

Judgment No. 1995-1

Ms. "S", Applicant v. International Monetary Fund, Respondent

(May 5, 1995)

1. On May 3, 4 and 5, 1995, the Administrative Tribunal of the International Monetary Fund, comprised of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to hear the case brought against the International Monetary Fund by Ms. "S", a staff member of the Fund.

The Procedure

2. On August 3, 1994, Ms. "S" filed an Application with the Tribunal. In accordance with the Rules of Procedure, the Fund, on August 8, 1994, was notified of the Application. In response to an inquiry by counsel of the Fund, the President decided to allow the parties 45 days for any Motion for Summary Dismissal and Objection thereto, instead of the 30 days provided under the amended Rule XII of the Rules of Procedure, because the case had been filed prior to the adoption of the amendment of that Rule changing the period of 45 days to 30 days.

3. The Fund, on September 22, 1994, filed a Motion to Dismiss the Application, contending that the Tribunal lacked jurisdiction because "the Application challenges the legality of a decision taken before the commencement of the Tribunal's jurisdiction." In addition, the Fund argued, the Tribunal lacks jurisdiction because there had not been an "administrative act" with respect to the matter complained of.¹ On September 26, 1994, the Motion was transmitted to the Applicant who filed an Objection to the Motion on November 14, 1994.

4. Rule XII permits only one further pleading after a Motion of Summary Dismissal has been filed, i.e., an Objection by the Applicant. However, as the Fund had requested the opportunity to file further observations, and as the President was of the opinion that further observations by the parties might be helpful in the determination of the issues involved in the case, the President, in the exercise of his authority under paragraph 8 of Rule XII,² decided to allow each of the parties to file one additional pleading. The Fund, thereupon, filed a

¹ Article II, Section 1 of the Statute of the Tribunal provides: "The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; ..."

² Rule XII, para. 8 of the Rules of Procedure provides: "There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests."

Response to Ms. "S"'s Objection (December 15, 1994) and the Applicant filed a Rejoinder to the Fund's Response (January 17, 1995).

5. On March 20, 1995 the case was placed on the agenda for the forthcoming judicial session of the Tribunal.

6. The Tribunal decided that oral proceedings on jurisdictional issues, which the Applicant had requested, would not be held, as the condition laid down in Rule XIII, paragraph 1 that they be "necessary for the disposition of the case" was not met.

7. Pursuant to the Rules of Procedure, a Motion to Dismiss suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. In view of the Fund's filing of a Motion to Dismiss, the present consideration of the claim is confined to the jurisdictional issues of the case. Its substantive aspects are referred to only to the extent necessary for disposition of the jurisdictional issues.

The Facts

8. Of the facts on which the claim is based some are not in dispute between the parties, while there is disagreement about at least one of these facts. The facts that are not in dispute between the parties may be summarized as follows:

- a. Ms. "S" took a full-time contractual position with the Fund in 1986. She worked part-time in a contractual position from September 15, 1988 until February 24, 1993. She received an appointment to the staff on February 25, 1993.
- b. On March 24, 1993, she wrote to Mr. Rea (Director of the Administration Department) requesting that her contractual service be considered qualified service under the Staff Retirement Plan (SRP) on an exceptional basis.
- c. On April 19, 1993, Mr. Rea declined to accept her request.
- d. Ms. "S" requested Mr. Rea on September 9, 1993, as Chairman of the Administration Committee the SRP, to bring before that Committee her request that her prior contractual service be considered as qualified service under the SRP either on an exceptional basis or, alternatively, that the SRP be amended with retroactive effect to recognize part-time contractual service.
- e. The Secretary of the Administration Committee replied on May 4, 1994, refusing to grant exceptional treatment and declining to recommend an amendment to the SRP.

The fact that is in dispute between the parties may be summarized as follows:

The Applicant states that the relevant provision of the SRP defining eligible service (Section 3.2(b)(ii))³ was adopted on December 14, 1992, which is the date of the current, published text of the SRP. The Fund maintains that the provision was originally adopted in 1974, and amended on a point not pertinent to Ms. "S"'s case on April 30, 1991, with effect from May 1, 1991. The Fund has supplied as evidence of its position internal memoranda and minutes of Executive Board meetings, as well as Staff Bulletins, Fact Sheets and other documents concerning the SRP regularly furnished to the staff.

Respondent's Contentions in Support of the Motion to Dismiss

9. The following points summarize the Fund's contentions:

(i) The regulation at issue pre-dates the establishment of the Tribunal; consequently, the Tribunal lacks jurisdiction because, pursuant to Article XX, Section 1, of the Statute of the Administrative Tribunal,⁴ it is not competent to review the legality of a provision in effect prior to October 15, 1992. Additionally, a decision applying a regulation adopted prior to October 15, 1992 (the date of commencement of the Tribunal's jurisdiction) cannot be complained of, even if the decision was taken subsequent to that date.

(ii) The current version of the SRP provision at issue, Section 3.2(b)(ii), was adopted on April 30, 1991, with effect from May 1, 1991. The Applicant assumed that December 14, 1992, the date of publication of the latest text of the SRP, was the date of its adoption and effectiveness. Even assuming, arguendo, that the 1991 amendment to Section 3.2(b) had been adopted on December 14, 1992, the element about which there is a contest (i.e., the requirement of full-time service) has existed and remained unchanged since 1974. To allow a request for change in a term or condition of employment in existence prior to the start of the Tribunal's jurisdiction, or a request for exceptional treatment, to be a basis for jurisdiction would be contrary to the

³ / Section 3.2(b)(ii) provides: "(b) ... eligible service of a participant shall include: (ii) any period that commenced prior to May 1, 1991, if that period is not less than three years and immediately preceded a period of contributory service, during all of which the participant was retained by the Fund as a consultant in full-time service, provided that the consultant was employed by the Fund on May 1, 1991."

⁴ / Article XX, Section 1 provides that: "The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date."

legislative history of the Statute and to the ruling in Mr. "X" v. International Monetary Fund (IMFAT 1994, Judgment No. 1).

(iii) The consideration of Applicant's request did not constitute a "decision" for the purposes of the Tribunal's jurisdiction. While the Administration Committee did consider the Applicant's requests, it did not take a "decision" in the sense of the Statute for the following reasons: (1) the Committee left the existing policy in place; the implementation of an existing policy is not a "decision" for the purposes of the Statute, and (2) she asked for a recommendation by the Administration Committee to the Pension Committee rather than a decision; any such decision would have to be taken by a different body. The fact that the Administration Committee declined to make a recommendation was not tantamount to a decision. There has been no "administrative act" taken with respect to Applicant altering or amending her conditions of service, and the Tribunal, consequently, has no competence over the matter.

Applicant's Contentions in Opposition to the Motion to Dismiss

10. The Applicant's opposition to the Fund's Motion must be understood in light of the arguments presented in the Application in which she (1) challenges the decision made on May 4, 1994 by the Administration Committee of the SRP; (2) contends that she has exhausted all channels of administrative review; (3) argues that the SRP is illegal because it contains Section 3.2(b)(ii), which discriminates against women by limiting pension credit to full-time employment (virtually all part-time staff affected being women); (4) complains that the provision has been arbitrarily, capriciously and discriminatorily applied to her to deny credit, for pension benefit purposes, for what would otherwise be creditable employment time; and (5) contends that provision was adopted and promulgated on December 14, 1992. The illegal administrative acts which Ms. "S" challenges are "the deliberate and intentional failure to amend the provision cited above when it was adopted on December 14, 1992, and the application of the illegal provisions of the SRP to me by the decision taken on May 4, 1994."

11. The relief requested in the Application is for the Tribunal to instruct the Administration and Pension Committees to amend Section 3.2(b)(ii) by adding "or part-time" after the words "in full-time", and to include the entire period of Ms. "S"'s contractual service in her eligible service for pension purposes.

12. In her Objection to the Motion to Dismiss, Ms. "S" argues that a "decision" was taken and challenges the "decision" not to refer the matter to the Pension Committee and the Executive Board. She contends that the refusal and failure of the Administration Committee to recommend an amendment of the relevant SRP provision or even to refer the matter to the

Pension Committee did constitute a "decision" for purposes of Article II of the Statute.⁵ Applicant asked the Administration Committee to submit the matter to the Pension Committee because, she maintains, "there is no other means available to staff of the Fund to have the Pension Committee consider an amendment to the Staff Retirement Plan except through the prior endorsement of the Administration Committee," since a provision which would allow formal direct access by staff to the Pension Committee does not exist. She maintains that, by its decision of May 4, 1994, the Administration Committee blocked her access to the Pension Committee. That decision, taken at a time when the Tribunal's jurisdiction was in effect, was, the Applicant maintains, arbitrary, capricious and discriminatory. Its result was that the Pension Committee was not required to deal with the question of amending a provision of the SRP that in effect illegally discriminates against the female gender. It was not the Administration Committee's failure to "recommend" such an amendment that is being challenged, but its decision to refuse to refer the matter to the Pension Committee and the Executive Board for decision.

The Fund's Response to Applicant's Objection to Motion to Dismiss

13. In its Response to Applicant's Objection to the Motion to Dismiss, the Fund argues that there is no requirement that the Administration Committee endorse or transmit a proposed amendment to the SRP in order for the Pension Committee to consider the matter.⁶ The Administration Committee's refusal to recommend an amendment to the SRP does not preclude the Applicant from raising the issue with the Pension Committee, which in any event includes two members of the staff. Moreover, the Fund contends, the Applicant has not shown that the refusal to amend a rule adopted prior to the effective date of the Tribunal's jurisdiction is a "decision" for purposes of Article II of the Statute.

In any event, the Fund's Motion to Dismiss maintains that the provision in the SRP to which the Applicant is objecting pre-dated the establishment of the Tribunal and, therefore, is not within its jurisdiction. A refusal to reconsider a rule that was adopted before the effective date of the Tribunal's jurisdiction cannot, consistent with this Tribunal's earlier judgment in the case of Mr. "X" v. International Monetary Fund, be considered a "decision" for purposes

⁵Article II of the Statute provides in part:

"1. The Tribunal shall be competent to pass judgment upon any application: (a) by a member of the staff challenging the legality of an administrative act adversely affecting him...

"2. For the purposes of this Statute: (a) the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund."

⁶Section 7.1(c) of the SRP provides: "The Pension Committee shall decide all matters of a general policy nature arising under the Plan, and all other matters, including any interpretation of the provisions of the Plan, required to be decided by it under the provisions of the Plan or submitted to it by any Committee appointed by it."

of Article II of the Statute, given the clear jurisdictional limitation prescribed by Article XX, Section 1, of the Statute.

The Applicant's Rejoinder to the Fund's Response to Applicant's
Objection to Motion to Dismiss

14. In her Rejoinder, Ms. "S" asserts that she followed the only procedure available to have the Pension Committee consider amendments to the SRP, stating that the SRP contains "no channel for administrative review of the arbitrary determinations of the Administration Committee of the Pension Committee. . ." Ms. "S" further complains that there exists no procedure concerning the manner in which pension decisions are made or reviewed, and that proceedings are not open to staff members. Ms. "S" observes that she was not notified whether the Pension Committee was informed of, or reviewed, the decision on her request. She further asserts that she discussed her case with some members of the Pension Committee. She refers to a memorandum to her from the Assistant Director of Administration, dated September 27, 1994 (after the filing of the Application), informing her that her request would not be referred to the Pension Committee. Finally, Ms. "S" contends that the Tribunal has jurisdiction over her Application because the Administration Committee's adverse decision was taken after October 15, 1992.

Request for Documents and Information

15. After Ms. "S"'s Application, the Fund's Motion for Summary Dismissal and the Applicant's Objection to that Motion had been submitted, it became clear to the Tribunal that the availability of certain information additional to that contained in the pleadings would better enable the Tribunal to clarify considerations bearing on the judgment that it would have to make. Accordingly, pursuant to Article X, Section 1 of the Statute⁷ and Rule XVII, paragraph 3 of the Rules of Procedure,⁸ the Tribunal requested the Fund to produce certain documents and information, dealing principally with the decision-making procedure in

⁷Article X, Section 1 provides: "The Tribunal may require the production of documents held by the Fund, except that the Managing Director may withhold evidence if he determines that the introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document. Such a determination shall be binding on the Tribunal, provided that the applicant's allegations concerning the contents of any document so withheld shall be deemed to have been demonstrated in the absence of probative evidence to the contrary. The Tribunal may examine witnesses and experts, subject to the same qualification."

⁸Rule XVII, paragraph 3 provides: "The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in possession of the Fund, and may request information which it deems useful to its judgment."

matters concerning the SRP and the communication to the staff of changes in the SRP. The requested documentation was provided by the Fund.

Grounds of the Decision

16. The Respondent in its Motion to Dismiss essentially contends that the Tribunal lacks jurisdiction over the claim because: (a) there was no administrative act, i.e., no individual or regulatory decision, such as is required for the Tribunal's competence by the terms of Article II, Sections 1 and 2 of the Statute, and (b) the pension provisions complained of pre-date the commencement of the Tribunal's jurisdiction; accordingly, the complaint concerning their application is barred by Article XX, Section 1 of the Statute.

17. The Tribunal does not accept the Fund's contentions summarized in (a) of the preceding paragraph. When, in a letter of May 4, 1994, the Secretary of the Administration Committee stated: "Section 3.2(b) of the Plan clearly requires that the individual must have been employed full-time by the Fund for the whole of the three-year period immediately preceding contributory service, and your service does not meet that test," that statement reflected a decision; when the Applicant's request for an exception in her favor in the application of the pertinent SRP provision was rejected, that constituted a decision; when the Administration Committee declined to transmit the Applicant's request to the Pension Committee for amendment of the provision at issue, that constituted a decision.

18. The Respondent in its Motion to Dismiss further and principally contends that the Tribunal is not competent to pass judgment upon the application because of the time bar of Article XX, Section 1 of the Statute. The Applicant points out that the decisions referred to in the preceding paragraph in fact were taken after October 15, 1992, the determinative date for the Tribunal's competence specified in Article XX. The ultimate position of the Respondent is that, if decisions were taken and were taken after that date, they necessarily import a challenge to the legality of a regulatory provision which pre-dates October 15, 1992. The Tribunal thus must resolve the question of when the administrative act whose legality is challenged or whose illegality is asserted was taken for the purposes of its jurisdiction as provided in the Statute.

19. On October 10, 1974, the Chairman of the Administration Committee of the Staff Retirement Plan transmitted to the Chairman of the Pension Committee a proposal for amendment of Article 3 of the Plan ("Eligible Service") to give retroactive credit under the Plan for substantial service which a participant rendered as a consultant immediately before joining the Plan. The Tribunal understands that, in the practice of the Fund, the term "consultant" embraces contractual employees as well. There was no reference to part-time contractual service in the consideration of the proposal by the Administration Committee or in the amendment as adopted by the Executive Board of the Fund shortly thereafter.⁹

⁹The text in Section 3.2 as adopted in 1974 read as follows:

(continued)

20. The relevant provision of the SRP was amended in 1991 and, as amended, was brought to the attention of the participants in the SRP in the Plan's Report on Operations as of April 30, 1991, which explained the change in the following terms:

"Changes were made to the provisions of Article 3 concerning retroactive participation in the Plan under certain conditions for participants formerly on contractual or temporary appointments. Because the classification of 'staff member on temporary appointment' has been abandoned, the provision was removed from the Plan. The provision concerning contractual appointments gave rise to a number of problems. The contracts of contractual appointees typically state that benefits deriving from the IMF employment are limited to those specified in the contract, the compensation paid makes some allowances for the absence of pension benefits, and a specific payment is made at the end of the contract in lieu of a pension. The Pension Committee therefore recommended, and the Executive Board agreed, that participants should not be allowed in the future to convert to eligible service periods of IMF employment during which they were ineligible to participate in the Plan. As a 'grandfathering' exception, the current provisions would apply to all contractual persons who were employed by the Fund prior to May 1, 1991, if they ultimately would satisfy the conditions for validating contractual service." (At page 7)

The "grandfathering" exception applied to those persons who were eligible for conversion before the change, i.e., to full-time employees only. The 1991 amendment did not refer to or alter the situation of part-time contractual employees in respect of the Pension Plan.

21. Both the 1974 amendment to the Staff Retirement Plan and the 1991 revision of it pre-dated the establishment of the Tribunal. It follows that, pursuant to Article XX, Section 1 of the Statute, the Applicant's complaint, in so far as it challenges the legality of an element of those provisions, is time barred. The denial of requests for exceptional application or amendment of a "pre-existing" provision equally cannot confer jurisdiction on the Tribunal it otherwise lacks, nor can a refusal to refer a request for amendment to the Pension Committee do so. That a current complaint about a rule which came into force before October 15, 1992 is not sufficient to give rise to jurisdiction which otherwise is absent follows from the principle that formed the basis of the Tribunal's judgment in the case of Mr. "X" v. International Monetary Fund. That principle governs in respect of assertions of the illegality

"(b) Eligible service for a staff member shall include any period of not less than three years during all of which the staff member was retained by the Fund in full time service as a consultant or a temporary appointee and which immediately preceded a period of participating service, provided that the participant pays in full during such participating service and within ninety days of the commencement of his participating service, or by January 31, 1975, whichever is later, the amount he would have paid if he had been a participant throughout the entire period of such service plus regular interest thereon."

of pre-existing rules. It also governs requests for changes in pre-existing rules and requests for exceptions to their application.

22. In a judgment confined to the question of jurisdiction, the Tribunal is not empowered to consider the issue of whether a regulation of the Fund has given rise to gender discrimination, however inadvertent. The terms of Article XX, Section 1 of its Statute require the Tribunal to dismiss the Application. The terms of Article XX are clear, categoric and compelling. While Article VI, Section 2 of the Statute provides that "the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision," that general proviso is subject to the lex specialis of Article XX. The specific governs the general. Moreover, although the terms of Article XX are clear and require no recourse to their travaux préparatoires for elucidation, it may be observed that the Report of the Fund's Executive Board to the Board of Governors prepared with a view to adoption of the Statute of the Administrative Tribunal states that the quoted provision of Article VI is "subject to the provisions of Article XX" (at page 25 of the printed version).

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund, unanimously,
decides summarily to dismiss the Application.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
May 5, 1995