

REGISTRY'S SUMMARY¹: *“TT”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2022-1 (June 30, 2022)

ADMINISTRATIVE LEAVE WITH PAY – DUE PROCESS – RETALIATION – HARASSMENT – WHISTLEBLOWING – AGE DISCRIMINATION – GRIEVANCE COMMITTEE – CIVILITY OF COUNSEL IN TRIBUNAL PROCEEDINGS – COMPENSATION FOR INTANGIBLE INJURY – LEGAL FEES

Applicant challenged the Fund’s decision to place him on administrative leave with pay and to deny him access to his work unit and systems.

The Tribunal began by observing that the Fund, in taking the administrative-leave-with-pay decision, had not advised Applicant of the authority in the Fund’s internal law for the decision. “It is fundamental,” said the Tribunal, “that an institution governed by the rule of law provides both the factual basis for a decision that affects a staff member’s employment status and the legal basis (the provision of the internal law) to support that decision.” (Para. 100.) Failure to identify the authority for the decision meant that the decision maker was without guidance as to what standards to apply, and the staff member may have been hindered in developing his challenge to it.

In the Tribunal proceedings (and earlier in the Grievance Committee), the Fund invoked Staff Handbook, Ch. 5.01, Section 5.6 (Administrative Leave With Pay for Special and Unusual Situations), as the basis for the challenged decision. Section 5.6 provides for administrative leave with pay when “in the view of the Director of HRD, the continuing presence of a staff member at work may not be in the interest of the Fund.” Applicant contended that a different provision, Section 5.3 (Administrative Leave Pending Investigation of Misconduct), should have applied. The Tribunal observed that Section 5.3 is integrally tied to the misconduct process. A misconduct investigation had not been pursued against Applicant. Given the structure of the internal law, the Tribunal decided that it was within the Fund’s authority to base the administrative-leave-with-pay decision on Section 5.6.

The next question was, given its application of Section 5.6, did the Fund properly exercise the discretion afforded by that provision?

Applicant’s case was the first to reach the Tribunal challenging a decision taken under Section 5.6. The Fund argued that Section 5.6 conferred a “wide discretion” on the decision maker and that no prerequisites, such as formal investigation, were required. Applicant, for his part, contended that the decision should not have been taken without the procedural steps associated with Section 5.3.

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

Considering the facts of the case, the Tribunal concluded that “Section 5.6 may not be deployed to evade the procedural requirements that protect both the staff member and the institution from erroneous decision making Fair and reasonable procedures must govern,” said the Tribunal, “whether or not the formal disciplinary machinery has been activated or Section 5.3 (Administrative Leave with Pay Pending Investigation of Misconduct) has been invoked.” (Para. 124.)

Accordingly, “[w]hen the Fund takes a decision to place a staff member on administrative leave with pay under Section 5.6 on the basis that ‘in the view of the Director of HRD, the continuing presence of a staff member at work may not be in the interest of the Fund,’ and that decision is grounded, as the evidence shows it was here, in alleged conduct that might constitute misconduct and/or in the view that the staff member’s presence poses a risk of future harm, then procedural protections must be afforded *akin to those required in cases of administrative leave with pay pending investigation of misconduct.*” (Para. 125.) (Emphasis added.) The Tribunal held that “. . . general principles of international administrative law require that the decision be taken on the basis of an impartial assessment, following notice of the proposed action and an opportunity for the staff member to be heard on the matters that are to form the basis for the decision. The staff member needs to be apprised,” stated the Tribunal, “of how his continuing presence at work is alleged to be antithetical to the ‘interest of the Fund.’” (Para. 129.)

The requirements of due process were heightened in Applicant’s case for two reasons. First, the allegations giving rise to the administrative-leave-with-pay decision involved discord and purported interpersonal misconduct vis-à-vis the person reporting that conduct. Second, rather than preserving the *status quo* while accusations were investigated and resolved (as in the case of administrative leave with pay pending investigation of misconduct), in Applicant’s case, the administrative-leave-with-pay decision effectively ended his Fund career without resolving the allegations made against him, given that Applicant was reaching mandatory retirement age. The Tribunal noted that the accusations were serious ones, which deserved impartial assessment and resolution “. . . both in fairness to Applicant and in the interest of the Fund and its staff in seeking to eradicate the type of conduct in which Applicant was said to have engaged.” (Para. 128.) In implementing the administrative-leave-with-pay decision, Applicant was immediately denied access to his work unit and systems, contrary to what he had been informed. Due process also applies to the implementation of the decision taken under Section 5.6.

Based on its review of the record of the case, the Tribunal concluded that the challenged decision, and its implementation, were affected by the following fundamental failures of due process: (i) the Fund’s omission in its communications with Applicant to cite any basis in its internal law for the impugned decision; (ii) the Fund’s failure to take an impartial decision, following notice and an opportunity for Applicant to be heard, that the

“continued presence of [Applicant] at work may not be in the interest of the Fund”; and (iii) the Fund’s failure to meet the standard that all reasonable efforts must be taken to mitigate the inherent stigma and potential humiliation associated with implementing a decision to place a staff member on administrative leave with pay.

The Tribunal accordingly concluded that the Fund exceeded the margin of its discretionary authority afforded by Section 5.6, and that the administrative-leave-with-pay decision must be rescinded.

The Tribunal additionally considered Applicant’s allegation that the administrative-leave-with-pay decision was further tainted by being improperly motivated by retaliation, harassment, and age discrimination. Applicant alleged that the decision was part of a pattern of “retaliatory harassment” perpetrated by the Head of Office and then endorsed by officials of the Human Resources Department (“HRD”). The Tribunal decided that a “pattern of incidents could give rise to a finding of retaliation under the Fund’s Retaliation Policy. The incidents, however, must involve protected activities within the scope of that policy, and the ultimate adverse action must be clearly attributable to the pattern of protected activity.” (Para. 172.) In Applicant’s case, the Tribunal concluded that the “Fund’s failure to act in accordance with fair and reasonable procedures mean[t] that the evidentiary record remain[ed] opaque as to the respective responsibilities of Applicant and the Head of Office for the discord that afflicted their working relationship.” (Para. 174.) The Tribunal accordingly found the evidence insufficient to draw a conclusion as to whether that discord gave rise to an actionable claim of retaliation.

Applicant also asserted, as part of his retaliation claim, that the administrative-leave-with-pay decision was immediately caused by an incident that he characterized as “whistleblowing.” The Tribunal observed that the written policy of the Fund governing retaliation “. . . does not reference ‘whistleblowing’ *per se* or expressly provide protection of staff members who call into question colleagues’ views as to how Fund policies shall be applied or, indeed, call into question the policies themselves.” (Para. 178.) The Tribunal noted that, as interpreted by the Tribunal, the Fund’s internal law “‘broadly protects all staff who ‘speak up’ or ‘raise ethical concerns,’ either formally or informally, with managers or through other workplace conflict resolution channels.” (*Id.*, quoting *Mr. “SS”*, para. 170.) The Tribunal further observed: “The protection of staff members’ ability to engage in rigorous discussion on the important issues under the Fund’s jurisdiction and to bring matters to the attention of decision makers is critical and underlies international administrative law.” (*Id.*)

As to Applicant’s additional contention that the administrative-leave-with-pay decision had been improperly motivated by age discrimination, the Tribunal decided that Applicant had failed to substantiate that claim.

The Tribunal next considered a secondary claim raised by Applicant, that is, that the Grievance Committee proceedings in his case constituted a separate injury to him. In light of its statutory mandate, and its jurisprudence confirming that the Tribunal does not sit as an appellate body in relation to the Grievance Committee, the Tribunal decided it would not pass judgment on these complaints. The Tribunal stated that it was “. . . resolute in maintaining its own impartiality in resolving the disputes that come before it.” (Para. 196.) The Tribunal also emphasized the importance of coherence within the Fund’s dispute resolution system in the interpretation of the Fund’s internal law. The Tribunal reaffirmed that the recourse procedures of the Fund are meant to be “complementary and effective.” Finally, the Tribunal “recognize[d] its inherent authority to ensure fairness in the channels that lead to its resolution of a dispute, and it remind[ed] the Fund to remain vigilant in ensuring the robustness and integrity of the dispute resolution system.” (*Id.*)

The Tribunal also considered Respondent’s request that it address alleged lack of civility on the part of Applicant’s counsel in his presentation of the case. Applicant’s counsel, for his part, defended the “professionalism, propriety and style” of his representations. The Tribunal observed that counsel for both parties in Tribunal proceedings “. . . are expected to conduct themselves in a manner that facilitates a fair and reasoned adjudicatory process.” (Para. 199.) “Zealous advocacy must not give way to argumentation that misleads. Counsel, while necessarily partisan, are obliged to follow the canon of candor to the Tribunal, which applies in respect of both the facts and the law. Doing so,” the Tribunal stated, “is essential to supporting the Tribunal’s fundamental function to discern dispassionately the facts of the case and to interpret the law in the light of applicable principles and precedents.” (Para. 203.)

Having concluded that Applicant had prevailed on his principal claim that the Fund abused its discretion in deciding to place him on administrative leave with pay, and in implementing this decision, the Tribunal rescinded the administrative-leave-with-pay decision and prescribed “measures . . . required to correct the effects of that [rescinded] decision” (Statute, Article XIV(1)), in the form of monetary compensation for the intangible injury consequent to the Fund’s abuse of its discretionary authority. Considering both aggravating and mitigating factors, the Tribunal set that sum at \$30,000.

Lastly, pursuant to Article XIV(4) of the Statute, the Tribunal ordered the Fund to pay Applicant the legal fees and costs he had incurred in bringing the case, in the sum of \$38,421.97, which was approximately 80 percent of the total fees and costs requested. The Tribunal applied a principle of proportionality, awarding full legal fees and costs associated with those pleadings that focused on Applicant’s successful challenge to the administrative-leave-with-pay decision. Consistent with its statutory commitment to access to justice, the Tribunal rejected the Fund’s request to deny Applicant legal fees on the basis of alleged incivility on the part of Applicant’s counsel.