# ADMINISTRATIVE TRIBUNAL

# OF THE

# INTERNATIONAL MONETARY FUND

***Judgment No. 2024-1***

***February 12, 2024***

***"WW", Applicant v. International Monetary Fund, Respondent***

**Office of the Registrar**

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INTRODUCTION

1. The Administrative Tribunal of the International Monetary Fund ("Tribunal"), composed for this case, pursuant to Article VII, Section 4, of the Tribunal's Statute, of Judge Nassib G. Ziadé, President, and Judges Deborah Thomas-Felix and Maria Vicien Milburn, has decided the Application brought against the International Monetary Fund ("Respondent" or "Fund") by "WW", a staff member of the Fund. Applicant's request for anonymity was granted on March 29, 2022. Applicant was represented on the written pleadings by Schott Law Associates, LLP. Ms. Tembiso Nleya, of Schott Law Associates, LLP, represented Applicant in the oral proceedings before the Tribunal. Respondent was represented on the written pleadings by Ms. Juliet Johnson, then Senior Counsel, and Mr. Antonio Hernandes-Neto, Senior Counsel, in the Administrative Law Unit of the IMF Legal Department. Ms. Melissa Su Thomas, Deputy Division Chief, and Mr. Hernandes-Neto, Senior Counsel, appeared on behalf of Respondent in the oral proceedings.

2. The pleadings in this case are voluminous, consisting of over ten thousand pages, and a significant number of facts are in dispute. The Tribunal conducted a thorough assessment of the pleadings and includes below only those facts that are relevant to this Judgment.

3. In his Application, Applicant challenges the following principal decisions: (a) to reassign him from his Resident Representative ("Res Rep") position to Headquarters ("HQ"); and (b) to grade him as "Not Rated" in his FY2019 Annual Performance Review ("APR").

4. Applicant contends that the contested decisions were taken in violation of Staff Handbook provisions governing performance management and the reassignment of staff, as well as in violation of general principles of international administrative law, including the right to be heard. Applicant submits that the reassignment decision was based on the improper evaluation of Applicant's performance, an assessment that Applicant says relied on false and unsubstantiated allegations.

5. Applicant also challenges aspects of the administrative review and Grievance Committee processes applied in his case. Applicant contends that these processes were affected by the violation of his right to be heard and to have the benefit of the application of unwritten sources of law as recognized in the Commentary on Article III of the Statute of the Administrative Tribunal. He further contends that the then Director of the Human Resources Department ("HRD") was involved in the reassignment decision and should have therefore recused herself from the administrative review, and that the Grievance Committee incorrectly concluded that Applicant had waived his claim regarding obstruction of his appointment as Res Rep. Applicant additionally

contends that he had been the subject of racial discrimination and asserts—contrary to what the Grievance Committee concluded—that he did not waive this claim.

6. Applicant seeks as relief that the Tribunal: (a) rule that Fund law (at General Administrative Order ("GAO") 11, Chapter 11.03, Section 4.2(ii) and Section 5.10(ii)), as applied by the Grievance Committee is not restricted to what is explicitly mentioned in GAOs but also includes the unwritten sources of law referenced in the Commentary on Article III of the Statute of the Administrative Tribunal; (b) order the Fund to update the Staff Handbook to recognize unwritten sources of law, in particular, the right to be heard before adverse decisions are taken, and in connection with performance assessment and record-keeping in relation thereto; (c) affirm that the Fund violated Fund law to the detriment of Applicant, including violations of Applicant's rights (i) to be heard, including on all allegations against Applicant, (ii) to proper performance discussions and records thereof, (iii) to a proper FY2019 performance evaluation process, (iv) to a fair administrative review process, (v) to a respectful work environment, and (vi) to a fair Grievance Committee process; (d) expunge various documents from Applicant's records, including the administrative review memorandum, Grievance Committee report, and a "fraudulent" FY2019 APR; (e) order the Fund to redo Applicant's FY2019 APR and grant Applicant a rating of "Effective" or above; (f) order the Fund to clear Applicant's records of unsubstantiated allegations against him; (g) rule that remarks made by the then HRD Director and "false allegations" included in Applicant's records by Fund managers constitute racial discrimination; (h) order the Fund to compensate Applicant for monetary losses, with interest, including in relation to pension, arising from the decisions to reassign Applicant and to downgrade Applicant's APR rating; (i) order the Fund to pay damages equivalent to six times Applicant's annual salary at the time of the decisions for "egregious violations" of Fund law to the detriment of Applicant, long-term damage to Applicant's IMF career, significant reputational damage associated with decisions against Applicant, and for moral and intangible damages from the "harassment, disrespectful, hostile, and stressful work environment" to which Applicant was subjected; (j) order the Fund to start recording APR roundtable discussions every year; and (k) order the payment of legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4, of the Tribunal's Statute, if it concludes that the Application is well-founded in whole or in part.

7. Respondent, for its part, maintains that there was a sufficient basis to reassign Applicant from his Res Rep position. Respondent argues that there were three equally valid and independent reasons for concluding that Applicant could no longer effectively serve as Res Rep: Applicant's poor management of the local staff; Applicant's poor exercise of judgment in his interactions with HQ and the country authorities; and Applicant's lengthy absences from his post for a job that in its essence requires presence in-country. Respondent further argues that Applicant had no right to an APR discussion or report before the decision was made to reassign him.

8. Respondent further maintains that the decision to rate Applicant as "Not Rated" in the FY2019 APR did not constitute an abuse of discretion. Applicant was given timely feedback of performance deficiencies, as well as an opportunity to remedy those deficiencies; and the performance evaluation decision was based on a balanced assessment of Applicant's performance, was taken in accordance with fair and reasonable procedures and was not based on improper

motives. Lastly, Respondent maintains that the Tribunal should dismiss Applicant's claims relating to the administrative review and Grievance Committee processes.

FACTUAL BACKGROUND

9. Applicant, an economist, has served as a staff member of the Fund for over 20 years, both at HQ and overseas. He has served in a number of different roles, including as a Res Rep and as a Mission Chief in various regions of the world. There is no dispute that Applicant was a high performer in those roles, receiving ratings of outstanding and excellent.

10. In December 2017, Applicant was selected to be Res Rep for Country X. Applicant was selected unanimously by a panel that included both the Deputy Senior Personnel Manager ("SPM") and the Country X Mission Chief (or "Mission Chief"). The Country X Division Chief (or "Division Chief") was to be Applicant's manager, and the Mission Chief was to be Applicant's direct supervisor.

11. Applicant assumed his position as Res Rep in August 2018. Soon after arriving in Country X, he took a week of annual leave, followed by a week in Washington, D.C., for personal reasons. WhatsApp messages show that Applicant's supervisor (the Country X Mission Chief) was aware of the leave; however, during the Grievance Committee hearings, the Mission Chief testified that she was unaware that Applicant had traveled to Washington and did not recall the WhatsApp messages.

12. Shortly thereafter, the Country X Mission Chief was on leave for personal reasons and, as a result, the Country X Senior Economist became acting Mission Chief. He would lead a previously scheduled mission to Country X in September.

13. On September 11, 2018, the Country X acting Mission Chief wrote to Applicant concerning an e-mail Applicant had sent to an e-mail group and to the Regional Deputy Director. The acting Mission Chief stated the following:

> I feel I need to repeat: please do not send messages to [the e-mail group] and [the Regional Deputy Director] until further notice. Each time you send a message to [the e-mail group], [the Mission Chief] receives it. I want to keep messages to [the Mission Chief] and [the Regional Deputy Director] to a bare minimum. I will alert them when urgent. **Please confirm**.
>
> When meeting with the Governor, please keep it short as a courtesy visit and do not raise any policy issues.
>
> [Emphasis in original.]

The Country X acting Mission Chief testified before the Grievance Committee that he wanted to avoid the discussion of policy issues because the meeting was intended to be a courtesy call and he was concerned that the authorities might confuse the purpose of the meeting.

14. On September 12, 2018, another Division Chief in the same Region as Country X sent an e-mail to the Country X acting Mission Chief regarding an issue concerning Applicant. Specifically, the Division Chief stated:

> [Applicant] forwarded an internal email that reported on discussions between a res rep and her counterpart to the [Country X] authorities. A very poor display of judgement as far as I'm concerned. I've communicated this to him, no need for further action. But may be useful to keep an eye on his communication style.

15. Also on September 12, 2018, there was an exchange of e-mails between the Country X acting Mission Chief and a Center Coordinator regarding the upcoming mission to Country X in September. The acting Mission Chief wrote in one e-mail:

> Just a heads up and for your eyes only. The new resident representative has shown very poor displays of judgement since his posting about two weeks ago. I am in contact with [the Communications Department] and handling this. I suspect he will experience a steep learning curve on communications. There is a need to handle this very delicately and mitigate any collateral damage.

16. The Center Coordinator thanked the Country X acting Mission Chief for the "heads up," noting: "[Applicant] seems to have been out of the office for a while, shortly after joining. There may be something going on in his private life that has distracted him?" The acting Mission Chief responded, stating that Applicant was going through [some personal matters] and that he was "cutting [Applicant] some slack because of that . . . ." However, the acting Mission Chief added that "not sharing an internal communication on TA [Technical Assistance] with the authorities should be common sense. And not having policy discussions with the authorities immediately prior to the mission in his long delayed courtesy calls."

17. On September 14, 2018, Applicant circulated a Weekly Note. The Country X acting Mission Chief—one of the recipients—responded to Applicant the same day, pointing out errors and asking Applicant to recall the message, fix the errors and resend. The acting Mission Chief added: "Also <u>please do not include</u> [the Country X Mission Chief] as a recipient as requested earlier." (Emphasis in original.)

18. On September 18, 2018, the Country X acting Mission Chief traveled to Country X. He brought with him two mission team members. The acting Mission Chief testified before the Grievance Committee that during the mission he became "particularly concerned" about the Country X Driver. The Driver "looked very distracted and depressed." The Driver was reluctant to say anything, but after probing by the acting Mission Chief, stated that she was working very long hours and was not permitted to have lunch during meetings. The acting Mission Chief also spoke with the Country X local Economist who "seemed fin[e]." The acting Mission Chief testified that he also spoke with other members of local staff, but he did not discuss the outcome of those discussions. The acting Mission Chief did not speak with Applicant about the issues raised by the Driver. He explained during his testimony before the Grievance Committee that he did not speak

with Applicant because he (the acting Mission Chief) "had a lot of other issues going on and I was there for one mission . . . ." He acknowledged that, based on his first-hand observations, Applicant treated local staff professionally and with respect.

19. In an e-mail dated September 21, 2018, the Country X acting Mission Chief provided "[b]rief notes from the field" to the Regional Deputy Director on high level points from his first two days on mission to Country X. Among the issues he addressed were some "minor disruptions from the Res Rep office." He stated:

> The team is a well-oiled machine and things are working smoothly. I am addressing some minor disruptions from ResRep office. . . . I am gently coaching [Applicant] daily by bilaterally pointing out where things are going wrong and how to minimize reputational risks to the Fund. I also had a chat with him suggesting that his focus should be ensuring that missions run smoothly rather than on committing to analytical projects with authorities without internal discussion. He was receptive. My initial diagnosis is that, and I already pointed this [out] to him, he seems to delegate too much to the local staff who are unable to function without guidance.

20. In late September 2018, the Regional Deputy Director asked the Country X Mission Chief (who had been on leave) to take part in the last part of the September mission to Country X. The purpose of her participation was to reassure donors on some program issues and to check to see how things were going with Applicant because they had been "hearing . . . things" from the team.

21. Upon arrival in Country X at the end of September, the Country X Mission Chief was picked up at the airport by the Country X Driver. The Mission Chief testified before the Grievance Committee that on the way from the airport to the hotel the Driver became "very, very, very upset and very changed from how I had seen her before." According to the Mission Chief's testimony, the Driver alleged to the Mission Chief that Applicant was "yelling at her, and he wasn't letting her eat, and she wanted to leave the IMF." The Mission Chief concluded that the Driver was "very, very unhappy."

22. On September 29, 2018, the Country X Mission Chief wrote to the Office Manager to inform him that she was in Country X and to ask that he (the Office Manager) set up some bilateral meetings "for due diligence on the new resrep." She stated that she was "the control on this, and [was] required to meet with the local staff to see how it [was] going."

23. While in Country X, the Mission Chief (working with the HR Business Partner) interviewed three local staff and two Mission staff members. The three local staff consisted of the Driver, the Office Manager and the local Economist. The Mission Chief did not interview the other local staff, *i.e.*, the Office Cleaner and the Gardener. According to the Mission Chief's testimony before the Grievance Committee, Mission staff members expressed the view that local staff had "changed" since the arrival of Applicant, with one stating that Applicant had an "imposing style that was intimidating." (In testimony before the Grievance Committee, this Mission staff member emphatically denied having said this.)

24. Of the local staff interviewed, the Driver and the Office Manager were reportedly very unhappy and wanted to leave. (The Driver would later testify before the Grievance Committee that during Applicant's tenure as Res Rep, he spoke to her in a "very brutal," "inappropriate," "excessively rude" and "very savage, wild" manner; made racist comments to her; refused to speak with her for a period of time; was "very angry and rude" with her; and was otherwise intimidating.)

25. The local Economist, however, was positive in his interview with the Country X Mission Chief. In his view, it was too early to evaluate Applicant's management performance, and he expressed satisfaction at being more included in projects (as compared with the previous Res Rep). Before the Grievance Committee, the local Economist testified that Applicant was close with all the staff, that he (the local Economist) rated Applicant "high" as a manager and that Applicant "interacted very well" with staff and was "inclusive." Further, the local Economist testified that he had told the Country X Mission Chief during his interview with her that he "rated [Applicant] highly because of his management style." He noted, for example, that Applicant was the first person to acknowledge him as the author of the "Weekly Notes." The local Economist denied in his testimony that Applicant ever said anything to staff that was "infuriating" during his tenure as Res Rep.

26. The Country X Mission Chief did not speak with Applicant regarding the alleged issues raised concerning his management style. Based on the interviews of staff and her interactions with Applicant, however, the Mission Chief developed the view that the situation with Applicant was more serious than she previously thought.

27. In early October 2018, the Country X Mission Chief communicated her concerns about Applicant to the Country X Division Chief and the Regional Deputy Director. She recommended that either the Division Chief, the Regional Deputy Director "and/or someone from the HR team do an independent assessment of the situation by talking to the team and the local staff."

28. One particular concern of the Country X Mission Chief was that Applicant had discussed a joint research project with country authorities without discussing internally first, and that he was pushing ahead on a concept note despite feedback from the Senior Country Economist to slow down. A number of e-mail communications during this period reflect Applicant's managers' growing concerns with his purported exercise of poor judgment, performance and dismissive approach to guidance.

29. In order to have an independent assessment, the Country X Mission Chief thereafter asked the Country X Division Chief to conduct interviews of the same staff whom she had interviewed. The Division Chief and the HR Business Partner conducted interviews of mission and local staff on October 3-5, 2018.

30. In his Grievance Committee testimony, the Country X Division Chief stated that there was an expectation that Applicant would be a "very high performer" based on his previous performance as a Res Rep and that these issues therefore came as a surprise. In light of Applicant's track record, Applicant's managers thought they could "turn [the situation] around in a rapid manner." That's why, he explained, they "intervened relatively quickly." The objective was to have a more positive account by the time the APR process started.

31. On October 3, 2018, the HR Business Partner interviewed the Driver and Office Manager by phone. In an e-mail that day to the Country X Division Chief, the HR Business Partner reported the following: (a) Applicant yelled at them, and had even made the Driver cry, because the car was not waiting for Applicant in front of a hotel when he finished a meeting; (b) Applicant told them that they were responsible for his security; (c) Applicant micromanaged and did not let them do their work; and (d) Applicant did not allow the Driver to take meal breaks. Both the Driver and the Office Manager expressed fears of retaliation if Applicant learned of their statements. By contrast, the local Economist testified before the Grievance Committee regarding the alleged yelling incident, stating that it was his understanding that Applicant "was not annoyed" and that the situation was "a simple thing."

32. The HR Business Partner also interviewed the local Economist but was instructed by the Division Chief not to provide written feedback on this interview. According to the HR Business Partner, the local Economist told her that it was too early to provide feedback on Applicant's performance. The local Economist was happy because Applicant had been involving him more than the previous Res Rep had. In testimony before the Grievance Committee, the local Economist stated that, in his view, "it was unfair for anybody to ask—for me to give a judgment about a person that I have interacted with for so short a time."

33. The Country X Division Chief, for his part, interviewed two Country X Mission team members, including the Country X Senior Economist (who had served as acting Mission Chief during the Mission Chief's absence). The Division Chief also spoke with the Office Manager, but not with the Driver, because the Driver was more comfortable speaking in her local language with the HR Business Partner. Neither the Division Chief nor the HR Business Partner spoke with Applicant about concerns raised regarding his management style.

34. The results of the interviews conducted by the Country X Division Chief and the HR Business Partner were set out in a Memorandum for Files dated October 18, 2018 (prepared by the Division Chief) concerning "Performance issues with incoming RR [Res Rep] for [Country X]." The Memorandum set out detailed examples of Applicant's purported poor management of local staff, lack of teamwork and displays of poor judgment.

35. As reflected in the Memorandum for Files, the Country X Division Chief spoke with Applicant on October 16, 2018, to discuss his performance. According to the Memorandum, Applicant expressed "concern" that the Country X Mission Chief had begun asking team members for feedback on his performance shortly after she arrived on mission. In his view, this showed a lack of confidence in him; it would have been preferable if she had come to him directly "to understand his side of the story."

36. The Country X Division Chief and the Country X Mission Chief held a follow-up discussion with Applicant on October 17, 2018, by telephone, which was also recorded in the October 18 Memorandum for Files. The Memorandum for Files noted the following: (a) it was standard procedure for Mission Chiefs to get feedback on new Res Reps from team members and local staff; (b) upon the Mission Chief's arrival in Country X, the mission team unanimously expressed concerns about Applicant; (c) because the Mission Chief had very little firsthand information of the situation and had only participated in the mission for a few days, she asked that

HQ conduct an independent assessment; (d) Applicant was told that immediate improvement was needed; and (e) Applicant's initial reaction was defensive, but he stated that he would consider the feedback. The Memorandum for Files set out next steps:

> Follow up will be needed to assess whether there is a tangible change in his management of the local office. [The Country X Division Chief] indicated that we would be following up with the local staff once or twice a week. [The Division Chief] will also call him every two weeks. We indicated that we would be happy to arrange management coaching as well. We underscored that we believed his intentions were good, and that our motivation is to help him succeed in this position. We indicated that it was early in the assignment and thus there is time to take corrective, but immediate, action.

37. The record does not reflect that the specifics of the accusations against Applicant were shared with him. Further, Applicant was not provided a copy of the October 18, 2018 Memorandum for Files. The Country X Mission Chief testified before the Grievance Committee that the Memorandum for Files was not provided to Applicant for the following reasons: (a) it was hoped that the situation would improve and that there would not be a need for the Memorandum; and (b) Applicant's managers wanted to protect local staff, whose names were identified in the Memorandum. The Deputy SPM—in his testimony before the Grievance Committee—provided a different rationale for why the Memorandum was not shared with Applicant:

> So the question is that sometimes we need to have a record of what happened and discussions we had with staff that are not intended to be shared with staff for the simple fact that this is of course our view. It does not – especially in contentious situations, the risk is that you go start a negotiations [sic] over text with staff, which is not necessarily what you want, right?

38. In an e-mail dated October 17, 2018, the Country X Mission Chief expressed her concern to the Country X Division Chief that Applicant was of the view that the negative feedback he was getting was only from her. She emphasized that "[t]his simply isn't true and it will hurt me when the B list [*i.e.*, for promotions] reopens."

39. During this period, concerns were raised in a number of e-mails regarding Applicant's oversight of the local Economist (checking his work), his purported defensiveness and his exercise of judgment concerning political reporting. In one particular e-mail exchange with Applicant, the Country X Mission Chief emphasized the need for Applicant to be more cautious regarding how he reported on Country X politics, noting that the issues are "extremely sensitive and we do not want to appear to be taking any sides."

40. In late October 2018, the Office Manager completed the Country X quarterly financial report for FY2019 Q2, which was the first financial report since Applicant's arrival as Res Rep. The report contained a discrepancy of over US$2,000 between the IMF ledger ("ERS") and the bank statement.

41. On October 22, 2018, the Office Manager submitted the report to the HQ Budget Team, but without a bank reconciliation statement showing the over US$2,000 discrepancy. Instead, the Office Manager explained in a cover e-mail that the discrepancy was due to a banking software issue: "[T]he difference in the local currency as explained in previous mails is for the double salary payment issue with the local bank we bank [at] when they migrated from their old core banking system to the new one." He stated that the issue should be corrected in the next month. The Office Manager later testified before the Grievance Committee that the previous Res Rep had given him a salary advance by check and that the banking software issue had impacted two guards and the Gardener, resulting in their receiving double salary payments.

42. Applicant states that during this episode, he learned that the Office Manager kept the petty cash in his personal bank account because the office safe was not functioning. Applicant wrote to the Office Manager, directing him to "buy a safe for the IMF petty cash account and put in the IMF cash asap. . . . [and] [l]et me know when it is done." The FY2019 Q2 financial report also identified a petty cash discrepancy of approximately US$1,000. Applicant explains that he chose to give the Office Manager the benefit of the doubt regarding the petty cash discrepancy and therefore did not report the matter to HQ.

43. Applicant asserts that on October 23, 2018, the Office Manager asked him to sign a check in Applicant's name for a payment he could not explain. Applicant says that this caused him to become more worried and led him (on the same day) to write to the HQ Budget Team asking that they withhold processing of the FY2019 Q2 financial report, stating that he was "trying to understand the discrepancy between the ERS balance and the bank statement balance." He noted that he was attempting to confirm the Office Manager's initial explanation of a banking software issue. He asked that they treat his "investigation" as strictly confidential, as he did "not want to be seen as questioning the integrity of local staff."

44. Also on October, 23, 2018, Applicant wrote to the Country X Mission Chief to inform her that the local office had a new intern who would be working unpaid for the next few months. He noted that the intern would mainly be working with the local Economist on economic summaries, and asked if there was another area on which she would like him to work. The Mission Chief responded the same day by e-mail, saying: "Sounds fine, or you may wish to involve him in the discussion notes we are going to do for the new program?" (However, in testimony before the Grievance Committee, the Mission Chief stated that she did not "have any memory at all of that e-mail.") The HR Business Partner explained in her testimony that there were "guidelines" in place for hiring interns, which included consulting with HR, seeking the approval of the Mission Chief and advertising the position. She stated that Applicant had not followed the guidelines.

45. By an e-mail dated October 25, 2018, the Country X Mission Chief asked the Country X Division Chief to call the Officer Manager, saying that he was very upset. The Mission Chief stated that, according to the Office Manager, Applicant had been implying to the Office Manager (and sharing with other staff in the office)

> his suspicions that [the Office Manager] has been mishandling the petty cash and the books. (Remember that he implied something like this to us on the phone.) After [the Office Manager] gave him an accounting of the petty

> cash and [Applicant] saw there was nothing wrong, he asked for every quarterly budget statement submitted while [the previous Res Rep] was resrep, apparently saying he wanted to go through them line by line. [The Office Manager] is really upset by the obvious mistrust. [The Office Manager] also perceives that [Applicant] is creating a "coalition with [the local Economist]" to go after him – and that perception is quite dangerous, I can explain in person.

46. Also by an e-mail dated October 25, 2018, Applicant wrote to the HQ Budget Officer, copying the Country X Mission Chief, the Country X Division Chief and two Regional Deputy Directors, to report on the results of his "investigation into discrepancies in IMF accounts." Applicant, based on a detailed analysis, stated that he could

> reasonably conclude that IMF monies in [Country X] have been misused in a manner that meets the qualification of embezzlement, with a clear attempt to cover up the wrongdoing and mislead. Moreover, basic safeguards on the IMF Petty cash account have also been ignored. My findings are below. Preliminary steps taken are also below. I think that all FY2019 submissions must be redone. Should you agree with my conclusion, I would be grateful for your guidance on how to proceed and actions to be taken, including to ensure that people are held accountable. . . .

47. The Country X Division Chief forwarded Applicant's October 25 e-mail to the Deputy SPM and the HR Business Partner, saying that "[t]his is the first time we have heard of these concerns from [Applicant]." He added that this "seems out of the scope of our expertise to assess the accounting issues below so I would suggest we first leave it to [the HQ Budget Officer]."

48. For his part, the Deputy SPM testified before the Grievance Committee that Applicant's investigation was "extremely extensive" and raised very serious issues. In his view, Applicant should have first sufficiently discussed the issues "with the mission chief or the division chief, and possibly the previous res rep to try and decide who could be the reason for this before going into the examination of all the bank accounts." He added that Applicant "essentially reached certain conclusions without having discussed this with people who would at least have known the history of the matter." However, in the view of the SPM, there was "merit in looking into" the issues.

49. The HQ Budget Officer reviewed Applicant's findings and on November 14, 2018, prepared a Memorandum for Files. The Budget Officer, in his Memorandum for Files, identified the following issues: (a) the previous Res Rep had made a payment to the Office Manager for approximately US$2,000 which, due to banking software issues, resulted in a double payment of the Office Manager's salary; (b) the Office Manager had never reimbursed this extra payment; and (c) neither the previous Res Rep nor the Office Manager had followed Fund standard procedures for securing petty cash in the office safe (rather, the previous Res Rep wrote checks to the Office Manager, which he cashed and used to pay petty cash items out of pocket).

50. The HQ Budget Officer recommended that the Office Manager reimburse the extra salary payment immediately and noted that Applicant had corrected the petty cash procedures. The extra

salary payment was later reimbursed. Applicant states however that, in total, the Office Manager should have reimbursed the Fund approximately US$3,000 (US$1,000 of which was the missing petty cash).

51. Among those who were copied on the HQ Budget Officer's November 14 Memorandum for Files were the Country X Mission Chief, the Country X Division Chief and the Deputy SPM. However, it is not clear if or when they actually received the Memorandum. The Division Chief and the Mission Chief both testified before the Grievance Committee that they saw the Memorandum for the first time when Applicant's counsel presented it to them at the Grievance Committee hearing. The HQ Budget Officer testified during the hearing that he did send the Memorandum to them, but later during the hearing testified that he could not be sure. By an e-mail dated December 4, 2018, the HQ Budget Officer informed Applicant of the outcome of the review without providing him a copy of the Memorandum.

52. On November 16, 2018, a number of e-mails were circulated in which departmental management appeared to express frustrations with Applicant. The apparent frustrations centered on: the purported lack of quality in the work being overseen by Applicant; Applicant's purported defensiveness; and his forwarding of documents without providing context and comment. These frustrations led the Country X Mission Chief to write to the Country X Division Chief on November 16, saying: "[My] feeling is that we should recommend [that] the HR team pull [Applicant] back, and give him a desk job. He is just creating too much stress for all of us." The Division Chief testified before the Grievance Committee that no recommendation was made to HR at that time in the hopes that something could be done to remedy the situation.

53. On January 9, 2019, Applicant met with a Regional Deputy Director (for the same Region as Country X) and the Deputy SPM in Washington, D.C., to discuss his health, personal matters and his management of the office in Country X. The Deputy SPM prepared a draft note of the meeting. As reflected in the draft note, Applicant was reminded at the meeting "of the importance of managing well the local office." It was noted that "[m]any if not most of the problems that emerged during his tenure do not need to be escalated outside the local office or the [Country X] team and can be addressed with appropriate feedback" and that "[a]s resident representative, Applicant [was] accountable for the effectiveness of the local office, and it [was] his duty to make sure that all members of his team are productive and satisfied." In closing, the following was emphasized in the draft note:

> [T]he HR team underlined the importance of the RR's [Res Rep's] presence at his duty station and the need for good communication between the RR and the mission chief who needed to approve any absences. Should [Applicant's] situation . . . no longer be compatible with the duties of [a Res Rep] they underscored the department's readiness to offer him work opportunities at headquarters, e.g., a desk assignment.

The Deputy SPM testified before the Grievance Committee that a decision was made not to share the note with Applicant, because Applicant "would have likely had a different view on the text of the email and we needed to have a record of the meeting."

54. In a letter dated January 17, 2019, the mayor of the capital city in Country X informed the Fund that its office lease in Country X would expire January 31, 2019. The parties dispute who was at fault for not being able to negotiate an extension or to secure another office space prior to the expiration of the lease. In any event, the country office had to prepare for a move to a temporary location (the "Hotel") until a new permanent office was identified and prepared for occupancy.

55. In her Grievance Committee testimony, the Country X Mission Chief testified that Applicant, against the recommendations of departmental management, mainly worked from home while the other members of the local staff worked from the Hotel. The Mission Chief asserted that she only learned during the Grievance Committee hearing that Applicant had received guidance from Corporate Services and Facilities ("CSF") that he should work from home. The parties dispute whether this was brought to the attention of the Country X Division Chief and the Mission Chief.

56. During this period, the Office Manager became very ill, necessitating plans for an eventual medical evacuation to another country in February 2019. The record reflects that Applicant was very concerned about the Office Manager; that he was in regular contact with a doctor; monitored the Office Manager's medical progress and expressed care and concern; managed discussions with the insurance provider; managed and helped to expedite the Office Manager's eventual evacuation; kept HQ abreast of the situation; visited the Office Manager in the hospital and at his home; and allowed the Driver to drive the Office Manager in the office car. Applicant's close involvement in the matter began in January 2019 and would continue through April once the Office Manager's situation stabilized.

57. In late January 2019, Applicant reported to the Country X Mission Chief that the Office Manager (who at that time was hospitalized in a local hospital) had checked himself out of the hospital and had come to work against the advice of his doctors, with a "visibly paralyzed" left hand. The Office Manager wanted to close the accounts and submit the next financial report (FY2019 Q3) to HQ himself.

58. On January 31, 2019, the Office Manager sent to the HQ Budget Officer the FY2019 Q3 submission. The Office Manager noted in his cover e-mail that there was a discrepancy of about US$82 and stated that he was unable to determine whether this was an error on his part. The Applicant and the local Economist later discovered that the discrepancy was about ten times higher than what the Office Manager had reported.

59. In early February 2019, the Country X Mission Chief expressed concerns regarding Applicant's absences from the office in Country X. In a WhatsApp message to Applicant dated February 4, 2019, the Country X Mission Chief asked Applicant if he was coming into the office that morning. Applicant responded that he was still in his home country and would be traveling to the U.S. the next day. The Mission Chief was apparently unaware that Applicant was traveling to the U.S. via his home country.

60. On February 6, 2019, the Country X Mission Chief wrote the following e-mail to the Country X Division Chief and the HR Business Partner:

> My sense is we should start documenting [Applicant's] work absences. . . . I will produce a list of absences since he took up the position in August. The absences – including all the "work from home" – will be very significant. After taking off the last three days work days [sic] – it turns out these were spent in [his home country] again, during a serious crunch period for the team, and while leaving the local office unpacked in a hotel, and [the Office Manager] in the ICU at the hospital – [Applicant] had said he would come to HQ this morning. At 9 am this morning he sent a message that his flight landed. I asked if he was coming in to work to help with the PN. He said that he might be able to work late this afternoon and tomorrow morning, given [personal] appointments, but then only from home. (These days are marked as work from home.) I haven't responded, because what can I say? I've never encountered this situation before. I've had resreps with long absences/serious family issues, but they always kept me in the loop and made a good faith effort to work when needed. Please advise if you have other ideas. (I will also, as recommended by [the HR Business Partner], enquire about why so much time [was] spent in [his home country], but I'm certain [Applicant] won't respond well.)

61. On February 7, 2019, the Country X Senior Economist wrote to Applicant regarding a draft mission schedule Applicant had prepared. The Senior Economist noted that dates were incorrect and that the schedule did not include any meetings. He asked Applicant to make corrections.

62. On February 11, 2019, the Country X Division Chief and the Country X Mission Chief held a mid-term APR meeting with Applicant. Among the issues discussed were Applicant's absences from the office. In a follow-up e-mail of the same day, Applicant took particular issue with the suggestion that he was taking excessive teleworking days. The Mission Chief responded by an e-mail dated February 12, 2019, saying:

> The issue is not of teleworking, per se. It is that when you were teleworking, others (e.g. team members, other colleagues) have reported to me their impressions several times that you were not available/fully engaged.
>
> Perhaps the amount of teleworking is not the right focus. [The Division Chief ] and [I] have been very flexible about accommodating that, as long as the work gets done in a timely and high quality manner.

63. The February 11, 2019 meeting was recorded in a Memorandum for Files dated February 25, 2019. As reflected in the Memorandum for Files, the following performance issues were said to have been raised during the meeting (with specific examples): (a) Applicant's physical presence in the Country X office had been limited and he needed to be more engaged in the role; (b) Applicant needed to focus more on producing consistently high quality work product; and (c) Applicant needed to improve his management of the local staff, as distrust with and among local staff was growing. On the latter point, it was noted (among other issues) that Applicant "continued to raise accusations of financial misdoing by the [Office Manager] without taking time to get the complete picture." It was recommended that Applicant investigate the facts as needed to fulfill his

fiduciary responsibilities in a more measured and calm manner, without interim accusations. It was noted that the alleged "misdeeds" were still unproven.

64. The Memorandum for Files closed by setting out the following next steps:

> Although his initial response was defensive, since the discussion [Applicant] has shown improvement in responsiveness and the quality and quantity of information flow. However, his management style with local staff continues to be overly heavy-handed. Given [Applicant's] current personal difficulties and strong past record, and specific feedback we have given him to help improve his performance, we would favor giving [Applicant] additional time to correct his behavior over the remainder of the FY. However, should performance problems persist – especially as regards management of the local staff – consideration should be given to reassigning [Applicant] to a desk position at HQ. As advised by the HR team, we plan to send follow-up bullets to [Applicant] summarizing the discussion.

The Memorandum for Files was not provided to Applicant. Nor does the record show that Applicant was provided the specifics of the accusations made against him by the Driver and the Office Manager.

65. The record shows that during this period there was a difference of opinion between Applicant, the Office Manager and departmental management concerning the timing of the Office Manager's medical evacuation. The Country X Mission Chief stated that there was a "bad row" between Applicant and the Office Manager and recommended that performance input be provided to Applicant in writing only after the situation was resolved. However, numerous WhatsApp messages between Applicant and the Office Manager and his spouse demonstrate that the Office Manager and his spouse were very thankful and appreciative for Applicant's efforts, care and attention.

66. On March 6 and 7, 2019, Applicant and the Country X Mission Chief exchanged e-mails regarding the planning of an upcoming meeting. In one e-mail, Applicant took the opportunity to explain the dysfunction of the office:

> [The local Economist] is helping a lot, especially on finances. The problem is that I found an office where only the OM [Office Manager] knew what he was doing and did not organize documents well. We are still missing some and there are some transactions without justifying documents. So we have wasted a lot of time just putting financial documents in order to get money from HQ. [The Office Manager's] sickness and associated evacuation, combined with the office move to [the Hotel], where we have many IT restrictions, are big "negative shocks" to the work of the local office.
>
> [The Office Cleaner] and [the Driver] are also helping a lot, but they can only help up to a certain point. They help on what they are supposed to do.

> The problem here is that they were not associated closely to the management of the local office. Therefore I still have to teach them a few things, especially the way we organize work in the office in the context of reduced staff.
>
> In general, when I arrive[d] in this office, I found an office where people should have worked more closely together as they need each other. It was not the case at all . . . .

67. The Mission Chief replied, stating: "You should have seen how bad it was before [the Office Manager] arrived. The previous [Office Manager] didn't do anything at all, and none of the local staff spoke with each other." Applicant responded, further explaining the situation in the office, writing:

> Unfortunately putting "finances" in order in [Country X] was not easy at all because of the reasons I gave you before. We spent many days on this and we are not even done yet!!!!! This is not "rocket science", but it requires discipline, organization, and more importantly transparency. It was not the case at all in this office. In a small office like this one, everybody must understand what is going on, even on finances, and know where documents are kept and how they must be classified. There are important documents that even [the Cleaner] cannot find. Now I am working with [the Cleaner] and [the local Economist] to put an end to this. We are closer to the end of this process . . . .
>
> What I will need the most is greater room to increase local staff salaries because I have made them do many tasks that were beyond their usual duties as [the Office Manager] was not around, and we had to move. [The Cleaner] for example is employed as an Assistant but paid as a person at a much lower grade. There is no point hiring a[n] "interim local staff" since these tasks can be done either by [the Cleaner], [the Driver], or [the local Economist]. We just have to "motivate them" more.

68. On an unrelated matter also on March 7, 2019, the SPM transmitted to department staff a memorandum that set out APR procedures on (a) the APR timeline, and (b) a tool for soliciting feedback from direct reports—the Direct Report Input ("DRI") tool. The memorandum specified that all Res Reps were expected to participate in the DRI process, "provided they have a minimum of three raters." Further, the memorandum attached Annual Talent Management Exercise ("ATME") performance guidelines for FY2019. The memorandum stated that the "aim of the ATME is to provide managers with the framework within which to review staff performance over the last fiscal year, in a consistent, transparent, and fair manner, following the suggested process" set out in the ATME Guidelines. (Emphasis in original.) The ATME Guidelines set out steps that "should" be followed.

69. On March 10, 2019, the Country X Mission Chief met with Applicant in Country X to discuss his performance, in lieu of providing him follow-up bullets as was discussed in the

February 25, 2019 Memorandum for Files (*see* para. 64). The Mission Chief testified before the Grievance Committee that she had told Applicant that departmental management was still hearing a lot of complaints from staff, that he needed to "fix" the problem and that HR would have to make a decision to reassign him if the situation did not improve. She also testified that she had emphasized that HQ needs to hear from staff that "things are going well." The Mission Chief further testified that she told Applicant that he had to "have at least three people to complete the DRI [Direct Report Input] for [him] to get the feedback" (*i.e.,* there needed to be at least three input providers for a DRI report to be generated). She further testified that she discussed with Applicant the points that were set out in the February 25, 2019 Memorandum for Files. Applicant, however, asserts that the Mission Chief told him that "HR wants to remove you" because of the local staff and that "you will not get a DRI." There is no written record of this meeting.

70. The Country X Mission Chief testified before the Grievance Committee that she was hopeful after the discussion that the mission meetings with government counterparts would go smoothly, but that Applicant displayed poor judgment. She noted, in particular, two purported instances: one, where Applicant queried a counterpart about obtaining a discount for a tourist trip, and another where Applicant asked the CEO of the national airline for assistance in obtaining his frequent flyer card. Additionally, the Mission Chief testified that she had heard from the Driver that Applicant was referring to her as his "domestique," was using the Res Rep car for "personal stuff" and was being impatient and disrespectful with lower-level functionaries in the Country X Government. Applicant disputes these assertions.

71. The record reflects that on March 16, 2019, the HR Team e-mailed DRI requests, seeking feedback on Applicant from the local Economist, the Office Manager and the Driver (through their IMF e-mail accounts) as part of the FY2019 APR process. (An informal request was also sent to the Cleaner through her personal e-mail account.) The feedback of the local Economist, the Office Manager and the Driver was due on April 12, 2019. A reminder e-mail was sent early in April. They did not respond.

72. The local Economist testified before the Grievance Committee that he did not recall receiving the DRI feedback request and that he normally ignores messages like this, believing them to be a scam. The Cleaner testified that she had received an e-mail (although it is not in the record) asking to provide input on Applicant's performance, but thought that it was "spam" and deleted the e-mail. However, if she had provided feedback, she would have said that Applicant "was a good manager." There is no evidence in the record of feedback being sought from any other Fund employees.

73. On March 26, 2019, Applicant submitted an FY19 forecast and FY20 budget request for the Country X office. Among the items addressed in the e-mail were the salaries of the Cleaner and the Driver. Regarding both, Applicant explained that their salaries needed to "catch up with the UN salary scale." Applicant also stated in the e-mail that the Driver had not been paid her full salary (only a base salary without a cash allowance). With respect to the Cleaner, Applicant stated that she was actually performing the duties of an administrative assistant and that her salary was well below what the UN pays its staff with the lowest grade. Applicant lobbied, unsuccessfully, for the Cleaner to receive either a promotion or a significant salary increase (beyond a seven percent increase agreed to by HR).

74. The documentary evidence reflects that during this period, Applicant and the Driver had exchanged friendly e-mail and WhatsApp messages regarding a salary increase for her. However, in her Grievance Committee testimony, the Driver stated that she had had no discussions with Applicant regarding a salary increase. She further testified that during this period she and Applicant rarely communicated and that any written messages were very limited and formal.

75. The Cleaner testified before the Grievance Committee that she had worked at the Country X office for about 18 years for seven different Res Reps and that there was "[n]o difference" in her work experience with them. She stated that they were all "hard working and . . . supportive." The Cleaner further testified that Applicant's "management was good," that, before the Office temporarily moved to the Hotel, Applicant came regularly into the office, and that Applicant's relationship with the Driver "didn't match very well."

76. On March 30, 2019, the HR Business Partner provided to the Country X Division Chief her unsolicited performance feedback on Applicant. She wrote that Applicant "[h]ad a rough start in managing some local employees[,]" that "he is an advocate for his employees; had to deal with the evacuation of a local employee for medical reasons and handled it well." She added that Applicant "seeks clarity on the local Employee Guidelines to ensure proper management." The HR Business Partner made no mention of any purported difficulties Applicant had in managing local staff.

77. On April 2, 2019, Applicant wrote to the HQ Budget Officer regarding Applicant's review of the FY2019 Q3 financial accounts. Applicant stated, among other things, that the ending balance was inflated by about ten times the amount originally reported by the Office Manager.

78. The HQ Budget Officer testified before the Grievance Committee concerning Applicant's inquiry. He stated that to his knowledge the books (prepared by the Office Manager) were never correct during Applicant's tenure as Res Rep, and that "in the end [he] couldn't figure out what the discrepancy was . . . ." He added that an official audit by the Finance Department was requested but that he did not know the outcome of the audit.

79. In the oral proceedings before the Tribunal, counsel for Respondent disclosed that disciplinary proceedings were ultimately initiated against the Office Manager and that these resulted in a misconduct finding against him, on the basis of issues raised by the Finance Department, Applicant's Department and Applicant. Applicant asserted in the oral proceedings before the Tribunal that the investigation was initiated based on a complaint made by him after he was later reassigned from his Res Rep position.

80. In late April 2019, Applicant exchanged a number of e-mail communications with the SPM and others proposing leave and teleworking arrangements up until the end of his assignment in August 2021. Applicant presented a number of different leave scenarios. The SPM wrote to Applicant stating that no matter how he accounted for the days, Applicant would be out of Country X for up to 15 or 16 weeks a year which, in the view of the SPM, was unacceptable for a Res Rep:

> We need a res rep to be physically present in the post for much of the time, and to be flexible enough to be there for unanticipated events that might

> arise. A plan that requires you to be out of the country for around 15-16 weeks a year, regardless of whether it is on leave or otherwise, and for us to pre-commit to specific leave days up to two years ahead, is not consistent with that.
>
> . . . .
>
> We understand your difficult situation and are ready to accommodate it by finding a suitable assignment for you at HQ.

81. On April 29, 2019, the Office Manager wrote to the Country X Mission Chief to provide examples of actions taken by Applicant which, in the view of the Office Manager, were done with the intent of undermining the Office Manager. The Mission Chief responded: "We are looking into this. Please hang in there."

82. On April 30, 2019, the Country X Mission Chief met with a senior official of HRD, along with the HR Business Partner, and the Deputy SPM to discuss a process for reassigning Applicant. The HRD official reportedly explained that pursuant to the Staff Handbook, teleworking outside the duty station required prior approval by the Department Director, up to a maximum of 30 days; beyond that, it must be approved by HRD. Further, the HRD official was said to be of the view that the performance issues, especially the management of local staff, would "clearly meet" the standard for reassignment. However, the HRD official apparently cautioned that they needed to be careful on process, both for the purpose of fairness and potential future litigation. That official reportedly stated that it would be much better for Applicant to accept reassignment voluntarily and that the Department Director should have a conversation with Applicant first before moving to an involuntary reassignment.

83. On May 1, 2019, the Country X Mission Chief submitted Applicant's draft APR to the Country X Division Chief. The Mission Chief provided many positive comments regarding Applicant's performance and one comparatively short paragraph setting out her concerns:

> [Applicant] received feedback, during October 2018 and February 2019, about key areas where his performance needed to be improved: management of the local office; aligning his work agenda with that of the HQ team; more careful judgment about handling sensitive material in emails and reporting content; keeping the team in the loop about his activities; and responsiveness when teleworking outside the duty station. He has shown improvement in some areas. Notably, despite addressing the most obvious problems, his management of the local office still requires improvement. His approach has been perceived as heavy-handed and un-transparent by some local staff and has created an atmosphere of mistrust.

84. The Mission Chief wrote that Applicant's "performance was [effective] in FY2019." She testified before the Grievance Committee that she "softballed it" and left the rating open, stating:

> I always put my recommended rating and I put in "effective." Certainly even if they brought him back, I didn't want him to have – he had been in this bad personal situation. I had just been through a traumatic personal situation myself, so I just felt like I didn't want him to have something on his record that might be a function of him having been in this bad situation. And I just – I didn't want, like, to hurt him going forward. . . . I just wanted to be fair and I wanted to, like, kind of not have him have a stain on his record. … [I]t just seemed like this was the wrong job . . . at that time of his life. And, you know, he had some judgment issues. . . and he wasn't aware of how badly the managerial stuff was going. . . . I worked with him before. . . and liked him a lot and . . . I didn't want his record to be stained, especially when he'd been going through all this personal stuff.

85. The Country X Mission Chief further testified that she "always put[s] the recommended rating in brackets, because of course it changes when you have the roundtable and . . . the discussion." She acknowledged that the draft "Effective" rating was "a generous interpretation of his performance." If she had not been concerned about the impact on Applicant's career, she would not have put an "Effective" rating.

86. On May 15, 2019, the department held its FY2019 APR roundtable discussion. The Country X Director, who was part of the roundtable performance discussion, testified before the Grievance Committee to being "very – very concerned about issues that were coming up in terms of [Applicant's] performance . . . ." These included extensive absences, difficulties managing local staff, and not taking feedback well.

87. As a result of the roundtable discussion, Applicant's department made the two principal decisions that are challenged in this case: the decision to reassign Applicant from his Res Rep position to HQ and the decision to give him a "Not Rated" performance evaluation. The Country X Mission Chief testified before the Grievance Committee that she lobbied to keep Applicant's rating as "Effective" taking into consideration Applicant's personal issues. The SPM, for his part, testified that the "greatest concern" was "how [Applicant] managed and treated local staff." He noted that this was an issue that had been discussed with the HR team and with the Mission Chief for some time. The SPM further testified that during the roundtable discussion on Applicant's performance there was "a general feeling that . . . to give someone – to describe someone's performance as effective while at the same time seeing these significant performance problems, particularly in terms of the treatment of local staff, and having made a decision that these were bad enough to want to recall a person was not consistent with giving an effective rating, so that in this case it had to be a not rated."

88. On May 15, 2019, following the roundtable performance discussion of the same day, the Country X Mission Chief wrote to the SPM by e-mail to set out the reassignment process that had earlier been discussed at the April 30 meeting (*see* para. 82), which included steps recommended by the senior HRD official. The Mission Chief attached the two earlier Memoranda for Files (of October 18, 2018 and February 25, 2019) (*see* paras. 34-36 and 63-64) in order "[t]o bring everything into one place." The e-mail and the Memoranda were copied to two Deputy Directors, the Country X Division Chief, the Deputy SPM and the HR Business Partner.

89. According to the e-mail of May 15, 2019, one of the recommendations of the senior HRD official was that "[X Region] should also notify [the then HRD Director] in order to contain negative externalities for [the Mission Chief] . . . ." The Deputy SPM testified before the Grievance Committee that the Mission Chief "was referring to the negative perceptions of her management and how that could affect her career progression." He further clarified: "[S]he was looking for being eligible for a promotion . . . in this period, and these are sensitive subjects that could negatively impact her prospects."

90. The SPM responded to the Country X Mission Chief's e-mail of May 15, 2019, by asking whether she had ever sent an e-mail to Applicant summarizing the main points from the February 11, 2019 meeting with Applicant, which had been recorded in the February 25, 2019 Memorandum for Files (*see* para. 64). The Mission Chief responded by an e-mail dated May 21, 2019, stating that a decision had been made not to do so in order to avoid "risking negative backlash" from Applicant during a mission. She explained that according to HRD "the 3 remedial performance discussions were adequate for reassignment, even if we hadn't sent the points in writing." The Mission Chief testified before the Grievance Committee that she was the one who lobbied against sending bullets to Applicant, due to the fact that he was so "defensive and argumentative about all of this stuff and very, like, 'Prove it. Prove it. Give me examples. Prove it.'"

91. On May 20, 2019, the Country X Senior Economist wrote to the Country X Mission Chief regarding an e-mail Applicant had forwarded to the Country X team. The Senior Economist wrote:

> You could add this one for forwarding of messages to the team with no context. Each team member has to search for clues as to find out what is important and why this is forwarded. Not useful at all.

92. Also on May 20, 2019, a document was prepared by the Country X Division Chief, entitled "[p]erformance issues regarding [Applicant] as resrep in [Country X]." The document set out details (with examples) concerning Applicant's performance issues. These consisted of the following: (a) Applicant leveled numerous accusations of financial misconduct against the Office Manager without taking the time to get a complete picture; (b) according to the Driver, Applicant had confronted her about having shared her concerns with HQ; (c) since the local office moved to the Hotel, Applicant had been working from home against the recommendations of his supervisors; (d) Applicant made the Office Manager's medical evacuation difficult; (e) Applicant unnecessarily raised expectations of the Cleaner that she could have administrative assistant-type responsibilities for a higher salary; (f) Applicant was frequently absent from the office (during the first nine months he was out of the duty station about 30% of the time); (g) numerous days away from the office were never claimed or were claimed incorrectly; (h) due to his frequent absences from the office Applicant had been leaving the local Economist (who was not trusted by others) in charge of the office; (i) Applicant availed himself of office resources for personal use and prioritized personal tasks over office tasks; (j) since Applicant's arrival as Res Rep there had been a deterioration of the quality and quantity of information from the field; and (k) local staff had been contacting the Country X Mission Chief and the HR team "very frequently" with concerns about Applicant's actions, and they asked about speaking with the IMF Ombudsperson.

93. On May 22, 2019, it came to the attention of Regional management that Applicant had hired an intern without their approval (*see* para. 44). The SPM wrote to Applicant on May 22, stating:

> I am really shocked that you would have someone working in the office that neither [the Country X Mission Chief] nor the HR team were aware of. Did you inform anyone at HQ about this arrangement? Also, can you let me know whether you (or he) have ever presented him as having any connection with the IMF?

94. Applicant asserted that he had obtained HQ approval and that he even had had a video conference meeting on the issue. Applicant forwarded the information to the SPM. The SPM reviewed the material and stated that while Applicant had let the Mission Chief know about the internship—"presenting it though as a done deal"—the internship was very "problematic." Applicant was directed to end the arrangement by the end of the week.

95. On May 22 and 23, 2019, HR and Regional management exchanged draft speaking notes for a call with Applicant. The draft speaking notes addressed the following issues: (a) Applicant's management approach had led to a loss of trust and confidence between him and several local employees; (b) Applicant's limited availability in his post, as well as his inadequate communication about this, was problematic; and (c) there were substantial concerns about Applicant's exercise of judgment in handling sensitive issues with the authorities. The notes added:

> Senior management in [the Region] appreciates your experience and past achievements. But despite substantial feedback on these issues through the year, we have not seen sufficient improvement. Indeed, you continue to resist and push back against feedback by deflecting responsibility to others.
>
> Following discussions in the context of your APR, we intend to reassign you to HQ in the near future. We want to manage the re-assignment to HQ in a cooperative manner that minimizes any impact on your career.

96. Further, according to the speaking notes, Applicant would be invited to raise performance factors that may not have been taken into consideration, but also emphasized that management was "not prepared to continue with the risks of having [him] in a field role, given the performance problems we have identified." The notes further emphasized that Applicant was expected to leave Country X within two weeks.

97. The performance discussion with Applicant took place on May 23, 2019 in a telephone call with the SPM, who followed up with an e-mail to Applicant to put on record their conversation. The SPM used the above-referenced speaking notes as talking points and for the e-mail.

98. On May 23 and 24, 2019, Applicant sent 17 e-mails, with attachments, to the Regional Director about "his situation." In the penultimate e-mail, Applicant wrote the following:

> I have sent you 16 emails with many attachments in addition to this one. They show you that there has always been an unprofessional and racist agenda behind my assignment from the beginning. Do the investigation yourself. Ask the authorities why my appointment was delayed. Ask for evidence of "disrespect" Check my "availability" in [Country X], including for the authorities. . . . You still have time to stop this racist scandal!!!!

99. The Regional Director responded on May 24, 2019, stating that he did not "see anything to alter the assessment of your performance that was conveyed to you . . . ." In fact, he added, "in some areas, it reinforced my concerns." He directed Applicant to return to HQ no later than June 10, 2019. Applicant did not respond. Thereafter, senior managers made a number of unsuccessful attempts to reach Applicant and to obtain a commitment from him that he would return to HQ by June 10.

100. On June 9, 2019, Applicant wrote to the Regional Director and the SPM. He apologized for not responding sooner, which he said was due to the stressful situation. He asked for an additional 10-14 days to pack his items and properly bid farewell to colleagues. Applicant, among other things, expressed surprise "that nobody ever asked [him] for [his] side of the story whenever allegations surfaced against [him] at HQ."

101. The Regional Director responded on June 10, 2019. He agreed to allow Applicant additional time to pack and arrange for his return. Applicant was expected to return to Washington, D.C., no later than June 24, 2019 (but his Res Rep assignment was over June 10), after which he could take leave as he wished.

102. Later in June, Applicant applied for extended sick leave due to stress, lack of sleep and inability to focus. He went on sick leave the month of July and then took annual leave the month of August. He returned to the Office on September 3, 2019, but then sometime later in September traveled to Canada to renew his G4 visa. It was decided to hold off on discussing with Applicant his APR until he returned from Canada.

103. In July 2019, an IMF staff member reviewed Applicant's leave records. She stated that "hardly anything matches." Following a full and available accounting of Applicant's leave, it was determined that for the roughly nine months he served as the Res Rep, he spent about 30% of that time outside the duty station. However, it was noted that the official data was incomplete, "since some days away apparently were not properly accounted for." In his pleadings before the Tribunal, Applicant has not disputed this accounting.

104. The Country X Department Director testified before the Grievance Committee that during this period, a decision was made to offer Applicant a "good" country assignment where he could highlight his abilities as an economist. He testified that there were no questions regarding Applicant's abilities as an economist and that departmental management wanted to provide him an opportunity to succeed. He further testified that Applicant rejected the offered assignment.

105. On October 11, 2019, Applicant took part in his APR discussion for FY 2019. In the comments section of the APR, Applicant's manager (the Country X Division Chief) noted

Applicant's valuable contributions during the year, but stated that his "performance did not reach the effective level in FY2019." The Division Chief noted that Applicant had "received feedback in October 2018, February 2019, and March 2019 about three key areas where his performance needed to be improved: management of the local office; showing better judgment; and availability to carry out his duties." With respect to these three areas, the Division Chief elaborated as follows:

> On the first point, his treatment of some local staff was excessively heavy-handed (e.g. raising his voice to the Driver . . ., repeated accusations of financial misdoing of the OM [Office Manager] before conducting adequate due diligence, warning his local office staff against communicating directly with HQ), while he raised expectations of others (e.g. salary of cleaner, . . .). This created an atmosphere of division and mistrust, including among local staff, which worsened steadily throughout his tenure. This was based on extensive feedback from local staff and the country team to the HR team, to me, and the mission chief. [Applicant's] heavy-handed approach was also observed by other Regional colleagues (e.g. other colleagues, the HR team and the budget teams).
>
> On the second point, [Applicant] displayed poor judgment in several instances, for example in email exchanges (e.g. forwarding sensitive information to the authorities), his use of local office resources (e.g. using the office car and Driver extensively for personal reasons), and signing an official letter for an unofficial intern.
>
> On the third point, [Applicant's] limited availability at his post and frequent remote working undermined the quality of input from the local office (e.g. with less economic content and more errors in the weekly reporting, cessation of biweekly analytical notes) and the work flow of the team (e.g. with frequent rescheduling of/absence from team meetings). [Applicant] received extensive feedback on these points and he made some progress to address them. However, the progress was inadequate by the end of the rating period – particularly as regards management of the local office – since he did not seem to accept/internalize fully the feedback and repeatedly sought to deflect responsibility onto others. Looking forward, [Applicant] has been reassigned to headquarters, where he can capitalize better on his strengths. I wish him well in his new assignment.

106. Applicant's APR also included feedback for the period May 2018 to August 2018, from Applicant's former Mission Chief. The former Mission Chief stated that Applicant had been a good discussion partner and had provided good advice. He added that Applicant had handled financial sector issues, led discussions in that area with authorities and helped to formulate policy recommendations. The former Mission Chief found Applicant to be collegial and a good team player.

107. In early October 2019, Applicant requested mediation. The Fund did not agree to participate in mediation, stating that it "continue[d] to believe that the decision at issue was

reasonable and that this will be confirmed through the grievance process . . . ." (Applicant later made two additional requests for mediation, both of which were rejected.)

108. The Country X Division Chief signed the "Not Rated" APR on November 4, 2019; the signature of the SPM was provided on March 9, 2020.

CHANNELS OF ADMINISTRATIVE REVIEW

A. Applicant's requests for administrative review and HRD Director's response

109. On June 13, 2019, Applicant filed a request for administrative review of the decision to reassign him from his assignment in Country X. On August 29, 2019, Applicant reached out to HRD by e-mail to ask about the status of his request for administrative review. He took the opportunity of the e-mail to note that he had still not received his final APR.

110. Later that day, the then HRD Director sent a memorandum to Applicant setting out her decision on Applicant's request for administrative review. The then HRD Director reached the following pertinent conclusions: (a) Applicant did not receive a DRI Report because input was not received from at least three staff; (b) while Applicant had a fiduciary duty to investigate the possible misuse of office funds, he should have done so "in a more measured and calm manner, without interim accusations"; (c) the criticisms regarding Applicant's management approach were reasonably based on feedback obtained from the Mission team and local staff; (d) Applicant's availability was sometimes unpredictable, there were concerns that he was not properly documenting his leave and travel status, and his request in April 2019 for advance approval of leave "raised concerns that it would be difficult for [Applicant] to be physically present at post for a sufficient time and to be flexible enough to be there for unanticipated events that might arise"; (e) Applicant demonstrated poor judgment and poor performance on numerous occasions; (f) concerns about Applicant's performance had been raised with him during his assignment and he had been provided opportunities to improve; and (g) there was no evidence of racial discrimination in relation to the decision to transfer Applicant to Headquarters. In closing, the then HRD Director wrote:

> Res Rep roles are prominent field-based representative roles. As such they carry particular risks for the organization. The evidence I have seen indicates that [the Department Director's] decision that he could not continue to take the risk of your remaining in the Res Rep role in [Country X] was taken for legitimate business reasons and for no improper purpose. It appears to have been reasonably based on evidence giving rise to concerns about your management ability, judgment, and presence at post.

111. In the light of the above conclusions, the then HRD Director informed Applicant that she was unable to grant his request to rescind the decision to reassign him to HQ. Applicant thereafter had two months from receipt of the memorandum to file a grievance with the Grievance Committee.

112. On March 20, 2020, Applicant filed a request for administrative review of his "Not Rated" APR. The then HRD Director waived administrative review of Applicant's claim in light of the overlap of issues considered in Applicant's prior review.

B. Grievance Committee proceedings

(1) Applicant's Grievance

113. On October 21, 2019, Applicant filed a Grievance contesting the following two decisions: (a) "[u]njustified recall from Res Rep position in [Country X]"; and (b) "[u]nfair performance evaluation to justify the recall." As relief, he sought payment of all Res Rep benefits accruing from July 1, 2019 to August 31, 2021; six years' salary for long-term damage to his career, and the "moral and intangible damages from harassment, hostile and stressful work environment as well as the associated reputational costs"; the granting of a rating of "Effective" or above for FY2019 and the associated merit increase in the salary and interest; the "[c]learing of his IMF performance records"; "[i]mmediate and tangible measures to repair reputation and career"; and reimbursement of all legal and other costs.

(2) Grievance Committee pre-hearing conferences

114. The Grievance Committee held pre-hearing conferences on March 12 and October 26, 2020. During the pre-hearing conferences it was agreed to consolidate the following two issues:

> Was the Fund's decision to recall grievant from his post as Resident Representative ("Res Rep") in [Country X] invalid for any of the reasons set forth in GAO Chapter 11.03, Section 5.10?
>
> Was the Fund's decision to assign grievant a "not rated" for the 2019 fiscal year APR invalid for any of the reasons set forth in GAO Chapter 11.03, Section 5.10?

115. It was the view of the Grievance Committee that all of the matters raised by Applicant were subsumed under these two issues. Also during the pre-hearing conferences, the Grievance Committee determined which witnesses would testify, and it addressed disputed discovery requests and exhibits.

(3) Grievance Committee hearing

116. Oral hearings in the case took place over a period of six days in March 2021. In addition to Applicant, 16 witnesses testified. The Grievance Committee denied requests by Applicant for testimony by an additional 11 witnesses.

(4) Grievance Committee's Report and Recommendation

117. The Grievance Committee issued its Report and Recommendation on July 28, 2021. It recommended that the Grievances be denied based on the following considerations: (a) Applicant's transfer from Country X to HQ was a lateral transfer to a new position governed by the provisions

of GAO Chapter 3.01, Sections 3 and 5; (b) the procedural requirements for misconduct investigations (set out in GAO Chapter 11.02) were not applicable because no allegations of misconduct were referred to the Office of Internal Audit, the Office of Internal Investigations or another internal or external investigator, and Applicant's reassignment was not treated as a disciplinary measure; (c) the reassignment decision and the "Not Rated" decisions are independent of each other even though they were based on the same performance problems and were made contemporaneously; (d) management's failure to provide Applicant with a management coach was not a procedural flaw; (e) Applicant was given sufficient notice (oral and written) of the dissatisfaction with his performance well before his reassignment; (f) Applicant had ample opportunity to defend himself and he received sufficient notice of the reassignment decision; (g) Applicant was provided ample notice of his poor performance as required by GAO Chapter 3.02; (h) Applicant's reassignment was not based on a manifestly erroneous assessment of the facts, in disregard of essential facts or improper bias; (i) GAO Chapter 3.02, Section 6.2 ("Addressing Unsatisfactory Performance") did not require that Applicant be placed on a Performance Improvement Plan ("PIP"); (j) Applicant was not harmed by the delay in finalizing his APR; (k) the Department Director did not violate GAO Chapter 3.02 by not personally interviewing local staff; and (l) the failure to obtain positive inputs from some local staff and the failure to seek the input of local authorities was not an abuse of discretion.

(5) Conclusion of review procedures

118. On August 24, 2021, the Deputy Managing Director informed Applicant by letter that Management had decided to accept the recommendations of the Grievance Committee.

PROCEDURE BEFORE THE TRIBUNAL

119. On November 2, 2021, Applicant filed this Application with the Tribunal. On November 13 and December 16, 2021, Applicant—at the Registrar's request—submitted a corrected and supplemented Application. The Application was transmitted to the Fund on January 3, 2022. On January 10, 2022, pursuant to Rule IV, para. (f), of the Tribunal's Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Application. On January 19, 2022, the Fund submitted a request for an extension of time to file its Answer. The Fund's request was granted on January 24, 2022, taking into consideration Applicant's comments on the request.

120. On March 4, 2022, the Fund filed its Answer to the Application. On April 18, 2022, Applicant submitted his Reply. The Fund's Rejoinder was filed on May 23, 2022.

121. On October 7, 2022, Applicant filed an Updated Application for Costs, which was transmitted to the Fund on October 21, 2022.

122. On September 22, 2023, Applicant filed a supplemental request for fees, which was notified to the Fund the same day. On September 28, 2023, the Fund filed a response to Applicant's supplemental request for fees.

123. Applicant made requests for anonymity, the production of documents and oral proceedings. Those requests are elaborated below.

A. Applicant's request for anonymity

124. Pursuant to Rule XXII(1) of the Tribunal's Rules of Procedure, in his Application, Applicant requested anonymity "to protect his privacy." The Fund supported Applicant's anonymity request, given that the contested decisions to reassign Applicant from his overseas post and to grade him as "Not Rated" in his FY2019 APR are directly related to the assessment of Applicant's professional competencies.

125. On March 29, 2022, the Tribunal notified the parties that it had decided to grant Applicant's request for anonymity. This decision was based on the Tribunal's jurisprudence protecting candor in the performance assessment process, *see Mr. "HH", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-4 (October 9, 2013), para. 43, the issues and evidence of this case, and the fact that the Fund did not object to the request.

B. Applicant's request for the production of documents

126. Pursuant to Rule XVII of the Tribunal's Rules of Procedure, in his Application, Applicant made twenty-one requests for documents. The Fund opposed each of the requests.

127. On March 29, 2022, the Tribunal notified the parties of its decision (a) to deny Applicant's Document Requests Nos. 3-11 and 15-21, (b) to request clarification from the Fund on a Fund Exhibit that was related to Request No. 14, and (c) to request that Applicant state in his Reply whether, in light of additional documents provided by the Fund with its Answer, he maintained Requests Nos. 1, 2, 12, and 13.

128. The Tribunal denied Document Requests Nos. 3-11 and 15-21 on the basis of the Fund's assertion that it had no documents responsive to the Requests and Applicant's failure to proffer any evidence to the contrary. In cases in which the Fund asserts that it has no documents responsive to a request under Rule XVII, and the applicant has not proffered evidence suggesting that such documents exist, the Tribunal has denied the request on the ground that the applicant has not shown that he has been "denied access" (Rule XVII (1)) to the requested documents. *Mr. "RR", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-2 (December 24, 2021), para. 12, citing *Mr. "OO", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-2 (December 17, 2019), para. 28.

129. Applicant's Request No. 14 consisted of a request for "[s]creenshots of DRI invitation emails sent to all five [of] Applicant's subordinates." The Fund asserted that relevant evidence of e-mail delivery to the five subordinates could be found at Amended Fund Exhibit 11. The Tribunal reviewed Amended Fund Exhibit 11, which appeared to show that the Fund produced copies of e-mails relating to only three of the five subordinates. The Fund was accordingly requested to clarify how Amended Fund Exhibit 11 showed that the DRI tool had been sent to all five of the subordinate employees.

130. With regard to Document Requests Nos. 1, 2, 12 and 13, the Fund disputed the admissibility of the claims to which the Requests related and, in the alternative, answered those claims on the merits. Where a dispute concerning a document request depends on the admissibility of the claim to which the document is said to be relevant, the Tribunal has taken an approach that leaves open the decision as to the admissibility of the claim. *See Ms. "GG" (No. 2), Applicant, v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 21. The Tribunal took this approach in *Ms. "GG" (No. 2)* even while deciding the document requests following the submission of both rounds of written pleadings. In the instant case, the Tribunal was of the view that Applicant—having not yet filed his Reply—had not had an opportunity to respond to the Fund's contention that the claims related to Requests Nos. 1, 2, 12 and 13 were not admissible before the Tribunal. The Tribunal therefore requested that Applicant state in his Reply whether, in the light of additional documents provided by the Fund with its Answer, he maintained Requests Nos. 1, 2, 12 and 13.

131. On March 31, 2022, the Fund filed its clarification regarding Applicant's Document Request No. 14. The Fund maintained that the record of the case demonstrated that the DRI invitations were sent to all five subordinates. The Fund's clarification was transmitted to Applicant on April 1, 2022. Applicant, in his Reply, confirmed that he maintained Document Request No. 14. Applicant also confirmed in his Reply that he maintained Document Requests Nos. 1, 2, 12 and 13.

132. On November 4, 2022, the Tribunal notified the parties of its decisions to deny Applicant's Document Request No. 14 and to grant Applicant's Document Requests Nos. 1, 2, 12 and 13. These decisions are elaborated below.

(1) Document Request No. 14

133. As to Document Request No. 14, which requested screenshots of the DRI invitation e-mails, the record reflects that on March 16, 2019, the HR Team sent formal e-mail requests for feedback to the local Economist, the Office Manager and the Driver as part of the annual performance evaluation process. (They all had IMF e-mail accounts.) Their feedback was due on April 12, 2019. A reminder e-mail was sent to them on April 10. They declined to provide feedback. The local Economist testified before the Grievance Committee that he did not recall receiving the feedback request and that he normally ignores messages like this, believing them to be a scam.

134. The Cleaner testified that she had received an e-mail (to her private e-mail account) asking to provide input on Applicant's performance, but thought that it was "spam" and deleted the e-mail. The Gardener was not asked during the Grievance Committee hearing whether he had received a DRI invitation, yet there is no reason to doubt it had been sent. He was on the list of subordinates to receive an e-mail invitation. Further, given that the Cleaner had received an e-mail invitation to her private e-mail account, it is reasonable to assume that a similar e-mail had also been sent to the Gardener's private e-mail account. As the other four subordinates who were sent e-mail invitations chose not to provide feedback, there was no material value added in confirming with the Gardener whether he in fact also received an e-mail invitation. (It should be noted that there must be at least three feedback providers to generate a DRI report.) Moreover, all five of

Applicant's subordinates testified before the Grievance Committee. Each subordinate was subject to cross-examination by Applicant's counsel.

135. The Tribunal accordingly considered the record to be sufficiently complete on the question of the subordinates' feedback and therefore required no further documentation responsive to Document Request No. 14.

(2) Document Requests Nos. 1, 2, 12 and 13

136. As to Document Requests Nos. 1, 2, 12 and 13, the Fund both disputed the admissibility of the claims to which the Requests related and, in the alternative, answered those claims on the merits. Further, in the course of its argumentation, the Fund produced some documentation that was responsive to Requests Nos. 1, 2, 12, and 13. The disposition of these Requests in considered in more detail below.

(a) Document Requests Nos. 1 and 2

137. Applicant's Document Requests Nos. 1 and 2 concerned documents involving the pre-appointment process. Applicant, in his Reply, argued that "false allegations against him were part of a pattern that aimed at preventing him from getting the Res Rep job in Country X and keeping it after he took it up." The Fund objected to Requests Nos. 1 and 2 on the basis that Applicant, during the Grievance Committee hearings, waived his claims regarding the pre-appointment process.

138. As noted earlier, the Tribunal in *Ms. "GG" (No. 2)*, para. 21, held that in deciding on the Applicant's document requests "it was not necessary to decide at that stage on the admissibility" of her claim. The Tribunal further held, at para. 21, that "[w]hat was significant in the context of considering Applicant's discovery requests" were her contentions that the claim in question "formed part of a pattern of unfair conduct of which [Applicant] was the object and to which the Fund failed effectively to respond."

139. In the instant case, Applicant asserted that Document Requests Nos. 1 and 2 were pertinent to a pattern of conduct against him. The Tribunal, taking into consideration the above jurisprudence, granted Document Requests Nos. 1 and 2 in advance of deciding on the question of admissibility of the underlying claims. If such claims were admissible, the requested documents—if they existed—could be relevant to the Tribunal's assessment of the case on the merits.

(b) Document Requests Nos. 12 and 13

140. Applicant's Document Requests Nos. 12 and 13 concerned documents underlying the administrative review decision. Applicant's position was that the information that served as the predicate for the administrative review decision (and the reassignment and performance review decisions) had not been substantiated and that the administrative review decision was therefore flawed.

141. The Fund objected to Document Requests Nos. 12 and 13, arguing that the administrative review is an independent process conducted by HRD and that the Tribunal does not review the administrative review process or findings. In the alternative, the Fund argued that the administrative review process afforded Applicant a right to be heard. The Fund attached to its Answer documents in support of its statements that HRD interviewed Applicant and reviewed numerous documents submitted by him as part of that process.

142. The Tribunal considered that in order for it to assess and determine whether the reassignment and performance review decisions constituted an abuse of discretion, it was necessary to have at its disposal the totality of documents related to those decisions. The Fund suggested in its pleadings that there were no relevant additional documents, but did not explicitly state as much. Therefore, the Tribunal granted Applicant's Document Requests Nos. 12 and 13, to the extent any responsive documents existed that had not already been produced. The Tribunal reserved its decision as to the admissibility of the claims to which the Requests related. The Fund was requested to submit all responsive documents that were not already part of the record or to assert that no such documents exist.

(c) Further exchanges on Document Requests Nos. 1, 2, 12 and 13

143. On November 18, 2022, the Fund provided its Response to the Tribunal's decision on Applicant's document requests Nos. 1, 2, 12 and 13. By a letter dated November 21, 2022, the Tribunal invited Applicant to comment on the Fund's Response. On December 2, 2022, Applicant submitted his Comments on the Fund's Response.

144. Applicant in his Comments discussed the Tribunal's then-recent Judgment in *"TT", Applicant, v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2022-1 (June 30, 2022). *"TT"* had not been issued at the time of the closure of the regular pleadings in this case. The sections of the *"TT"* Judgment referred to by Applicant addressed the issue of the right to be heard. The Tribunal decided to afford the Fund the opportunity to file a Response to Applicant's Comments, which was to be strictly limited to the question of the significance of the *"TT"* Judgment to the Tribunal's consideration of the issues in the present case.

145. On May 30, 2023, the Fund filed its Response. The Response was transmitted to Applicant on June 5, 2023. The Tribunal notified the parties that there would be no further pleadings in response to the Fund's submission.

C. Applicant's request for oral proceedings with witness testimony

146. Pursuant to Rule XIII of the Tribunal's Rules of Procedure, Applicant requested oral proceedings, stating that he was available to explain many of the events that occurred during his tenure as Res Rep for Country X, as well as to discuss the moral remedy he was requesting. In addition, he stated that there are "[m]any other worrisome issues [that] need clarifications from the Fund. . . ." Further, Applicant requested that the Driver "be called back to finish her cross-examination." He also stated that the then HRD Director should be called to testify, not only with regard to "the insulting and racially charged remarks" he says she made, but also with respect to "what she knew or did before the administrative review." Lastly, Applicant stated that "[a]n

independent financial auditor may be needed to enlighten the Tribunal on [the Office Manager's] serious financial wrongdoings of October 2018 and January 2019."

147. Respondent objected to Applicant's request for oral proceedings. It argued that the reasons proffered by Applicant "would [not] clarify legal issues or enhance legal appreciation of the record."

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

149. In *Mr. "RR"*, para. 21, the Tribunal noted that its recent practice had been to "hold oral proceedings where they have been expressly requested by applicants, limiting such proceedings to the oral arguments of counsel." The Tribunal further noted the benefit of oral 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." *Id.*

150. With regard to witness testimony, the Tribunal has held that "[t]he sufficiency of the record is particularly pertinent to the determination of whether oral proceedings will include witness testimony, given that the Tribunal will ordinarily have the benefit of the transcript of oral hearings held by the Fund's Grievance Committee in those cases that emerge from that channel of review." *Mr. "KK" Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-2 (September 21, 2016), para. 39. Furthermore, "[g]iven the structure of the Fund's dispute resolution system and the exhaustion requirement of Article V, Section 1, of the Tribunal's Statute, it will be rare for the Tribunal to admit witness testimony in cases arising through the Grievance Committee, in the absence of a showing that such testimony would be useful to clarify a material point at issue before the Tribunal." *Mr. "KK"*, para. 42, citing *Ms. "GG" (No. 2*), para. 59.

151. The Tribunal, taking into consideration the above jurisprudence, notified the parties on June 5, 2023, of its decision to grant Applicant's request for oral proceedings "to the extent that it seeks oral arguments of counsel." Oral proceedings took place on August 22, 2023.

## SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

### A. Applicant's principal contentions

152. The principal arguments presented by Applicant in his written and oral pleadings may be summarized as follows:

1. The decision to reassign Applicant should not have been made until Applicant received his final APR and had a proper performance discussion. Since the decision to reassign Applicant was based on the assessment of Applicant's performance, the decision to ask

Applicant to leave Country X should only have come after sending him his draft APR and holding a proper performance discussion, even with false allegations therein.

2. Applicant was not afforded a right to be heard: (a) the review conducted by the Country X Mission Chief, the Country X Division Chief and the HR Business Partner was an "HR investigation" that was biased and that did not afford Applicant a right to be heard; (b) the allegations against Applicant were included in "secret" memoranda and e-mails that were never shared with Applicant and created without Applicant's knowledge, which was a violation of Applicant's right to be heard; (c) false information concerning Applicant was discussed at the performance evaluation roundtable discussion, which Applicant could not rebut; (d) and the October 2019 draft APR included false and unsubstantiated allegations that were not part of the discussions in October 2018, February 2019 and March 2019.

3. The Fund did not properly apply the FY2019 APR guidance set out in the FY2019 ATME Guidelines when assessing Applicant's performance. The following is not clear from the record: (a) who was consulted as part of the Fund's assessment of Applicant's performance; (b) how the Fund assessed Applicant's "invisible work"; and (c) why the Fund chose not to consult with those who had a favorable view of Applicant. Of the five local staff, two (the Office Manager and the Driver) lacked credibility. The Office Manager was involved in serious financial wrongdoing and the Driver lied throughout her testimony before the Grievance Committee.

4. Applicant's final APR was a fraudulent and forged document that was replete with unjustified criticisms that were used against Applicant. Such criticisms included Applicant's behaviors during the September-October 2018 mission; Applicant's hiring of an intern; Applicant's trips to HQ for family reasons; production of the Bi-Weekly Notes; the non-extension of the office lease; and Applicant's handling of the medical evacuation of the Office Manager. The Fund failed to (a) take into account all relevant and significant facts that existed for that period of review, (b) balance positive and negative factors in a manner that was fair to Applicant, and (c) provide Applicant an opportunity to respond.

5. After Applicant was selected as Res Rep he saw clear signs of obstruction to his appointment. The false allegations against him were part of a pattern, the objective of which was to prevent him from getting the Res Rep job in Country X and keeping it after he assumed his position. Further, Applicant never waived before the Grievance Committee his claims regarding his appointment as Res Rep.

6. This case shows strong signs of racial bias against Applicant, which is consistent with persistent racism in the Fund. The case highlights larger governance issues in Applicant's Region, and in the Fund in general, regarding racial harassment, verbal intimidation and bullying, the assessment of performance and the handling of poor managers. Further, Applicant never waived his claims of racial discrimination before the Grievance Committee. Applicant's testimony at the Grievance Committee hearing

confirms that he maintained his complaints about racial discrimination, and that the Committee ruled on them.

7. The administrative review constituted a violation of Fund law. At the time of the administrative review, Applicant had still not received his final APR, had never been presented with the specific allegations made against him and had not been given an opportunity to respond. He simply did not know why he was really removed from Country X.

8. The then HRD Director was involved in the reassignment decision. Therefore, she should have recused herself from the administrative review.

9. The Grievance Committee committed major violations of Fund law, especially on Applicant's right to be heard. The Grievance Committee mischaracterized and ignored relevant facts and evidence. Further, the Grievance Committee violated Fund law by falsely insinuating that the right to be heard was restricted to investigations of the IMF Office of Internal Investigations.

10. Applicant requests the Tribunal to:

    a. rule that Fund law (at GAO 11, Chapter 11.03, Section 4.2(ii) and Section 5.10(ii)) as applied by the Grievance Committee is not restricted to what is explicitly mentioned in GAOs but also includes the unwritten sources of law referenced in the Commentary on Article III of the Statute of the Administrative Tribunal;

    b. order the Fund to update the Staff Handbook to recognize unwritten sources of law, in particular, the right to be heard before adverse decisions are taken, and in connection with performance assessment and record-keeping in relation thereto;

    c. affirm that the Fund violated Fund law to the detriment of Applicant, including violations of Applicant's rights (i) to be heard, including on all allegations against Applicant, (ii) to proper performance discussions and records thereof, (iii) to a proper FY2019 performance evaluation process, (iv) to a fair administrative review process, (v) to a respectful work environment, and (vi) to a fair Grievance Committee process;

    d. expunge various documents from Applicant's records, including the administrative review memorandum, Grievance Committee report, and a "fraudulent" FY2019 APR;

    e. order the Fund to redo Applicant's FY2019 APR and grant Applicant a rating of "Effective" or above;

    f. order the Fund to clear Applicant's records of unsubstantiated allegations against Applicant;

g. rule that remarks made by the then HRD Director and false allegations included in Applicant's records by Fund managers constitute racial discrimination;

h. order the Fund to compensate Applicant for monetary losses, with interest, including in relation to pension, arising from the decisions to reassign Applicant and to downgrade Applicant's APR rating;

i. order the Fund to pay damages equivalent to six times Applicant's annual salary at the time of the decisions for "egregious violations" of Fund law to the detriment of Applicant, long-term damage to Applicant's IMF career, significant reputational damage associated with decisions against Applicant, and for moral and intangible damages from the "harassment, disrespectful, hostile, and stressful work environment" to which Applicant was subjected;

j. order the Fund to start recording APR roundtable discussions every year; and

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

B. Respondent's principal contentions

153. The principal arguments presented by Respondent in its written and oral pleadings may be summarized as follows:

1. There was a sufficient basis for reassigning Applicant to HQ. The Fund had three equally valid and independent reasons for concluding that Applicant could no longer effectively serve as the Fund's "ambassador" to Country X: his poor management of the local employees in the Country X office; his poor exercise of judgment in his interactions with HQ and the authorities; and his lengthy absences from Country X for a job that in its essence requires presence in-country. Any one of these would have been ample basis for the Department Director to reassign Applicant.

2. Applicant had no right to an APR discussion or report before the decision was made to reassign him. The relevant rule on intradepartmental reassignment does not require that an employee be given his APR in advance of the reassignment. Nor could it, because the reassignment could take place, at the Department Director's discretion, at any time of the year. Even though the reassignment decision was made during the APR process, this does not mean that Applicant could not be reassigned until the APR process was complete.

3. The decision to grade Applicant as "Not Rated" in his APR did not constitute an abuse of discretion. Applicant was given timely feedback of performance deficiencies, as well as an opportunity to remedy those deficiencies; and the performance evaluation decision was based on a balanced assessment of Applicant's performance, was taken

in accordance with fair and reasonable procedures and was not based on improper motives.

4. Applicant was provided ample opportunity to be heard in respect of both the reassignment decision and the decision to assign him a "Not Rated" APR. The right to be heard is satisfied by giving a staff member an opportunity to respond to any concerns raised about his or her performance. Applicant admits that he had those discussions and used the occasions to "correct the record." Applicant had no right to internal memoranda and communications, and such documents do not become part of Applicant's personnel file. Management should be encouraged to document and share their views candidly. A requirement to share such documents with staff would likely discourage this practice.

5. Applicant was not subject to an investigation. Rather, Applicant was subject to an informal inquiry into his performance. Therefore, the procedures outlined in GAO Chapter 11.02, Section 5.4 (misconduct investigations) are not applicable. Further, the reassignment decision was not a disciplinary measure for misconduct, but rather a discretionary decision that Applicant was not the right fit for the Res Rep position.

6. Applicant waived his racial discrimination claim. The Grievance Committee ruled that Applicant had waived his racial discrimination claim based on representations of Applicant's two counsel at the hearing. Because of Applicant's waiver, these claims have not been subject to exhaustion through all the channels of administrative review and are not properly before the Tribunal. In any event, Applicant's claims of racism are meritless, because he has not pointed to any specific statement or actions from which the Tribunal could reasonably infer a racist motive by his managers in taking the impugned decisions.

7. Applicant waived his claims about his pre-appointment as Res Rep. The Grievance Committee held that it was not reviewing claims about the pre-appointment process and rejected the Fund's evidence on this point. Applicant now attempts to resuscitate this claim before the Tribunal by making unfounded allegations about the approval of his appointment by the Country X Government. These claims were not reviewed by the Grievance Committee and thus there has not been proper exhaustion of administrative remedies. In any event, Applicant's own documents undermine his claims of wrongdoing in connection with the approval of his appointment as Res Rep for Country X.

8. The Tribunal should dismiss Applicant's claim that the administrative review violated his right to be heard. The administrative review decision fully addressed all of Applicant's claims. Applicant was interviewed and the documents he submitted were reviewed. Further, there is no basis to Applicant's claim that the then HR Director should have recused herself from the administrative review because she had been in communication with departmental management regarding Applicant's reassignment. One of the key functions of HRD is to advise Fund managers on compliance with Fund staff regulations, as well as to address unusual and concerning situations arising with

staff. Management's consultation with HRD in advance of the reassignment decision was not only proper but is encouraged. In any event, Applicant could have requested that the then HRD Director recuse herself, even though there were no grounds for recusal.

9. The Tribunal should dismiss Applicant's claim that the Grievance Committee proceedings violated his right to be heard. The Tribunal has long made clear that it does not function as an appellate body of the Grievance Committee, and if there were any lapses in the Grievance Committee's proceedings, the Tribunal may take account of that in its own *de novo* review of the case. The Grievance Committee's record is one element of the evidence before the Tribunal and, contrary to Applicant's claims, he was given a full opportunity to be heard before the Committee, and thus, this record should be given the usual weight.

10. Applicant's requests for relief are either unnecessary, inappropriate, frivolous or unfounded.

CONSIDERATION OF THE ISSUES

154. The Application presents the following principal issues for decision by the Tribunal. First, did the Fund abuse its discretion in deciding to reassign Applicant from his Res Rep position to a position at HQ? Second, did the Fund abuse its discretion in grading Applicant "Not Rated" in his FY2019 APR?

155. Many of the arguments made by Applicant regarding the reassignment decision and the APR decision overlap. This is a reflection of the fact that the underlying rationale for the reassignment decision was Applicant's performance as Res Rep for Country X. It is notable that when Applicant challenged the reassignment decision through a request for administrative review, the then HRD Director, in rejecting Applicant's challenge, addressed mostly performance-related issues.

156. The record shows that Applicant's perceived performance shortcomings played a predominant role in his managers' decision to reassign him to HQ, so much so that the reassignment decision and Applicant's APR decision are inextricably intertwined. The import of the nexus between the two decisions is discussed more extensively in this Judgment as the Tribunal addresses each issue in turn against the applicable standards.

A. Did the Fund abuse its discretion in deciding to reassign Applicant from his Res Rep position to a position at HQ?

(1) What standard of review governs Applicant's challenge to the reassignment decision?

157. In cases concerning the review of individual decisions involving the exercise of managerial discretion, the Tribunal has consistently invoked the following standard set out in the Commentary on the Tribunal's Statute, p. 19:

> [D]iscretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.

*See Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 106.

158. This standard contemplates a number of different factors, each of which will be assessed. The Tribunal in *Ms. "J"* explained that in any given case, one factor may be emphasized over the others or multiple factors may be involved, "depending upon such variables as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned." *Ms. "J,"* para. 107.

(2) Was the reassignment decision arbitrary or capricious?

159. The Tribunal has observed that "[t]he IMFAT and other international administrative tribunals have recognized that an important element of the lawful exercise of discretionary authority with respect to individual administrative acts is that conclusions must not be arbitrary or capricious, but rather must be reasonably supported by evidence." *Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-2 (March 5, 2002), para. 63. Therefore, the question in the present case is whether the reassignment decision was not arbitrary but reasonably supported by the evidence.

160. The Tribunal first notes that while there is a Fund rule governing the *transfer* of staff, there is no rule that specifically addresses the *reassignment* of staff from overseas assignments. There is an obvious distinction between transferring staff from one department to another (or within a department) on the one hand, and reassigning staff from overseas assignments on the other: the former is a relatively simple process, whereas the latter is much more complex, involving the shipment of personal effects, the securing of housing and grants, and the physical moving from one country to another. If a specific rule addressing the reassignment of staff from overseas assignments were to be put in place, it would add transparency and predictability to the process.

161. The rule governing the *transfer* of staff is found at Staff Handbook, GAO, Chapter 3.01 (Assignment of Staff). Section 5.1 of Chapter 3.01 provides: "A transfer is a reassignment to another position at the same grade level either within the same department (intradepartmental) or in another department (interdepartmental)." Regarding intradepartmental transfers (*i.e.,* which occurred with respect to Applicant), Section 5.2 provides, in pertinent part, that "[u]pon due notice, a staff member may be transferred by his or her Department Head from one position to another within the department, provided that the grade or the established range of grades of the two positions is the same."

162. Section 5.2 appears to afford broad discretion to managers to make intradepartmental transfers. The only requirements are that the affected staff member be reassigned at the same grade level and that he or she receive "due notice." Due notice under Chapter 3.01 consists of staff members' receiving "at least 30 calendar days' notice of an intradepartmental transfer at the

Department Head's initiative, unless they agree to waive this period." There is no dispute that Applicant was reassigned to a position at the same grade level. Further, while Applicant was initially provided less than 30 calendar days' notice of the reassignment, this shortcoming was ultimately rectified. Therefore, the Fund reasonably applied the intradepartmental transfer provisions of Section 5.2.

163. Considerations that managers are required to take into account when assigning and reassigning staff to positions are reflected in Section 3.1 of GAO Chapter 3.01, which provides:

> Staff members shall, upon appointment and throughout their Fund employment, be assigned to a specific position. The initial and subsequent assignments of a staff member [footnote omitted] to a position shall take into account:
>
> i. the staff member's education, training, experience, performance, and other factors that may be relevant to the duties of the position; and
>
> ii. the overall interests, staffing, work requirements, and budgetary considerations of the Fund and of the department to which the staff member is assigned.

In the view of the Tribunal, there is nothing in the record to suggest that the Fund failed to take into account the above considerations in taking the decision to reassign Applicant to HQ. More importantly, the considerations set out in Section 3.01 do not restrict the Fund's discretion to transfer staff.

164. The Tribunal's jurisprudence also recognizes managers' broad discretion to transfer staff. In *Ms. "C", Applicant, v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 30, the Tribunal held that "[i]t is accepted that the administration of an international organization has the power to transfer staff members when and how it will . . . . [and] that there is no general requirement that the staff member transferred consent to the transfer, since, if there were, this would be an unworkable restriction on the ability of the administrative authority to organize its services and to adapt to changing requirements." The Tribunal emphasized that "[t]he administrative authority is generally at liberty to organize its offices to suit the tasks entrusted to it and to assign its staff in the light of such tasks." *Id.*

165. The Tribunal's reasoning in *Ms. "C"* regarding the *transfer* of staff has equal application to the *reassignment* of staff. The jurisprudence of the World Bank Administrative Tribunal ("WBAT") further supports this proposition. The WBAT has held that it would decline to reverse a decision to recall the applicant and to reassign him to another position if it was "satisfied that the Bank had a reasonable basis for its decision." *Mpoy-Kamulayi (No. 2)*, WBAT Decision No. 457 [2011], para. 46, citing *Sweeney*, WBAT Decision No. 239 [2001], para. 74; and *Desthuis-Francis*, WBAT Decision No. 315 [2004], para. 23.

166. In the instant case, there is no evidence to support the contention that the reassignment decision was not reasonable. Concerns regarding aspects of Applicant's performance and his

unavailability in Country X were regularly expressed, soon after he assumed his position as Res Rep and continuing up until the decision was made to reassign him to HQ. While the Tribunal is troubled by aspects of the Fund's handling of the reassignment decision (*see* paras. 182-189 and 199-221), the evidence shows that the Fund based its decision on legitimate concerns regarding Applicant's ability to carry out the Res Rep responsibilities effectively.

167. A principal issue was Applicant's frequent absence from his duty station in Country X. In light of Applicant's personal situation, he needed to travel to Washington, D.C. and/or to telework with some regularity. In the Tribunal's view, this issue could have—on its own—served as a reasonable basis to reassign Applicant from his Res Rep position. The record shows that Applicant had been absent from his duty station (Country X) for a significant amount of time (approximately 30%) prior to his reassignment. Further, he did not always keep his supervisor (the Country X Mission Chief) informed of his travel and teleworking plans and did not maintain complete and accurate leave records. Moreover, in April 2019, Applicant requested significant time away from Country X for the upcoming two years. This request led the SPM to emphasize the following to Applicant:

> We need a res rep to be physically present in the post for much of the time, and to be flexible enough to be there for unanticipated events that might arise. A plan that requires you to be out of the country for around 15-16 weeks a year, regardless of whether it is on leave or otherwise, and for us to pre-commit to specific leave days up to two years ahead, is not consistent with that.

168. In reviewing Applicant's challenge to the reassignment decision, the Tribunal is also mindful of the nature of the position of Res Rep. The Department Director testified before the Grievance Committee that Res Rep positions are considered to be high profile and important positions, and that Res Reps are in the field to represent the institution. He explained that they are expected to behave like ambassadors of the IMF, as well as trusted advisors to ministers and central bank governors, and often interact with heads of state and prime ministers to provide economic policy advice. In other words, Res Reps serve in quasi-political positions that require tact, diplomacy and sound judgment. If any of those characteristics comes into question and there is a reasonable basis for the concerns, it is within the discretion of management to reassign a Res Rep.

169. In the light of the above, the Tribunal concludes that the decision to reassign Applicant was neither arbitrary nor capricious. Management has broad discretion to reassign staff members in accordance with the provisions of the Fund's internal law. The record supports that Applicant's managers had a reasonable basis for the reassignment decision based on the requirements of the Res Rep position and Applicant's performance in the role.

(3) Was the reassignment decision improperly motivated by discrimination?

170. This Tribunal has held that "[t]he general principle guiding international administrative tribunals regarding improper motive is that there must exist a causal link between the alleged irregular motive and the decision that is being attacked." *Mr. "F", Applicant v. International*

*Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 73. *See also Ms. "GG" (No. 2)*, para. 330.

171. Applicant claims that the reassignment decision was improperly motivated by racial discrimination. He argues that there was a "malicious plan to remove" him from his position as Res Rep, which can only be explained by "racial discrimination." In support of his claim, Applicant points to purported insulting, disrespectful, condescending and disparaging comments made to and concerning him. He argues that this case "illustrates larger governance problems in [his Department] and the Fund in general when it comes to racial harassment, verbal intimidation and bullying, the assessment of performance, and the handling of poor managers, which are also reflected in IMF staff surveys . . . ." Applicant further argues that "racism is 'pervasive' in the Fund in general and in [his Department] in particular, and this has been confirmed in a recent survey and supports the moral remedy Applicant is seeking from the Tribunal."

172. The Fund, however, argues that Applicant waived his claims of racial discrimination before the Grievance Committee. Therefore, argues the Fund, these claims have not been subject to "exhaustion through all the channels of administrative review and are not properly before the Tribunal."

173. For his part, Applicant asserts that he did not waive his claims of racial discrimination. In support of this assertion, Applicant emphasizes that the Grievance Committee ruled that the challenged decisions were not motivated by racial discrimination. In Applicant's view, the Tribunal must therefore "complete the judicial review of Applicant's complaints" and "rule on Applicant's complaints of racism, which is a systemic issue in the Fund."

174. The record shows that Applicant's counsel clarified during oral hearings before the Grievance Committee that Applicant was not alleging racial discrimination. In light of counsel's representations, the Grievance Committee's Chair ruled that documents and lines of questioning regarding racial discrimination would not be permitted. This decision was specifically mentioned in the Report and Recommendation of the Grievance Committee:

> One of Grievant's . . . emails . . . referenced racism, and Grievant testified to multiple examples of actions taken by [the Mission Chief] and others that he claimed were racially motivated. . . . However, during the hearing, his counsel stated that the issues being presented by his client did not include a claim of racism or discrimination. . . . Based on counsel's representation, the Committee believes Grievant has abandoned his discrimination claim.

175. Notwithstanding this conclusion, the Grievance Committee specifically addressed Applicant's contention that complaints concerning his performance and the decision to reassign him to HQ were discriminatory. It concluded as follows:

> The evidence shows . . . that early complaints about Grievant's conduct as Res Rep came from multiple sources . . . . The recall decision . . . was based on a collective sense of dissatisfaction with Grievant's work and with his lack of progress over many months. There is no evidence that these

> complaints or the Department's decision [to recall Applicant] were motivated by anything other than a consideration of the Department's business needs.

176. The Grievance Committee accepted that Applicant had waived his general claims of racial discrimination. At the same time, the Grievance Committee addressed Applicant's specific claim that the performance and the reassignment decisions (*i.e.,* issues that were properly before the Grievance Committee) were improperly motivated by discrimination.

177. Having considered the issues of the case, the Tribunal takes a similar approach. Applicant's claim of racial discrimination is properly before the Tribunal only to the extent that he asserts that the impugned decisions were tainted by discrimination or were otherwise improperly motivated by discrimination. The Tribunal will not entertain Applicant's more generalized claims of discrimination, either regarding himself individually or concerning the Fund more generally. The Tribunal reaches this conclusion while emphasizing that it regards charges of racial discrimination with the utmost seriousness. As the Tribunal stated in *Mr. "QQ" (No. 2), Applicant v International Monetary Fund, Respondent*, IMFAT Judgment No. 2022-2 (October 25, 2022), para. 93, with respect to discrimination based on nationality:

> Invidious discrimination on the basis of nationality has no place in an international organization. The Tribunal also appreciates that there can be professional disagreements concerning standard managerial decisions regarding grading exercises, work assignments, and promotions. These do not by themselves give rise to sustainable claims of discrimination.

178. With regard to Applicant's challenge to the reassignment decision, the record shows that concerns were raised regarding Applicant's performance and his ability to be present consistently at his duty station in Country X. These concerns began to be expressed almost immediately after Applicant assumed his position as Res Rep and continued until the decision was made to reassign him to Headquarters. The concerns were not isolated; rather, they were raised by multiple staff on multiple occasions. *See Ms. "JJ", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2014-1 (February 25, 2014), para. 97 ("Applicant's accusation of improper motive in the FY2009 performance review process is further rebutted by the fact that the conclusion that her performance was significantly lacking was reached not by one but by three supervisors."). In the present case, Applicant has not satisfied the burden of showing that the reassignment decision was tainted by discrimination or otherwise improperly motivated by discrimination. The evidence does not substantiate a causal link between the alleged irregular motive and the reassignment decision.

(4) Was the reassignment decision based on an error of law?

179. An error of law occurs when decision-makers fail to apply the rules correctly. Applicant argues that the following errors of law exist in regard to the reassignment decision: (a) Applicant had a right to his APR and a performance discussion before the decision was made to reassign him to HQ from his position as Res Rep for Country X; (b) Applicant was not afforded a right to be

heard in regard to the accusations raised against him; and (c) Applicant had a right to the summaries of the performance discussions between him and management.

(a) Did the Fund's internal law require that Applicant be provided with his APR and a performance discussion before the decision was made to reassign him to Headquarters from his position as Res Rep for Country X?

180. The Fund's written internal law does not require that a staff member be provided with his or her APR and a performance discussion prior to a transfer or reassignment. As discussed earlier in this Judgment (*see* paras. 161-163), the only requirements set out in GAO Chapter 3.01 are that (a) the affected staff member receive "due notice" of the transfer and that "the grade or established range of grades of the two positions is the same" (Section 5.2, Intradepartmental Transfers), and (b) certain other considerations (*e.g.*, education, training, experience, performance, interests, budget, etc.) be taken into account by management (Section 3.1, Assignment of Staff to Positions). The absence of any other requirements allows management to address business and staffing needs quickly and flexibly, as the need arises.

181. However, while there is no rule which required Applicant to have his APR and performance discussion in advance of the reassignment decision, the Tribunal is of the view that a written performance evaluation in advance of the reassignment decision was required in the circumstances of this case. This is discussed more fully below.

(b) Was Applicant afforded a right to be heard in relation to the reassignment decision?

182. As articulated in the Commentary on the Tribunal's Statute: "[C]ertain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund." Commentary on the Statute, p. 18. Notice and an opportunity to be heard are considered to be essential principles of international administrative law, "not only in the context of misconduct decisions but in non-disciplinary circumstances as well." *"TT"*, para. 127. *See also Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-2 (November 20, 2001), para. 152.

183. Applicant requests that the Tribunal order the Fund to update the Staff Handbook to recognize such general principles of international administrative law. Given that the Fund must be cognizant of general principles of international administrative law, the Tribunal believes that it is not necessary to address Applicant's request in the circumstances of this case.

184. The accusations made against Applicant by the Driver and the Office Manager triggered the internal review by Applicant's managers shortly after Applicant assumed his position as Res Rep for Country X. Further, the accusations were a primary concern of Applicant's managers throughout Applicant's tenure as Res Rep and served as one of the main reasons for reassigning Applicant. In this respect, the SPM testified before the Grievance Committee that the "greatest concern" was "how [Applicant] managed and treated local staff."

185. Applicant asserts, however, that not all details of the complaints against him by the Driver and the Office Manager were shared with him and that he only learned of the specifics during the Grievance Committee process. This statement is supported by one of the Fund's justifications for not sharing the October 18, 2018 Memorandum to Files with Applicant—namely, that Applicant's managers were trying to protect local staff whose names were identified in the Memorandum. Concerns about possible retaliation against the Driver and the Office Manager were also identified in the Memorandum. In this regard, the October 18, 2018 Memorandum to Files specifically states that both the Office Manager and the Driver "asked that [their feedback] be strictly confidential as they are afraid that [Applicant] will retaliate." The Memorandum further notes that Applicant had asked for specific examples of when he had raised his voice to staff, which request was declined "for confidentiality purposes." The Fund asserted nonetheless during oral proceedings before the Tribunal that specifics of the accusations were in fact shared with Applicant, stating that Applicant's managers received the complaints and concerns and then met with Applicant and told him about them. The record, however, does not support this assertion.

186. In *Ms. "C"*, an applicant's co-workers complained to the applicant's supervisor about the applicant's interpersonal skills. The supervisor met with the applicant to discuss with her the accusations raised, without identifying the source of the accusations. The supervisor declined to provide to the applicant the names of the accusers on the grounds that they had spoken in confidence and that what was important was what was said not who said it. The Tribunal concluded that the applicant's supervisor had failed to afford applicant a meaningful opportunity to rebut accusations, stating that this was a "lapse in due process." *Ms. "C"*, paras. 41-42. In reaching its conclusion, the Tribunal referred to the Asian Development Bank Administrative Tribunal's ("ADBAT's") Decision in *Carl Gene Lindsey v. Asian Development Bank*, ADBAT Decision No. 1, para. 9 (1992), which held that "[i]ndividual complaints or adverse comments by one staff member on the conduct of another should not be taken into account unless first brought to the attention of the latter, to whom an opportunity of replying should have been given including, where appropriate, the opportunity of meeting and questioning the complainant or witness."

187. In the present case, Applicant is a long-serving senior staff member with an excellent track record as a Res Rep and Mission Chief in other countries. Both of these positions involved managing staff. The record before the Tribunal is devoid of any evidence showing that Applicant exhibited poor management skills prior to his appointment as Res Rep for Country X. This alone casts a level of doubt on the credibility of the accusations and should have been a factor in how Applicant's managers decided to handle them. (The issue of credibility is covered more extensively at paras. 199-206.) Raising the issues directly with Applicant early in the process would have provided him an opportunity to respond to the accusations directly and could have avoided the tensions and frustrations that escalated over time and which appear to have exacerbated the situation.

188. The Tribunal recognizes the Fund's concerns for confidentiality and protecting staff in a small office from possible retaliation. However, such concerns should not override the basic requirement that, absent exceptional circumstances, staff should be able to respond to specific allegations that form a basis for decisions made against them. As is discussed in more detail below (at paras. 208-213), in light of the nature of the complaints raised against Applicant, it would have

been appropriate for Applicant's managers to refer the complaints to the office in the Fund that has the staff with the skills and experience for handling such matters. Such an office is equipped to manage issues of confidentiality and possible retaliation, while safeguarding basic requirements of due process.

189. In light of the above, the Tribunal concludes that Applicant should have had an opportunity to respond promptly and fully to the accusations against him, but this was denied. This is an error of law that tainted the decision to reassign Applicant.

(c) Did the Fund's internal law require that Applicant be provided with summaries of performance discussions between him and his managers?

190. Applicant argues that it was an error of law for the Fund not to provide him a copy of the Memoranda for Files of the October 18, 2018 and the February 25, 2019 meetings between Applicant and his managers. He states that this is an "administrative practice . . . that gives rise to a legal right . . . ." The administrative practice, in Applicant's view, consists of the practice of APR summaries being "sent to staff to confirm accuracy before they are introduced in the staff's record."

191. Applicant's arguments and request are misguided in this regard. Staff Handbook, GAO Chapter 3.02 (Performance Evaluation) sets out the process to be followed in respect of APRs. Chapter 3.02 contemplates that a staff member will receive written feedback on his or her performance as part of the APR process and affords the staff member an opportunity to provide written feedback. However, there is nothing in the Fund's internal law that requires managers' non-APR summaries of performance discussions to be shared with the staff member. Moreover, there is nothing in the record to suggest that the Memoranda for Files – unlike an APR – formed part of Applicant's staff record. This was confirmed during the oral proceedings before the Tribunal.

192. In the light of the above, the Tribunal concludes that there is no support in the Fund's internal law for Applicant's assertion that he should have been provided with the Memoranda for Files of October 18, 2018 and February 25, 2019. Accordingly, the Fund's decision not to provide the Memoranda to Applicant was not an error of law. However, as discussed further below (*see* para. 220), the Memoranda for Files should have been provided to Applicant as an alternative to a written performance assessment, as a matter of fair process and transparency.

193. In addition, Applicant asserts that a staff member should have a legal right to records of performance discussion meetings *in which the staff member did not participate*. He requests the Tribunal to declare that the Fund has an obligation to maintain "proper records, including minutes and/or recordings, of performance discussions, including 'APR roundtable meetings' . . . . [and that staff have a] legal right to know what has been said about them during such meetings in case of a dispute." The Tribunal notes that deliberative documents provide managers an opportunity to memorialize their thoughts in deciding how best to address staff-related issues. Further, staff ultimately have an opportunity to present counter facts and arguments. The Tribunal cannot accept Applicant's assertion in these circumstances.

(5) Was the reassignment decision based on an error of fact?

194. An error of fact arises when the decision-maker had the wrong facts or interpreted them incorrectly. Applicant asserts that there was an error of fact because, in his view, "[a]lmost all allegations against [him] were false and unsubstantiated."

195. As stated earlier in this Judgment, the record in this case is voluminous and there are a significant number of facts that are in dispute—including the veracity of the accusations that were made by the Driver and the Office Manager against Applicant. The record reflects that the accusations initially consisted of the following: (a) Applicant yelled at the Driver and was not allowing her to take meal breaks; (b) Applicant made the Driver cry because she was not waiting for him in front of a hotel after a meeting; and (c) Applicant micromanaged staff and was threatening at times. During her testimony before the Grievance Committee, the Driver elaborated on her claims, stating (among other things) that Applicant spoke to her in a "very brutal," "inappropriate," "excessively rude" and "very savage, wild" manner; made racist comments to her; refused to speak with her for a period of time; was "very angry and rude" with her regarding her handling of the office move; and was otherwise intimidating. For his part, the Office Manager alleged that Applicant was seeking to undermine him and to "frame him" for financial improprieties. The Driver and the Office Manager were purportedly reluctant to raise concerns due to fears of retaliation.

196. Accusations concerning Applicant were first made by the Driver and the Office Manager almost immediately after Applicant assumed his position as Res Rep for Country X in August 2018, during a mission to Country X by the acting Mission Chief. The acting Mission Chief testified before the Grievance Committee that he spoke with local staff about the matter, but did not speak with Applicant because he (the acting Mission Chief) "had a lot of other issues going on and I was there for one mission . . . ." He further testified that based on his first-hand observations, Applicant treated local staff professionally and with respect. The acting Mission Chief nonetheless reported the matter to the Deputy Director of the Department.

197. The accusations thereafter led the Fund to conduct two reviews in the Country X office: the first, by the Mission Chief and the HR Business Partner in September 2018; and the other in October 2018 (at the recommendation of the Mission Chief) by the Division Chief and the same HR Business Partner. The Fund has characterized the reviews simply as "due diligence" to collect performance feedback on Applicant; however, the reviews were conducted in response to specific accusations raised against Applicant. The reviews were therefore more akin to an inquiry.

198. The September 2018 review consisted of interviews of three of the five local staff (the Driver, the Office Manager and the local Economist, but not the Cleaner or the Gardener), as well as two international mission staff members. The same local and international staff were interviewed during the October review. As noted above, the record does not reflect that the specific accusations were brought to Applicant's attention for response during the review. Further, a statement attributed to one of the international mission staff members (that Applicant had an "imposing style that was intimidating") was vehemently denied by the staff member during his testimony before the Grievance Committee.

199. Of particular concern to the Tribunal are contradictions on the part of the Driver and facts in the record that cast doubt on the credibility of the Office Manager. The local Economist contradicted the Driver's claim that Applicant yelled at the Driver "in a very brutal," "very rude" and "very inappropriate" manner for not waiting for him (Applicant) in front of a hotel after a meeting that took place at the hotel shortly after Applicant assumed his duties as Res Rep for Country X. The local Economist, who was with Applicant at the time of the purported incident, testified that Applicant "was not annoyed" and that the situation was "a simple thing." Further, the local Economist testified that Applicant was close with all staff and that Applicant had never said anything to staff that was "infuriating." It appears, based on the record, that these questions were not put to the local Economist during the Fund's September and October 2018 inquiries.

200. Other statements made by the Driver reflect further contradictions. For example, the Driver testified before the Grievance Committee that Applicant had never advocated for a salary increase for her, when the record clearly shows that he in fact had done so. Applicant and the Driver exchanged friendly WhatsApp messages about the issue in April 2019. In March 2019, Applicant requested a salary adjustment for the Driver as part of his budget submission, stating that "the [salary] adjustment will bring [the Driver's] salary closer to her counterpart at the UNDP, who has a similar level of experience. . . . [and] [i]t is also in line with the UN scale . . . ." It is notable that the Driver provided to Applicant a payslip from her counterpart at the UNDP so that Applicant would have information to support his request for a salary adjustment.

201. Further, the Driver testified before the Grievance Committee that Applicant stopped communicating orally with her sometime before January 2019 and that this continued until Applicant left Country X. According to the Driver, communications were limited to WhatsApp messages and that such messages consisted only of brief instructions, such as "Pick me up at this time" or "Come and make this money transfer for me." However, there are over 20 twenty friendly and cordial WhatsApp or e-mail messages between Applicant and the Driver of record from February 2019 to April 2019. In one message, Applicant sent some pictures to the Driver through WhatsApp; the Driver responded, saying: "Nice pictures thank you." In another WhatsApp message, the Driver informed Applicant that she had found a company that could repair the office safe. Applicant responded: "Ok many thanks . . . . We talk more when we meet later today." The Driver replied: "Most welcome[.] Thanks[.]"

202. The Office Manager for his part made conflicting and contradictory statements concerning financial discrepancies in the FY2019 Q2 and Q3 financial reports that he prepared and submitted to HQ. The Q2 report had a financial discrepancy of more than US$2,000, which the Office Manager explained was the result of a banking software issue that caused a double salary payment. The previous Res Rep later explained to the HQ Budget Officer that he had made a check payment to the Office Manager in the amount of more than US$2,000 for a delayed payment from the local bank due to banking software issues. The Office Manager testified before the Grievance Committee that the previous Res Rep had in fact given him a salary advance by check, but that he had not been the subject of any banking software issues. Rather, according to the Office Manager, the banking software issue had impacted two guards and the Gardener, resulting in their receiving double salary payments. However, also according to the Office Manager's testimony, the two guards and the Gardener were paid a combined $300 per month which, when doubled and added

to the Office Manager's purported salary advance, did not equal the reported discrepancy of over US$2,000.

203. Regarding the FY2019 Q3 report, the Office Manager self-reported a financial discrepancy of approximately $82. However, upon further inspection, Applicant discovered that the discrepancy was approximately US$800—*i.e.*, ten times what was reported by the Office Manager.

204. The Office Manager's handling of the finances became a central and complicating feature of this case involving a number of parties (including the former Res Rep for Country X). What is not disputed is that the Office Manager had not balanced the books during Applicant's tenure as Res Rep. The responsible HQ Budget Officer testified that, in light of the financial discrepancies, the Finance Department had been asked to conduct an audit.

205. Applicant was criticized for his handling of the matter, with his managers stating that Applicant should have brought the issue to their attention in advance of reaching his conclusions concerning the Office Manager. The Tribunal learned, however, during the oral proceedings that the Office Manager was later found to have engaged in misconduct based on complaints made to the Office of Internal Investigations (including by Applicant). This, alone, casts serious doubt on any statements made by the Office Manager against Applicant.

206. The contradictory statements and credibility issues call into question the veracity of the accusations made against Applicant by the Driver and the Office Manager. However, absent a proper and thorough investigation into the accusations, the Tribunal is not in a position to determine whether the reassignment decision was based on an error of fact. In this regard, the Tribunal is of the view that the absence of such an investigation in the present case constituted a violation of fair and reasonable procedures. The Tribunal addresses this issue below.

(6) Was the reassignment decision carried out in violation of fair and reasonable procedures?

207. The Tribunal finds that the reassignment decision was carried out in violation of fair and reasonable procedures in three respects: (a) the accusations against Applicant should have been referred to the office responsible for handling such issues; (b) Applicant's managers should have provided him a written assessment of his performance in advance of the reassignment decision; and (c) Applicant, as an alternative to receiving a written assessment of his performance, should have received a copy of the October 18, 2018 and the February 25, 2019 Memoranda for Files. The Tribunal's reasoning is discussed below.

(a) The accusations against Applicant should have been referred to the office responsible for handling such issues

208. The accusations made against Applicant could reasonably have been considered accusations of workplace harassment. This was implicitly acknowledged by the Country X Division Chief in the October 18, 2018 Memorandum to Files, where he wrote: "All policies on harassment apply equally to local staff as [well] as to HQ staff." The Division Chief stated in the Memorandum that he conveyed this message to Applicant.

209. Notwithstanding the existence of apparent allegations of workplace harassment, the Fund asserted during oral proceedings before the Tribunal that Applicant's managers were responsible for conducting an inquiry to determine what occurred. The Tribunal is of the view that absent a rule or policy to support this approach, it would have been more reasonable for the Fund to have referred the allegations against Applicant (as well as the allegations against the Office Manager) to the office responsible for handling such matters. Such office has staff with relevant experience, and cognizant of policies and procedures, to conduct neutral and objective fact-finding inquiries, as well as to make credibility assessments.

210. The Fund's decision not to make a referral resulted in a flawed review of the accusations. Applicant was not afforded a full opportunity to respond to the specific accusations leveled against him and therefore did not have a timely opportunity to tell his side of the story. Further, as the following examples illustrate, Applicant's managers at all times afforded the accusers (the Driver and the Office Manager) the benefit of the doubt and never questioned their credibility:

> - In the October 18, 2018, Memorandum to Files, the Division Chief wrote that he had told Applicant that "both the office manager and the driver are extremely unhappy, and they have solid track records as strong performers," while not taking into consideration Applicant's solid track record as both Res Rep and Mission Chief in other countries.
>
> - In the February 25, 2019 Memorandum to Files, Applicant was criticized for continuing "to raise accusations of financial misdoing by the [Office Manager] without taking the time to get the complete picture," even though Applicant's concerns had already been partially validated by the HQ Budget Officer in November 2018 (and were later fully validated after a full investigation).
>
> - In April 2019—*i.e.,* after Applicant had alerted his managers to the possible financial irregularities—the Office Manager wrote to the Country X Mission Chief to provide examples of purported actions taken by Applicant to undermine the Office Manager. The Mission Chief did not respond in a neutral and objective manner, but stated: "We are looking into this. Please hang in there."
>
> - Earlier (in October 2018), the Mission Chief wrote to the Division Chief, asking that he call the Office Manager. According to the Mission Chief, the Office Manager was "very upset" by Applicant's "obvious mistrust" of the Office Manager's handling of the finances.

211. The Tribunal notes that Applicant's managers, in making a referral of the accusations against Applicant, would have been better able to ensure objectivity in their decision to reassign Applicant. In this regard, the record reflects the following: (a) there were obvious tensions between Applicant and the Country X Mission Chief, who was directly involved in the decision to reassign Applicant; (b) the Mission Chief was worried that the situation with Applicant might negatively impact her ability to secure a promotion; and (c) the Mission Chief was frustrated with Applicant's

performance and defensiveness and appeared to be eager to reassign him (and thereby remove him from her supervision).

212. Regarding (a) above, the Country X Division Chief testified before the Grievance Committee that the relationship between the Country X Mission Chief and Applicant was "undoubtedly" the worst he had ever seen in his Fund career. Regarding (b) above, in an e-mail dated October 17, 2018, the Mission Chief expressed her concerns to the Division Chief that the negative feedback Applicant was receiving was only from her and that this perception would "hurt" her "when the B list [for promotions] reopens." Further, the Deputy SPM testified before the Grievance Committee that the Mission Chief was "looking for being eligible for a promotion . . . in this period" and was concerned about the "negative perceptions of her management and how that could affect her career progression." Lastly, regarding (c) above, as early as November 2018 (only a few months after Applicant assumed his position as Res Rep), the Mission Chief wrote to the Division Chief stating: "[M]y feeling is that we should recommend the HR team pull [Applicant] back, and give him a desk job. He is just creating too much stress for all of us."

213. Had the accusations concerning Applicant's management of local staff been referred to the appropriate office, that issue (which was a significant factor in the decision to reassign Applicant) would have been handled professionally. This could have eased tensions and afforded Applicant's managers a more neutral and objective basis to decide whether to reassign Applicant from his position as Res Rep. The failure to make such a referral, in connection with the reassignment decision, meant that the decision was not taken in accordance with fair and reasonable procedures.

(b) Applicant's managers should have provided him a written assessment of his performance in advance of the reassignment decision

214. As discussed earlier, the Tribunal finds that the reassignment decision and APR decision are inextricably intertwined. In light of the nexus between these two decisions, it would have been fair and reasonable for Applicant's managers to provide Applicant with a written assessment of his performance shortcomings in advance of the reassignment decision so that he could respond appropriately. However, as of the date on which the reassignment decision was conveyed to Applicant (May 23, 2019) he had not had a written performance evaluation that clearly set out all of the issues that were of concern to his managers. Applicant was therefore not in a position to respond fully and effectively to the issues that served as the predicate for the reassignment decision and which could have factored into his managers' decision.

215. The Tribunal notes that the May 2019 decision to reassign Applicant was communicated to him by the SPM both orally (by phone) and in writing (by e-mail), at which time particular performance issues were set out as the justification for the reassignment decision. The performance issues centered on Applicant's management of local staff, his limited availability in the local office (and the adequacy of his communications regarding this), and his judgment in handling sensitive matters with authorities. The e-mail invited Applicant to raise "factors affecting [his] performance that we have not taken account of . . . ." However, the SPM was explicit in stating that Applicant's managers were "not prepared to continue with the risks of having [Applicant] in a field role, given the performance issues we have identified." Applicant was instructed to leave Country X within two weeks. Thus, while performance issues were raised with Applicant in writing, this was done

concurrently with the notification to Applicant that he was being reassigned from his position as Res Rep and with the admonition that any factors Applicant might raise would not change the decision. Further, the May 23, 2019 notification did not provide details of the accusations against Applicant, which served as the basis for his managers' conclusion that Applicant managed local staff poorly.

216. The Fund asserts that Applicant nonetheless had ample warning of his performance deficiencies in advance of the reassignment decision. The Tribunal notes that Applicant received *ad hoc* feedback by e-mail (on specific issues) and had performance discussions with his managers in October 2018, February 2019 and March 2019. The Tribunal also notes that another discussion took place in January 2019 between Applicant, a Deputy Director and an SPM, the purpose of which was to discuss Applicant's health, a personal matter and his management of the Country X office.

217. However, the record does not reflect that Applicant was provided the specifics of the accusations that were raised against him. Further, and in any event, in light of the close nexus between the reassignment decision and Applicant's performance, *ad hoc* e-mail feedback and oral performance discussions were not an adequate substitute for a written performance assessment (with specifics of the accusations against Applicant) in advance of the reassignment decision. This would have established a complete record of management's concerns regarding Applicant's performance and of Applicant's response. The failure to provide Applicant a written assessment of his performance in these circumstances also meant that the reassignment decision was not taken in accordance with fair and reasonable procedures.

(c) <u>As an alternative to receiving a written assessment of his performance, Applicant should have received a copy of the October 18, 2018 and the February 25, 2019 Memoranda for Files</u>

218. Applicant's managers created a record of their concerns regarding Applicant's performance; however, such record was not shared with him. They prepared Memoranda for Files of the October 2018 and the February 2019 performance discussions, but did not share these documents with Applicant.

219. During oral proceedings before the Tribunal, the Fund asserted that it is of no concern that the Memoranda for Files were not shared with Applicant, because they were not shared with the Front Office, were not used in connection with either the reassignment or the APR decision and were not used to advance the Fund's case; they were only made part of the litigation record at Applicant's request. The Fund also asserted before the Tribunal that the Memoranda for Files effectively do not exist, emphasizing that the Memoranda are kept by the person in their private folder and that staff in the Front Office have never seen the Memoranda before.

220. The record, however, shows that the Memoranda for Files were in fact shared with others. On May 15, 2019, a departmental roundtable discussion on staff performance was held, at which meeting the decision to reassign Applicant was made. After the meeting, the Country X Mission Chief provided to the SPM, by e-mail of the same day, a copy of the Memoranda for Files of the October 2018 and February 2019 performance discussions, in preparing for an ongoing discussion

on the steps to reassign Applicant. The May 15, 2019 e-mail and Memoranda were copied to two Deputy Directors, the Country X Division Chief, the Deputy SPM and the HR Business Partner. The e-mail stated the following in the introductory paragraph:

> Per this morning's APR discussion, see below the process recommended by HRD . . . for reassigning [Applicant]. HRD said we needed to be careful on process, both for the purposes of fairness and potential future litigation. Please let us know your thoughts. To bring everything into one place, see attached the two memos for files [from the October 2018 and February 2019 performance discussions] . . . on performance issues and a snapshot summary of [Applicant's] leave stats.

While the decision to reassign Applicant had been made earlier that day (during the roundtable performance discussion), the Memoranda for Files were used to inform the reassignment process. The fact that the Memoranda were shared with a number of senior officials serves only to reinforce the Tribunal's view that the Memoranda were used by the Fund to advance its case against Applicant. Consequently, although there was no rule requiring that Applicant have access to the Memoranda for Files, they should have been provided to Applicant (as an alternative to a written performance assessment) as a matter of fair process, in advance of the reassignment and the APR decisions. This was all the more important since Applicant took part in the meetings that resulted in the creation of the two Memoranda for Files. The failure to provide the Memoranda to Applicant in the singular circumstances of the case meant that the reassignment decision was not taken in accordance with fair and reasonable procedures.

(7) Tribunal's conclusions regarding Applicant's challenge to the reassignment decision

221. The Fund has broad discretion to reassign staff, and there was a reasonable basis in the present case for the reassignment decision. However, Applicant was not afforded a right to be heard in relation to the accusations raised by the Driver and the Office Manager against him. Further, the reassignment decision was carried out in violation of fair and reasonable procedures in three respects: (a) the accusations—given their nature and because Applicant's Department was unable to address them properly—should have been referred to the appropriate office, and the failure to do so resulted in a flawed review; (b) in light of the close nexus between the reassignment and APR decisions, Applicant's managers should have provided Applicant a written assessment of his performance in advance of the reassignment decision; and (c) Applicant, as an alternative to receiving a written assessment of his performance, should have received a copy of the October 18, 2018 and the February 25, 2019 Memoranda for Files in advance of the reassignment (and APR) decisions, not only because they were used by the Fund to advance its case against Applicant, but because Applicant was not provided any other written assessment in advance of the reassignment. These shortcomings tainted the reassignment decision and warrant the payment of compensation. *See, e.g., Mr. "OO"*, para. 217.

B. Did the Fund abuse its discretion in grading Applicant as "Not Rated" in his FY2019 APR?

(1) What standard of review governs Applicant's challenge to the APR decision?

222. As discussed earlier, in cases concerning the review of individual decisions involving the exercise of managerial discretion, the Tribunal has consistently invoked the following abuse of discretion standard set out in the Commentary to the Tribunal's Statute:

> [D]iscretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.

Commentary on the Statute, p. 19. The Commentary provides that this abuse of discretion standard "is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities. . . ." *Id.* The Commentary adds that "administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility." *Id.*

223. With regard to performance assessments, the Tribunal has drawn upon its jurisprudence, *see Ms. "JJ"*, paras. 50-56, and the jurisprudence of other tribunals to develop specific criteria for determining whether an assessment of an employee's qualifications and abilities constitutes an abuse of discretion. Such criteria were summarized by the Tribunal in *Ms. "JJ"* as follows: (a) whether the staff member was given adequate and timely feedback of alleged performance shortcomings, as well as an opportunity to remedy those shortcomings; (b) whether the performance evaluation decision was based on a balanced assessment of the staff member's performance; (c) whether the performance evaluation was not vitiated by improper motives; and (d) whether the performance evaluation decision was taken in accordance with fair and reasonable procedures. *Id.*, para. 57. It bears emphasizing that if the Tribunal determines that a performance assessment constituted an abuse of discretion, it may not substitute its own judgment as to what a particular performance rating should be. This falls beyond the Tribunal's statutory remit.

(2) Was Applicant given adequate and timely feedback of alleged performance shortcomings, as well as an opportunity to remedy those shortcomings?

224. The record reflects that for the most part Applicant was provided timely feedback regarding his performance in advance of his final FY2019 APR. Applicant's managers held performance discussions with him in October 2018 and in February and March 2019. Further, concerns regarding Applicant's performance were communicated to him orally and in writing on May 23, 2019 (at the time of the reassignment decision). Additionally, the record reflects multiple written communications between Applicant and the Country X Mission Chief (and others) beginning in September 2018 and continuing into mid-2019, during which time *ad hoc* feedback was provided to Applicant in a number of different performance areas.

225. Regarding the adequacy of feedback and an opportunity to remedy shortcomings, the record shows that the feedback provided to Applicant in his performance discussions consistently addressed certain broad themes. In this connection, Applicant's management of local staff and one or more of the following additional issues were consistently addressed: the quality of work produced by the local office; teamwork; Applicant's exercise of judgment; and Applicant's presence in the local office. Applicant's final APR focused on three of these issues, namely Applicant's management of local staff, his exercise of judgment and his availability at his post.

226. The Tribunal observes that there are some internal inconsistencies within some of the performance documents. For example, the October 18, 2018 Memorandum for Files faults Applicant as being a "micromanager," while also stating that he delegates too much. This same document also criticizes Applicant for leaving his post in August 2018, without informing the Country X Mission Chief. However, the record includes contemporaneous WhatsApp messages between Applicant and the Mission Chief showing not only that Applicant informed the Mission Chief of his plans, but that the Mission Chief acknowledged his message. As another example, the February 25, 2019 Memorandum for Files criticized Applicant's handling of his inquiry into the Office Manager's management of the finances, stating that the alleged "misdeeds" were still unproven. However, the HQ Budget Officer had already concluded (in November 2018) that the Office Manager had not followed procedures. While the above inconsistencies do not undermine the overall performance feedback given to Applicant over the course of his assignment, they do call into question the seriousness with which Applicant's performance was being managed.

227. The most extensive discussion of Applicant's performance is found in the October 18, 2018 and the February 25, 2019 Memoranda for Files. As discussed earlier, Applicant did not receive a copy of these Memoranda until the Grievance Committee process. Applicant contends that the Memoranda do not accurately reflect what was discussed at the performance meetings that resulted in the Memoranda. However, the Memoranda were prepared contemporaneously with the meetings and are largely consistent with written feedback that was shared with Applicant—namely, (a) the May 23, 2019 reassignment notification, (b) Applicant's final APR, and (c) the *ad hoc* feedback provided to Applicant through a number of e-mails beginning in September 2018. Additionally, there are a number of e-mails of record between Applicant's managers in which they express frustrations with Applicant's purported defensiveness and various aspects of his performance, such as work quality issues, exercise of judgment and presence in the local office. The Tribunal also notes that Applicant himself could have taken contemporaneous notes of the meetings that resulted in the preparation of the Memoranda for Files, either for his own records or to share with those who participated in the meetings. While there may very well have been disagreement regarding the sum and substance of the notes, at least there would be a contemporaneous record of the disagreement.

228. Notwithstanding the above, the Tribunal is concerned about the adequacy of some of the feedback provided to Applicant. First, a consistent criticism of Applicant's performance pertains to his management of local staff—in particular, his management of the Office Manager and the Driver. This issue arose as a result of accusations raised by the Office Manager and Driver against Applicant. However, as discussed earlier, the record does not reflect that Applicant was ever provided all of the specifics of the accusations, which deprived Applicant of his right to be heard.

Compounding the problem is the lack of credibility of the Office Manager and the contradictions made by the Driver, which cast doubt on the veracity of their accusations. In light of these factors, the Tribunal concludes that the feedback Applicant received regarding his management of local staff was incomplete and, therefore, inadequate. Applicant was not in a position to remedy shortcomings if he was not fully aware of the specifics of the shortcomings.

229. The second issue of concern for the Tribunal involves the introduction into Applicant's final APR of an issue which, the record reflects, was brought to Applicant's attention for the first time in the final APR. More specifically, the final APR refers to Applicant's "use of local office resources (e.g. using the office car and driver extensively for personal reasons)" as an example of Applicant's "poor judgment." The record reflects that the issue of the use of the car was first referenced in a May 20, 2019 document (entitled "performance issues regarding [Applicant] as resrep in [Country X]") prepared by the Country X Division Chief. However, this was an internal record for the Division Chief that was neither a record of a meeting with Applicant, nor shared with him. The issue of the use of the car appears to have originated from the Driver. In this respect, the Country X Mission Chief testified before the Grievance Committee that she had heard from the Driver that Applicant was using the car for "personal stuff."

230. Whatever the origin of this accusation, there is no indication that it was brought to Applicant's attention before the final APR. Applicant stated during oral proceedings before the Tribunal that the issue had never been brought to his attention, while also denying the claim. The Fund, for its part, was unable to identify any instance before the final APR where Applicant had been apprised of the matter. As there is no indication that the matter had ever been brought to Applicant's attention prior to its inclusion in the final APR, the Tribunal cannot conclude that Applicant had timely and adequate feedback and an opportunity to remedy this perceived shortcoming in his performance.

(3) Was the FY2019 APR decision based on a balanced assessment of Applicant's performance?

231. Applicant's final APR included both positive and negative input. The positive feedback consisted of input from his previous supervisor for the period May 2018 to August 2018, as well as positive input on various initiatives. Such initiatives consisted of the following: (a) the establishment of "effective working relationships with many of the main [Country X] interlocutors for the team"; (b) providing "helpful information exchanges to support IMF TA [Technical Assistance] on domestic revenue mobilization and fiscal transparency"; (c) "working with authorities to establish more concrete structural reforms in these areas to support program objectives"; (d) organizing an "outreach event at the university to present the fall REO"; and (e) providing "logistical support for the mission for the Article IV [sic] and negotiation for a new PCI-supported program in spring 2019."

232. The negative input focused on three key areas: Applicant's management of local staff; his poor exercise of judgment; and his limited availability at his post, which impacted the quality of the work from the local office. Examples were provided with respect to each of the three areas. It appears that the examples set out in the APR were mostly raised with Applicant during the year.

233. Notwithstanding the inclusion of both positive and negative input in the APR, the evaluation was not based on a balanced assessment of Applicant's performance. The APR does not reflect that performance feedback from relevant staff was taken into consideration or sought. Further, certain criticisms of Applicant's performance are not supported, and the APR did not take into account factors that reasonably could have had an impact on Applicant's performance. These issues are discussed below.

(a) Absence of feedback from relevant staff

234. The HR Business Partner provided feedback by an e-mail of March 30, 2019, to the Country X Division Chief on Applicant's performance, but there is no indication that such feedback was taken into consideration in Applicant's final APR. According to the HR Business Partner's testimony before the Grievance Committee, her feedback was provided at her initiative as part of the feedback process. The HR Business Partner stated in her feedback that Applicant "[h]ad a rough start in managing some local employees[,]" that "he is an advocate for his employees; had to deal with the evacuation of a local employee for medical reasons and handled it well." The HR Business Partner added that Applicant "seeks clarity on the local Employee Guidelines to ensure proper management."

235. The Fund stated during oral proceedings before the Tribunal that the HR Business Partner was not necessarily in a position to assess Applicant's performance and while she was part of the roundtable performance discussion she was just a scribe. However, the HR Business Partner testified before the Grievance Committee that she was asked during the roundtable performance discussion to "provide feedback on whether there's more or something was missing or what the interaction has been with the HR team." The record reflects in this regard that the HR Business Partner was extensively involved in the issues concerning Applicant's management of local staff. She took part in the October 2018 assessment of the accusations against Applicant and continued to be engaged with the various issues that arose concerning Applicant's performance.

236. The HR Business Partner further testified before the Grievance Committee that "the HR and budget teams each provide feedback on the res reps separately based on our interactions with the res reps." In the present case, the HQ Budget Officer engaged closely with Applicant on Applicant's concerns regarding the Office Manager's handling of local office finances—which was a central issue in this matter. However, there is no evidence in the record of the Budget Officer's performance feedback.

237. The only solicitations for feedback requests of record are those that were sent to the local Economist, the Office Manager, the Driver and the Cleaner, but they did not respond. The Fund stated during oral proceedings before the Tribunal that the Country X HQ team, the Country X Division Chief and the Front Office provided feedback; however, there is no record of such feedback or even of solicitations for their feedback. The absence of performance feedback from a range of persons who interacted closely with Applicant during the performance year points to the lack of a balanced APR.

(b) Unsupported criticisms of Applicant's performance

(i) Applicant's management of local staff

238. The APR identifies the following issues regarding Applicant's management of local staff: Applicant's "treatment of some local staff was excessively heavy-handed (e.g. raising his voice to the driver, repeated accusations of financial misdoing of the [Office Manager] before conducting adequate due diligence, warning his local staff against communicating directly with HQ), while he raised expectations of others (e.g. salary of [the] cleaner)." Of these criticisms, two of them (Applicant raising his voice and warning local staff against communicating directly with HQ), were made by the Driver (who made contradictory statements) and/or the Office Manager (whose credibility is impugned). Further, as also discussed earlier, the record does not demonstrate that Applicant was provided with all of the specifics of the complaints raised against him and was therefore not afforded a full opportunity to respond to the complaints. It cannot be concluded that an APR is balanced when it includes (a) negative comments that are based primarily on information provided by staff who either lack credibility (the Office Manager) or who made contradictory statements (the Driver), and (b) where the recipient of the APR was not provided a full opportunity to respond to the specifics of complaints, elements of which are included in the final APR.

239. Likewise, the Tribunal is troubled by the inclusion in the APR of the criticism that Applicant "repeated accusations of financial misdoing of the [Office Manager] before conducting adequate due diligence." On October 25, 2018, Applicant sent to a group of senior staff the findings of an inquiry he conducted into a financial discrepancy of over $2,000 (between the IMF ledger and the relevant bank statement) in the FY2019 Q2 report prepared by the Office Manager (there apparently was also a petty cash discrepancy of about US$1,000). The recipients of Applicant's findings included the HQ Budget Officer, the Country X Mission Chief, the Country X Division Chief, and two Deputy Directors. It was Applicant's conclusion that the Office Manager had engaged in conduct that rose to the level of "embezzlement, with a clear attempt to cover up the wrongdoing and mislead." The HQ Budget Officer testified before the Grievance Committee that Applicant's investigation was "extremely extensive" and "extremely substantive."

240. In light of his serious conclusions regarding the Office Manager, Applicant arguably could have managed the situation with more tact in advance of distributing his findings to the management of his department. Specifically, he could have briefed the Country X Mission Chief and the Country X Division Chief in detail on his concerns and asked for guidance. However, there are some indications that Applicant attempted to do just that. In this respect, also on October 25, 2018, the Mission Chief wrote to the Division Chief, stating that the Office Manager in Country X was "pretty upset" about Applicant implying that the Office Manager had mishandled funds. The Mission Chief wrote: "Remember that [Applicant] implied something like this to us on the phone." While the Mission Chief testified at the Grievance Committee hearings that Applicant "never even raised it with us, so it just came from out of the blue," the record reflects that the Mission Chief and the Division Chief were at least aware of the issue prior to Applicant's submission of his findings.

241. Importantly, however, the APR faults Applicant not for failing to inform his managers of the issues concerning the Office Manager in advance, but rather for Applicant's making accusations of wrongdoing against the Office Manager "before conducting adequate due diligence." The reference to "due diligence" presumably included that Applicant should have reached out to the former Res Rep to understand whether there was a legitimate explanation for the financial discrepancy in the Office Manager's FY2019 Q2 financial reporting. That is what the HQ Budget Officer did when reviewing Applicant's findings. The Budget Officer, based on his review, concluded the following:

> [T]he previous Resident Representative . . . acknowledged making a check payment to the Office Manager . . . in the amount of . . . (some USD 2,050) for a delayed payment from the Bank due to banking software issues. This lead [sic] to a double payment of [the Office Manager's] salary. Once the double payment was realized, [the previous Res Rep] had the understanding with the office manager that he repay this extra salary payment before [the previous Res Rep's] departure from [Country X]. This repayment by [the Office Manager] was not made as agreed and is still outstanding.

242. However, at the time of his inquiry, Applicant arguably had no reason to contact the previous Res Rep. In July 2018 (before Applicant assumed the position as Res Rep in Country X), the outgoing Res Rep wrote to Applicant to say that the Office Manager had asked for a three-month salary advance to help pay for his wedding. Applicant replied, stating that he was not inclined to agree to an advance salary payment unless it was authorized by HQ. The previous Res Rep agreed to drop the matter.

243. It is notable that the previous Res Rep did not inform Applicant of the purported double salary payment to the Office Manager (*i.e.*, what the previous Res Rep explained to the HQ Budget Officer). This logically would have been an issue for the then-Res Rep to flag with Applicant (the incoming Res Rep), because a double salary payment would have been outstanding when the then-Res Rep left Country X. Applicant, as the incoming Res Rep, would be responsible for ensuring that the books were balanced. Because the previous Res Rep had agreed not to provide a salary advance to the Office Manager, and the previous Res Rep did not raise any other payment issue regarding the Office Manager, Applicant arguably had no reason to reach out to the previous Res Rep regarding the financial irregularity in the FY2019 Q2 report.

244. Even assuming there was at the time a plausible rationale for the discrepancy in the FY2019 Q2 report, Applicant later discovered another financial discrepancy in connection with the Office Manager's preparation of the FY2019 Q3 report. The Office Manager self-reported a discrepancy of about US$82. However, upon further inspection by Applicant, it was found that the discrepancy was ten times that amount (*see* para. 58).

245. The record does not reflect that Applicant's managers took into consideration any of the concerns regarding the Office Manager's handling of the finances, or queried Applicant as to why he did not reach out to the previous Res Rep, before concluding that Applicant should have conducted "adequate due diligence" in advance of making "repeated accusations of financial misdoing of the [Office Manager]." Further, as discussed earlier, Applicant's managers appeared

at all times to afford the Office Manager the benefit of the doubt, notwithstanding the serious issues that were being identified by Applicant. While Applicant arguably could have handled the situation with more tact, Applicant's inquiries were, in the words of the HQ Budget Officer, "extremely extensive" and "extremely substantive." Applicant's cause for concern later bore fruit. The Office Manager was ultimately found to have engaged in misconduct following a full investigation.

(ii) Applicant's purported misuse of local office resources

246. The Tribunal earlier discussed the introduction into Applicant's APR the remark that Applicant misused "local office resources (e.g. using the office car and driver extensively for personal reasons.)" The genesis of this criticism was the Driver, who made contradictory statements, and this issue previously had not been raised with Applicant. As such, the inclusion of this statement in the APR calls into question the objectivity and fairness of the APR.

(c) Additional factors that reasonably could have had an impact on Applicant's performance

247. It is the obligation of the Fund, when assessing the performance of a staff member, to take into consideration all relevant and significant facts that existed for that period of review. *See Ms. "T", Applicant, v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-2 (June 7, 2006), para. 47.

248. In the present case, Applicant's final APR did not take into consideration a number of relevant and significant factors that could have impacted Applicant's performance. These factors consist of the following: inheriting a dysfunctional office; the absence of the Office Manager for health reasons for many months (and his medical evacuation); and the move of the office to a local hotel in January 2019. In a March 6 and 7, 2019 e-mail exchange between Applicant and the Country X Mission Chief (*see* paras. 66-67), the Mission Chief acknowledged nevertheless the existence and seriousness of these issues—none of which was reflected in Applicant's final APR. Moreover, the Tribunal notes that there was evidence that the Office Manager was mishandling the office finances. The Fund's failure to take these issues into consideration contributed to an unbalanced APR.

(4) Was Applicant's performance evaluation improperly motivated by discrimination?

249. The Tribunal, as discussed earlier in this Judgment, has held that "[t]he general principle guiding international administrative tribunals regarding improper motive is that there must exist a causal link between the alleged irregular motive and the decision that is being attacked." *Mr. "F",* para. 73; and *Ms. "GG" (No. 2)*, para. 330.

250. As with his challenge to the reassignment decision, Applicant argues that the APR decision was improperly motivated by racial discrimination. However, Applicant has not established a causal link between this alleged improper motive and the decision that is being challenged—namely, his final APR. For the reasons set out earlier in respect to Applicant's challenge to the reassignment decision, and in the absence of evidence to the contrary, the Tribunal finds no basis

to conclude that the APR decision was motivated by racial discrimination or other improper motive.

(5) Was the performance evaluation decision taken in accordance with fair and reasonable procedures?

251. Applicant contends that the Fund violated provisions of the Staff Handbook, as well as the FY2019 Annual Talent Management Exercise ("ATME") Guidelines.

(a) Did the Fund violate Chapter 3.02, Sections 4 and 6, of the Staff Handbook?

252. Staff Handbook, GAO Chapter 3.02 (February 2019) is the provision that governs performance evaluations. Section 4 of Chapter 3.02 addresses performance discussions, while Section 6 covers the management of unsatisfactory performance. These Staff Handbook provisions establish the legal framework for performance evaluations and for managing performance. It is for the Tribunal to determine whether the Fund—in applying the Staff Handbook to Applicant's situation—abused its discretion.

253. Section 4 specifically applies to the "performance assessment included in the APR form," *i.e.*, the end of the year performance assessment. Paragraph 4.2 of Section 4 (which provides that "[t]he staff member may submit written comments on the performance assessment") pertains to the final APR, rather than to performance discussions that take place during the performance year.

254. The Fund elaborated on this point during oral proceedings before the Tribunal, stating that the focus of Section 4 is on the annual performance assessment that occurs at the end of the fiscal year. The Fund explained that performance discussions conducted during the year (including the mid-year performance discussion) provide an informal process to ensure that the final APR does not come as a surprise. In other words, there are no written rules, policies or procedures that govern how performance discussions should be conducted during the performance year, in advance of the APR discussion. The absence of such guidance may lead to disagreements between staff and management on the proper process to be followed.

255. Section 6 sets out the rules governing the management of unsatisfactory performance. Paragraph 6.2 provides that when a staff member's performance is considered unsatisfactory at any point during the performance cycle

> the manager should draw this to the staff member's attention at the earliest opportunity, and provide guidance on the improvement needed. If, notwithstanding these efforts, the performance remains less than fully satisfactory and the manager believes more structured feedback and monitoring would be helpful, the Department Head, in consultation with HRD, may initiate a performance improvement plan ("PIP").

In its oral hearings before the Tribunal, the Fund stated that what is important is that staff members be provided notice of performance deficiencies as they occur and an opportunity to respond; a PIP may be resorted to in the event of unsatisfactory performance, but is not required. Further, added

the Fund, there is nothing in the Fund's internal law requiring that staff be informed in advance of the possibility of a "Not Rated" performance rating, as it would not always be possible for managers to predict the outcome of a roundtable discussion.

256. Applicant argues that the Fund violated Sections 4 and 6, on the following bases: (a) the APR was based in part on allegations, the specifics of which were not shared with him, and which therefore denied him a right to be heard; (b) Applicant had a right to the Memoranda for Files of the performance discussions with him; and (c) the Fund violated GAO Chapter 3.02, Section 6, paragraph 6.2, by failing to provide Applicant formal, written, guidance on improvement needed and by failing to place Applicant on a PIP.

257. The Tribunal addressed (a) and (b), above, earlier in this Judgment. Applicant was not provided an opportunity to respond to the specifics of the accusations made against him by the Driver and the Office Manager, thus denying him a right to be heard. Further, in light of credibility issues concerning the Office Manager and contradictions by the Driver, any criticisms of Applicant's performance that can be attributed to either of them should be carefully assessed. Further, the Memoranda for Files should have been shared with Applicant in advance of the reassignment and APR decisions (as an alternative to receiving a written performance assessment), because they were relied upon by the Fund in connection with the reassignment process and to advance its case more generally. However, these findings have no relationship with either Section 4 or 6 of the Staff Handbook.

258. Regarding (c), the Tribunal is unable to conclude that the Fund violated GAO Chapter 3.02, Section 6, paragraph 6.2. As was discussed earlier in this Judgment, the record demonstrates that Applicant had a number of performance discussions during the performance year, and received *ad hoc* written performance feedback from the Country X Mission Chief (and others) beginning in September 2018 and continuing into mid-2019. During this period Applicant was provided guidance on improvements needed. While Applicant was not placed on a PIP, this was not mandated by paragraph 6.2, which specifically provides that a manager "may" initiate a PIP if a staff member's performance—despite feedback and guidance—remains unsatisfactory. Further, there was no indication that Applicant's performance as an economist was at all unsatisfactory. In the Fund's view, it was Applicant's performance as Res Rep that was unsatisfactory and that this was remedied by reassigning Applicant to HQ. Indeed, the Fund states that Applicant has been performing at a very high level since his reassignment.

259. In light of the above, the Tribunal concludes that Applicant's managers did not violate Chapter 3.02, Sections 4 and 6, of the Staff Handbook.

(b) Did the Fund violate the FY2019 Annual Talent Management Exercise Guidelines?

260. On March 7, 2019, the SPM distributed a memorandum to all staff in Applicant's Department. The memorandum "describe[d] [Department] procedures for the FY2019 annual talent management exercise . . . ." The "procedures" addressed the APR timeline, the Direct Report Input ("DRI") process, and promotions. Attached to the memorandum were Annual Talent Management Exercise Guidelines ("ATME Guidelines"). The memorandum stated that the "aim

of the ATME is to provide managers with the framework within which to review staff performance over the last fiscal year, in a consistent, transparent, and fair manner, following the suggested process" set out in the ATME Guidelines. (Emphasis in original.) The ATME Guidelines, in pertinent part, addressed issues such as soliciting feedback from staff and government authorities and the recognition of "invisible work."

261. Applicant argues that the Fund did not adhere to procedures in the memorandum and to provisions of the ATME Guidelines. More specifically, he asserts the following: (a) his managers did not make a legitimate effort to obtain feedback on his performance from local staff through the DRI process; (b) his managers did not seek feedback from relevant stakeholders, including from members of the Country X HQ team, previous supervisors (for his work just prior to becoming Res Rep for Country X) and country authorities; (c) his managers did not consider his "invisible work"; and (d) the delays in finalizing his APR (which in Applicant's view was a fraudulent and forged document) prevented him from knowing in a timely manner the specifics (issues, documents, dates, locations, witnesses) of the accusations that led to the reassignment and rating decisions against him. The Tribunal will address each of these issues in turn.

(i) Did Applicant's managers make sufficient effort to obtain feedback from local staff through the DRI process?

262. The March 7, 2019 cover memorandum to the ATME Guidelines provided that "resident representatives are expected to participate in the DRI [process], provided they have a minimum of three raters." In other words, Res Reps had to have at least three subordinates provide DRI feedback in order for DRI feedback to be reflected in an APR. The cover memorandum further provided that staff would receive requests for input on their supervisors through the DRI process by March 18.

263. The record reflects that on March 16, 2019, the HR Team sent formal e-mail requests for feedback to the local Economist, the Office Manager and the Driver as part of the DRI process. (They all had IMF e-mail accounts.) Their feedback was due on April 12, 2019. A reminder e-mail was sent to them on April 10. They failed to provide feedback. The Cleaner further testified before the Grievance Committee that she had received an e-mail (to her private e-mail account) asking to provide input on Applicant's performance, but thought that it was "spam" and deleted the e-mail. However, if she had provided feedback she would have said that Applicant "was a good manager."

264. The local Economist testified before the Grievance Committee that he did not recall receiving the feedback request and that he normally ignores messages like this, believing them to be a scam. The Gardener was not asked during the oral hearing whether he had received a DRI invitation. However, he was on the list of subordinates to receive an e-mail invitation. Given that the Cleaner had received an e-mail invitation to her private e-mail account, it is reasonable to assume that a similar e-mail had also been sent to the Gardener. In any event, four out of five subordinates who clearly were sent e-mail invitations did not provide feedback.

265. In light of the above, the Tribunal concludes that there is no basis to Applicant's claim that his managers did not make sufficient effort to obtain feedback from local staff through the DRI process.

(ii) Did Applicant's managers seek feedback from relevant stakeholders?

266. The ATME Guidelines included a section that addressed the assessment of the performance of Res Reps. It provided that supervisors "should seek input from the range of stakeholders with whom the Res Rep … interacts." It added that the following approach "can" be used:

- Supervisors should ask Res Reps . . . to list: (i) the functional departments with which they have had direct interaction; (ii) the primary points of contact in each functional department; and (iii) the nature and extent of the interaction with each functional department . . . .

- Based on this information, supervisors will request inputs from the primary points of contact in each functional department. Supervisors will incorporate this feedback into the draft APR write up.

- Separately, the SPM [Senior Personnel Manager] . . . will inform the SPMs of functional departments [for which] input on the performance of . . . Res Reps . . . will be sought.

- The budget, HR and CD teams will provide input on Res Rep . . . performance.

- Supervisors should solicit feedback from local employees on the performance of resident representatives and center coordinators. This feedback would supplement the information contained in DRIs, where available.

The ATME Guidelines added that "supervisors should also seek feedback from the authorities where feasible and appropriate." Supervisors were expected to "use their own judgment on when and how to gather such feedback, and what weight to give the feedback in light of the general state of Fund relations with the authorities."

267. Applicant argues that the record is devoid of evidence showing which stakeholders were consulted by his managers. In Applicant's view, such stakeholders should have included the Country X HQ team, the local staff and country authorities with whom Applicant worked. The Fund, for its part, asserts that the ATME Guidelines were not a mandatory checklist, but rather a suggested process that listed possible sources from whom managers may seek input when assessing performance.

268. The Fund is correct that the ATME Guidelines were characterized (in the March 7, 2019 cover memorandum) as a "suggested process" to be followed. However, the ATME Guidelines state that supervisors: (a) "*should* seek input from the range of stakeholders with whom the Res Rep . . . interacts"; (b) "*should* ask Res Reps" to list the functional departments with which they have had direct interaction, the primary points of contact in each functional department, and the nature and extent of the interaction with each functional department; and (c) "*should* solicit feedback from local employees on the performance of resident representatives and center coordinators," which would supplement DRI feedback. (Emphasis added.)

269. The only language in the ATME Guidelines that is qualified is the language regarding the solicitation of feedback from authorities. The Guidelines provide that such feedback should only be sought "where feasible and appropriate" and that supervisors were expected to "use their own judgment on when and how to gather such feedback, and what weight to give the feedback in light of the general state of Fund relations with the authorities." This is a reasonable direction to supervisors that would better enable them to weigh whether and in which circumstances feedback should be sought from authorities. In this case, Applicant's supervisors did not seek feedback from authorities. There is no evidence indicating that the decision not to seek feedback from authorities was unreasonable.

270. The above analysis suggests that there is an inconsistency within the March 7, 2019 cover memorandum itself, as well as an inconsistency between what is stated in the cover memorandum and the language used in the ATME Guidelines. The ATME Guidelines are not clear and may (as in this case) lead to differing views as to the proper process that should be followed in assessing performance. However, the record does not reflect that the Fund abused its discretion in its application of the ATME Guidelines.

271. In any event, as discussed earlier, the Fund stated during oral proceedings before the Tribunal that the Country X HQ team, including the Country X Division Chief and the department Front Office all provided feedback on Applicant's performance. However, as was also previously discussed, there is no evidence of record showing that feedback was solicited from these sources or that such feedback was provided. Likewise, there is no evidence showing that performance feedback was sought from the HQ Budget Officer who was very much involved in Applicant's review of the Office Manager's handling of the office finances. According to testimony of the HR Business Partner, this ordinarily should have been done. These findings factored into the Tribunal's earlier conclusion that the APR was not a balanced assessment of Applicant's performance.

272. Lastly, Applicant asserts that feedback was not sought from his previous supervisor. However, Applicant's APR clearly includes such feedback. This assertion is thus without merit.

(iii) Did Applicant's managers take account of his "invisible work"?

273. The ATME Guidelines specified that '"[i]nvisible work' continues to be recognized as an input to the APR." However, it was the responsibility of staff to include such work in their section of the APR. In this regard, the ATME Guidelines provided: "We expect: (i) all staff to ensure that any 'low visibility' work . . . that they feel should be properly recognized, is described in their own section of the APR, and (ii) supervisors to comment on such work in their assessment, and be sensitive to the fact that such work may squeeze out more visible analytical or cross country work."

274. Applicant argues that his supervisors did not recognize his "invisible work." He states in his Reply that his invisible work "includes all daily tasks and meetings that are not seen by HQ." He provides in his Reply numerous examples of what he considers to be invisible work. However, it was his responsibility to include this information in his section of the APR. Having failed to do this, he cannot now credibly claim that his managers should be held accountable for not considering this work.

(iv) Did the delays in finalizing Applicant's APR harm him?

275. The March 7, 2019 cover memorandum to the ATME Guidelines set out an FY2019 APR process timeline, which was characterized in the memorandum as being "quite rigid." The memorandum asked that all staff respect the deadlines. Pursuant to the memorandum, "[s]taff should complete their sections of the APR by April 10" and "[s]upervisors should complete the draft performance assessment by May 3." Further, performance discussions with staff were to take place between June 12 and July 12, with staff signing off on the FY2019 APR by July 30, 2019.

276. In the present case, it is not disputed that Applicant's APR was delayed. However, at least some of the delays can be attributed to Applicant and there is no indication that the other delays caused Applicant any compensable harm.

277. The decision to assign Applicant a "Not Rated" APR (and to reassign him to HQ) was made on May 15, 2019. His performance discussion (at which time his rating was conveyed to him) did not take place until October 11, 2019. The delays were in large part due to the following: (a) Applicant took sick leave the month of July and annual leave the month of August; and (b) after returning to the office in early September, he traveled to Canada sometime shortly thereafter to renew his visa. In this regard, in an e-mail dated September 3, 2019, concerning a September 10 appointment for a new computer, Applicant stated: "Sorry. I may travel in the coming days to renew my G4 visa in Canada. I will let you know if I will be able to come for this appointment in a few days." Whenever Applicant traveled to Canada, it appears that he returned to HQ on October 9, 2019. His APR discussion took place two days later, on October 11, 2019, at which time Applicant was made aware of the "Not Rated" decision and the rationale for the decision. The Country X Division Chief signed the "Not Rated" APR on November 4, 2019.

278. The computer-generated departmental signature of the SPM was not provided on the APR until March 9, 2020. The Fund states that the absence of a final APR came to light only when Fund counsel followed up with the HR team after realizing that Applicant's APR exhibit (before the Grievance Committee) was not the final system-generated version. The Fund asserts that the final APR may have become held up in the system because the SPM responsible for Applicant's APR had assumed another position. The Fund further asserts that Applicant would have been the only person aware of the delay, yet chose not to bring the matter to the attention of HR.

279. While the delay in generating the final APR is not best practice, there is no evidence that the delay was intentional or that it harmed Applicant. Applicant was apprised of his performance assessment and rating in October 2019 and there are no differences between that version and the March 2020 final version. Further, Applicant remained (and remains) fully employed by the Fund and was able to pursue his grievances through administrative review, the Grievance Committee, and this Tribunal. As to Applicant's attempts to mediate his dispute, while they were rejected by the Fund, it was within the Fund's discretion not to participate in the mediation process. Mediation is dependent on both parties agreeing to participate.

280. Lastly, Applicant argues that his final APR was a "fraudulent document with a forged signature," because the APR was not signed by the SPM responsible for Applicant's APR. This argument is without merit. The SPM responsible for Applicant's APR testified before the

Grievance Committee that while he did not recall having signed the APR, he was no longer SPM at that time and that perhaps the system included his name because he had been SPM in June or July 2019. The Tribunal has no reason to doubt this explanation.

(6) Tribunal's conclusions regarding Applicant's challenge to the APR decision

281. In light of the issues identified above, the Tribunal concludes that the Fund abused its discretion in finalizing Applicant's FY2019 APR. Applicant was not provided adequate feedback regarding some of the identified performance shortcomings or an opportunity to remedy those shortcomings. Further, the APR was not based on a balanced assessment of Applicant's performance: notwithstanding the inclusion of both positive and negative input in the APR, the APR did not reflect that performance feedback from all relevant staff was either sought or taken into consideration or sought; certain criticisms of Applicant's performance are unsupported; and the APR did not take into account factors that reasonably could have had an impact on Applicant's performance. In light of these deficiencies, Applicant's FY2019 APR is vitiated.

C. Are Applicant's claims regarding the pre-appointment process properly before the Tribunal?

282. Pursuant to Article II, Section 1(a), of its Statute, the Tribunal is competent to pass judgment upon any application submitted by a staff member challenging the legality of an administrative act adversely affecting him or her. The expression "administrative act" is defined as "any individual or regulatory decision taken in the administration of the staff of the Fund." *See* Article II, Section 2(a) of the Statute. The Commentary on Article II, Section 2, explains that "[i]n order to invoke the jurisdiction of the Tribunal, there would have to be a 'decision' . . . identified in the application filed by the staff member." Commentary on the Statute, p. 14. The Commentary further explains that "in most cases concerning individual administrative decisions, the staff member would be challenging the decision after unsuccessfully pursuing the established channels for administrative review of his complaint, including recourse to the Grievance Committee." *Id.*

283. In the present case, Applicant did not challenge before the Grievance Committee any pre-appointment decisions. During the pre-hearing conferences of the Grievance Committee, the Committee ruled that there would be no discovery or questions related to issues concerning the time prior to when Applicant was appointed as Res Rep for Country X (*i.e.*, pre-appointment issues), because "[w]e don't have jurisdiction to assess [pre-appointment issues]." The Committee added that such issues were "only useful to us if [they were] relevant to the question of whether or not there was a proper factual basis to terminate your Res Rep post."

284. Thereafter, during Grievance Committee hearings, Applicant's counsel stated that they did "not anticipate going into the appointment process except to the extent that it would bear on establishing that the decision violated the Fund's rules based on erroneous facts or is otherwise directly relevant to the issues before the Committee." Applicant's counsel later sought during the Grievance Committee oral hearings to introduce evidence and testimony regarding the pre-appointment process. The Committee's Chair, however, sustained an objection of the Fund's counsel to such evidence and testimony, stating that this decision was made in part because

Applicant's counsel had represented that Applicant was "not pursuing a claim that involves decisions made prior to the appointment as res rep."

285. Likewise, before the Tribunal, Applicant does not frame as a contested decision any aspect of the pre-appointment process. Applicant argues, however, that pre-appointment issues are relevant to his case. He asserts in his pleadings that "false allegations against him were part of a pattern that aimed at preventing him from getting the Res Rep job [in Country X] and keeping it after he took it up." In this regard, he argues that after he was selected as Res Rep in February 2018, he saw clear signs of obstruction to his appointment.

286. To the extent Applicant is alleging that the appointment process was part of a pattern of conduct that is related to the decisions he is challenging, the Tribunal finds that Applicant's assertions are without merit. Applicant was selected unanimously by a panel that included the Deputy SPM and the Country X Mission Chief. The record reflects that there were some delays on the part of the Country X Government in processing the necessary papers for Applicant's appointment. However, the record also reflects that the processing delays were slightly less than the delays experienced by Applicant's predecessor and successor. While Applicant asserts that the delays were intentional, there is nothing in the record to support this claim.

287. Moreover, Applicant's assertions are unpersuasive. He argues that his "malicious managers decided to undermine him and spread false allegations about him very early on to have him removed as soon as possible after their obstruction to his appointment did not succeed." However, Applicant was unanimously selected by a panel that included his soon-to-be supervisor, the Mission Chief. If the Mission Chief did not favor Applicant for the position as Res Rep, she could simply have chosen not to select him. Further, as noted above, there is no evidence of obstruction.

D. Are Applicant's claims concerning the administrative review and the Grievance Committee processes properly before the Tribunal?

288. Applicant makes numerous claims regarding the administrative review and Grievance Committee processes. With respect to the administrative review, Applicant argues that at the time of the administrative review he had still not received his final APR, had never been presented with the specific allegations made against him and had not been given an opportunity to be heard. He states that he therefore did not know why he was really removed from his Res Rep position. Applicant further argues that the then HRD Director was involved in the reassignment decision and therefore should have recused herself.

289. Regarding the Grievance Committee, Applicant asserts that he was likewise denied a right to be heard. Further, he asserts that the Grievance Committee made false insinuations and factual errors, mischaracterized and ignored evidence and acted like Fund lawyers instead of impartial decision-makers, because it allowed the Fund to bring in new testimonial evidence to build its case *de novo* during the Grievance Committee hearing. Applicant submits that the Grievance Committee's Report should be expunged, and that the Grievance Committee should be held accountable for its "deliberate violations of basic requirements of legal proceedings."

290. Article V, Section 1, of the Tribunal's Statute provides that applicants must exhaust "all available channels of administrative review" before coming to the Tribunal. Within the Fund, the channels of administrative review principally consist of requests for administrative review to the HRD Director followed by the filing of a grievance with the Grievance Committee. Staff Handbook, GAO Chapter 11.03, Sections 4 and 5 (February 2019) sets out the applicable filing requirements. Where the staff member concerned is dissatisfied with the outcome of the Grievance Committee process, he or she may file an application with the Tribunal following final decision by Fund Management on the Grievance Committee's recommendation. The Tribunal conducts a *de novo* review of the challenged administrative acts that adversely affect him or her.

291. The Tribunal has consistently ruled that it does not function as an appellate body to the Grievance Committee because the Tribunal's competence is not limited as it would be if it were a court of appeal; the Tribunal, unlike a court of appeal, reviews cases *de novo* and makes findings of fact and holdings of law. *See, e.g., Ms. "GG" (No.2)*, para. 423, citing *Mr. M. D'Aoust, Applicant v, International Monetary Fund, Respondent,* IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17. As the Tribunal held in *Ms. "J"*, para. 95, "[t]he authority of the Administrative Tribunal to make both findings of fact and conclusions of law, and therefore to review *de novo* the legality of an administrative act of the Fund, stems from the Tribunal's unique role as the sole judicial actor within the Fund's dispute resolution system."

292. The above fundamental principles apply equally to the administrative review process. The Tribunal insulates both the administrative review and the Grievance Committee processes from the adjudicatory role served by the Tribunal. *See e.g., Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 168.

293. Notwithstanding the above, the Tribunal has also held that "[t]he integrity of the administrative review and Grievance Committee processes has a direct bearing on the work of the Administrative Tribunal." *Ms. "GG" (No. 2)*, para. 429. Further, the Tribunal has 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." *Id.*, para. 430. A principal concern of the Tribunal in making this assessment is whether information was purposefully withheld from an applicant, such that the administrative review and Grievance Committee processes materially impaired the record in an applicant's case. *See, e.g., Mr. E. Verreydt, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-5 (November 4, 2016), para. 103.

294. In the present case, the Tribunal—as is its usual practice—reviewed the administrative review and the record of the Grievance Committee proceedings and weighed the record generated by these processes. There is no evidence demonstrating that the channels of review were materially impaired. At both stages, Applicant was provided an opportunity to be heard, to present evidence and (before the Grievance Committee) to call witnesses.

295. The Tribunal does note that the then HRD Director was involved in the decision to reassign Applicant, and then later conducted the administrative review of the reassignment decision. Applicant argues that she should have recused herself and should have been called to testify before the Grievance Committee on comments she made about Applicant that he considered

objectionable. In this regard, on May 26, 2019, the Country X Department Director wrote to the then HRD Director to explain the situation with Applicant (Applicant was being non-responsive to e-mails and phone calls after the reassignment decision) and to ask for advice. In an e-mail to the Department Director the following day, the then HRD Director provided the requested advice.

296. Further, on June 7, 2019, the then HRD Director wrote to Applicant to encourage him to respond to the Department Director's instruction that Applicant inform HR about his plans to return to HQ. The then HRD Director emphasized the following:

> Your reassignment, which I understand is a disappointment to you, is a business decision that your department has the authority to make. It was taken after detailed consideration and was maintained after consideration of your recent emails. All of us at the Fund are required to follow reasonable instructions from our managers. Failure to do so can have serious implications for continued employment. Although your ResRep role will end this Sunday, I know [your Department] has also made clear that they are willing to assist you by being flexible on the date of your return to HQ.
>
> Each of us sometimes has to comply with work-related decisions that we may not like and may not agree with, but which our managers are entitled to make. . . .

It was after these e-mails that the then HRD Director conducted the administrative review.

297. The Tribunal is of the view that the then HRD Director should have considered recusing herself due to her substantive involvement in the case. *See, e.g., ILOAT Judgment No. 3958* (December 6, 2017), para. 11, which held that: "A conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest."

298. In any event, the administrative review and the proceedings of the Grievance Committee are not dispositive regarding matters before the Tribunal. *See Ms. "GG" (No. 2)*, para. 424, citing *Mr. "DD"*, para. 168. The Tribunal makes its own findings of fact and legal conclusions. Further, to the extent there are any lapses in the evidentiary record, such lapses "may be rectified, for purposes of the Tribunal's consideration of the case, through the Tribunal's authority, pursuant to Article X of its Statute and Rules XVII and XIII of its Rules of Procedure to order the production of documents, to request information and to hold oral proceedings." *Ms. "GG" (No. 2)*, para. 425, citing *Mr. "DD"*, para. 166. Lastly, the Tribunal notes—as was explained by the Fund in its pleadings—that neither the administrative review decision nor the Grievance Committee recommendation are part of Applicant's personnel record. Therefore, there is no basis to Applicant's request that these documents be expunged.

299. In light of the above, the Tribunal dismisses Applicant's assertions concerning the administrative review and Grievance Committee processes. To the extent Applicant is raising

systemic issues concerning the dispute resolution system more generally, "it is the province of the policy-making organs of the Fund to address such issues . . . ." *Ms. "GG" (No. 2)*, para. 431.

CONCLUSIONS OF THE TRIBUNAL

300. For the reasons elaborated above, the Tribunal concludes as follows:

1. The Fund had a reasonable basis for the reassignment decision. However, Applicant was not afforded a right to be heard in relation to the accusations raised by the Driver and the Office Manager against him. Further, the reassignment decision was carried out in violation of fair and reasonable procedures in three respects: (a) the accusations—given their nature and because Applicant's Department was unable to address them properly—should have been referred to the appropriate office, and the failure to do so resulted in a flawed review; (b) in light of the close nexus between the reassignment and APR decisions, Applicant's managers should have provided Applicant a written assessment of his performance in advance of the reassignment decision; and (c) Applicant, in the alternative, should have received a copy of the October 18, 2018 and the February 25, 2019 Memoranda for Files in advance of the reassignment (and APR) decisions, not only because they were used by the Fund to advance its case against Applicant, but because Applicant was not provided any other written assessment in advance of the reassignment. These shortcomings tainted the reassignment decision and warrant the payment of compensation.

2. The Fund abused its discretion in finalizing Applicant's FY2019 APR. Applicant was not provided adequate feedback regarding some of the identified performance shortcomings or an opportunity to remedy those shortcomings. Further, the APR was not based on a balanced assessment of Applicant's performance: notwithstanding the inclusion of both positive and negative input in the APR, the APR did not reflect that performance feedback from relevant staff was taken into consideration or sought; certain criticisms of Applicant's performance were unsupported; and the APR did not take into account factors that reasonably could have had an impact on Applicant's performance. In light of these deficiencies, the APR is vitiated.

3. Applicant's claims of racial discrimination are properly before the Tribunal only to the extent the claims apply specifically to the impugned decisions, *i.e.*, that the challenged decisions were tainted by discrimination or were otherwise improperly motivated by discrimination. However, Applicant has not satisfied his burden of showing that the reassignment or the APR decisions were either discriminatory or otherwise improperly motivated.

4. Applicant's claim regarding the appointment process is properly before the Tribunal only to the extent he is asserting that the appointment process was part of a pattern of conduct that is related to the decisions he is challenging. However, Applicant's assertions are without merit.

5. There is no evidence demonstrating that the channels of review were materially impaired. At both the administrative review and the Grievance Committee stages, Applicant was provided an opportunity to be heard, to present evidence and (before the Grievance Committee) to call witnesses. In any event, the administrative review and the proceedings of the Grievance Committee are not dispositive regarding matters before the Tribunal, which makes its own findings of fact and legal conclusions.

REMEDIES

301. The Tribunal's remedial authority in respect of challenges to individual decisions is found in Article XIV, Section 1, of the Tribunal's Statute, which provides:

> If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

302. The Tribunal's jurisprudence reflects that its remedial powers fall broadly into three categories: (i) rescission of the contested decision, together with measures to correct the effects of the rescinded decision through monetary compensation or specific performance; (ii) compensation for intangible injury resulting from procedural failure in the taking of a sustainable decision; and (iii) compensation to correct the effects of intangible injury consequent to the Fund's failure to act in accordance with its legal obligations in circumstances where there may be no decision to rescind. *"TT"*, para. 207; *Ms. "GG" (No. 2)*, para. 444.

303. In this case, the Tribunal has concluded that Applicant has not prevailed on his claim that the Fund abused its discretion in reassigning him from his Res Rep position to a position at HQ. Nonetheless, that decision was marked by procedural failures that warrant the award of compensation for intangible injury.

304. As to Applicant's challenge to his APR decision, the Tribunal has concluded that Applicant has prevailed on his claim that the Fund abused its discretion in grading him "Not Rated" in his FY2019 APR. Accordingly, that decision is rescinded and Applicant's FY2019 APR shall be expunged from his personnel record. Due to the passage of time, the Tribunal finds that it would be neither practical nor appropriate to order the Fund to redo Applicant's FY2019 APR.

305. Applicant, in his requests for relief, asks the Tribunal to order the Fund to grant him the rating of "Effective" (or above) for the FY2019 APR. He also seeks compensation for monetary losses, including in relation to pension, arising from the impugned decision. As the Tribunal has stated above (at para. 223), however, in the event that it determines that a performance assessment constitutes an abuse of discretion, it may not substitute its own judgment as to the appropriate performance rating. It follows that the Tribunal also may not speculate as to any monetary consequences that may have flowed from the rescinded FY2019 APR. In these circumstances, the Tribunal concludes that compensation for intangible injury will be necessary to "correct the effects of that [rescinded APR] decision." (Statute, Article XIV, Section 1.)

A. Remedy for intangible injury

306. The Tribunal turns now to assess the compensation to be awarded Applicant for intangible injury: (a) consequent to the Fund's failure to afford Applicant a right to be heard in relation to the accusations raised against him and to take the reassignment decision in accordance with fair and reasonable procedures; and (b) to correct the effects of the Fund's abuse of its discretionary authority in taking the FY2019 APR decision.

307. The Tribunal has recognized that intangible injury, by its nature, will be difficult to quantify. *"TT"*, para. 209, citing *Ms. "GG" (No. 2)*, para. 446. The Tribunal's approach in such cases is to "identify the injury and assess its nature and severity, giving due weight to factors that may either aggravate or mitigate the degree of harm to the applicant." *Id.* This is because compensation for intangible injury responds not only to a staff member's legitimate expectation that the Fund will adhere to its legal obligations, "but also to the nature of the particular obligation that has been breached." *Id.*, para. 448.

308. As to the reassignment decision, the Tribunal has identified the following procedural failures: (a) Applicant was not afforded a right to be heard in relation to the accusations raised against him by the Driver and the Office Manager; (b) the accusations—given their nature and because Applicant's Department demonstrated that it was unable to address them properly by itself—should have been referred to the appropriate office, and the failure to do so resulted in a flawed review; (c) in light of the close nexus between the reassignment and APR decisions, Applicant's managers should have provided Applicant a written assessment of his performance in advance of the reassignment decision; and (d) in the alternative, Applicant's managers should have provided Applicant with copies of the October 18, 2018 and the February 25, 2019 Memoranda for Files in advance of the reassignment (and APR) decisions. These failures breached Applicant's legitimate expectations that the Fund would not take a performance-based decision to reassign a staff member from an overseas post to HQ in the absence of a fair opportunity for the staff member to answer accusations against him and in advance of receiving either a written assessment of his performance or copies of documents (in this case, the Memoranda for Files) that were used by the Fund to support its reassignment decision.

309. As to the "Not Rated" FY2019 APR decision, it was marked by some of the same procedural failures as the reassignment decision. In addition: (a) Applicant was not provided adequate feedback regarding certain identified performance shortcomings or an opportunity to remedy those shortcomings; and (b) the APR was not based on a balanced assessment of Applicant's performance because, notwithstanding the inclusion of both positive and negative input in the APR, (i) the APR did not reflect that performance feedback from relevant staff was taken into consideration or sought; (ii) certain criticisms of Applicant's performance were unsupported; and (iii) the APR did not take into account factors that reasonably could have had an impact on Applicant's performance. These failures breached Applicant's legitimate expectation that the Fund would assess performance in a fair and balanced manner.

310. In awarding compensation for intangible injury, the Tribunal considers that an aggravating factor was that the procedural failures that marked the reassignment decision were then

compounded by grading Applicant "Not Rated" in the FY2019 APR decision. The latter decision had the potential for longer-term consequences in relation to Applicant's career advancement and salary level. A mitigating factor in this case is Applicant's continued employment with the Fund, where he has remained in good standing since his reassignment.

311. For the intangible injury consequent to the procedural failures in taking the reassignment decision, and to correct the effects of the Fund's abuse of discretion in taking the FY2019 APR decision, the Tribunal awards Applicant compensation in the sum of nine (9) months' net salary as at the time of the reassignment decision.

B. Legal fees and costs

312. As part of the Tribunal's remedial authority, Article XIV, Section 4, of the Tribunal's Statute provides for awards of legal fees and costs as follows:

> If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

313. In accordance with Rule IX(5) of the Tribunal's Rules of Procedure, Applicant submitted with his Reply of April 18, 2022 documentation supporting his fee request. That request is considered together with Applicant's October 7, 2022 Updated Application for Costs, and his September 22, 2023 Supplemental Fee Application, filed following the oral proceedings in the case. The Fund set out its views in its September 28, 2023 Response on Applicant's Supplemental Request for Costs ("Response").

314. In total, Applicant seeks legal fees and costs in the amount of $172,775. Of this sum, the invoices indicate that $160,462.50 represents fees billed for representation before the Grievance Committee that were unreimbursed. The remaining $12,312.50 in legal fees were billed for Applicant's representation before the Tribunal. Applicant further claimed the amount of $483 in parking fees incurred in connection with his Grievance.

315. In its Response, the Fund, among other arguments, takes the position that the statutory basis for the Tribunal to award attorneys' fees requires that an applicant show either proof of payment or of liability to make such payment, in the form of the fee agreement between the applicant and counsel. The Fund asserts: "At this time, Applicant has failed to provide sufficient evidence to establish fees were actually incurred," and the "invoices submitted are incomplete and inadequate for the Fund's review and the Tribunal's consideration."

316. It has not been the Tribunal's practice, in awarding legal fees and costs pursuant to Article XIV, Section 4, to probe whether an applicant has already made payment for legal representation or what contractual obligations the applicant may have for doing so. Furthermore, in awarding legal fees, the Tribunal has consistently "recognized that the overriding purpose of the statutory

provision at issue is to 'provide for cost-shifting in favor of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members.'" *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2006-6),* IMFAT Order No. 2007-1 (January 24, 2007), quoting *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 138.

317. In the view of the Tribunal, it would undermine this fundamental purpose of Article XIV, Section 4, of its Statute, which is to "increase[e] access to the Tribunal for aggrieved staff members," *Mr. "V"*, para. 138, if it were to require an applicant—absent unusual circumstances—to prove that payment had been made or to establish details of his or her contractual relationship with counsel. The Tribunal has recently emphasized, however, that all fee awards must be "reasonable." *"VV" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2023-4 (December 22, 2023), para. 110.

318. Turning to the issue of the amount of fees and costs to be awarded under Article XIV, Section 4, the Tribunal is guided by the criteria set out in that provision and by the following principles developed in its jurisprudence: "compensable fees and costs include those incurred for representation in the channels of administrative review [including the Grievance Committee] that must be exhausted before the filing of an application with the Tribunal"; "a 'measure of proportionality' will apply, based on the degree to which an applicant is successful in the context of [their] total claims"; and "in determining compensable costs, there is 'no legal relationship between the amount of compensation awarded to Applicant and the costs of legal representation,'" *"TT"*, para. 218, citing *Ms. "NN", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2017-2 (December 11, 2017), para. 154; *Ms. "C", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1)*, IMFAT Order No. 1997-1 (December 22, 1997).

319. Where, as here, an applicant prevails only in part on an application, the Tribunal will apply a principle of proportionality. The Tribunal will weigh the "relative centrality and complexity" of the various claims and their ultimate disposition by the Tribunal. The Tribunal may also consider the role of the record assembled by counsel and relied on by the Tribunal in its decision-making process. *"VV" (No. 2)*, para. 110; *Mr. "F", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2005-1),* IMFAT Order No. 2005-1 (April 18, 2005).

320. In the instant case, Applicant has prevailed on one of his two principal claims, that the Fund abused its discretion in grading him as "Not Rated" in his FY2019 APR. Although Applicant has not prevailed on his second principal claim, that the Fund abused its discretion in reassigning him from his Res Rep position to a position at HQ, the Tribunal has nonetheless concluded that the reassignment decision was marked by procedural failures. The Tribunal has not sustained Applicant's claims regarding the pre-appointment process or the administrative review and Grievance Committee processes.

321. Applying the principle of proportionality, the Tribunal awards Applicant $8,000 in legal fees and costs associated with his representation before the Tribunal. This decision takes into

account the large number of documents (in excess of 10,000 pages) submitted by Applicant, many of which were either not relevant to the Tribunal's consideration of the case or were related to claims that have not been sustained by the Tribunal. *See "VV" (No. 2)*, para. 112 (identifying a further "principle guiding the assessment of 'reasonable costs' [as] the necessity of the legal work associated with the expenses, namely, whether the material submitted was relevant to the issues before the Tribunal and responsive to the Tribunal's requests or whether it was unnecessarily duplicative."). Additionally, the Tribunal awards Applicant $90,000 in legal fees and costs related to his Grievance before the Grievance Committee, where he raised the same claims on which he has prevailed or partially prevailed before the Tribunal. In this regard, it is settled jurisprudence that this Tribunal may award attorneys' fees and costs for representation in proceedings antecedent to the Tribunal's review. *Ms. "NN",* para. 155.

322. Having considered the representations of the parties and the criteria set out in Article XIV, Section 4, of the Statute, the Tribunal concludes that Applicant shall be awarded $98,000 in legal fees and costs, a sum which includes the unreimbursed fees and costs incurred in the Grievance Committee proceedings.

DECISION

FOR THESE REASONS

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

1. "WW" has not prevailed on his claim that the Fund abused its discretion in reassigning him from his Res Rep position to a position at HQ. Accordingly, that decision is sustained.

2. "WW" has prevailed on his claim that the Fund abused its discretion in grading him as "Not Rated" in his FY2019 APR. Accordingly, that decision is rescinded, and "WW"'s FY2019 APR shall be expunged from his personnel record.

3. The additional complaints of "WW", relating to the pre-appointment process and the administrative review and Grievance Committee processes, are not sustained.

4. "WW" shall be awarded compensation in the amount of nine (9) months' net salary as at the time of the reassignment decision for intangible injury: (a) consequent to the Fund's failure to afford Applicant a right to be heard in relation to the accusations raised against him and to take the reassignment decision in accordance with fair and reasonable procedures; and (b) to correct the effects of the Fund's abuse of its discretionary authority in taking the FY2019 APR decision.

5. All other claims for relief are denied.

6. The Fund shall also pay "WW" $98,000, for legal fees and costs incurred by "WW" in this case, a sum which includes the unreimbursed fees and costs incurred in the Grievance Committee proceedings.

Nassib G. Ziadé, President

Deborah Thomas-Felix, Judge

Maria Vicien Milburn, Judge

/s/

Nassib G. Ziadé, President

/s/

Celia Goldman, Registrar

Washington, D.C.
February 12, 2024