

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2021-2

Mr. “RR”, Applicant v. International Monetary Fund, Respondent

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INTRODUCTION

1. On May 4 and 5, 2021, the Administrative Tribunal of the International Monetary Fund, composed for this case, pursuant to Article VII, Section 4 of the Tribunal’s Statute, of Judge Catherine M. O’Regan, President, and Judges Andrés Rigo Sureda and Deborah Thomas-Felix, met to adjudge the Application brought against the International Monetary Fund by Mr. “RR”, a former fixed-term staff member of the Fund. Applicant was represented by Mr. Peter C. Hansen and Mr. J. Michael King, Law Offices of Peter C. Hansen, LLC. Respondent was represented on the written pleadings by Ms. Diana Benoit, Senior Counsel in the IMF Legal Department. Ms. Juliet Johnson, Senior Counsel in the IMF Legal Department, appeared on behalf of Respondent in the oral proceedings.

2. In light of the COVID-19 pandemic, consequent restrictions on travel, and the Fund’s work-from-home directive, the Tribunal decided to hold its session by electronic means, in accordance with amended Article XI of the Statute, which provides:

The Tribunal shall ordinarily hold its sessions at the Fund’s headquarters. The Tribunal may decide to hold a session at another location or by electronic means, taking into account the need for fairness and efficiency in the conduct of proceedings. The Tribunal shall fix the dates of its sessions in accordance with its Rules of Procedure.

The session, including the oral arguments of the parties (see below), was held by videoconference coordinated by the Tribunal’s Registry.

3. Applicant challenges the decision not to convert his fixed-term appointment to an open-ended appointment, and the subsequent decision not to select him for a vacancy for a similar position at a lower grade level, for which he applied. Applicant contends that the non-conversion decision was arbitrary and capricious and not substantiated under the criteria applicable to such decisions. That decision, which was taken by the Fund’s Deputy Managing Director/Chief Administrative Officer (DMD/CAO), was contrary to the advice rendered by the Fund’s Review Committee (RC), which had endorsed the recommendation of Applicant’s Department that his appointment be converted.

4. In challenging the non-conversion decision, Applicant also asserts that the Fund failed to provide him a fair opportunity to demonstrate suitability for career employment, including adequate warning of perceived performance deficiencies and reasonable opportunity to remedy

them. Officials of the Human Resources Department (HRD), submits Applicant, also played an improper role vis-à-vis his managers in the preparation of Applicant's periodic performance assessments and in the Department's memorandum in support of his conversion. Applicant additionally alleges that the Fund failed to give him timely notice of the non-conversion decision or to provide him with the decision in writing. As to the subsequent decision not to select Applicant for a vacancy for a similar position at a lower grade level, for which he applied, Applicant contends that decision was improperly influenced by the non-conversion decision and that HRD officials wrongfully precluded his selection on that basis.

5. Applicant seeks as relief: (a) rescission of the Fund's decisions to deny Applicant conversion of his fixed-term appointment and further employment at the Fund; (b) reinstatement to the position Applicant had occupied on a fixed-term appointment, converted to open-ended status, along with back pay and benefits from the time of termination until return to Fund service, or 5 years of compensation in view of "extraordinary career damage," unemployment, and reduced pension; (c) an additional 3 years' salary for "actual, moral and intangible damages" to compensate for mental and emotional harm, loss of professional reputation and employment prospects, and additional harms suffered as a "result of the Fund's many and grave violations of [Applicant's] rights and due process"; and (d) all attorneys' fees and costs incurred in the case, including those in the Grievance Committee proceedings that have not been fully reimbursed. In his Reply, Applicant additionally seeks a separate award of moral and intangible damages for retaliation, in connection with Respondent's invocation in its Answer of an anonymously captioned decision of another international administrative tribunal for purposes of impeaching his credibility in the IMFAT proceedings.

6. Respondent, for its part, maintains that Fund Management properly exercised its prerogative to decide not to convert Applicant's fixed-term appointment to an open-ended appointment, after his Department recommended in favor of Applicant's conversion and the RC endorsed that recommendation. Respondent submits that Management's decision was based on proper criteria, proper procedure, and a full review of the record. Respondent maintains that Applicant was provided assignments that afforded him a fair opportunity to demonstrate "career potential" with the Fund and that he was given early and unambiguous feedback on gaps in key competencies that would figure in the determination that he lacked the requisite "career potential" for conversion to open-ended status. Respondent denies that officials of HRD played an improper role in the assessment of Applicant's performance or in the preparation of his Department's recommendation in favor of conversion. The delay of some 2-1/2 months after the 30-month mark in taking the non-conversion decision did not amount to a failure of fair process, says Respondent, as that delay was designed to enhance Applicant's chances of conversion and Applicant was compensated for the lost portion of the notice period.

7. As to Applicant's non-selection to the lower-graded position to which he applied, Respondent maintains that decision was based on proper considerations. HRD officials gave policy advice, submits Respondent, but did not improperly intervene in the non-selection decision.

PROCEDURE

8. On October 21, 2019, Applicant filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on October 23, 2019. On October 31, 2019, pursuant to Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

9. On December 9, 2019, Respondent filed its Answer to the Application. On January 13, 2020, Applicant submitted his Reply. The Fund's Rejoinder was filed on February 13, 2020.

A. Applicant's requests for production of documents

10. Pursuant to Rule XVII of the Tribunal's Rules of Procedure, in his Application, Applicant made the following requests for production of documents:

1. "[A]ll internal and non-privileged documents and correspondence not produced to date, and materially relating to events or arrangements referenced above";
2. "[T]he draft of the . . . Report actually submitted to departments for review"; and
3. "[T]he memorandum sent to SPMs [Senior Personnel Managers] or other officials regarding the . . . issue, and demanded by [a Department Director]."

11. The Fund responded to these Requests as follows. As to Request No. 1, the Fund stated that all documents responsive to the request had already been produced to Applicant during the Grievance Committee process and are before the Tribunal as Annexes to the Application. As to Request No. 2, the Fund attached to the Answer two versions of the draft Report that had been circulated by Applicant's work unit. As to Request No. 3, the Fund attached to the Answer a memorandum from the head of Applicant's unit to the SPM Group.

12. 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. *See Mr. "OO", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-2 (December 17, 2019), para. 28. The same principle supports denying Applicant's requests for production of documents in the instant case. The Fund has either produced responsive documents with its Answer or has stated that such documents have already been produced and Applicant has not disputed these assertions in his further pleading.

13. Accordingly, on March 12, 2021, having considered the views of the parties and the record of the case, the Tribunal notified the parties that it had denied Applicant's requests for production of documents.

B. Applicant's request for anonymity

14. Pursuant to Rule XXII of the Tribunal's Rules of Procedure, Applicant requested anonymity on the ground that he has "... already suffered severe career damage from his non-conversion and termination from the Fund, and is challenging decisions relating to performance assessments, which is an accepted basis for receiving anonymity in this forum." The Fund did not oppose the request. Although not accepting Applicant's assertion of potential career damage as a basis for granting anonymity, the Fund stated that key evidence in the case relates to the assessment of Applicant's performance and, on that basis, submitted that Tribunal precedent supports anonymity in the case.

15. Beginning with its Judgment in *Mr. "HH", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-4 (October 9, 2013), the Tribunal has granted anonymity to applicants in order to protect candor in the performance assessment process. In *Mr. "HH"*, para. 43, in which the applicant challenged the performance-based decision not to convert his fixed-term appointment to an open-ended appointment, the Tribunal observed that because "key evidence in this case relates to the assessment of performance, it is not possible to protect the confidentiality of the performance review process without concealing Applicant's identity." Likewise, in *Mr. "OO"*, para. 17, in which the applicant challenged a non-conversion decision that had been based on alleged failure to demonstrate "career potential," the Tribunal concluded: "Given that the assessment of Applicant's 'career potential' is based on the material in the fixed-term monitoring/annual performance review documentation and that the Tribunal has previously afforded applicants anonymity in cases in which the core of the evidence involves assessment of job performance, the Tribunal considered it would be appropriate to grant Applicant's request for anonymity."

16. The same principle has been extended to other circumstances in which an applicant's professional competencies are at issue. See *Mr. "QQ", Applicant v. International Monetary Fund, Respondent (Motion to Dismiss in Part)*, IMFAT Judgment No. 2020-1 (November 2, 2020), para. 12 (challenge to non-promotion decision, where Fund's argument in favor of sustaining the decision "relies on managers' comparative assessments of Applicant's suitability for career advancement vis-à-vis that of other staff members, assessments that will necessarily draw upon views about meeting professional competencies"); *Ms. "NN", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2017-2 (December 11, 2017), para. 29 (managers' perception of applicant's performance was key factual element underpinning issues of the case where applicant challenged failure to afford a pre-screening interview for vacancy to which she applied).

17. In the instant case, the decisions Applicant challenges, that is, the non-conversion of his fixed-term appointment and his non-selection for another position, relate to the Fund's assessment of his professional competencies. Furthermore, the Fund asserts that "key evidence" in the case concerns the assessment of job performance.

18. In light of the Tribunal's jurisprudence and the issues and evidence of the case, the Tribunal decided to grant Applicant's request for anonymity. The parties were so notified on March 12, 2021.

C. Applicant's request for oral proceedings

19. 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 Rules of Procedure provides that such proceedings shall be held "... if ... the Tribunal deems such proceedings useful."

20. In this case, Applicant requested oral proceedings limited to oral arguments by the parties' counsel. *See* 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."). The Fund, for its part, responded that it "... defers to the Tribunal's determination of whether such proceedings would be useful."

21. The Tribunal's recent practice has been to hold oral proceedings where they have been expressly requested by applicants, limiting such proceedings to the oral arguments of counsel. The Tribunal has recognized the benefit of such proceedings, even when the evidentiary record is complete, for the purposes of clarifying legal issues and providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record. *Ms. "PP", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-1 (May 20, 2021), para. 25; *Mr. "LL", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-1 (April 5, 2019), para. 27; *Ms. "NN", para. 23*; *Mr. "KK", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-2 (September 21, 2016), paras. 43-44.

22. On March 12, 2021, the Tribunal notified the parties that it had granted Applicant's request for oral proceedings limited to the oral arguments of parties' counsel. The Tribunal also decided that the oral proceedings would be "held in private," per Article XII of the Statute and Rule XIII, para. 1, in light of its decision that Applicant would not be referred to by name in the Tribunal's Judgment.¹ *See Ms. "PP", para. 26*; *Mr. "LL", para. 28*; *Ms. "NN", para. 22*; *Mr. "KK", para. 43*.

23. Oral proceedings in the case were held by videoconference on May 4, 2021, in accordance with Article XI of the Tribunal's Statute, which allows for the holding of Tribunal sessions by electronic means.

FACTUAL BACKGROUND

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

A. Overview

25. In March 2015, Applicant was hired by the Fund on a three-year fixed-term appointment at Grade A15 in one of the Fund's offices (the "Office"). The Fund provided Applicant with the

¹*See supra* Applicant's request for a nonymity.

governing Guidelines on Conversion of Fixed-Term Appointments (2006)² when it offered him the post. Applicant was recruited to the position by Office Director 1, who continued in that role until October 2016. An acting head of Office was then appointed for several months until the arrival of Office Director 2 in February 2017. In October 2017, Applicant's Department recommended the conversion of his fixed-term appointment to an open-ended appointment. In November 2017, the RC endorsed that recommendation following a due diligence review and committee deliberations. In December 2017, however, the DMD/CAO decided not to follow these recommendations and decided instead that Applicant's fixed-term appointment would not be converted. Applicant's three-year fixed-term appointment concluded in March 2018, and he separated from the Fund. Before leaving the Fund, Applicant applied for a vacancy for a position similar to the one he had been occupying but at a lower grade level. Following his separation, Applicant was notified of his non-selection for that vacancy.

B. Assessment of Applicant's performance

26. As a fixed-term appointee, Applicant's performance was to be monitored at six-month intervals, to culminate in a decision at the 30-month mark as to whether the appointment would be converted to an open-ended appointment or allowed to lapse. A key dispute between the parties is whether Applicant's performance assessments afforded him the requisite timely feedback of perceived shortcomings that he would need to remedy in order to support a decision to convert his appointment to open-ended status.

27. Office Director 1 prepared Applicant's FY2016 APR (May 1, 2015 – April 30, 2016). Applicant's performance was rated as "Effective." The narrative overall assessment in the APR read, in part, as follows: "Transitional challenges of the learning curve and the expectations that come with a senior position, have been largely overcome including through enhanced planning and brainstorming on expected deliverables. . . . [Applicant] has also established good working relationships with his counterparts across different support departments." In identifying areas for development, the APR stated that Applicant "needs to continue to expand his knowledge of the Fund's processes and operations and to adapt quickly and innovatively to the realities of the Fund. . . ."

28. According to Applicant, the FY2016 APR left him "feeling very positive about his progress and trajectory at the Fund." In his testimony to the Grievance Committee, Office Director 1 could not recollect well what had been discussed in the performance discussion that he would have had with Applicant relating to the FY2016 APR and that in testifying he was "just borrowing from the write-up." He testified that he thought the message "would have been . . . we have made progress," and that he assumed what he would have conveyed would have been that initial tensions with colleagues had been successfully addressed because of Applicant's strong interpersonal abilities, but that "there was still work to do" in other areas where "we were running behind."

² See *infra* RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW.

29. Office Director 1, before departing his post in October 2016, met with the Personnel Manager (PM) assigned to the Office and the HRD Deputy Director (HRD DD) to whom the PM reported. In that meeting, Office Director 1 conveyed concerns as to whether Applicant was demonstrating performance consistent with A15 responsibilities and doubts about Applicant's long-term suitability for a career with the Fund. According to HRD officials, Office Director 1 considered that Applicant's performance revealed "gaps relative to expectations at A15 grade (including strategic and analytical leadership)." Applicant maintains that any such misgivings on the part of Office Director 1 were not communicated to him.

30. Applicant's mid-year review meeting at the end of 2016 was conducted by the acting head of Office. Applicant summarized the discussion in an email in which he recorded that the discussion had focused on areas for development including the need for him to expand his knowledge of the Fund. Following this mid-year review, Applicant arranged a meeting with the PM so that he could better understand how the Fund's leadership competency framework applied to him and how he would be assessed for conversion.

31. Office Director 2 prepared Applicant's FY2017 APR (May 1, 2016 – April 30, 2017). Applicant's performance was again rated "Effective." In the overall comments section of the narrative report, Applicant was said to have "made some progress in addressing the feedback provided in previous mid-year and annual performance discussions aimed at better reaching the standards and key competencies expected for positions at grade A15." It also stated: "While his contributions are appreciated, [Applicant's] performance partially met the standards and key competencies expected for positions at Grade A15, as indicated by the Fund Leadership Competencies Framework. . . . [Applicant's] ability to demonstrate these competencies will be a key element of the assessment of his suitability for long-term employment with the Fund, in accordance with the criteria for conversion to open ended status."

32. Applicant asserts that the FY2017 APR was the "first time that he had received any indication that the Fund had serious concerns about his work, or that his conversion might be in jeopardy."

33. The process whereby Applicant's FY2017 APR was prepared is set out in the record. Office Director 2, who had joined the Office in mid-February 2017, asked the manager who had served as acting head of the Office between August 2016 and February 2017 (and who had conducted the mid-year review in 2016) to prepare the first draft of Applicant's APR. The first draft of the APR was in broadly positive terms, noting that Applicant "continued to make progress, building on the feedback of last year," that he had "effectively supervised two colleagues, showing initiative, good planning skills, and potential in people management" and that he was "extremely collegial and easy to work with." It did note that Applicant would benefit from "further developments in the area of intellectual leadership and strategic planning . . . and taking initiative on initiating and steering innovation and strategic change in his areas of expertise." Office Director 2, however, revised the draft stating that the APR needed to reflect that there were areas of Applicant's performance that were not satisfactory. The draft was then sent to the PM and the HRD DD.

34. On May 15, 2017, Office Director 2 held a meeting with the former acting head of the Office, Office Director 1 and the PM. The discussion included consideration of possible options that might allow the continued employment of Applicant with the Office, in the event that his fixed-term appointment were not converted, including the possibility of extending his fixed-term appointment or creating a lower-graded vacancy to which Applicant could apply. HRD advised that these alternatives were unlikely to be available. A subsequent email exchange between Office Director 2 and the PM confirmed this.

35. Following the meeting, there was an ongoing exchange of emails between Office Director 2, the PM and the HRD DD regarding the final text of FY 2017. In that exchange, there was some disagreement between Office Director 2, on the one hand, and the PM and HRD DD on the other in relation to the language. Notably, the PM and HRD DD wished to include the word “only” in the following sentence: “Applicant’s performance *only* partially met the standards and key competencies . . .,” while Office Director 2 wanted it deleted, as he thought it was “inflammatory.” The word “only” did not appear in the final version of the APR.

36. In the performance discussion on June 23, 2017, Applicant expressed his concern that the short time remaining before his conversion decision in September would not provide enough opportunities to demonstrate sufficient progress against the A15 competencies being flagged. In his testimony before the Grievance Committee, Office Director 2 stated that he assured Applicant that there would be an opportunity to demonstrate his progress, particularly because Applicant was about to undertake a major task, which would enable him to show the necessary competencies. It was agreed that the conversion decision would be delayed beyond the 30-month mark so that Applicant’s work on the major task could be taken into account.

C. Non-conversion of Applicant’s fixed-term appointment

37. For fixed-term staff members such as Applicant who have been appointed at Grades A15-B2, a decision in favor of conversion to an open-ended appointment is to be taken by Fund Management, following a recommendation of conversion made by the appointee’s department and endorsed by a Fund committee comprising senior Fund officials, the Review Committee (the RC). (Intranet Note: “Review Committee.”)³ This process, as applied in Applicant’s case, is outlined below.

(1) Department’s recommendation for conversion (October 2017)

38. On October 20, 2017, the PM assigned to Applicant’s Department submitted to the RC a Recommendation for Conversion Memorandum and supporting documentation.

39. The Department’s Memorandum recommended the conversion of Applicant’s appointment, noting the following: Applicant “initially needed time to become familiar with Fund processes and culture”; there were “complexities [to] his role”; and “at the same time . . .

³ See *infra* RELEVANT PROVISIONS OF THE FUND’S INTERNAL LAW.

the conceptual framework for [the mission of the Office] was still being established.” Applicant was said to have “grown into the role well and is now performing his duties at an appropriate level and fulfilling an important institutional business need.” The Memorandum concluded: “Based on his skills and experience, [Applicant] has demonstrated the potential for a longer-term career in the Fund within his specialized set of competencies. He could make potential contributions outside [the Office] in other areas [of the Fund].”

40. In his testimony to the Grievance Committee, Office Director 2 stated that he supported Applicant’s conversion to an open-ended appointment. In regard to Applicant’s performance on the major task that he had undertaken between August and October 2017, Office Director 2 stated: “I felt that the competencies were met. I felt that the tasks that were assigned to [Applicant] were quite challenging. . . . I mean, he delivered a good product. There was a lot of interaction with other departments, even contentious interaction, but it was managed professionally. . . . The feedback from the staff that [Applicant] supervised was very positive. They continued to respect him and they felt he provided good leadership. . . . So I felt that all those demonstrated competencies that . . . matched what my expectations would be for an A15 based on the leadership competency framework in the Fund.”

(2) Review Committee endorsement of Department’s recommendation for conversion (November 2017)

41. The RC advises the Managing Director on all managerial appointments, fixed-term conversions and promotions at Grades A15 – B2, as well as certain positions at Grade A14. It is a Fund-wide body chaired by the HRD Director and comprises ten top-level (Grade B4) managers appointed by the Managing Director for three-year terms, who serve in their individual capacities. (Intranet note “Review Committee.”)

42. The RC assesses candidates for conversion on three criteria: whether candidates meet the Fund’s performance requirements, whether they have demonstrated potential for a career at the Fund, and whether their appointment meets the Fund’s staffing requirements. (GAO No. 3, Rev. 7, Section 3.02.1.3.)

43. In reviewing Applicant’s case, the RC undertook a process that included a due diligence review by one of the RC members (“the RC reviewer”). The RC reviewer testified that he interviewed some 12-14 people, including Applicant, in undertaking that review. In accordance with the RC’s procedures, findings of the due diligence review were memorialized in the “Independent Assessment Form” (IAF) of November 15, 2017.

44. With regard to performance and potential, the IAF recorded:

The candidate’s performance track record, as evidenced in the APRs, is not very strong, with the last APR raising significant shortcomings vis-à-vis the A15 competencies. The [Department’s] submission explains that as part of the last APR . . . , clear performance expectations were established that would demonstrate the A15 competencies. It also asserts that [Applicant] “fulfilled”

these expectations. This said, the track record for having demonstrated these expectations is very short (some 4 months), and there is a question if one can firmly come to this conclusion within such a short period. Senior managers . . . were cognizant of these performance issues and the short track record, and would have preferred a longer trial period (which is not feasible under the old term contract). On balance, they were of the view that [Applicant] warranted conversion and would be fungible. Stakeholders outside the [Office] were generally (but not universally) very positive on both [Applicant]'s strengths and also on his fungibility. . . . Due diligence covered [another department] ("brilliant, breath of fresh air, very collegial"), [another department] ("knowledgeable, innovative, would take him in [to this department]"), another department ("most knowledgeable . . . in [his Department], very professional, good strategic sense") HRD ("fabulous job in his role, fungible . . .") Dissenting voice related to his role on a cross-departmental working group . . . , with a working group member noting that he was initially not very collaborative and did not seem to be integrated well into the Fund's culture, also considering his grade level—but also noting that these issues were largely overcome over time.

45. The IAF also recorded that: "Longer-term suitability is asserted in the write up, but the case is not very well substantiated. Feedback from other departments more positive in this regard, including with respect to fungibility." In response to the question, has the staff member demonstrated flexibility, interests and motivation to take on different roles, the RC reviewer responded: "No firm evidence, as he worked so far only in one role in [the Office]. This said, he responded well when given different tasks and called upon to take on more responsibility. Furthermore, after a difficult start, it seems that he has integrated quite well into the Fund's culture and work arrangements." To the final question: "Given what you know of this person's performance and potential, would you always want him or her on your team?", the IAF read: "For work assignments that require his area of expertise . . . , he would be a good candidate; would need more testing on complex managerial assignments before assigning him to those."

46. The RC reviewer recommended conversion of Applicant's fixed-term appointment. In his testimony before the Grievance Committee, the reviewer recalled that he had found the case "a difficult call" and that he "saw the arguments on both sides." He explained his recommendation as follows: ". . . among the factors that sort of tilted the balance for me . . . was that his own group felt he had sufficiently grown. They also – they wished they could test him over a longer period. That was evident. But that was not possible under our rules. But so in that judgment area, his own group . . . were supportive of conversion. And secondly . . . several of the other departments were also very appreciative of [Applicant]'s contributions and his strengths."

47. The RC reviewer presented his report to the RC when it met. During his testimony in the Grievance proceedings, the reviewer recalled that the discussion at the RC "was . . . relatively

brief” and that there was “agreement on the outcome, including on seeing this as a sort of finely balanced case . . . but there was no . . . dissenting voice”

48. On November 29, 2017, the RC’s decision endorsing the Department’s recommendation for conversion of Applicant’s fixed-term appointment—together with its endorsements of seven candidates for other types of appointments in various Fund departments—was transmitted to the DMD/CAO, “seek[ing] [her] approval.” That transmittal included the Department’s recommendation packet and the IAF prepared by the RC.

(3) Non-conversion decision taken by Deputy Managing Director/Chief Administrative Officer (DMD/CAO) (December 2017)

49. As mentioned above, the RC advises the Managing Director on, amongst other things, fixed-term conversions at Grades A15 – B2. It is clear on the record that Applicant’s case is an exception to the usual process. During the course of the Grievance Committee proceedings in this case, the Fund entered a stipulation which made clear that Applicant is the only person among 39 staff members recommended for conversion by their departments and the Review Committee since 2000, whose conversion was not approved by Fund Management. The full text of the stipulation reads as follows:

The Fund has reviewed its records and identified 47 individuals who were hired at Grade A15 on three-year fixed-term contracts from 2000 to the present. Of these, 8 of the 47 separated from the Fund prior to the 30-month conversion decision. Among the remaining 39, all of them were recommended for conversion by their Departments, and that recommendation was endorsed by the Review Committee to Management. [Applicant] is the only individual among those 39, who was recommended by his Department and the Review Committee for conversion, but the recommendation was not accepted by Management.

50. Fund law does not set out how the Managing Director or her delegate should exercise the discretion once the report of the RC is received. In her Grievance Committee testimony, the DMD/CAO explained that the RC gives “an institutional view to the promotions and to the conversions to open-ended contracts, . . . in a very reasoned way.” The DMD/CAO also stated that she was not “a rubber stamper” and explained that when she receives files from the RC, which she does six to eight times per year, she reads the files to decide whether “to say yes or no.”

51. When the DMD/CAO received the packet of materials relating to Applicant, she read through them and marked them as she went. After her review, her Office sent a memorandum to the RC stating: “[The DMD/CAO] has cleared the attached memo, with the exception of [Applicant’s] open-ended conversion . . . as it is unclear whether there will be an ongoing business need for the candidate’s role in the Fund in view of the candidate’s profile, skills and career experience.”

52. In a follow-up communication, the Secretary of the RC stated:

We need to make sure that [the DMD/CAO]'s decision be communicated clearly to the RC, [Applicant's Office], and the staff and, the decision-making process is legally water-tight. In consulting with [Legal Department], their advice [PORTION REDACTED] . . .

Can you help us to clarify with [the DMD/CAO] how she applied the criteria? We suspect she isn't questioning that [Applicant's Office] has ongoing business needs for [Applicant's] position (criteria #3). Rather, she arrived [at] a different judgement on the incumbent's performance and potential (criteria #2 and #3) based on the material submitted by the RC. In any case, we can help craft the email once we are clear on her rationales.

53. A few days later, the Secretary of the RC again contacted DMD/CAO staff:

I am seeking [the HRD Director]'s advice . . . on whether it is necessary for [the DMD/CAO] to speak to the RC (or the due diligence member as the rep) – not to question her decision but to ensure a more deliberate decision-making process. Since [the DMD/CAO] arrived at a different conclusion based on the same material provided to the RC, [the Legal Department] advised that [PORTION REDACTED]

54. The HRD Director then organized a meeting that was attended by the DMD/CAO, HRD Director, HRD DD (who was not a member of the RC), Secretary to the RC, and the RC reviewer. According to the RC reviewer, at that meeting he was asked again to present the key findings of his due diligence report that recommended the conversion. He testified that he presented them just as he had presented them to the RC. The RC reviewer also testified that it became clear to him during the course of the meeting that the DMD/CAO took a different view and was likely not to approve the conversion.

55. Ultimately, the DMD/CAO's rationale for the non-conversion decision was captured in the following language, which was delivered by email from DMD/CAO staff to the HRD Director and the RC: "[G]iven the position's seniority in the [Office], the candidate has not sufficiently demonstrated his leadership potential in driving innovation and guiding strategic changes." This reason was different from that originally provided by the DMD/CAO.

56. In her testimony before the Grievance Committee, the DMD/CAO explained that she did not think it was possible that Applicant, whose FY2017 APR of July 2017 had questioned whether he had demonstrated key Grade A15 competencies, could have developed them by October 2017, when the memorandum recommending conversion recorded that he had. The DMD/CAO also noted that the Department would have liked to afford Applicant a longer trial period, but that was not possible within Fund rules. She also noted that Applicant's long-term

suitability at the Fund was not well substantiated and that his APRs were not strong. Finally, she stated that Applicant's expertise was "easy to find in the market." This last comment, which echoed her original annotation on Applicant's file that Applicant's skills were "easy to find" was not a view shared either by Office Director 1 or Office Director 2. The former testified that recruiting for Applicant's position had not been straightforward, and the latter testified that the post Applicant held was "a very complex assignment" and "a very difficult position to fill." The Department's Memorandum recommending conversion stated that Applicant was "fulfilling an important institutional business need."

(4) Communication of non-conversion decision to Applicant

57. Fund Management's decision not to convert Applicant's fixed-term appointment was verbally communicated by HRD to Office Director 2 who, in turn, notified Applicant. In its Tribunal pleadings, Respondent states that the "content of [the DMD/CAO]'s December 13 explanation was shared orally with Applicant by HRD and [the RC reviewer]." It is not disputed that Applicant was not provided in writing with the non-conversion decision or its rationale.

(5) Expiration of fixed-term appointment

58. In accordance with the decision not to convert him to an open-ended appointment, Applicant was separated from the Fund at the expiration of his fixed-term appointment in March 2018. Applicant received a lump-sum payment to compensate for the less-than-6-months' notice period.

D. Non-selection of Applicant for lower-graded position to which he applied subsequent to the non-conversion decision

59. Following Fund Management's decision not to convert Applicant's fixed-term appointment to an open-ended appointment, Office Director 2 raised with HRD officials the possibility of advertising a Grade A13/A14 vacancy in the same Office, to cover some of the functions Applicant had been performing but without the same managerial responsibilities. Office Director 2 made clear that he would be interested in considering Applicant for such vacancy. In his testimony before the Grievance Committee, Office Director 2 explained that "we had a business need. So we needed to have someone essentially to do the job that [Applicant] was doing before."

60. The HRD DD testified at the Grievance Committee that HRD would not support the appointment of Applicant to a lower grade post, even though according to Fund rules, he would be eligible to apply for such a position. He told Office Director 2, he said in his testimony, that his position "was very clear on this one, that HRD will not be supportive in this case in light of . . . what has just happened in the context of [Applicant's] fixed[-term] appointment. . . . Given that we've just made the conclusion that he didn't have the potential to go above and beyond, I didn't think it was a reasonable thing for the institution to do in terms of bringing [him] back to the same testing grade that we had just concluded on." The HRD Director testified in a similar manner, saying that although Applicant would be eligible to apply it would be "strange" and "awkward" to appoint him to the vacancy.

61. The vacancy was advertised at Grade A13/14 and Applicant applied. The selection panel comprised Office Director 2, the former acting head of the Office, the PM and another Fund official. Applicant was shortlisted, and was considered to be one of the top candidates by all the members of the selection panel. However, he was not selected. According to an email from Office Director 2 to the HRD DD, “[o]ur decision process was very much guided by HR’s position that you would not be supportive of [Applicant’s] selection.”

62. The Vacancy Selection Recommendation stated as follows: “[Applicant], an internal [Office] candidate, held a similar position in [the Office] previously (and for several years at [another institution]), would have fit the position, and performed very well at the interview. However, his candidature was not considered further based on a recent institutional decision not to convert his Fixed Term Contract into an Open-Ended contract (at A15 level) based on insufficient leadership potential in driving innovation and guiding strategic change.” Applicant contends that HRD officials had effectively excluded him from the competition based on the non-conversion decision.

CHANNELS OF ADMINISTRATIVE REVIEW

63. Given that Fund Management took the non-conversion decision that Applicant contests, he was not required to exhaust any channel of review prior to the filing of his Grievance with the Fund’s Grievance Committee.

64. On May 18, 2018, Applicant filed his Grievance, challenging the decision not to convert his fixed-term appointment to an open-ended appointment. Applicant’s Grievance was later expanded to include his challenge to the non-selection decision. The Grievance Committee considered Applicant’s Grievance in the usual manner, on the basis of oral hearings and the briefs of the parties.

65. The Tribunal has the benefit of the record of the Grievance Committee proceedings, including the testimony of the following witnesses: the DMD/CAO, who took the non-conversion decision on behalf of Fund Management; Office Director 1, who recruited Applicant; the HRD Director, who serves as RC Chair; Office Director 2, who recommended Applicant for conversion; the acting head of the Office between Office Directors 1 and 2; the HRD DD; the RC reviewer; and Applicant.

66. On March 18, 2019, the Grievance Committee issued its Report and Recommendation, concluding that Applicant: (1) did not prevail on his challenge to the non-conversion decision; but (2) did prevail in his challenge to the non-selection decision. As a remedy in relation to the non-selection decision, the Grievance Committee recommended that Applicant be reinstated to a term appointment at the lower-graded position.

67. Following a series of submissions made directly to Fund Management by Applicant and the Fund, each seeking deviations from the Grievance Committee Recommendation, on July 19, 2019, the Acting Managing Director notified Applicant that Fund Management had accepted the Grievance Committee’s recommendations as to the merits of his Grievance. As to the remedy in relation to the non-selection decision, however, Fund Management rejected the Grievance

Committee's recommendation of reinstatement. Instead, the Fund determined that Applicant would be paid monetary compensation in the sum equivalent to eight months' salary, "reflecting a reasonable period within which to secure other employment," calculated at the rate Applicant would have been paid had he been selected for the position. The Fund also reimbursed 50 percent of Applicant's legal fees incurred in the Grievance Committee proceedings. The notification concluded with the following statement: "Neither this award by the Fund, nor your acceptance of it, constitutes a concession by either party with respect to the merits of the case, should you choose to proceed to the Administrative Tribunal."

68. On October 21, 2019, Applicant filed his Application with the Administrative Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment to an open-ended appointment was arbitrary and capricious, and it was not substantiated by the criteria applicable to such decisions. Applicant merited conversion to open-ended status.
2. The Fund mismanaged Applicant's career and failed to provide him with a fair opportunity to demonstrate suitability for career employment during his fixed term, including adequate warning of perceived performance deficiencies and reasonable opportunity to remedy them that are integral to a sustainable non-conversion decision.
3. HRD officials played an improper role vis-à-vis Applicant's managers in the preparation of Applicant's performance assessments and his Department's submission to the RC recommending conversion of his fixed-term appointment. Their actions harmed Applicant's opportunity for conversion.
4. Office Director 1 wrongfully undermined Applicant's conversion prospects.
5. The issue of "career potential" was raised only belatedly by Fund Management as a post hoc justification for the non-conversion decision. Assessment of "career potential" without reference to objective metrics is a ready tool for abuse by arbitrary and capricious managers. Fund officials demonstrated a lack of clarity as to whether "career potential" was to be understood in terms of advancement from the A to B grade levels or in terms of fungibility among various Fund work units.

6. Lack of “business need” was an invalid pretext for the non-conversion decision, which conflated the Fund’s “business needs” with the replaceability of an individual.
7. The DMD/CAO abused her discretion when she imposed her assessment over the deliberative and collective judgment of the RC, a group of senior level managers from across the institution. Their recommendation was entitled to a “presumption of success absent truly extraordinary circumstances” or “severe or systemic error.” Additionally, in failing to follow the RC’s recommendation, the DMD/CAO “violated binding Fund custom.” In the circumstances, the Tribunal must apply an exacting review for abuse of discretion.
8. The Fund violated Applicant’s right to timely notice of the non-conversion decision, which was taken less than six months before the expiration of the fixed-term appointment, and wrongfully denied him extension of the period of his fixed term.
9. The Fund failed to provide Applicant with a written decision stating the reasons for the non-conversion. Failure to disclose the decision in writing was a procedural wrong that constitutes intangible injury.
10. The Fund abused its discretion in not selecting Applicant for the lower-graded vacancy in his Office, to which he applied following the non-conversion of his fixed-term appointment.
11. HRD officials wrongfully determined, on the basis of the non-conversion decision, that Applicant would not be selected for the vacancy and improperly imposed their determination on the selection panel.
12. Respondent’s invocation in its pleadings of an anonymously captioned decision of another international administrative tribunal for purposes of impeaching Applicant’s credibility, was improper, misleading and amounted to “cross-institutional retaliation” in seeking to harm Applicant for having successfully raised a claim of managerial mistreatment in another institution.
13. Applicant seeks as relief:
 - a. rescission of the Fund’s decisions to deny Applicant conversion of his fixed-term appointment and further employment at the Fund;
 - b. reinstatement to the Grade A15 position Applicant had occupied on a fixed-term appointment, converted to open-ended status, along with back pay and benefits from the time of termination until return to Fund service, or 5 years of compensation, in view of “extraordinary career damage,” unemployment, and reduced pension;

- c. an additional 3 years' salary for "actual, moral and intangible damages" to compensate for mental and emotional harm, loss of professional reputation and employment prospects, and additional harms suffered as a "result of the Fund's many and grave violations of [Applicant's] rights and due process"; and
- d. all attorneys' fees and costs incurred in the case, including those in the Grievance Committee proceedings that have not been fully reimbursed.

14. With regard to Respondent's invocation of the anonymously captioned decision of another international administrative tribunal for purposes of impeaching his credibility, Applicant seeks a "new, separate, specific and substantial award of moral and intangible damages for the Fund's retaliation, to compensate for the grave violation of his privacy, his mental health, and his right to bring good-faith (and successful) claims for relief."

B. Respondent's principal contentions

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

1. Fund Management properly exercised its prerogative to decide not to convert Applicant's fixed-term appointment to an open-ended appointment, after his Department recommended in favor of Applicant's conversion and the RC endorsed that recommendation. Management's non-conversion decision was based on proper criteria, proper procedure, and a full review of the record.
2. Fund Management's conclusion that Applicant lacked "career potential" with the Fund provides sufficient basis to sustain the non-conversion decision.
3. The non-conversion decision is equally well supported by "business need," on the ground that the Fund would be able to find necessary expertise in the market if Applicant were not converted.
4. Applicant's managers provided assignments that afforded him a fair opportunity to demonstrate "career potential" with the Fund, in particular, assignments to demonstrate leadership and the ability to drive innovation.
5. Applicant was given early and unambiguous feedback on gaps in the key competencies of leadership and innovation that would figure in the determination that he lacked the requisite "career potential" for conversion of his fixed-term appointment, as well as advice on the importance of these competencies to his conversion prospects and the opportunity to remedy identified shortcomings.
6. HRD officials' role in the assessment of Applicant's performance, and in the preparation of his Department's recommendation in favor of conversion, was

appropriate. Their actions were consistent with the structure by which HR services are delivered in the Fund and with the “heightened HR support and advice [to be given] to managers dealing with difficult cases.”

7. Applicant’s contentions that he was misled during the recruitment process, with regard to job content or prospects for conversion, are not credible.
8. Office Director 1 did not play an improper role in the process leading to the non-conversion of Applicant’s fixed-term appointment.
9. The delay of some 2-1/2 months after the 30-month mark in reaching the non-conversion decision did not amount to a failure of fair process, as the delay was to enhance Applicant’s chances for conversion, and Applicant understood this intention. The Fund paid Applicant monetary compensation for the lost portion of the notice period. Under the rules applicable to fixed-term staff hired, as Applicant was, in March 2015, no extension beyond the 36-month fixed term was permitted.
10. The decision not to select Applicant for the lower-graded position to which he applied following the non-conversion decision was a valid exercise of discretion, based on proper considerations.
11. HRD officials gave policy advice but did not improperly intervene in the non-selection decision.
12. There is nothing improper or retaliatory in Respondent’s invocation, in its confidential pleadings before this Tribunal, of an anonymously captioned decision of another international administrative tribunal for purposes of impeaching Applicant’s credibility on the basis of information made public in that decision.
13. Applicant’s request for full attorneys’ fees for his representation in the Grievance Committee proceedings should be denied on the basis of proportionality, given that he succeeded only partially on his Grievance. The same principle should apply to fees in the Tribunal, if it were to conclude that the Application is well-founded in part.

RELEVANT PROVISIONS OF THE FUND’S INTERNAL LAW

71. For ease of reference, the principal provisions of the Fund’s internal law relevant to the consideration of the issues of the case are set out below.⁴

⁴ The Tribunal’s practice is to reproduce the relevant provisions of the Fund’s internal law that governed the issues of the case. The Fund’s internal law changes over time and the provisions reproduced herein are not necessarily those in force as of the time of this Judgment.

A. GAO No. 3 (Employment of Staff Members), Rev. 7 (May 1, 2003), Section 3

72. GAO No. 3, Rev. 7, Section 3, governed the types of appointments to the staff of the Fund during the period of Applicant's employment. Sections 3.02.1.2 and 3.02.1.3 refer to the conversion of fixed-term appointments to open-ended appointments:

Section 3. Types of Staff Positions and Appointments

. . . .

3.02 Types of Staff Appointments

3.02.1 Open-ended appointments

3.02.1.1 Open-ended appointments are for:

- (i) functions that carry out the mission of the Fund (positions directly involved in consultations and negotiations with member countries and those that perform other key ongoing functions essential to the basic operation of the Fund); and
- (ii) functions that support the mission of the Fund and
 - (a) for which the Fund wishes to build expertise and the skills requirements are not likely to change significantly over several years, or
 - (b) that require institutional knowledge and continuity.

3.02.1.2 Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment. Persons holding fixed-term appointments shall be designated as fixed-term staff members.

3.02.1.3 If fixed-term staff members meet the *performance requirements, demonstrate potential for a career at the Fund, and meet the Fund's staffing requirement*, their

appointment may be converted from fixed-term to open-ended status at the expiration of the fixed-term appointment. Persons holding open-ended appointments shall be designated as regular staff members.

. . . .

(Emphasis added.)

B. Guidelines for Conversion of Fixed-Term Appointments (2006)

73. The Fund's Guidelines for Conversion of Fixed-Term Appointments governed the conversion of fixed-term appointments during the period of Applicant's employment and were provided to him with his offer of fixed-term appointment:

Guidelines for Conversion of Fixed-Term Appointments

It is the Fund's **policy to maintain a strong cadre of its staff on an open-ended basis**, through "regular" staff appointments. Initially, however, new staff are hired on a fixed-term basis for three years.

These guidelines are intended to ensure that staff members on a fixed-term appointment gain an accurate understanding of the meaning of their fixed-term status and a realistic view of their prospects of being converted to a "regular" open-ended appointment upon expiration of their fixed term.¹

Included is an overview of the normal departmental processes for providing fixed-term staff with relevant and timely feedback, and for developing a consistent and reliable basis for making assessments on possible conversions.

1. Intentions and expectations regarding fixed-term staff

The mutual objective during the fixed-term appointment is to enable the staff member to perform at full capacity as quickly as possible, not just to maximize the contribution to the Fund's work but also to provide an opportunity for the staff member to demonstrate potential for the future.

The Fund's legal obligation does **not** go beyond the fixed-term appointment, unless and until a formal written commitment to a conversion to open-ended status has been made by the Fund's Human Resources Department (HRD) in accordance with the procedures outlined below. No supervisor or other Fund official has the authority to commit the Fund outside these procedures.

2. Considerations in the Fund's decision whether to convert to open-ended status

Conversion to open-ended status depends on the following criteria:

- the departmental assessment of the staff member's performance during the fixed-term appointment;
- the individual's long-term potential for a successful career with the Fund; and
- the department's and institution's staffing needs.

There must be a clearly positive assessment of performance and potential for taking the important step of committing the Fund to providing a career opportunity for the individual. However, the short- and long-term staffing needs of the Fund are of paramount importance in this process. The Fund's personnel requirements can change substantially over time. Therefore, staffing requirements at the time of possible conversion may not justify a positive decision that would otherwise have been warranted if the decision was solely made on the grounds of performance and potential.

3. Overview of monitoring and decision-making process

The supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek and accept this assistance from the supervisor(s). The human resources team in the staff member's department and staff in HRD are also available to assist upon request, should the staff member or the supervisor find this necessary.

The monitoring process is as follows.

- Within the first three months, key responsibilities and objectives will be established during a performance planning discussion. This discussion is timed to allow supervisors to establish work assignments and objectives in relation to divisional/departmental workload and goals.
- Six to seven months after the performance planning discussion, a feedback session will take place and the supervisor will provide brief feedback to the individual on performance. This session will include a discussion on actions and objectives

identified in the performance planning discussion and can lead to the inclusion of new or revised objectives.

- During the twelfth month, a detailed performance assessment will be conducted. The following detailed performance assessment will take place in the context of the Fund's annual performance review (APR) cycle that is at least six months after the twelfth month review. Depending on when the staff member joins the Fund, the period between these two detailed performance assessments may be greater than nine months. In this case, the staff member will also have a mid-point performance assessment halfway between the two detailed performance assessments.
- At the thirty-month point (i.e. six months before the end of the fixed-term appointment), there will be another detailed assessment to allow the supervisor and the department to make an informed career employment assessment. Performance will be assessed as either (1) meeting required standards, or (2) not meeting required standards in one or more key areas of responsibility. In addition, the department will assess the staff member's potential for a career in the Fund and whether the individual's skills and experience meets staffing needs. HRD will review the department's assessment in relation to the relevant criteria, as well as broader institutional staffing needs. Based on these assessments, the fixed-term staff member (1) will be offered conversion to an open-ended appointment, or (2) will not be offered a conversion to an open-ended appointment and the fixed-term appointment will be allowed to lapse.

If a conversion is offered, HRD will subsequently issue a change of appointment letter to the staff member. The conversion to an open-ended appointment becomes legally binding once the change of appointment letter has been issued and the open-ended appointment becomes effective at the end of the fixed-term appointment.

Human Resources Department
September 2006

¹ These guidelines do not apply to individuals on secondments, where the clear expectation is that conversion will not be possible, or to categories for which separate rules apply (i.e., Grade B3–B5 staff recruited externally, participants in the Economist Program, Research Assistants participating in the two-year

Research Assistant Program, limited-term appointees, and staff on part-time employment).

(Emphasis in original.)

C. Intranet Note: “Career Employment Decision”

74. The following Fund intranet note describes the process and criteria for taking a decision to convert a fixed-term appointment to an open-ended appointment:

The career employment decision occurs 30 months after the fixed-term hire date and will become effective at the end of the fixed-term appointment (the 36th month). Requests for early conversion decisions will not be endorsed by HRD, except through Limited Term credit, as per the Fiscal Year 2012 revision.

The Career Employment Decision assessment at the 30th month mark includes the staff member's overall performance over the entire fixed-term period. In this assessment, the staff member will also have the opportunity to document key achievements since the last annual performance review and submits it to the manager. The manager and department determine the final career employment decision based on the following criteria having been met:

1. The staff member meets the established performance requirements for the position;
2. The staff member demonstrates potential for a career in the Fund; and
3. The conversion decision is consistent with the Fund's staffing needs.

One of two decisions is possible: conversion from a fixed-term to an open-ended appointment; or allowing the fixed-term appointment to lapse. *The staff member will be informed of this formal decision. Review Committee endorsement is required for all fixed-term staff appointed at Grades A14 (Deputy Divisions Chief) to B2.* Please note that the recommendations for FT conversions needing Review Committee's (RC) endorsement (for Grade A14 Deputy Division Chiefs) to B2) will need to be submitted to HRD at least six weeks prior to the 30 month conversion decision date so that an RC date can be identified. The discussion with the staff member should only be scheduled after the career

employment decision has been endorsed by the RC and approved by HRD. . . .

. . . .

(Emphasis in original.)

D. Intranet note: “Review Committee”

75. The following Fund intranet note describes the role and composition of the Review Committee (RC):

The Review Committee (RC) is responsible for advising the Managing Director on all managerial appointments, fixed-term conversions, and promotions at Grades A15—B2 as well as Deputy Division Chief, Section Chief, Assistant to the Director, and other titled supervisory positions at Grade A14. The RC also considers appointments to Resident Representative and RTAC Coordinator positions.

In addition, the RC has a well-established talent review process for A15 fungible macroeconomists that results in a list (RC or B List). Inclusion in the RC List is a prerequisite for macroeconomists to be considered/appointed to fungible economist positions at Grade B1.

The Committee meets annually to consider candidates proposed for promotion to Grade B2, and as needed to replenish the Review Committee List (RC List). The RC also meets regularly to consider:

- selections to titled supervisory vacancies at Grades A14/A15, such as Section Chief, Deputy Division Chief, and Assistant to the Director vacancies, and B1 vacancies for candidates not on the B List;
- selection to resident representative vacancies; and
- fixed-term/term conversion decisions.

Vacancy selections that result in lateral transfers or selections from the B list do not require further RC endorsement though notification to HRD is still necessary.

Committee Membership

The RC is composed of the Director of HRD, who serves as the Chairperson, and ten members at Grade B4 appointed by the MD for three-year terms. Members of the Committee serve in their individual capacities and not as representatives of their departments. HRD serves as the secretariat to the committee.

....

CONSIDERATION OF THE ISSUES

76. The Application presents the following principal questions for decision by the Administrative Tribunal: (a) Did the Fund abuse its discretion in taking the decision not to convert Applicant's fixed-term appointment to an open-ended appointment? (b) Did the Fund abuse its discretion in taking the decision not to select Applicant for a vacancy for a similar, but lower-graded, position to which he applied following the non-conversion decision? The Tribunal additionally will consider Applicant's allegation that the Fund engaged in impermissible retaliation against him by invoking in its pleadings in this Tribunal an anonymously captioned decision of another international administrative tribunal for purposes of impeaching Applicant's credibility in these proceedings.

A. Did the Fund abuse its discretion in taking the decision not to convert Applicant's fixed-term appointment to an open-ended appointment?

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

77. The non-conversion of a fixed-term appointment to an open-ended appointment is an individual decision taken in the exercise of managerial discretion and is reviewable for abuse of discretion. *Mr. "OO"*, para. 134; *Mr. "HH"*, para. 94. Accordingly, Applicant's challenge will succeed only if he shows that the decision was "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures." Commentary on the Statute,⁵ p. 19. The abuse of standard discretion is "a flexible one that this Tribunal has tailored in a manner appropriate to the nature of the case." *Mr. "HH"*, para. 94 (internal quotations omitted).

78. The Tribunal has further observed that the Fund's discretionary authority to decide on a staff member's suitability for conversion is "... constrained by principles of fair treatment and by the applicable internal law." *Mr. "OO"*, para. 135; *Mr. "HH"*, para. 98. The Fund's internal

⁵ The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Reports of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009 and 2020).

law governing this case provided that fixed-term appointments may be converted to open-ended appointments if the staff members “meet the performance requirements, demonstrate potential for a career at the Fund, and meet the Fund’s staffing requirement.” (GAO No. 3, Rev. 7, (May 1, 2003), Section 3.02.1.3.) The Guidelines for Conversion of Fixed-Term appointments (2006) similarly provide that conversion to an open-ended appointment “depends on the following criteria: the departmental assessment of the staff member’s performance during the fixed-term appointment; the individual’s long-term potential for a successful career with the Fund; and the department’s and institution’s staffing needs.”

79. When the Tribunal considers a challenge to a non-conversion decision, it will consider whether the Fund has met the requirements it has set for itself in exercising that discretionary authority. For example, in cases challenging a non-conversion decision based on failure to meet “performance” requirements, the Tribunal has emphasized that the fixed-term appointee “. . . is to be evaluated periodically, given adequate warning of performance deficiencies and a reasonable opportunity to remedy them. In short, the fixed-term appointee must be afforded adequate opportunity to demonstrate performance consistent with suitability for career employment. *Mr. “HH”*, para. 131.

80. The Tribunal has also noted that there is “a close relationship” between two of the criteria for conversion to open-ended appointments, “performance” and “career potential” in the Fund and that the fixed-term monitoring process is to assist managers in evaluating both the performance of fixed-term staff members and their potential for a long-term career in the Fund. *Mr. “OO”*, para. 140. The Tribunal, citing the Commentary on the Statute, p. 19, has also recognized that deference to managerial discretion is “particularly significant with respect to decisions which involve an assessment of an employee’s qualifications and abilities,” which is “a managerial, not a judicial, responsibility.” *See Mr. “OO”*, para. 140; *Mr. “HH”*, para. 95.

81. However, the Tribunal has noted that an assessment of “performance” differs from an assessment of “career potential,” in that the former is “backward-looking” while the latter requires an assessment of a “future trajectory.” *Mr. “OO”*, para. 142. Decisions concerning assessment of potential, the Tribunal has held, are afforded “a considerable degree of deference by the Tribunal,” insofar as they are informed by managerial expertise. *Mr. “OO”*, para. 142, citing *Ms. “J”*, *Applicant v International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-2 (September 30, 2003), para. 99. The Tribunal has held, with respect to non-conversion decisions, that “[w]hen managers take such a decision . . . with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.” *Mr. “OO”*, para. 142, citing *Mr. “HH”*, para. 96.

82. This case, however, is not a typical non-conversion case. This is the first case to reach the Tribunal in which the conversion of the staff member’s fixed-term appointment was recommended by the staff member’s department and the RC had endorsed that recommendation, but Fund Management declined to follow the advice of the RC. Accordingly, in this Judgment, the focus of the inquiry by the Tribunal is the question whether the DMD/CAO’s decision constituted an abuse of discretion.

- (2) Did the DMD/CAO's decision to reject the RC's recommendation to convert Applicant's fixed-term appointment to an open-ended appointment constitute an abuse of discretion?

83. Applicant argues that the DMD/CAO's decision constituted an abuse of discretion. The Tribunal observes that the discretion conferred upon the DMD/CAO is constrained by the internal law of the Fund, and its exercise must be consistent with that internal law. As such, it is subject to review for abuse of discretion and may be overturned if it is 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.

84. In the view of the Tribunal, there are several separate, though related, issues that need to be considered to address Applicant's arguments: (a) What were the reasons for the DMD/CAO's decision? (b) To the extent that the DMD/CAO's decision was based, in whole or in part, on her view that the criterion of business need was not established in relation to the conversion of Applicant's fixed-term appointment, did that constitute a rational basis for the decision? (c) To the extent that the DMD/CAO's decision was based on her conclusion that Applicant had not demonstrated his leadership potential in driving innovation and strategic changes, was Applicant afforded adequate warning of his performance deficiencies and a reasonable opportunity to remedy them? (d) Did the Fund's failure to provide Applicant with written notice of the non-conversion decision or its rationale constitute a violation of the Fund's duty to exercise its discretion consistently with fair and reasonable procedures? Each of these questions will be considered separately.

(a) What were the reasons for the DMD/CAO's decision?

85. The DMD/CAO did not provide Applicant with a written record of her decision or its rationale. The Tribunal therefore needs to discern from the record of the case the reasons for her decision. The key materials on the record in this regard are two notes sent by the DMD/CAO's office to the RC, recording her decision on December 4, 2017 ("the first memorandum") and December 13, 2017 ("the revised memorandum"), and the DMD/CAO's testimony before the Grievance Committee. As will appear, the reasons given in these different evidentiary materials for the decision do not provide a clear or consistent account of the DMD/CAO's reasons.

86. Prior to making her decision, the DMD/CAO perused the bundle of documents she received from the RC relating to Applicant ("the RC file"). The RC file included the Department's Memorandum recommending the conversion of Applicant's fixed-term appointment to an open-ended appointment; Applicant's curriculum vitae; the Fixed-Term Performance Monitoring (Career Decision Review) in relation to Applicant (including his FY2016 APR, his 2017 APR and his 6-month review in September 2015); and the IAF report prepared by the RC reviewer.

87. After the DMD/CAO had reviewed the RC file, her office sent the first memorandum to the RC on December 4, 2017, which stated that the DMD/CAO had "cleared" the recommendations sent to her, "with the exception of the open-ended conversion [of Applicant's appointment,] . . . as it is unclear whether there will be an ongoing business need for the

candidate's role in the Fund in view of the candidate's profile, skills and career experience." The first memorandum thus appears to base the DMD/CAO's decision on the third criterion for conversion, "whether the appointment meets the Fund's staffing requirements." (GAO No. 3, Rev. 7, Section 3.02.1.3.)

88. The Secretary of the RC responded to the first memorandum by writing to the DMD/CAO's office the following day, saying: "We need to make sure that the . . . decision be communicated clearly to the RC, [the Office] and the staff and, the decision-making process is legally water-tight." It is clear from this message that the RC Secretary was concerned to ensure that the DMD/CAO's decision was both clearly communicated and legally sound. The record does not disclose a response to this email by the DMD/CAO's office, and three days later, on December 8, 2017, the RC Secretary wrote again to the DMD/CAO's office to say that she was seeking advice from the HRD Director (who chaired the RC) as to whether the DMD/CAO should speak to the RC "not to question her decision but to ensure a more deliberate decision-making process."

89. The HRD Director then convened a meeting attended by the DMD/CAO, the HRD Director, HRD DD (who was not a member of the RC), Secretary to the RC, and the RC reviewer. The purpose of the meeting according to the DMD/CAO was "to clarify my findings" with those of the RC reviewer. The RC reviewer also testified about the meeting, noting that he had made the same presentation that he had made to the RC committee, recommending the conversion of Applicant's fixed-term appointment, but also that it was clear to him that the DMD/CAO was against the conversion.

90. Following the meeting, on December 13, 2017, the DMD/CAO's office issued the revised memorandum responding to the RC recommendation. That memorandum stated that the DMD/CAO accepted the recommendations from the RC, "with the exception of the open-ended conversion [relating to Applicant] as management is of the view that given the position's seniority in the [Office], the candidate has not sufficiently demonstrated his leadership potential in driving innovation and strategic changes."

91. The revised memorandum thus provided a different reason for the DMD/CAO's decision from the reason that had been provided in the first memorandum. This reason focused on the second criterion for conversion, whether a candidate for conversion has "demonstrate[d] potential for a career at the Fund." (GAO No. 3, Rev. 7, Section 3.02.1.3.) No explanation was provided in the revised memorandum for the different reason given.

92. The third evidentiary source for the reasons for the DMD/CAO's decision to reject the RC's recommendation of the conversion of Applicant's appointment from a fixed-term appointment to an open-ended one is to be found in the DMD/CAO's testimony before the Grievance Committee.

93. In her testimony, the DMD/CAO explained the annotations she had made to the RC file. She testified that when reading the RC file, she noted that only four months had elapsed between the FY2017 APR when it had been noted that Applicant had "partially met" the required Grade A15 competencies, and November 2017, when the Department had recommended Applicant's

conversion. She told the Grievance Committee that she did not think it was “possible” for Applicant to have rectified the shortcomings noted in the FY 2017 APR within such a short period and she had annotated the RC file accordingly.

94. The DMD/CAO also testified that she disagreed with the Department’s recommendation, which stated that the post Applicant occupied “is a key business need . . . and one for which it can be difficult to find a good fit, either inside or outside the Fund.” Instead, the DMD/CAO, confirming a marginal note she made at the time of reviewing the file, testified that “it’s the kind of expertise that is easy to find in the market.”

95. When asked about the first memorandum in her testimony, the DMD/CAO said that her assistant “didn’t summarize it properly” and “didn’t put all the reasons that I had.” She clarified further that “I analyze potential performance and the institutional view.” In this regard, however, the Tribunal notes that the revised memorandum cited only one reason—though a different one to the first memorandum—which related to Applicant’s career potential in the Fund. The Tribunal also notes that the DMD/CAO did not testify that the reason given in the first memorandum was incorrect. Indeed, her testimony in the Grievance Committee suggests that the DMD/CAO continued to think that the business case for the conversion of Applicant’s fixed-term appointment was not strong, at least partly because she thought Applicant’s skills were “not difficult to find in the market.”

96. Having reviewed the record, the Tribunal considers it cannot be certain what the DMD/CAO’s reasons were for her decision to reject the RC recommendation in favor of converting Applicant’s appointment. The evidentiary materials on the record provide different answers to this question. In the first memorandum one reason is given (the absence of business need); in the second a different, but also singular, reason is given (lack of career potential); yet in her testimony, the DMD/CAO suggests that she had several reasons, notably absence of business need and lack of career potential. The Tribunal notes that in suggesting in her testimony that she had at least two reasons for her decision, the DMD/CAO contradicted both the first memorandum and the revised memorandum. The Tribunal will consider the legal implications of the absence of a coherent and consistent account of the DMD/CAO’s reasons for her decision on the record later in this Judgment.

97. The Tribunal will now proceed to consider the next issues on the assumption that the DMD/CAO’s decision was based either on the absence of business need, or on the lack of career potential, or on both these reasons. It will consider whether each reason could be considered rational on the record before the Tribunal. Then it will consider whether if the reason for the DMD/CAO’s decision was that Applicant lacked career potential at the Fund, whether Applicant was afforded adequate warning of his performance deficiencies and a reasonable opportunity to remedy them. And then the Tribunal will turn to consider whether the Fund’s failure to provide Applicant with written notice of the non-conversion decision or its rationale constituted a violation of the Fund’s duty to exercise its discretion consistently with fair and reasonable procedures.

(b) To the extent that the DMD/CAO's decision was based, in whole or in part, on her view that the criterion of business need was not established in relation to the conversion of Applicant's fixed-term appointment, did that constitute a rational basis for decision?

98. It appears from her testimony before the Grievance Committee, that the DMD/CAO persisted in her view that Applicant's fixed-term appointment should not be converted because his skills could easily be replaced, despite the fact that her revised memorandum to the RC did not give this as a reason for the DMD/CAO's decision. The DMD/CAO's testimony is consistent with her original annotations to the RC report, to which she made a marginal comment "easy to find in the market" where it spoke of work assignments within Applicant's area of expertise.

99. That the revised memorandum did not rely on business need (one of the three criteria relevant to whether a conversion decision should be made) was consistent with the Department's Memorandum recommending conversion of Applicant's appointment, which had noted that the Applicant's post fulfilled "a key business need for [the Office] and for which it can be difficult to find a good fit, either inside or outside of the Fund."

100. It also fits with the testimony of both Office Director 1 and Office Director 2, who both noted that the skills needed in Applicant's position were hard to find. Both Office Director 1 and Office Director 2 would have been closely aware of the functions performed by the Office and its business needs. Yet, in her testimony, the DMD/CAO continued to think that the business case for the conversion of Applicant's fixed-term appointment was not strong, at least partly because she thought Applicant's skills were "not difficult to find in the market." It is not clear on what basis, if any, the DMD/CAO came to a view different from that held by Office Directors 1 and 2. Nowhere on the record is any clear explanation given for her contrary view.

101. That the functions performed by Applicant were essential to the business needs of the Office is further confirmed on the record, the Tribunal notes, by the immediate advertisement of a post to perform the functions that Applicant had performed after Applicant's fixed-term appointment was not converted, a decision that Office Director 2 explained in the following terms: "we had a business need. So we needed to have someone essentially to do the job that [Applicant] was doing before."

102. The Tribunal also notes Applicant's contention that lack of a "business need" was an illegitimate pretext for the non-conversion decision, improperly conflating the business needs of the Fund with the replaceability of an individual. That the criterion of business need was an inapposite rationale for the decision not to convert Applicant's fixed-term appointment was further underscored on the record by the note of December 5, 2017, from the Secretary of the RC, seeking clarification of the rationale for the DMD/CAO's decision: "*We suspect she isn't questioning that [Applicant's Office] has ongoing business needs for [Applicant's] position (criteria #3).* Rather, she arrived [at] a different judgement on the incumbent's performance and potential (criteria #2 and #3) based on the material submitted by the RC." (Emphasis added.) Finally, the Tribunal observes that in the course of the oral proceedings in this case, the Fund pointedly abandoned its reliance on the business need criterion, conceding that there was a need for the responsibilities that Applicant was fulfilling in his post.

103. The Tribunal concludes that the evidence on the record points to a clear business need in relation to Applicant's post: the memorandum proposing Applicant's conversion indicated that the post was needed in the Department, and both Office Director 1 and Office Director 2 testified to that need. The fact that the Office was permitted to proceed with an advertisement for a new lower grade post following the non-conversion of Applicant's fixed-term appointment, to perform the role previously performed by Applicant is also clear evidence of business needs. Moreover, the Tribunal notes that both Office Director 1 and Office Director 2 testified that the skillset needed for the post was not easy to find, either in or outside of the Fund. Given that the Tribunal has concluded on the record that a business need for the post has been clearly established, it also concludes that no rational basis exists on the record for the contrary view taken by the DMD/CAO.

104. Accordingly, to the extent that one of the reasons for the DMD/CAO's decision to reject the RC's recommendation was the absence of business need, the Tribunal concludes that the DMD/CAO made a material error on the facts. There is no basis to conclude on the record before the Tribunal that lack of business need forms a sustainable basis for the decision not to convert Applicant's fixed-term appointment to open-ended status.

(c) To the extent that the DMD/CAO's decision was based on her conclusion that Applicant had not demonstrated his leadership potential in driving innovation and strategic changes, was Applicant afforded adequate warning of his performance deficiencies and a reasonable opportunity to remedy them?

105. The reason given in the revised memorandum for the DMD/CAO's decision to reject the RC's recommendation is that Applicant had "not sufficiently demonstrated his leadership potential in driving innovation and strategic changes." This reason squarely relates to Applicant's potential in the Fund. The Tribunal notes that for a non-conversion decision not to constitute an abuse of discretion, "the fixed-term appointee must be afforded adequate opportunity to demonstrate performance consistent with suitability for career employment." *Mr. "HH"*, para. 131.

106. The Tribunal now turns to consider, if the DMD/CAO rejected the RC's recommendation because he had "not sufficiently demonstrated his leadership potential in driving innovation and strategic changes," whether Applicant had been given an adequate opportunity during his fixed-term appointment to demonstrate performance consistent with the Fund's requirements for conversion to an open-ended appointment.

107. The first question that arises is when Applicant was first informed that his managers considered that he was not fully meeting the competencies required at Grade A15. Applicant asserts that he was only informed of his performance shortcomings in June 2017, when he received his FY2017 APR, more than two years after he had joined the Fund, and only a few months before his conversion decision would be taken.

108. The Fund argues that Applicant had been informed earlier and relies on the testimony of Office Director 1 who asserted that he had "unambiguously" informed Applicant that there were areas for improvement at the time of his FY2016 APR.

109. A review of Office Director 1's testimony before the Grievance Committee makes clear that he had little independent recollection of what he had said to Applicant at the performance review relating to his FY2016 APR. When asked about the performance review meeting relating to the FY2016 APR he stated that, "Again, . . . I'm just borrowing from the write-up," and "I think the messaging would have been . . . I think . . . that there are some success factors, but there are other areas in which . . . there was still work to do and in which we were running behind. That's what I assume I would have conveyed to [Applicant]."

110. Later in his testimony, under questioning from the Grievance Committee in relation to the FY2016 APR, Office Director 1 struck a different note, testifying that "I am clear what I communicated" and "I know what I said." It was at this time that Office Director 1 stated that he had "unambiguously" informed Applicant that there were areas for improvement in his performance. It is this statement in Office Director 1's testimony upon which the Fund relies for its assertion that Applicant had been clearly informed of his performance shortcomings. Given that there is an inconsistency in Office Director 1's testimony as to whether he could recollect what he said to Applicant during the performance review meeting relating to the FY2016 APR, the Tribunal cannot accept that Office Director 1 gave clear and consistent evidence on this issue. The Tribunal accepts that the text of the FY2016 APR was communicated to Applicant. That text did make mention of areas for improvement. However, unlike the FY2017 APR, it did not suggest that Applicant was not meeting the Grade A15 competencies in a manner that might jeopardize the conversion of his fixed-term appointment.

111. The Tribunal also notes that in the PM's testimony before the Grievance Committee, he stated that he could not recall whether he attended the six-month performance review with Office Director 1 and Applicant, and he could not recollect what was discussed at the meeting: "I think I was [at the meeting]. I cannot recall it specifically, but normally I was. Q: So you don't recall the content? A: No." Nor could he recall what was said at the FY2016 performance review meeting with Office Director 1 and Applicant: "I mean difficult to remember . . . that's - - in general what the discussion of the APR are."

112. Nor is there anything on the record that suggests that at the 2016 mid-year review meeting, which took place on December 16, 2016 with the acting head of his Office and the PM, that Applicant was advised of any shortcomings in his performance. Applicant's note recording the meeting is in the record and it contains no reference to any discussion about his failure to perform. Applicant testified that it was at that meeting that he learned about the Fund's leadership competency framework for the first time. As he was not familiar with that framework, Applicant contacted the PM for information on the Fund's leadership competency framework and what would be required for the conversion of his fixed-term appointment.

113. Applicant and the PM met on December 22, 2016. In an email to Office Director 2 in July 2017, the PM confirmed both the request and the meeting were "to understand better the leadership competency framework." The email continued: "In my view, he cannot claim that he did not receive feedback about the gaps in the competencies required at his grade earlier than the 2017 APR session." This sentence is the only sentence on the record that suggests that Applicant had been informed prior to June 2017 of dissatisfaction with his performance. Yet, there is nothing on the record to support the claim implicit in this sentence that Applicant had been

provided with “feedback about gaps in the competencies required at this grade” before June 2017.

114. Both the PM and Applicant mentioned the December 22, 2016 meeting in their testimony, but in both cases their testimony appears generally to confirm that the purpose of the meeting was to brief Applicant on the leadership competency framework, its relevance to the conversion process, how the conversion decision would be made, and what would be required of him. Neither claim that there was a discussion of Applicant’s performance against the leadership competency framework, despite the comment in the PM’s July 2017 email to Office Director 2 that appears to suggest otherwise.

115. In the light of its examination of the record, the Tribunal concludes that it was only in June 2017, two years after he had started at the Fund, that Applicant learned that he was seen as not fully meeting the competencies required of him at Grade A15. Neither Office Director 1, nor the acting head of the Office, had apprised Applicant of material shortcomings in his performance against the Grade A15 competencies in the three performance reviews (the 2015 mid-year review, FY2016 APR, and the 2016 mid-year review) that had taken place previously.

116. Applicant described his response to the FY2017 APR in his Grievance Committee testimony as one of “shock” and being “very, very surprised.” He added, “[i]t was so serious in terms of the potential implications and so unexpected . . .” and “for the first time I’m receiving feedback that is written not terribly clearly, but sufficiently clearly for me to understand that there was a question mark over my prospective conversion”

117. Upon receiving his FY2017 APR, and realizing that there were concerns about whether he was demonstrating the Grade A15 competencies satisfactorily, Applicant immediately raised the question how he could meet the competency requirements in the short period left before the conversion decision. He did so at a meeting with Office Director 2, the former acting head of the Office and the PM. In his testimony before the Grievance Committee, Office Director 2 recalled that Applicant had “found a sharp . . . discontinuity between the assessment [in the FY2017 APR] and the one from the previous year. . . . He was concerned about exactly which competencies he was being asked to display more of, and he was also concerned about the very short time remaining between the June discussion and the time that the conversion decision needed to be made.”

118. Office Director 2 assured Applicant that an upcoming major task would provide him with sufficient opportunity to demonstrate the relevant competencies and potential. Office Director 2 noted that a timing issue arose because the task that he proposed Applicant should undertake to demonstrate his competencies would only be completed in late October, whereas the conversion recommendation would ordinarily have to be prepared in September. So Office Director 2 took the decision that the conversion recommendation would be delayed until the task Applicant would undertake was concluded.

119. When asked in his Grievance Committee testimony how he thought Applicant had performed on the task in demonstrating his competencies, Office Director 2 responded: “I felt that the competencies were met. I felt that the tasks that were assigned to [Applicant] were quite

challenging. . . . I mean, he delivered a good product. There was a lot of interaction with other departments, even contentious interaction, but it was managed professionally. . . . Not much had to be done with [the draft report] in the same manner that in my previous experience [in other departments] I would expect A15s to deliver. The feedback from the staff that [Applicant] had supervised was very positive. They continued to respect him and they felt he had provided good leadership.” Office Director 2 concluded: “So I felt that all those demonstrated competencies . . . matched what my expectations would be for an A15 based on the leadership competency framework in the Fund.”

120. Once Applicant had completed the complex task to Office Director 2’s satisfaction, the Department prepared its Memorandum supporting the conversion of his fixed-term appointment to an open-ended one. Office Director 2 testified that in assessing the criterion of Applicant’s potential in the Fund for the conversion memorandum, he consulted colleagues in other departments in the Fund.

121. The Tribunal records that Office Director 2 would have preferred a longer period to permit Applicant to demonstrate his competencies. In May 2017, at a meeting with Office Director 1, the acting head of the department and the PM, Office Director 2 explored the possibility with HRD, following the FY 2017 APR, of extending Applicant’s fixed-term appointment, but was informed that Fund internal law would not permit that extension.

122. The Tribunal also notes that Office Director 2 was satisfied that Applicant raised his performance to a satisfactory level by the time that the recommendation for conversion had to be made.

123. The Tribunal observes that to the extent the DMD/CAO based her decision on the view that Applicant had “not sufficiently demonstrated his leadership potential in driving innovation and strategic changes,” the DMD/CAO appears not to have considered the fact that Applicant had only been given notice of his shortcomings a few months before a decision on his conversion had to be made. The Tribunal is of the view that for the Fund not to have provided Applicant with clear warning of performance issues that would threaten the conversion of his fixed-term appointment until only a few months before that decision was to be taken, was in violation of the Fund’s obligation to afford fixed-term appointees with adequate warning of performance deficiencies and a reasonable opportunity to remedy them. To the extent that the DMD/CAO based her decision on Applicant’s lack of career potential, without considering whether he had been given adequate notice of performance shortcomings and adequate opportunity to remedy them, that decision constituted an abuse of discretion.

(d) Did the Fund’s failure to provide Applicant with written notice of the non-conversion decision or its rationale constitute a violation of the Fund’s duty to exercise its discretion consistently with fair and reasonable procedures?

124. The DMD/CAO did not provide a written decision to Applicant explaining why his fixed-term appointment was not converted to an open-ended appointment. The two memoranda the DMD/CAO provided to the RC were not furnished to Applicant who was told of the decision orally by Office Director 2. The absence of written reasons for the DMD/CAO’s decision

contrasts with the written reports in support of the decisions to recommend conversion of Applicant's fixed-term appointment made by the Department and the RC reviewer.

125. In the view of the Tribunal, the obligation of a decision maker to give a reasoned written explanation for a decision, particularly where the decision has a profound and fundamental impact on the employment status of a person, is a general principle of international administrative law.

126. The importance of the provision of reasons was articulated by the United Nations Appeals Tribunal, in a case concerning the non-renewal of a fixed-term contract, where no reasons for the non-renewal were furnished. The Tribunal held: "[T]he obligation for the [organization] to state the reasons for an administrative decision . . . is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice . . . and the principle of accountability of managers" *Obdeijn v. Secretary-General of the United Nations*, 2012-UNAT-201, para. 36. *See also Obdeijn v. Secretary-General of the United Nations*, UNDT/2011/032, para. 33 ("Any administrative decision entails a reasoned determination arrived at after consideration of relevant facts since there is a duty and requirement on institutions to act fairly, transparently, and justly in their dealings with staff members. Like any other administrative decision, a decision not to renew a staff member's contract must be reasoned, as a decision taken without reasons would be arbitrary, capricious, and therefore unlawful")

127. The World Bank Administrative Tribunal (WBAT) has also recognized the important functional role that a written record of a decision performs: "A written record of the decision-making process, the underlying rationale and the consultation which has taken place (be it written exchanges or notes of oral exchanges) will not only assist any subsequent review, but also facilitates transparency and assists all parties in ensuring that no abuse of discretion arises in the first place." *DB v. International Finance Corporation*, WBAT Decision No. 524 (2015), para. 103.

128. In the view of the Tribunal, a written decision setting out reasons in circumstances where a staff member's continued employment with the Fund is being determined will have three beneficial consequences. First, it will enable the person whose interests are affected by the decision to know of the decision and its rationale, and thus foster trust in the Fund and its management. Secondly, it will facilitate the process of review of the decision, and thus foster the accountability of decision-makers. And thirdly, it will encourage coherent and consistent decisions to be made, thus improving the quality of decision-making.

129. In this case, the absence of a written decision setting out its rationale deprived Applicant of a transparent account of the reason for the decision. It also hampered the process of this Tribunal's review of the decision for compliance with the internal law of the Fund, as the preceding paragraphs of this Judgment illustrate. Finally, in the view of the Tribunal, the absence of a reasoned decision may have been one of the factors that resulted in the failure clearly to articulate the reasons for the decision in this case. If the DMD/CAO had formulated her reasons in writing and furnished them to the Applicant, some of the inconsistencies identified in this Judgment might have been avoided. Where, as in Applicant's case, Fund Management's decision

on non-conversion diverges from the advice given it by the RC, it was essential to avoid arbitrariness that the DMD/CAO provide a reasoned explanation for rejecting that advice.

130. The failure by the Fund to provide Applicant with a written decision confirming that his fixed-term appointment would not be converted to an open-ended appointment, coupled with the failure to provide Applicant with a brief written account of the reasons for that decision, thus constituted an abuse of discretion on the part of the Fund, in violation of its duty to exercise discretionary authority consistently with fair and reasonable procedures.

(3) Tribunal's conclusions on the non-conversion decision

131. In conclusion, the Tribunal observes that the discretion conferred upon the DMD/CAO, like all discretion conferred upon the Fund's management, is constrained by the internal law of the Fund, and its exercise must be consistent with that internal law. In the view of the Tribunal, the DMD/CAO's exercise of discretion in rejecting the RC recommendation to her to convert Applicant's fixed-term appointment to an open-ended appointment, was marred by three major flaws.

132. In the first place, the DMD/CAO provided no reasons in writing to Applicant. As mentioned above, where a decision of material importance regarding a person's ongoing employment at the Fund is taken, well established principles of international administrative law require that a written explanation for the decision be given to the affected employee. No such reasons were provided to Applicant in this case.

133. Secondly, the internal reasons given by the DMD/CAO for her decision, first in the memorandum her office sent to the RC on December 4, 2017, then in the revised memorandum sent to the RC on December 16, 2017, and then in her testimony before the Grievance Committee are inconsistent, leaving the Tribunal uncertain as to the basis on which the DMD/CAO in fact made the decision. As outlined above, in the first memorandum the DMD/CAO suggested that the reason for her decision related to the business needs of the Fund. The DMD/CAO repeated a version of this reason during her testimony, when she stated that it would not be difficult to replace the skills that Applicant brought to the Fund. However, this reason did not appear in the revised memorandum, which purported to explain to the RC the basis for the DMD/CAO's decision.

134. The DMD/CAO's reliance on the ease with which Applicant's skills could be replaced is inconsistent with the evidence of both Office Director 1 and 2. No explanation is provided on the record for that inconsistency, and, in particular, no evidence is provided to show why the DMD/CAO formed a different view. Where the DMD/CAO differs with the relevant senior managers on an important factual question relating to the business needs of the Fund, the Tribunal would have expected a clear explanation or evidentiary basis to account for the DMD/CAO's contrary views. In the absence of any explanation on the record as to why the DMD/CAO reached a different conclusion regarding whether Applicant's skills would readily be replaced from that asserted by the two senior managers in the relevant department, the Tribunal concludes that the business needs explanation does not provide a rational basis for the DMD/CAO's decision.

135. Thirdly, the second reason provided by the DMD/CAO for her decision was that Applicant “has not sufficiently demonstrated his leadership potential in driving innovation and strategic changes.” This reason was provided in the revised memorandum to the RC, and again in the DMD/CAO’s testimony.

136. To the extent that the DMD/CAO based her decision on Applicant’s lack of career potential with the Fund, and given that the Tribunal has found that Applicant was not given adequate warning that he was not demonstrating leadership potential until a matter of months before the conversion decision was taken, the decision of the DMD/CAO was in violation of the Fund’s duty to give Applicant adequate warning of performance issues and adequate opportunity to improve.

137. The DMD/CAO, on her reading of Applicant’s file and without any discussion with Office Director 2, concluded that it was not possible that Applicant improved his performance within the four months between July and October 2017. The consequence of that assumption (that is, that it was not possible for Applicant to have improved, despite what his manager had said), put Applicant in an impossible situation. Applicant was only informed of his shortcomings in June 2017, at a time when the conversion decision, which could not be postponed, was only months away. Given the DMD/CAO’s assumption that it was not possible for Applicant to improve within four months, when Applicant was informed in late June 2017 of his shortcomings, he was, at least on the DMD/CAO’s assumption, rendered ineligible for conversion. Accordingly, when the DMD/CAO rejected the RC’s recommendation on the basis that Applicant could not have improved within four months, effectively her decision deprived Applicant of an “adequate opportunity to demonstrate performance consistent with suitability for career employment.” *Mr. “HH”*, para. 131.

138. In the view of the Tribunal, the DMD/CAO’s decision, based as it was on the premise that Applicant could not have improved his performance sufficiently within four months to meet the criteria for conversion, had the consequence that Applicant was not given an adequate opportunity to demonstrate performance during the period of his fixed-term contract. The decision, to the extent that it was based on that reason, therefore constituted an abuse of discretion.

139. For these reasons, the Tribunal concludes that the DMD/CAO’s decision to reject the RC’s recommendation that Applicant’s fixed-term appointment be converted to an open-ended one constituted an abuse of discretion. The Tribunal will turn to consider the consequences of this finding and the question of appropriate remedies later in this Judgment.

B. Did the Fund abuse its discretion in taking the decision not to select Applicant for a vacancy for a similar, but lower-graded, position to which he applied following the non-conversion decision?

140. Applicant alleges that the decision not to select him for a vacancy for a similar position at a lower grade level, for which he applied, was improperly influenced by the non-conversion decision and that HRD officials wrongfully precluded his selection on that basis.

141. Respondent, for its part, maintains that the non-selection decision was based on proper considerations and that HRD officials gave policy advice but did not intervene improperly in the non-selection decision.

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

142. Like the decision not to convert a fixed-term appointment to an open-ended appointment, the decision not to select a staff member for a vacancy to which he applies is an individual decision taken in the exercise of managerial discretion. As such, it is subject to review for abuse of discretion and may be overturned if it is 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. When an applicant challenges the integrity of a selection process for a vacancy for which he or she was an unsuccessful candidate, the Tribunal will test that process against the requirements of the Fund's internal law, as well as general principles of international administrative law. *Ms. "NN"*, para. 84.

143. The Tribunal has recognized that a "staff member applying for a vacancy within the Fund has a right to have his candidacy fairly considered in accordance with the internal law of the Fund and general principles of international administrative law." *Ms. "NN"*, para. 83, citing *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 67. This is so even if the applicant does not claim to have been the candidate best suited to fill the post. *See Mr. M. D'Aoust (No. 2)*, para. 64 (applicant had standing to challenge elements of vacancy selection process in which he was an unsuccessful candidate, without contending that he was the candidate best suited for the vacancy). The Tribunal has also emphasized that a "transparent, rules-based vacancy selection process protects against arbitrariness and discrimination." *Ms. "NN"*, para. 95.

144. The question for the Tribunal is whether, as a factual matter HRD officials intervened in the decision effectively excluding Applicant from the competition, and as a matter of law, whether that decision was "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures." Commentary on the Statute, p. 19.

(2) Was Applicant wrongfully precluded from selection to the position as a result of interference by HRD in the selection decision or on the basis of the non-conversion decision?

145. Once Office Director 2 learned of the decision not to convert Applicant's fixed-term appointment, he immediately began the process of finding a person to carry out the tasks that Applicant had previously been performing. During the Grievance Committee hearing, he testified in this regard as follows: "So first of all, we had a business need. So we needed to have someone essentially do the job that [Applicant] was doing before."

146. He also testified that there was a discussion as to how the new post should be graded, noting his concern that appointing a person at Grade A15 set, in his view, "an implausibly high

bar for their conversion to open-ended staff.” [F]or somebody from outside coming in . . . to perform at the level of an A15 in a manner that was judged to be so by the whole institution, in my view, was a very, very high bar.” Secondly, he noted in his testimony that he hoped that a large pool of qualified candidates would apply, and thirdly, he testified that he “was also hopeful that we could keep [Applicant] in some capacity.”

147. For these three reasons, it was decided to advertise the new post at Grade A13/A14. (Office Director 2 had first raised the possibility of a lower-grade post with HRD at a meeting of May 15, 2017, and at that stage HRD had advised that the consequence of a regrading of Applicant’s post while he was in post would have been that any conversion to an open-ended appointment would not be possible.) Applicant was informed that a new post was to be advertised at a lower level, and he met with the HRD Director to find out whether he would be eligible to apply, but he testified that she did not respond to his inquiry.

148. Office Director 2 also consulted with the PM who informed him that Applicant was eligible to apply. In his testimony to the Grievance Committee, the PM recalled that there had been extensive discussions as to whether Applicant would be eligible to apply for the new position and that the conclusion was that he was eligible, as it “was a different job, a different job title, different grade band,” although he added that it “[w]as not ideal.”

149. Applicant did apply for the post in early 2018. He was shortlisted for the position and interviewed by a selection panel which comprised Office Director 2, the acting head of the Office, the PM and another Fund manager. The interview took place shortly before Applicant’s fixed-term appointment expired.

150. A group of nine candidates, both from within the Fund and from outside, were shortlisted. After tallying the scores of the individual selection panel members before deliberations, Applicant held the second highest score of the candidates. After its deliberations, the panel selected another candidate who had scored slightly higher than Applicant. Office Director 2 then drafted a vacancy selection recommendation, which he forwarded to HRD for approval. In relation to Applicant, the draft stated that: He “. . . was qualified for this new position, and performed very well in the interview. However, his candidature was not considered further as HRD indicated it would not support his selection in consideration of a recent institutional decision not to convert his Fixed Term Contract into an Open Ended contract (at A15 level) based on a judgment that he demonstrated insufficient leadership potential in driving innovation and guiding strategic change.” The HRD DD objected to inclusion of the phrase “as HRD indicated it would not support his selection.”

151. The final vacancy selection recommendation did delete the reference to HRD. It read as follows: [Applicant], “an internal . . . candidate, held a similar position in the [Office] previously (and for several years at [another institution]), would have fit the position, and performed very well in the interview. However, his candidature was not considered further based on a recent institutional decision not to convert his Fixed Term Contract into an Open-ended contract (at A15 level) based on insufficient leadership potential in driving innovation and guiding strategic change.”

152. With regard to HRD's role in the selection process, Office Director 2 testified that: "It certainly chafed because I thought that . . . a candidate should be considered either eligible or ineligible according to HR policy. Once a candidate is eligible, I thought all the candidates should be judged on equal grounds and the best one selected." He concluded that ". . . it may be too strong to say that I considered it inappropriate. But it certainly did affect the process and, I thought, the latitude that the panel had to operate."

153. The Tribunal finds on its review of the record that HRD did improperly interfere with the selection process in relation to Applicant. The Tribunal is of the view that once a candidate is deemed eligible to apply for a post in the Fund, that candidate should be treated in the same manner as other candidates. It is not open to the Fund, on the one hand, to say that the candidate is eligible for appointment to a position, and then once the candidate is under consideration by the selection panel to convey to the selection panel that the appointment of the candidate will not be approved by HRD despite HRD's having advised that the candidate is eligible to apply.

154. The Tribunal notes that a finding that the Fund abused its discretion in relation to a non-selection decision, does not require it to be established that the complainant would have been selected for the position in the absence of the unfair action of the Fund. *See Ms. "NN", para. 83; Mr. M. D'Aoust (No. 2), para. 64.*

155. The Fund has not identified any rule of the Fund that precluded Applicant's selection for the Grade A13/A14 vacancy following the non-conversion of his fixed-term appointment at Grade A15. In the absence of such a rule, the intercession of the HRD officials unfairly deprived Applicant of the opportunity to compete for the position.

156. Finally, the Tribunal has decided above that the non-conversion decision was invalid. Accordingly, even if a non-conversion decision could form a proper basis for excluding a candidate from a selection process for a vacancy—a proposition that the Tribunal does not endorse—there could be no sustainable basis for taking account of the non-conversion decision in the circumstances of Applicant's case.

C. Did the Fund engage in impermissible retaliation against Applicant by invoking in its pleadings in this Tribunal an anonymously captioned decision of another international administrative tribunal for purposes of impeaching Applicant's credibility?

157. Applicant contends that the Fund's invocation in its pleadings of an anonymously captioned decision of another international administrative tribunal for purposes of impeaching Applicant's credibility in these proceedings was improper, misleading and amounted to "cross-institutional retaliation" by seeking to harm Applicant for having successfully raised a claim of managerial mistreatment in another institution. Applicant requests a separate award of moral and intangible damages on this ground.

158. Respondent defends its citation of the anonymously captioned decision of another tribunal, asserting that there is nothing improper or retaliatory in Respondent's use, in its confidential pleadings before this Tribunal, of a decision of another international administrative

tribunal for purposes of impeaching Applicant's credibility on the basis of information made public in that decision.

159. The Tribunal decides Applicant's contention as follows. In the view of the Tribunal, Applicant's credibility is not germane to the disposition of his Application because the essential facts upon which this Judgment rests are not disputed between the parties. Nor is the particular point on which the Fund challenges Applicant's credibility one that is material to the Judgment. Accordingly, the Tribunal has not had reason to give any evidentiary weight to the material that the Fund has put before it through the decision of another international administrative tribunal and declines to decide whether it could take account of such an anonymously captioned tribunal decision in different circumstances.

CONCLUSIONS OF THE TRIBUNAL

160. For the reasons elaborated above, the Tribunal has concluded that the Fund abused its discretion, first, in deciding not to convert Applicant's fixed-term appointment to an open-ended appointment and, second, in the process it applied in taking the decision not to select Applicant for a vacancy to which he applied following the non-conversion of his fixed-term appointment. For these failures, the Tribunal awards relief as follows.

REMEDIES

161. Applicant seeks as relief: (a) rescission of the Fund's decisions to deny Applicant conversion of his fixed-term appointment and further employment at the Fund; (b) reinstatement to the position Applicant had occupied on a fixed-term appointment, converted to open-ended status, along with back pay and benefits from the time of termination until return to Fund service, or 5 years of compensation in view of "extraordinary career damage," unemployment, and reduced pension; (c) an additional 3 years' salary for "actual, moral and intangible damages" to compensate for mental and emotional harm, loss of professional reputation and employment prospects, and additional harms suffered as a "result of the Fund's many and grave violations of [Applicant's] rights and due process"; and (d) all attorneys' fees and costs incurred in the case, including those in the Grievance Committee proceedings that have not been fully reimbursed. In his Reply, Applicant additionally seeks a separate award of moral and intangible damages for retaliation, in connection with the Respondent's invocation in its Answer of an anonymously captioned decision of another international administrative tribunal for purposes of impeaching his credibility in the IMFAT proceedings.

162. The Tribunal's remedial authority in respect of challenges to individual decisions is found in Article XIV, Sections 1 and 2, of the Statute, which provide:

1. 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.

2. When prescribing measures under Section 1 other than the payment of money, the Tribunal shall fix an amount of compensation to be paid to the applicant should the Managing Director, within one month of the notification of the judgment, decide, in the interest of the Fund, that such measures shall not be implemented. The amount of such compensation shall not exceed the equivalent of three hundred percent (300%) of the current or, as the case may be, last annual salary of such person from the Fund. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher compensation; a statement of the specific reasons for such an order shall be made.

163. 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. *Mr. "OO"*, para. 215; *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 444.

A. Remedy in relation to non-conversion decision

164. The Tribunal has concluded that the decision not to convert Applicant's fixed-term appointment to an open-ended appointment constituted an abuse of discretion. In accordance with the remedial authority set out in the Statute, that decision must be rescinded. The next question is what "other measures, involving the payment of money or otherwise [may be] required to correct the effects of [the rescinded] decision." (Statute, Article XIV, Section 1.)

165. The Tribunal notes that Applicant's pleas for relief seek *either* reinstatement to the position he had occupied on a fixed-term appointment, converted to open-ended status, along with back pay and benefits from the time of termination until return to Fund service, *or* 5 years of compensation in view of "extraordinary career damage," unemployment, and reduced pension.

166. The Tribunal notes that the rescission of the non-conversion decision does not automatically reinstate Applicant in the employment of the Fund. His fixed-term appointment expired in March 2018, once its term ended. In considering whether an order of reinstatement is a suitable remedy in this case, Tribunal is also mindful of the Statutory Commentary on Article XIV, Section 2, which states:

Section 2 provides that where the consequences of the rescission of an individual decision or the corrective measures prescribed by the tribunal are not limited to the payment of money, the Managing Director would be authorized to determine whether, in the interest of the Fund, the applicant should be paid an amount of monetary compensation that has been determined by the tribunal in

accordance with the limitations prescribed in the statute, as an alternative to rescission of the individual decision or performance of the prescribed obligations.[footnote omitted] For example, if the tribunal prescribed, as a corrective measure, that a staff member be reinstated, the Managing Director might conclude that such a remedy was not possible or advisable. Such a situation might arise where the applicant's position has, in the meantime, been filled by another qualified individual. In general, the monetary award could not exceed three times the individual's current or last salary from the Fund, as applicable. The tribunal could, however, exceed this limit in exceptional cases, if it was considered justified by the particular circumstances.

Commentary on the Statute, p. 37.

167. The Tribunal is of the view that in the light of this provision, and given the seniority of the position in question, as well as the time that has elapsed since Applicant left the Fund, that reinstatement is not a suitable remedy in this case. A more appropriate remedy is compensation. However, the Tribunal notes that compensation in lieu of reinstatement must be substantial, and it must take account of the advanced stage of Applicant's career at the time when the non-conversion decision was taken and, consequently, his diminished prospects for reemployment. The Tribunal sets that sum at the equivalent of three times Applicant's last annual salary from the Fund.

B. Remedy in relation to non-selection decision

168. Applicant has also succeeded on his claim that the Fund abused its discretion in the process it applied in taking the decision not to select Applicant for a vacancy to which he applied following the non-conversion of his fixed-term appointment.

169. In a series of Judgments, the Tribunal has addressed the question of how to compensate applicants for the wrongful denial of an opportunity to compete for an employment opportunity. *See Ms. "NN"*, paras. 144-149 (wrongful denial of pre-screening interview); *Ms. "GG" (No. 2)*, paras. 461-463 (consideration for promotion delayed by wrongful failure to afford applicant benefit of transitional measure in relation to promotion policy); *Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-2 (March 13, 2013), paras. 91-93 (applicant wrongfully deemed ineligible to be considered for re-employment following separation during downsizing exercise; relief awarded in conjunction with nullification of regulatory decision upon which individual decision was based); *see also Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), paras. 150, 252, 256 (non-selection marked by series of failures of fair process).

170. In *Ms. "NN"*, the applicant challenged the selection process for a vacancy for which she applied. The Tribunal concluded that the Fund had wrongfully failed to afford her a pre-screening interview in contravention of department procedures, the effect of which was to bar any further consideration of her candidacy for the position. In awarding relief, it held that the

appropriate means of correcting the Fund's breach of its rules was to award monetary compensation for intangible injury. *Ms. "NN"*, para 144. In *Ms. "NN"*, the Tribunal noted that "intangible injury ordinarily arises when the Fund 'fails through inaction to discharge a duty imposed by its written law or by general principles of international administrative law, such as the obligation to take decisions in accordance with fair and reasonable procedures. Compensation for intangible injury responds to staff members' legitimate expectations that the Fund will act in accordance with the rule of law.'" *Id.*, citing *Ms. "GG" (No. 2)*, para. 445.

171. The Tribunal has also recognized that intangible injury, by its nature, will be difficult to quantify. *Ms. "GG" (No. 2)*, para. 446. The Tribunal has not required applicants to offer proof of harm. Rather, 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.

172. In this case, Applicant was wrongfully denied the opportunity to have his candidacy for a vacancy fairly considered when HRD officials invoked the non-conversion of his fixed-term appointment as a basis for not selecting him, after they had deemed him eligible to apply to the vacancy and after the strength of his candidacy had been validated through the shortlisting and interview processes. A singular aggravating factor in this case, therefore, is that the non-conversion decision, which the Fund interposed as an obstacle to the fair consideration of Applicant's candidacy for the vacancy, was itself an abuse of discretion and has been rescinded by this Tribunal. The career-ending nature of the invalid non-conversion decision was compounded by the procedurally unfair non-selection decision. The Tribunal, in this case, accordingly awards a substantial sum for intangible injury.

173. To compensate for the harm to Applicant's legitimate expectation that the Fund will adhere to its legal obligations to afford a transparent and fair process to staff members competing for vacancies within the Fund, in the singular circumstances of this case, the Tribunal sets the amount of compensation at a sum equivalent to Applicant's last annual salary from the Fund.

174. The Tribunal notes that the Fund has already granted Applicant eight months' salary in relation to the Grievance Committee's recommendation that he had succeeded on his non-selection claim.⁶ That award, however, was not calculated upon Applicant's last annual salary from the Fund, but rather at the rate Applicant would have been paid had he been selected for the vacancy; the Fund determined that salary would have been "at Grade A13 (the grade at which the selected candidate was appointed.)" (Acting Managing Director to Applicant, "Grievance No. . . . Decision of Fund Management," July 19, 2019.) Therefore, the Tribunal shall order the Fund to pay Applicant a sum equivalent to four months' salary, calculated on the basis of his final annual salary from the Fund, plus the difference between the eight months' salary at Grade A13 that

⁶ See *supra* CHANNELS OF ADMINISTRATIVE REVIEW.

Applicant has already been paid and eight months' salary calculated on the basis of Applicant's last annual salary from the Fund.

C. Legal fees and costs

175. As part of the Tribunal's remedial authority, Article XIV, Section 4, of the Statute provides:

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.

176. In his requests for relief in the Application, Applicant seeks all attorneys' fees and costs incurred in the case, including those in the Grievance Committee proceedings that have not been fully reimbursed. Applicant filed a Supplementary Request for Costs, following the oral proceedings in this case, and Respondent was afforded the opportunity to submit its Comment on that Request.

177. In total, Applicant seeks legal fees and costs in the amount of \$95,397.86, of which, \$38,745.71 are the unreimbursed fees related to Applicant's representation in the Grievance Committee.

178. In its Comment on Applicant's Supplementary Request for Costs, the Fund asserts that even if Applicant were to succeed fully on his Application to the Tribunal, the attorneys' fees he requests should be diminished on account of several factors: the fees are "excessive" in relation to the fees incurred in the Grievance proceedings by another experienced counsel, with the level of effort and output at the Tribunal "far lower"; that Applicant changed counsel following the Grievance Committee phase, citing *Sachdev*, para. 260; "overstaffing" on the case in the Tribunal, including at the oral proceedings; and inclusion of time spent seeking funding from the Staff Association Committee (SAC). Finally, the Fund seeks a reduction of any fee award on the basis of "wholly inappropriate and unfounded personal attacks on individual Fund officials" in the written and oral pleadings presented by Applicant's counsel. The Tribunal finds none of these arguments availing.

179. With regard to Applicant's request for the unreimbursed portion of the attorneys' fees for representation in the Grievance Committee proceedings, the Fund argues this request should be denied on the basis of proportionality, given that Applicant succeeded only partially on his Grievance. The Tribunal has long awarded fees for representation in proceedings that must be exhausted prior to the Tribunal's consideration of a case, with the view that had the applicant succeeded in the forum below, as success in the Tribunal suggests he should have, he should be

eligible for an award of attorneys' fees in respect of that earlier representation.⁷ Given that Applicant has succeeded fully in his claims in the Tribunal, the Tribunal does not accept the Fund's argument that Applicant's request for all unreimbursed fees from the Grievance Committee proceedings should be subject to a principle of proportionality based on his partial success in the Grievance proceedings.

180. Applicant has succeeded in the two main claims that he has brought to the Tribunal, that the Fund abused its discretion, first, in deciding not to convert Applicant's fixed-term appointment to an open-ended appointment and, second, in the process it applied in taking the decision not to select Applicant for a vacancy to which he applied following the non-conversion decision. The Tribunal considers it appropriate that Applicant receive compensation for all the attorneys' fees and costs claimed, that is, an amount of \$95,397.86.

⁷ See generally *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 136; *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 124; *Sachdev*, para. 258.

DECISION

FOR THESE REASONS

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

1. The Fund's decision not to convert Mr. "RR"'s fixed-term appointment to an open-ended appointment is rescinded.
2. The Fund's decision not to select Mr. "RR" for a Grade A13/14 position in his department is sustained.
3. Applicant is entitled to compensation:
 - a. In lieu of reinstatement following the Fund's failure to convert his fixed-term appointment to an open-ended appointment, monetary compensation in a sum equivalent to three times Mr. "RR"'s last annual salary from the Fund; and
 - b. for the failure of fair process in relation to Mr. "RR"'s non-selection for the Grade A13/14 vacancy in his department to which he applied, monetary compensation in a sum equivalent to four months' salary, calculated on the basis of his last annual salary from the Fund, plus the difference between the eight months' salary at Grade A13 that Applicant has already been paid and eight months' salary calculated on the basis of Applicant's last annual salary from the Fund.
4. The Fund shall also pay Mr. "RR" \$95,397.86, being the legal fees and costs incurred by Mr. "RR" in this case, a sum which includes that portion of fees and costs incurred in Grievance Committee proceedings not previously reimbursed by the Fund.

Catherine M. O'Regan, President

Andrés Rigo Sureda, Judge

Deborah Thomas-Felix, Judge

/s/

Catherine M. O'Regan, President

/s/

Celia Goldman, Registrar

Washington, D.C.
December 24, 2021