated mediation and written to her about safety concerns; (ii) June 22, 2018, when the Supervisor "demand[ed] that [Applicant] be disciplined" after he had complained that her APR remarks were discriminatory; and (iii) August 16, 2018, when the Supervisor "unilaterally decided to drop" his second chapter from the Book Project after he had initiated the Administrative Review. Applicant also presents an array of other "main protected activities" from October 2, 2017, through October 22, 2018, including other contacts with the Supervisor and various dispute resolution offices, which he believes led to various "adverse actions."

178. In each instance, Applicant relies on "close temporal proximity" between the asserted protected activities and adverse actions as proof of a causal link. According to Applicant, "the timeline alone is stunning and dispositive" of his *prima facie* case of retaliation, with no need to consider the credibility of any sources. He contends that the Fund's explanations for the challenged actions are false pretexts to conceal retaliatory intent.

179. Respondent argues that each claim of retaliation is lacking in one or more critical elements. First, Respondent asserts that, in all but two instances, Applicant fails to show a "protected activity" within the meaning of Section 11.1. Second, Respondent contends that the concept of "adverse action" should be limited to materially adverse changes such as termination, demotion, or lowered title, benefits, or responsibilities. According to Respondent, many of the actions that Applicant contends were retaliatory – such as having to schedule meetings in advance, move offices, or work with a co-author – would not qualify as adverse actions for purposes of retaliation. Third, Respondent asserts that Applicant fails to carry his burden of establishing a "causal link" between any protected activities and adverse actions.

180. As stated *supra* at Paragraph 170, the Tribunal considers that the scope of "protected activities" is not limited to participation in formal ethics investigations or grievance proceedings. The Tribunal further addresses the potential scope of protected activities and adverse actions with respect to individual retaliation allegations below.

(a) March 29, 2018

181. The first of Applicant's "three most clear-cut examples" of retaliation relates to the events of March 29, 2018. Applicant alleges that the Supervisor barred him from coming to her office without an appointment because he had raised safety concerns with her and initiated mediation earlier that month.

182. It is not clear to the Tribunal that Applicant's March 2018 expressions of concern about office safety, such as his March 27 email to the Supervisor noting "FYI" his discussion with the SPM and SSM, qualify as "raising an ethical concern" so as to constitute a protected activity. His request for mediation, however, clearly was a form of protected activity and one that had been brought to the Supervisor's attention. Although Respondent's Answer suggested that the Supervisor was unaware of Applicant's mediation request until after she imposed the scheduling requirement, the March 30, 2018 email (admitted to the record with redactions per Paragraph 29 *supra*) indicates that the Supervisor was aware of Applicant's mediation request before she instituted the scheduling requirement.

183. Respondent also disputes that a requirement to schedule meetings in advance constitutes an adverse action. The Tribunal is not persuaded that the advance scheduling requirement in this case would qualify as an adverse action for purposes of retaliation. In any event, Applicant cannot sustain his retaliation claim because he fails to show any causal link between his mediation request (or raising safety concerns) and the advance scheduling requirement. The Tribunal is persuaded by the Supervisor's detailed testimony before the Grievance Committee that her decision that Applicant could no longer enter her office "on demand" was based on his hostile and aggressive behavior that evening in impugning her authority and competence, accusing her of "stealing" the Book Project from him, following her to her office, and refusing to leave her office when asked.

184. The Tribunal notes that, in this instance, Applicant's reliance on chronology to prove causation does not aid his case. Temporal proximity, while not dispositive, may be one factor for consideration. Here, the Tribunal notes that the Supervisor imposed the advance scheduling requirement on March 29 in the immediate context of the unexpected, uncomfortable, and unwanted encounter in her office that evening – an evident impetus closer in time than Applicant's mediation request or other events in the preceding days and weeks. In addition, the Tribunal notes Applicant's own testimony that he and the Supervisor had "an overall friendly relationship" until that very evening, with Applicant "visiting frequently" and "dropping by her [office] to discuss [Division] issues." Applicant's testimony that this friendly interaction suddenly "stopped completely" on March 29 reinforces that it was his hostile approach that night, rather than the Supervisor's earlier receipt of his mediation request or other complaints, that triggered the advance scheduling requirement.

(b) June 22, 2018

185. The second of Applicant's "three most clear-cut examples" of retaliation relates to the events of June 22, 2018, which saw another tense encounter in the Supervisor's office. Applicant alleges that after he raised a legitimate concern that the Supervisor's comments in his APR were

insensitive and discriminatory, she retaliated by, among other actions, "demanding that [he] be disciplined."

186. Respondent contends that Applicant's behavior in barging into the Supervisor's office to shout at her about the APR writeup was not protected activity, both because this was not a covered use of the dispute resolution system and because his behavior was so intemperate. Respondent further argues that the Supervisor's actions after Applicant accosted her in her office on June 22 were all reasonable and not "materially adverse" reactions to his "rude and aggressive behavior." According to Respondent, it was Applicant's frightening and inappropriate behavior that led her understandably to require that a third person be present for any future meetings between them; that caused her to express concerns about his behavior and her own safety to the Department Director (though no formal complaint was filed against Applicant as a result); and that ultimately led to the Department's decision, in consultation with the Ethics Office and Security, to move his office away from hers.

187. Under the Fund's Retaliation Policy, raising a discrimination concern with management may qualify as a protected activity even in the absence of a formal ethics complaint or grievance. However, the next question is whether this protected activity was the proximate cause of any adverse action. Considering *de novo* the competing evidence presented on this matter, see *supra* at Paragraph 94, the Tribunal finds persuasive the Supervisor's testimony that she observed Applicant's behavior that evening to be threatening and that it was that behavior that motivated her third-party meeting requirement and her complaint to the Director. The operative fact was not that Applicant claimed discrimination, but the aggressive and inappropriate manner in which he approached the Supervisor.[12] On this record, the Tribunal finds that the actions challenged by Applicant were a direct result of what the Supervisor observed to be Applicant's threatening behavior, not retaliation for any protected activity.

(c) August 16, 2018

188. The last of Applicant's "three most clear-cut examples" of retaliation relates to the events of August 16, 2018. Applicant alleges that the Supervisor unilaterally decided on August 16, 2018, to drop his second chapter from the Book Project because he had requested an Administrative Review on August 14, 2018.

189. As Respondent acknowledges, Applicant's request for Administrative Review qualifies as a protected activity; and the record shows that Applicant informed the Supervisor of his request on August 14, 2018. The Tribunal also observes that removing a major deliverable or

[12] Contrary to Applicant's claims, the Fund's Discrimination Policy does not recommend or require that staff confront a supervisor with personal accusations of discrimination by that supervisor. Rather, it specifically advises staff to speak with "a neutral person." Nor could the asserted pressure of the APR process justify Applicant's decision to disregard the advance scheduling requirement and enter the Supervisor's office uninvited to confront her about his APR, which was planned for discussion the following week.

making other substantial changes to a staff member's work program could potentially qualify as an adverse action, depending on the circumstances.

190. In this case, however, Applicant cannot show any causal link between his August 14 request for Administrative Review and the decision to drop his second chapter. The record reflects that the Department made this decision on the basis of an earlier agreement, memorialized by the Mediator on July 30, 2018, under which Applicant committed to inform the Supervisor by mid-August whether he would accept a co-author to help restructure the chapter. Without a co-author, the second chapter would be dropped. In accordance with the July 30 agreement, the Supervisor asked Applicant on August 13 to confirm if he would agree to a co-author. The record shows that Applicant refused to respond. The second chapter was then dropped based on the agreement memorialized on July 30 – two weeks before Applicant sought Administrative Review.

(d) Other alleged instances of retaliation

191. Applicant's remaining retaliation claims relate to his asserted engagement in protected activities between October 2, 2017, and October 22, 2018.

192. Applicant asserts that he first engaged in protected activity on October 2, 2017, when he "informed [the Supervisor] that he would be without his hearing aids for a two-and-a-half-week period, and that he would need to be accommodated during that period for not being able to participate in in-person meetings." Accepting *arguendo* Applicant's characterization of his statements at that time, a request for accommodations by itself does not, in the view of the Tribunal, amount to "raising ethical concerns" or other protected activity under the Retaliation Policy. In the absence of a protected activity, the Tribunal need not address Applicant's assertions of adverse action and causation in relation to this retaliation claim.

193. Applicant next claims that the Supervisor retaliated against him as a result of his meetings with the Ethics Office and Ombudsperson to discuss accommodation concerns on October 26 and November 16, 2017. Meeting with these dispute resolution offices would constitute protected activity under the Retaliation Policy. Yet Applicant provides no evidence that the Supervisor was aware of such interactions and therefore fails to show causation. In addition, his claims of adverse actions focus on the Supervisor's conduct of October 2-20, 2017, which preceded the meetings in question. Accordingly, Applicant cannot show a causal link between his meetings and any alleged adverse actions by the Supervisor.

194. Applicant asserts that he engaged in protected activities by meeting with the CSF Officer on November 13, 2017, and with the SPM and Supervisor on December 13, 2017, to seek reasonable accommodations for his disability. As noted *supra* at Paragraph 192, a request for accommodations in itself is not a protected activity for purposes of the Retaliation Policy. Applicant's claims regarding these requests and the Fund's alleged failure to provide reasonable accommodations thereafter are instead matters for resolution under the Fund's policy on reasonable accommodations, and have been considered accordingly *supra*.

195. Applicant next asserts that he suffered retaliation after participating in joint mediation sessions on four occasions from April 30 through July 30, 2018. Participation in mediation is indisputably a protected activity. With respect to adverse actions, however, Applicant asserts only that the Fund failed to honor the Partial Mediation Agreement. His claim is thus properly considered in terms of alleged breach of a mediation agreement (see next section *infra*), rather than retaliation.

196. Applicant alleges that the Supervisor retaliated against him for filing a discrimination and retaliation complaint with OII on June 26, 2018, and participating in a meeting with OII and investigation by the SPM regarding his discrimination claims on June 27, 2018. Filing a misconduct complaint with OII and participating in a related OII meeting or investigation would constitute protected activities. However, Applicant provides no evidence that the Supervisor knew of his OII complaint at the time. Furthermore, while he claims that the Supervisor acted in a retaliatory fashion on July 3, 2018, by requiring that he either accept a co-author for his second chapter or drop the chapter, the record as discussed *supra* at Paragraph 151 reveals that the options given for that chapter were based on genuine concern from the Supervisor and the Department Director that his work was significantly delayed and poorly written. Accordingly, Applicant cannot demonstrate a causal link between his OII interactions and any adverse action.

197. Applicant claims that he engaged in protected activity on July 2, 2018, by requesting in an email to the Supervisor that "good meeting etiquette, in particular one person talking at a time, to the extent possible, and maintaining eye contact," be observed in his APR discussion and all Division meetings going forward. As noted *supra* at Paragraph 192, a request for accommodations in itself is not a protected activity for purposes of the Retaliation Policy. Applicant's claim on this point is instead addressed under the Fund's policy on reasonable accommodations, as reflected *supra* at Paragraph 114; see also *infra* Paragraph 208.

198. Applicant asserts that after he met again with the Ombudsperson to discuss accommodation concerns on July 23 and August 8, 2018, the Department took retaliatory decisions on August 16, 2018 to relocate his office and on August 17, 2018 to "unilaterally eliminate[]" his second chapter. Engagement with the Ombudsperson would be a protected activity. Although Respondent asserts that "[n]o evidence [has been] adduced regarding if/when [Department] managers learned of the Ombudsperson's involvement," the record shows that the Supervisor and SPM were aware of and accepted Applicant's engagement with the Ombudsperson by at least July 30, 2018. On that date, the additional points of agreement circulated by the Mediator explicitly noted that "[Applicant] shared that the Ombudsman is assisting him" with follow-up on safety arrangements and meeting etiquette.

199. In any event, Applicant cannot show a causal link between the Supervisor's and SPM's awareness of his recourse to the Ombudsperson from late July and the challenged decisions. As discussed *supra* at Paragraph 68, the Fund's decision to relocate Applicant's office stemmed from earlier consultation between the Supervisor, Ethics Advisor and Chief of Security following the June 22, 2018 incident. While the Ethics Advisor and Chief of Security had deferred relocation in hopes that "the continuation of mediation and the passage of time might remedy the situation," by August 15 they decided to proceed with moving Applicant based on the Supervisor's continued personal safety concerns. There is no evidence to suggest that

Applicant's engagement with the Ombudsperson was a factor at any point during the relocation discussions. Similarly, as set out *supra* at Paragraph 151, the record does not support Applicant's contention that the challenged decision to drop his second chapter was improperly motivated or even taken "unilaterally" without seeking his agreement to continue working on it with a co-author.

200. Applicant alleges that the Supervisor retaliated against him for writing to the Fire and Life Safety Officer on September 24, 2018, to "bring[] to his attention that [the Department] had assigned new fire wardens to his office and request[] him to help ensure that the new fire wardens received proper training." As described, Applicant's email to the Fire and Life Safety Officer does not amount to "raising ethical concerns" or other protected activity under the Retaliation Policy. Moreover, Applicant fails to show a related "adverse action" in the Supervisor's assignment of additional work responsibilities on September 26, 2018. The new assignments were evidently intended to fill the gap left in Applicant's work program after he declined to accept a co-author to continue with his second chapter.

201. Finally, Applicant claims that the Supervisor retaliated against him when, on October 22, 2018, he "informed [her] that following the relocation of his office, his new office had downgraded safety arrangements for his disability relative to the ones provided in his previous office." Even if Applicant's comment to the Supervisor could be construed as "raising ethical concerns" or other protected activity under the Retaliation Policy, Applicant fails to show a related "adverse action" in the Supervisor's request for an update on a work assignment the following day. First, the record suggests no retaliatory impetus for the Supervisor insofar as the CSF Officer and others managing the relocation were able to address Applicant's office concerns immediately on the morning of October 22 (see *supra* at Paragraph 162). Second, the Supervisor's request for a work update does not qualify as an adverse action. Nothing in the content or tone of her query – which was sent to three staff members, without singling out Applicant – suggests anything other than normal oversight of the work program, as was her responsibility.

202. For the reasons set out above, the Tribunal concludes that Applicant's retaliation claims are without merit.

C. Did the Fund breach its Partial Mediation Agreement with Applicant?

203. Applicant contends that the Fund breached the Partial Mediation Agreement by failing to observe proper meeting etiquette, failing to provide meeting summaries as promised, and dropping Applicant's second chapter for the Book Project. Respondent counters that Applicant mischaracterizes the Partial Mediation Agreement, and that there was no breach or mishandling of the Partial Mediation Agreement on the Fund's part.

(1) Standards applicable to Applicant's breach claims

204. Under the applicable Mediation Rules as excerpted *supra* at Paragraph 89, a guiding principle is "informality," which "allows the process to be flexible" (Section 1). Section 4.06 addresses the ways in which mediation can be concluded, including mediated agreement between

the parties (Section 4.06.1); and requires in each case that "[t]he Mediator shall document the conclusion of a mediation and shall notify the parties in writing of the case's conclusion" (Section 4.06.2). Under Section 4.07, a mutually acceptable resolution shall be memorialized in a Memorandum of Understanding that is binding once signed by both parties (Section 4.07.1); and enforceable through the "normal dispute resolution channels" (Section 4.07.2).

205. The Tribunal has not previously addressed claims of breach of a mediation agreement, as now presented. In a different context, the Tribunal has recognized the "importance both to staff members and to the Fund of enforcing negotiated . . . agreements." See *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 78 (addressing an applicant's claim that the Fund had breached terms of his separation agreement).

206. In *Mr. "V"*, the Tribunal cited the practice of other international administrative tribunals in stressing the importance of "indications that the agreement was entered into freely and reflected a real balancing and resolution of interests between the parties." *Id.*, para. 79. The Tribunal noted that the applicant was assisted by counsel for at least part of the process; and that he had sought, but not succeeded in obtaining, additional wording that might have protected him against the very actions that he was challenging before the Tribunal. *Id.*, para. 81. The Tribunal went on to reason that, "Where, as with the Retirement Agreement between Mr. "V" and the Fund, there is evidence of vigorous, individualized negotiation of terms, it is difficult to conclude that anything other than their plain meaning should be accorded those terms. This is especially so when alternative language was proposed and rejected in the course of negotiations." *Id.*, para. 82. The Tribunal concluded "that the specific terms of the Retirement Agreement must be enforced and that Applicant's construction of those terms must be rejected." *Id.*, para. 83.

(2) Analysis of Applicant's breach claims

(a) Alleged breaches regarding good meeting etiquette and meeting summaries

207. Applicant first asserts that the Fund breached the meeting accommodations provisions of the Partial Mediation Agreement "on multiple occasions." He specifically cites failures to observe proper meeting etiquette as he requested on July 2, 2018; and to provide written summaries as requested for meetings on July 3, 2018 and August 28, 2018.

208. The evidence cited by Applicant does not show any breach. On his claim that good meeting etiquette was not followed as he had requested on July 2, 2018, the referenced email correspondence shows that Applicant asked for "the use of good meeting etiquette, in particular one person talking at a time, to the extent possible, *and maintaining eye contact*." (Emphasis added). The Supervisor responded, "The part about good meeting etiquette is fine but as we discussed in mediation, I can't make people look at you as I am their primary manager and also it is healthy for them to look at each other while speaking . . . ." Notably, the plain text of the Partial Mediation Agreement as negotiated between the parties did not refer to or require maintenance of eye contact with Applicant. Rather, it stated that the Supervisor would "encourage at the beginning of divisional meetings the use of good meeting etiquette, such as one person speaking at a time and, where appropriate, suggest that questions be saved until the

end of formal presentations." It then emphasized, "These guidelines should not, however, unreasonably limit or change the dynamics of group discussion and brainstorming." The record supports a finding that the Supervisor complied with these provisions of the Partial Mediation Agreement by reasonably moderating substantive discussions to have one speaker at a time. Accordingly, Applicant fails to substantiate his claim that the Supervisor breached a "good meeting etiquette" requirement of the Partial Mediation Agreement.

209. As for Applicant's requests for written summaries of his meetings on July 3 and August 28, 2018, the evidence he cites shows that brief written summaries were in fact provided to him for each of these occasions. To the extent that Applicant now complains that he did not receive more detailed written summaries, the plain text of the Partial Mediation Agreement does not support his claim to such. It shows only a commitment that, "To assist [Applicant], a summary of the meeting and brainstorming ideas will be shared orally or when necessary in writing at the conclusion of meetings." On this record, Applicant fails to show that the Fund's written summaries were inadequate.

(b) Alleged breach in dropping second chapter for the Book Project

210. Applicant also claims breach and material harm in the Fund's decision to drop his second chapter for the Book Project after he had complied with an agreed deadline of June 18, 2018. The June 18 deadline relates to item 10 of the Partial Mediation Agreement, which among other points stated that "[Applicant] agrees to complete the [second] book chapter in four weeks, which is approximately June 18th." Applicant asserts that he "committed many hours to the timely completion of the [second] chapter by June 18, 2018, with the understanding that it would be included in the book upon its completion."

211. Respondent agrees that it "was the hope of all concerned" that Applicant's second chapter could ultimately be published. Respondent asserts that the Partial Mediation Agreement did not promise publication, however, and the Fund did not breach any undertaking in deciding ultimately to drop the second chapter.

212. The Tribunal agrees with Respondent that the Partial Mediation Agreement did not obligate the Fund to publish Applicant's second chapter simply because he had submitted a draft by June 18, 2018. The wording of the final item in the Partial Mediation Agreement reflects that the disposition of the second chapter remained to be determined, based on the Supervisor's review of the June 18 draft and on a follow-up mediation session. The parties' follow-up mediation sessions in late June and July then resulted in additional points of agreement documented by the Mediator on July 30, 2018, which among other items obligated Applicant to inform the Supervisor by mid-August whether he would accept a co-author to help "restructure the chapter." When Applicant refused to accept a co-author by mid-August, the Supervisor and the Department Director agreed that "the work associated with rescuing the [second] chapter was too high" and the second chapter should be dropped. The Department did not breach any mediation agreement in exercising its prerogative in this fashion.

213. The Tribunal concludes that, under a "plain meaning" approach as in *Mr. "V"*, Applicant has failed to substantiate any of his claims of breach of the Partial Mediation Agreement.

D. Did the Fund subject Applicant to a pattern of unfair treatment?

214. Applicant asserts that the Fund is liable for subjecting him to a pattern of unfair treatment, which need not rise to the higher level of proof for a hostile work environment claim. The alleged pattern included substantive unfairness through stereotyping and micro-inequities, violations of Applicant's legitimate expectations regarding his chapters for the Book Project, and application of an outdated retaliation policy.

215. Respondent denies that Applicant was subjected to a hostile work environment, as he alleged before the Grievance Committee and seemed to maintain in his Application; or to any substantively unfair treatment as alleged in his Reply.

(1) Standards applicable to Applicant's unfair treatment claims

216. Applicant alleges a pattern of unfair treatment under both the Harassment Policy and the Discrimination Policy. The following elements of those policies are particularly pertinent.

217. The Fund's Harassment Policy defines harassment as follows:

> **3.1 Harassment**
>
> Harassment is *behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile or offensive work environment*. Harassment may be directed at an individual or a number of people, it may be initiated by a peer, supervisor, or subordinate. *Depending on the circumstances, harassment may involve a pattern of behavior*, or it may take the form of a single incident. In determining whether conduct constitutes harassment, the effect of the conduct on others is paramount. Accordingly, a determination of harassment will involve a consideration of whether the behavior was reasonably perceived as offensive or intimidating by another, and whether it had a demonstrably negative effect on the other person. Harassing behavior is especially egregious if it involves an abuse of authority or is motivated by a discriminatory or retaliatory reason.

Staff Handbook, Annex 11.01.2 (Harassment Policy), Section 3.1 (emphases added; internal footnote and links omitted).

218. Although Applicant has explicitly disavowed a claim of hostile work environment, the Tribunal may note that Section 3.2.4 of the Harassment Policy provides a definition of hostile work environment that may otherwise seem applicable to his allegations:

> **3.2.4 Hostile Work Environment**
>
> Hostile work environment refers to a situation created by a pattern of words, action, or inaction, or otherwise innocuous behavior, the cumulative effect of which is to deprive a Fund employee of fair treatment

> in his/her employment or deliberately preclude the employee from performing his/her duties effectively.

219. The Fund's Discrimination Policy also recognizes that prohibited behavior may take the form of a pattern of action or inaction:

> Discrimination can be manifested in different ways, for example, by a **single decision** that adversely affects an individual or through a **pattern** of words, behaviors, action, or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.
>
> While the former may be readily identified (e.g., a denial of a promotion), the latter may be less obvious, as there is no specific act or decision at issue. Nevertheless, the failure to provide fair and impartial treatment, even if through inaction, can have harmful effects on an employee's career.

Staff Handbook, Annex 11.01.3 (Discrimination Policy), Section III (bold in original).

220. Importantly, both the Harassment Policy and Discrimination Policy specify that they do not necessarily prohibit a supervisor's negative feedback or adverse decisions about performance or work assignments. As stated in the Harassment Policy, Section 3.3, "[t]he mere expression of disagreement or professional criticism as part of a feedback process" is not harassment. As stated in the Discrimination Policy, Appendix 2, "criticism or adverse decisions about performance or work assignments do not of themselves constitute harassment, discrimination, or retaliation."

221. The Tribunal's jurisprudence does not appear to draw a clear distinction between claims of a "pattern of unfair treatment," as Applicant now alleges, versus "hostile work environment," which Applicant claimed earlier but describes as demanding a higher standard of proof.

222. The Tribunal's decision in *Ms. "GG" (No. 2)*, where the question presented was "whether the Fund has abused its discretion in failing to provide Applicant with a workplace free of unfair treatment," para. 65, is particularly instructive. While details of the governing policies have since changed, the core principles set out in *Ms. "GG" (No. 2)* remain applicable.[13] The Tribunal emphasized that "even mildly offensive words or behaviors can rise to the level of prohibited conduct when they are repeated and form a pattern, the cumulative effect of which is

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[13] The decision in *Ms. "GG" (No. 2)* indicates that the Fund's internal law at the time did not "define 'hostile work environment' as such," *id.*, para. 200, as Section 3.2.4 of the Harassment Policy does now. However, the decision in *Ms. "GG" (No. 2)* at para. 200 made clear that the governing law defined harassment to include hostile work environment; and noted at para. 198 that the Discrimination and Harassment Policies then in force clearly prohibited patterns of improper behavior. The decision thus considered whether the applicant was "subject to a pattern of unfair treatment, constituting a hostile work environment." *Id.*, para. 180.

to deprive the individual of fair and impartial treatment." *Id.*, para. 195. In assessing the alleged impact of the challenged conduct, "The 'reasonableness' of a perception of harassment or a hostile work environment will always be a fact-specific inquiry and will be judged in the light of the context in which the events unfold." *Id.*, para. 249. After examining in detail the array of comments and behaviors contested by the applicant, the Tribunal found that the applicant had substantiated her claim of a pattern of unfair treatment constituting a hostile work environment. *Id.*, para. 262.[14]

223. In other cases, the Tribunal has found that the applicant failed to substantiate a claim of harassment, hostile work environment or other actionable workplace hostility. See, e.g., *Mr. "DD"*, para. 90 (finding that the "severe clash of personalities" between the applicant and his supervisor did not constitute "harassment on the part of the Fund or maintenance of an intimidating, hostile, or offensive work environment"); *Ms. "NN"*, para. 135 (finding that the single inappropriate notation cited by the applicant was insufficient to substantiate a claim of "abuse" or constitute actionable workplace hostility to which her managers failed to respond).

(2) Analysis of Applicant's unfair treatment claims

224. Applicant identifies three "dimensions" to his substantive unfair treatment claims: (i) "stereotypes and micro-inequities"; (ii) violation of his "legitimate expectations" with respect to his two book chapters; and (iii) application of an "outdated" Retaliation Policy. The Tribunal addresses each in turn below.

(a) Alleged stereotypes and micro-inequities

225. While reiterating that he "does not claim . . . that [the Supervisor] harbored a discriminatory animus against him because of his hearing loss," Applicant contends that he was "subject to a pervasive pattern of stereotyping from her, and from others at the Fund," in the form of "ill-considered statements" making assumptions about his condition and their ability to understand it. Applicant's Reply lists examples of the allegedly stereotyping comments, beginning with several instances in which the Supervisor "expressed sympathy regarding [Applicant's] hearing issues" and "encouraged [Applicant] to seek medical attention." The examples also include other statements or views attributed to the Supervisor, the Department Director, the SPM, the Grievance Committee, and Respondent in its pleadings.

226. Applicant further contends that he was "exposed to a pattern of micro-inequities, the cumulative effect of which deprived him of fair treatment." Here he cites "a pattern of sending out e-mail invitations to [Applicant] for events and activities that already had been organized,"

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[14] In *Mr. "F"*, the Tribunal also sustained a claim of hostile work environment constituting harassment based on its review of the full record. The Tribunal observed that the record contained "admittedly contradictory and uneven evidence," including evidence that the applicant's own behavior "was at times offensive, combative and excessive." *Id.*, paras. 100-101. Nevertheless, the Tribunal concluded that "the evidence predominantly sustains the conclusion" that the applicant suffered from "an atmosphere of religious bigotry and malign personal relations" that was "tantamount to harassment" and which the Fund failed to address appropriately. *Id.*

sometimes in venues that he considered problematic. In particular, he refers to invitations for the Department's January 2018 New Year party, a February 2018 farewell lunch, a June 2018 World Cup viewing, and two farewell parties in July and August 2018. He does not allege that the venues were deliberately chosen "to exclude or annoy him" or "to cause damage to Applicant's hearing." He concedes that he could have requested accommodations if he wanted to join the events. However, he complains that the Supervisor "did not consult with him in advance on possible accommodation challenges and had him invited by a general e-mail to the Division, which reasonably could be perceived as suggesting to him that his participation in these events was not considered to be particularly important." He asserts that he "was left in the awkward position of either staying away or facing a possible negative reaction to an accommodation request."

227. Among the remarks challenged by Applicant as stereotyping, the first several comments attributed to the Supervisor appear in context to be appropriate expressions of support in response to Applicant's hearing difficulties. The Tribunal finds no reason to consider that the Supervisor overstepped professional boundaries or engaged in stereotyping through her expressions of empathy. To the contrary, her remarks appear fully consistent with the norms of a collegial and respectful workplace. As sincere expressions of empathy, her remarks also contradict Applicant's general implication that the Supervisor was insufficiently solicitous regarding his disability.

228. Other views that the Applicant attributes to the Supervisor, Department Director, SPM and Department appear to be mischaracterizations of various statements. Contrary to Applicant's claims, for example, the Supervisor never suggested that she viewed his accommodation requests as merely "the expression of a preference" to be addressed at her discretion, that "[d]isability . . . is a choice," or that she "can diagnose the mental health condition of a subordinate." Nor does the record support Applicant's claims that the Department Director suggested that "[t]he consequences of hearing loss can be overcome by learning to act"; that the Supervisor or SPM suggested that "[Applicant's] hearing loss does not affect his ability to control the level of his voice"; or that the Department viewed staff with invisible disabilities as having inferior "capabilities and attitudes" so as to justify "low professional expectations."

229. With respect to the remaining instances of alleged stereotyping that Applicant attributes to the Grievance Committee and Respondent, the Tribunal observes that the referenced statements were made in the course of the Grievance Committee and Tribunal proceedings in this case. It is not clear that such statements would constitute "administrative acts" subject to the Tribunal's jurisdiction as defined in Article II of the Tribunal's Statute. In any event, the challenged statements fall outside the time period for Applicant's claims ending October 29, 2018.

230. In response to Applicant's claim of micro-inequities related to office social events, Respondent contends that Applicant cannot show any "'pattern' of marginalization" in the few social gatherings he cited over the course of a year. The record supports Respondent's assertions that Applicant did not object to plans for the Department-wide holiday party in January 2018; that the outside venue for the February 2018 farewell lunch was never chosen again after Applicant objected to it; and that, after Applicant raised concerns about use of the City Lounge

where two farewell parties had taken place, departing staff were then specifically discouraged from use of that venue and generally accepted an alternative. The record also reflects that the Division changed its World Cup viewing practices to assuage Applicant's concerns about noise, with all but one of the games muted so as not to disturb Applicant in his office.

231. While Applicant argues that the Supervisor's failure to extend personalized advance invitations to him for Division events "reasonably could be perceived as suggesting to him that his participation in these events was not considered to be particularly important," the Tribunal disagrees. The record as a whole, including Applicant's own notes, reflects that the Supervisor and other Division staff acting under her direction made ongoing efforts to include him in social events. They did so even where this limited the range of venues and entertainment available to other staff, and despite Applicant's own reluctance to seek accommodations in advance. Applicant thus fails to show any evidence of micro-inequities or marginalization.

232. On the record presented, the Tribunal finds that Applicant has failed to demonstrate any pattern of words or behaviors that could reasonably be perceived as offensive so as to constitute unfair treatment.

(b) Alleged violation of legitimate expectations regarding two book chapters

233. As a second "dimension" of substantively unfair treatment, Applicant alleges that the Fund violated his "legitimate expectations" regarding his two chapters for the Book Project. Respondent denies that the Fund violated any legitimate expectations on Applicant's part.

234. With respect to his first chapter, Applicant asserts that the Fund failed to honor his rights of authorship or co-authorship because the published version of the first chapter included data, views and factual material that Applicant did not produce and considers to be inaccurate. Respondent counters that "it is not for the Tribunal to review and decide which dataset should have been used." Respondent posits it as unlikely that highly regarded experts such as the Department Director and Applicant's eminent co-author for the first chapter would have approved the final version of that chapter for publication if it contained all the inaccuracies that Applicant claims.

235. With respect to his second chapter, Applicant alleges that the Fund violated his legitimate expectation that his work on this chapter would "bear fruit" and lead to publication. Respondent asserts that Applicant had no legitimate expectation of publishing the second chapter when his management assessed it as needing substantial restructuring and he refused to work with a co-author to effect that.

236. The Tribunal finds no evidence of unfair treatment with respect to either of Applicant's book chapters. Regarding the first chapter, the Tribunal may not substitute its judgment for that of the Fund's management in assessing the technical and historical accuracy of the published version. See *Mr. "R"*, para. 33 (recognizing "the deference that the law requires that international administrative tribunals accord to the exercise of managerial discretion, especially where matters implicating managerial expertise are at issue"). Nor is the Tribunal persuaded that

Applicant had any right as a chapter co-author to overrule Fund management's feedback and revisions to his draft.

237. Regarding the second chapter, the Tribunal has previously considered and dismissed Applicant's various claims that the Fund's decision to drop his second chapter was discriminatory, retaliatory, and a breach of the Partial Mediation Agreement. See *supra* at Paragraphs 151, 190, 199, 212. The Tribunal also rejects Applicant's claim that the Fund's decision to drop his second chapter violated any "legitimate expectations" of publication. The Tribunal may not substitute its judgment for that of Fund management in assessing the quality and publication value of Applicant's second chapter. Contrary to Applicant's suggestion, staff are not entitled to publication of their work simply because they have invested time and effort in it. The final decision whether to proceed to publication is a matter for Fund management, subject to its criteria of excellence.

238. Moreover, the cases cited by Applicant do not support his claim. In *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), the Tribunal recognized the principle that "administrative practice may, in certain circumstances, give rise to legal rights and obligations." *Ms. N. Sachdev*, para. 80. But the Tribunal also observed that this principle is only applicable where there is evidence of the organization's conviction that the practice reflects a legal obligation. *Id.* As the Tribunal cautioned, "It will be rare that the Tribunal will find a legal obligation to have arisen from past practice where that obligation would prevent the Fund from acting in accordance with best . . . practices." *Id.*, para. 83. Applicant makes no showing that the Fund has an established practice of publishing all works that staff have prepared, or that an obligation to do so would be consistent with best practices.

239. Applicant also refers to *FB v. International Bank for Reconstruction and Development*, WBAT Decision No. 613 (2019), para. 110, to support his claim of an enforceable expectation that his second chapter would be published. That decision addressed the specific question of attribution for the applicant's published work, however, not whether her work merited publication in the first place. *Id.*

(c) Alleged improper application of an outdated Retaliation Policy

240. As a third "dimension" of substantively unfair treatment, Applicant asserts that it would be unfair to apply an "outdated" Retaliation Policy that "Fund management bodies have established . . . needed to be updated and improved." Instead, Applicant argues, his case should be considered under the revised and strengthened Retaliation Policy introduced in February 2019.

241. Referring back to its arguments on the governing law for Applicant's retaliation claims, Respondent states that it would be erroneous and unfair to apply a later-enacted retaliation policy to Applicant's case.

242. As the Tribunal stated *supra* at Paragraph 173, the governing law for Applicant's retaliation claims is the Retaliation Policy in effect for the time period of the case – that is, from

October 2, 2017, through October 29, 2018. There is no unfairness to Applicant in applying the governing policy then in force. In contrast, it would be unfair to Fund managers and other staff to apply a later policy retroactively.

243. In sum, the Tribunal concludes that Applicant has failed to show any type of substantively unfair treatment as would violate the Fund's Harassment Policy or Discrimination Policy.

E. Were the Administrative Review and Grievance Committee proceedings in Applicant's case undertaken in accordance with fair procedures?

244. Applicant alleges that he was subjected to procedural unfairness in the Administrative Review and Grievance Committee proceedings in two key respects. First, he asserts that the Administrative Review failed to address the legitimacy of the Department's decision to drop the second chapter unless he accepted a co-author. Second, he complains that the Administrative Review decision and Grievance Committee wrongly referred to three, rather than two, instances of verbal abuse by him. Respondent counters that Applicant's procedural complaints are meritless and, in any case, should be disregarded as outside the Tribunal's review.

(1) Standards applicable to Applicant's procedural unfairness claims

245. The Tribunal has on a number of occasions been presented with claims that elements of an Administrative Review or Grievance Committee proceeding represented failures of due process. In *Ms. "GG" (No. 2)*, the Tribunal emphasized that "[t]he integrity of the administrative review and Grievance Committee processes has a direct bearing on the work of the Administrative Tribunal," para. 429; and observed that "it is essential to the robustness and integrity of the Fund's dispute resolution system that all steps in the administrative review and Grievance Committee processes are fair to staff members," para. 430. The Tribunal "'may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee' and is 'authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it.'" *Id.*, para. 423 (quoting *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17).

246. At the same time, the Tribunal has long made clear that it does not function as an appellate body from the Grievance Committee, *Ms. "GG" (No. 2)*, para. 423, and does not review evidentiary decisions of the Grievance Committee, *id.*, para. 424. Because the Tribunal makes its own findings of fact as well as findings of law, the Tribunal can rectify any lapse in the Grievance Committee's evidentiary record for purposes of the Tribunal's own consideration of the case. *Id.*, para. 425. In weighing the evidence before it, the Tribunal may also discount the Grievance Committee's record when warranted. *Id.*, para. 427 (finding no ground to give the record less weight than is ordinarily accorded, and rejecting the applicant's assertion that the administrative review and Grievance Committee processes "materially impaired" the evidentiary record).

247. The Tribunal's analysis in *Mr. E. Verreydt, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-5 (November 4, 2016), bears noting, given Applicant's suggestion of a misrepresentation in the Administrative Review process in his case. In *Verreydt*, para. 101, the applicant claimed that the Fund had deliberately failed to disclose certain information to him in the course of the administrative review process. Respondent denied any deliberate concealment, *id.*, para. 102; and the Tribunal noted that the previously undisclosed information was brought to light through the Grievance Committee process, *id.*, para. 103. The Tribunal determined that, "In the absence of evidence that information was purposefully withheld from Applicant in the underlying departmental review, the Tribunal is unable to sustain Applicant's contention that the Fund's conduct of the administrative review process caused him compensable harm." *Id.*, para. 103.

(2) Analysis of Applicant's procedural unfairness claims

(a) Alleged failure to review a July 3, 2018 decision on the second book chapter

248. Applicant asserts that the Administrative Review addressed only one of two adverse decisions regarding the dropping of his second chapter. According to Applicant, the Administrative Review process reviewed only the final decision to drop his second chapter on August 16, 2018; and overlooked a prior decision of July 3, 2018 to make him choose between dropping the second chapter or accepting a co-author.

249. Respondent argues that the challenged action of July 3, 2018 was only a discussion of options, not a decision in itself; that the choice of options was exactly as Applicant had agreed in mediation; and that the Administrative Review in fact considered and validated this choice of options as presented to Applicant.

250. As noted above, the Tribunal sits *de novo*. It does not function as an appellate body to review the soundness of the Administrative Review decision. Moreover, as a factual matter, the record contradicts Applicant's claim that the Administrative Review failed to address the Fund's action of July 3, 2018. Regardless whether that action is characterized as a decision to offer two choices, or merely a discussion of two options, the record reveals that the Administrative Review considered and approved of this action as within the Supervisor's discretion. The Administrative Review decision quoted from the Supervisor's email of August 13, 2018, in which she reminded Applicant to indicate his preference between accepting a co-author to "reshape [the second chapter] for publication purposes" or "drop[ping] your book chapter as it currently stands." The Administrative Review decision then stated, "I note in particular that [the Supervisor] was not required to offer you the choice referred to in her August 13 email and could have made the decision herself without requesting your input."

(b) References to three instances of verbal abuse

251. Next, Applicant alleges that both the Administrative Review decision and the Grievance Committee incorrectly referred to three, rather than two, instances of verbal abuse by Applicant. With respect to the Administrative Review decision, Applicant points to the mis-quotation of a June 27, 2018 email in the record. The email as sent by the SPM to Applicant referred to his

demeanor and voice level "on two occasions." The Administrative Review decision mis-quoted the email to read "on three occasions." Applicant contends that this "goes beyond . . . a typographical error, and constitutes a deliberate modification of a quoted e-mail to make it consistent with a 'three incidents' story." According to Applicant, both the Administrative Review decision and the Grievance Committee went on to incorrectly rely on this impaired record, with uncorroborated testimony from the Supervisor, to find three instances of verbal abuse.

252. Respondent asserts that this complaint is baseless. According to Respondent, the misquote in the Administrative Review decision was a mere typographical error, and not a consequential one. An email from HRD to Applicant on December 11, 2019, shows that HRD acknowledged and apologized for what it described as its "regrettable typo" in the write-up of the Administrative Review decision; and confirmed that the typo was not relevant to the final decision. Respondent states that the Grievance Committee reviewed the original emails in its own proceedings, and did not rely on the Administrative Review decision as "evidence" in making a determination. Finally, Respondent contends that just as the Grievance Committee was able to draw its own conclusions and decided to credit the Supervisor's testimony that there were three instances, the Tribunal likewise can make its own findings based on the full record before it, including original emails and the transcript of the Grievance Committee hearing.

253. Without evidence of deliberate misrepresentation in the Administrative Review process, and considering that the records for the Administrative Review and the Grievance Committee included the original email and other evidence on the verbal abuse incidents, the Tribunal finds, consistent with its approach in *Verreydt*, para. 103, that there is no compensable harm. The Tribunal itself has had the opportunity to evaluate the full record and draw its own conclusions. Indeed, Applicant seems to recognize this in the Reply, stating, "The Tribunal will consider the evidence on the alleged [F]all 2017 verbal abuse incident *de novo*, and can address any related substantive concerns from [Applicant]."

254. As a final note, Applicant's closing comment on this point in the Reply seems to raise a more systemic concern that "[t]he standards of evidence used by the Grievance Committee for assessing the [alleged third] incident raise additional and separate procedural fairness concerns that should not be left unaddressed either." To the extent that Applicant is challenging the Grievance Committee's evidentiary standards generally, this would be a policy matter for Fund management's consideration. See *Ms. "GG" (No. 2)*, para. 431 (concluding that "[i]nsofar 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").

CONCLUSIONS OF THE TRIBUNAL

255. For the reasons elaborated above, the Tribunal concludes as follows: First, Applicant has not established that the Fund failed to provide reasonable accommodations for his disability. To the contrary, the record reflects that the Fund fully satisfied its duty to engage in an interactive process to identify and implement reasonable accommodations for Applicant. Second, Applicant has not established that the Fund otherwise engaged in any discrimination against Applicant based on his disability. Third, Applicant has not shown that the Fund engaged in retaliation

against him, as he has failed to show a causal link between any protected activities on his part and any adverse decisions on the Fund's part. Fourth, Applicant has not shown that the Fund breached any of its obligations under the Partial Mediation Agreement. Fifth, Applicant has failed to show any pattern of substantively unfair treatment or procedurally unfair treatment. Accordingly, the Application, including all of Applicant's requests for relief, must be denied.

DECISION

FOR THESE REASONS

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

The Application of Mr. "SS" is denied.

Catherine M. O'Regan, President

Andrés Rigo Sureda, Judge

Nassib G. Ziadé, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
December 27, 2021