ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2005-1

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

Introduction

1. On March 17 and 18, 2005, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Mr. "F", a former staff member of the Fund.

2. Mr. "F" contests the decision to abolish his position, resulting in his separation from service. Applicant contends that the decision was motivated by religious discrimination. Additionally, Mr. "F" alleges that during his employment he was subjected to a hostile work environment based on his religious affiliation, which differed from that of his immediate co-workers. Applicant maintains that the abolition of his position, which was part of a restructuring of his department, was not justified by institutional needs but rather was a pretext for removing him from his work unit. Applicant contends that he was qualified to meet the requirements of the redesigned position as well as those of a second position, but that he was not considered for these positions nor given good faith assistance in finding alternative employment in the Fund. He also maintains that he was not given adequate notice of the abolition of his position.

3. Respondent maintains that the decision to abolish Applicant's position was a lawful exercise of managerial discretion. The abolition, in Respondent's view, was taken in the interest of legitimate institutional needs and Mr. "F" was not qualified for the redesigned position or a second position that became available as a result of the restructuring of the department. Respondent also contends that neither the abolition decision nor Applicant's career with the Fund were adversely affected by religious discrimination. Finally, Respondent asserts that the abolition of post and subsequent separation of Applicant's service with the Fund, including efforts to assist in reassignment, were carried out in accordance with applicable procedures, including that for notice of separation.

4. The case of Mr. "F" is the first to place squarely before the Tribunal three important issues: 1) the lawfulness of an abolition of position; 2) an allegation of religious discrimination, discrimination prohibited by the Fund's internal law; and 3) a claim that a staff member has been subjected to a hostile work environment.

The Procedure

5. On November 20, 2003, Mr. "F" filed his Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicant that his Application did not fulfill all of the requirements of para. 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiency. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.[1]

6. The Application was transmitted to Respondent on December 9, 2003, and on January 6, 2004, pursuant to Rule XIV, para. 4[2] of the Rules of Procedure, the Registrar issued a Summary of the Application within the Fund. Respondent filed its Answer to Mr. "F"'s Application on January 23, 2004. Applicant submitted his Reply on March 1, 2004. The Fund's Rejoinder was filed on April 1, 2004.

7. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.[3] The Tribunal had the

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[1] Rule VII provides in pertinent part:

> "*Applications*
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> 3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.
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> 6. If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date. …"

[2] Rule XIV, para. 4 provides:

> "4. In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund."

[3] 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 decides that such proceedings are necessary for the disposition of the case."

benefit of a transcript of oral hearings of the Grievance Committee, at which Applicant and other witnesses testified.

Requests for Production of Documents

8. In his Application, Mr. "F" made the following requests for production of documents:

1. Working papers, memoranda, e-mails, etc. showing how the decisions on restructuring and abolition of Applicant's position were made;

2. The report of the former Ombudsperson that had led to the appointment of a senior Fund economist from outside of Language Services to manage the Section in which Applicant worked and advise on solving problems that had arisen in the Section;

3. The senior economist's reports on the Section, extracts of which had been produced during the Grievance Committee's proceedings;

4. The senior economist's terms of reference or management instructions regarding his tasks; and

5. The report of an outside consultant who had been engaged by the Director of Human Resources to investigate some of Applicant's claims after Mr. "F" lodged a request for administrative review pursuant to GAO No. 31.

In accordance with Rule XVII[4] of the Tribunal's Rules of Procedure, Respondent had the opportunity to present its observations, as both parties exchanged views in their subsequent

[4] Rule XVII provides:

"Production of Documents

1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.

2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.

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

(continued)

pleadings as to whether the document requests should be granted. On December 6, 2004, Applicant filed an additional memorandum regarding one of the requests, to which the Fund responded on December 8, 2004.

9. On December 10, 2004, the Administrative Tribunal, meeting in session, decided to deny three of the requests. Requests 1 and 4 were denied on the ground that Applicant had not shown that he had been denied access to the documents by the Fund, as the Fund had responded that it had provided all documents responsive to these requests as part of the Grievance Committee's proceedings.[5] Applicant did not dispute this response and the record before the Tribunal appeared to corroborate it. Request 2 was denied on the ground that the Ombudsperson's Terms of Reference provide that the Ombudsperson may not be called as a witness or otherwise be required to provide information in Tribunal proceedings.[6]

> 4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule."

[5] Discovery in the Grievance Committee is governed by GAO No. 31, Rev. 3 (November 1, 1995) (Grievance Committee), Section 7.06.4:

> "7.06.4 *Production of Evidence*. The Committee may at any time during the conduct of a hearing require evidence or argument in addition to that put forth by the parties. Upon the request of a party and with good cause shown, the Committee may, in its sound discretion, instruct the other party to provide to the Committee and to the opposing party documentary or other evidence. In deciding whether to order the production of documents, the Committee shall take into account the potential relevance of the documents sought to the issues presented and the extent to which the producing party would suffer any undue burden in producing such documents. The Committee may require the production of documents or other evidence from the Fund, except that the Managing Director may withhold evidence if he or she determines that the production or introduction of such evidence might hinder the operation of the Fund because of the secret or confidential nature of the document or evidence. Such a determination shall be binding on the Grievance Committee, provided that the grievant'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."

[6] "10. If a person who has raised a matter with the Ombudsperson decides to initiate a formal grievance under GAO No. 31, or to make an application to the Administrative Tribunal, the Ombudsperson may provide advice on the procedures prior to the filing of the grievance or the making of the application. However, the Ombudsperson shall thereafter refrain from assisting the grievant in the grievance process or in furthering an application to the Tribunal, except to the extent that, in the Ombudsperson's judgment, he or she may be able to assist in mediating the settlement of a case. The Ombudsperson may not be called as a witness or otherwise be required to provide information in such proceedings, or in any other administrative or judicial proceedings inside or outside the Fund."

Ombudsperson's Terms of Reference, June 1999.

10. As to the remaining requests, the Administrative Tribunal requested the Fund to transmit the responsive documents to the Tribunal for examination *in camera* in order to decide upon their disposition. On December 15, 2004 the documents were delivered for the Tribunal's inspection.

11. On February 28, 2005, the Administrative Tribunal, following consideration of the views of the parties, including the briefs and oral arguments in the Grievance Committee that had been made part of the record before the Tribunal, decided to deny Requests 3 and 5 on the following grounds.

12. As to Request 3, reports of the senior economist assigned to advise on the personnel problems in the Section, the Tribunal concluded that, in order to protect the privacy of other persons, only those documents relating directly to Applicant should be produced. Examination of the documents revealed that the same standard had been applied by the Grievance Committee in producing extracts of the materials to Mr. "F" during the Grievance Committee's proceedings. Accordingly, no further production of these documents was appropriate.

13. With respect to Request 5, the report of an outside consultant who had been engaged by the Director of Human Resources to investigate some of Applicant's claims following his request for administrative review pursuant to GAO No. 31,[7] the Tribunal concluded that there was merit to the Fund's contention that the investigator's report, flowing as it did not from proceedings leading up to the impugned decision[8] but rather from Applicant's request for administrative review of the acts now contested in the Administrative Tribunal, should be shielded from disclosure as not relevant since it did not bear on that decision. In addition, although not embracing the "work product doctrine" as a ground for denying the request, as had the Grievance Committee, the Tribunal considered that its conclusion was consistent with protecting the candor essential to preserving the twin purposes of administrative review: to reconsider and provide opportunities for settlement of a dispute and to prepare for litigation. *See* Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66.

14. At the same time, the record reflected that there was some ambiguity as to the exact nature of the outside consultant's role with respect to the administrative review process, and that Applicant possibly may have understood that he would have access to the report. The fact that an individual outside the Fund was engaged to perform the investigation was itself notable. Moreover, in inquiring into the question of whether Applicant had been subjected to a hostile work environment, the consultant in effect was charged with reviewing the Fund's alleged failure to act rather than a specific contested decision as is ordinarily the subject of administrative review under GAO No. 31.

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[7] *See infra* The Channels of Administrative Review.

[8] *Cf.* In re Malhotra, ILOAT Judgment No. 1372 (2000), Consideration 11.

15. In light of these circumstances, it was appropriate for the Tribunal to examine *in camera* the disputed document. Having examined the Report, the Tribunal concluded that the Director of Human Resources in her August 8, 2002 letter to Applicant's counsel marking the exhaustion of the administrative review process had fairly summarized the conclusions of the Report, and that the Report's contents did not support Applicant's claim that it contained "information damaging to Respondent's position and favorable to his own." Moreover, as similar information was found elsewhere in the record before the Tribunal, its disclosure would not have been of probative value to Applicant. Request 5 was therefore denied.

The Factual Background of the Case

16. The relevant factual background, some of which is disputed between the parties, may be summarized as follows. Additional factual elements will be included in the consideration of the issues of the case.

Overview

17. Mr. "F" joined the Fund on February 4, 1980 as a Transcriber of his native language ("Language 1").[9] While holding the title of Transcriber, Applicant received several promotions. In 1990, he was appointed to the post of Translation Preparation Assistant at Grade A6. In October 1996, following a temporary assignment as Special Projects Assistant, Applicant assumed the position of Translation Coordination Assistant ("TCA") at Grade A6, and in 1998 was promoted to Grade A7. It was in this position that Applicant was serving when the position was abolished effective November 1, 2001.

18. Prior to the abolition of Applicant's position, the work unit of which he was a member, the "Language 1" Section, underwent structural changes within the organization of the Fund. In 1999, the Section, as part of the Bureau of Language Services ("BLS"), was brought under the administration of the newly created department of Technology and General Services ("TGS"). TGS, the largest department in the Fund, combined the functions of the BLS, the Bureau of Computing Services, parts of the Administration Department, and a number of other entities under a single umbrella. In 2001, refinements were made to the organizational structure of TGS, resulting in the merger of the "Language 1" Section into a

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[9] The Administrative Tribunal's policy on protection of privacy, adopted in 1997, provides:

> " 1. In order to protect the privacy of the persons referred to in the text of the Tribunal's judgments, these persons shall be designated by acronyms; the departments and divisions of the Fund shall be referred to by numerals. However, the application of these procedures shall not prejudice the comprehensibility of the Tribunal's judgments."

Accordingly, Applicant's native language, which is also the name of the Section in which he worked, shall be referred to herein as "Language 1."

larger preexisting language Division to form the "Languages 1 & 2" Division. (A similar merger absorbed two other smaller language sections into another Division, while two other large language Divisions remained intact.) As part of the restructuring of language sections, Mr. "F"'s and two other support positions in the "Languages 1 & 2" Division were abolished.

The Problems in the "Language 1" Section

19. The record before the Administrative Tribunal reflects that almost from its inception (shortly before Applicant's arrival in 1980) and throughout his twenty-one year tenure in the unit, the "Language 1" Section was plagued with problems of interpersonal conflict, questions about its integrity and productivity, and complaints of ineffectual supervision. In Applicant's view, these problems were rooted in religious animosity between adherents to one major religion, who comprised a large majority of the Section's staff, and another religion of which Mr. "F" was an adherent. Applicant asserts that with the abolition of his position the Section became religiously homogeneous with no persons of his religion remaining. The conflicts between majority and minority religions played out within the Section, maintains Applicant, mirrored those that exist within the part of the world in which "Language 1" is spoken, most particularly in his native country, from which a number of members of the Section were drawn. Respondent's view, by contrast, is that the problems observed in the Section essentially did not derive from any religious animosity among the staff.

20. In 1998, the difficulties in the Section drew the attention of senior Fund management when, in September of that year, the Deputy Managing Director was informed by the Administration Department that the situation had reached "crisis proportions:"

> "The section has been beset with difficulties over the years, attributable largely to strong interpersonal differences and poor working relationships among the staff. Despite changes of personnel and repeated efforts to improve the working atmosphere in the section, the situation has gone from bad to worse and, in the past few months, has reached crisis proportions. The Ombudsperson and ADM [Administration Department] staff have been heavily involved with BLS senior staff in seeking a solution to the problems."

21. Acknowledging the depth and history of the Section's problems, in October 1998, the BLS Director put forth a plan to the Deputy Managing Director:

> "This plan aims at finding a long-term, permanent solution to the personnel problems that have beset this Section almost since its creation some twenty years ago. As these problems have been long-standing, it would appear that their cause goes beyond [the Section Chief]'s possible deficiencies in management skills and style."

Accordingly, a senior economist from another Fund department was appointed to assess and recommend solutions to the problems:

> "The objective of the plan is to use [the senior economist]'s two-year assignment to diagnose the actual roots of the problems and to recommend concrete, workable, fair, and durable solutions. As an independent observer of the Section in its daily activities, [the senior economist] will be called upon to assess the situation objectively, guide, coach, and advise the Section Chief as necessary, investigate possible complaints, identify any wrongdoings, and eventually make recommendations regarding the future structure, role, size and staffing of the Section. ... being of ["Language 1"] culture and having been with the Fund for many years, he will be well positioned to assess the situation in the Section in an informed, balanced, and institutional manner, and make actionable recommendations for the future."

22. The intensity of the difficulties once again was underscored when the BLS Director announced at a meeting of the Section's staff the senior economist's appointment for a two-year period starting November 30, 1998. According to the minutes of that meeting, the BLS Director commented that "... most staff from the ["Language 1"] Section had complained, through various institutional channels, about their general level of dissatisfaction with the running of the Section." Moreover, he noted, the situation had resulted in a "... serious disfunctioning and in very high costs in terms of resources spent (often at senior staff level) in many meetings with ADM and the Fund management."

23. The senior economist was to report his observations periodically to senior BLS management. When he did so, he maintained that the then Section Chief "consistently understated the achievements and abilities of some staff members," including those of Mr. "F", while he "inflated the achievement and skills of other staff," including the staff member who ultimately was appointed to occupy the position of TP/PA that was created following the abolition of Mr. "F"'s and another position in the Section. In particular, it was the view of the senior economist that the Section Chief "attempted to put [the other staff member] at a comparative advantage to take a leading role in the work on DTP [Desk Top Publishing] by inflating his qualifications and experience."

24. The senior economist furthermore concluded that there were "doubts regarding the reliability of statistics produced to measure both the production of the Section and the individual performance of the staff," and suggested that statistics were "massaged" in reporting performance of those staff members favored by the Section Chief. The BLS Director himself expressed the concern that "[b]ecause of the long history of mismanagement of the ["Language 1"] Section, the credibility of its production/productivity stats [statistics] is, to put it mildly, seriously in doubt."

25. It is apparent from the record that the senior economist rated the performance of Mr. "F" highly and relied upon him to gather statistical information for his review of the Section:

> "At the outset, I found Mr. ["F"] easy to work with; he is a reliable, can-do operator, and possesses superior organizational skills. .... Although the content of his job remained the same, his work as TCA put tremendous pressure on his time. The translation jobs, both dispatched and requested, had increased by almost 50 percent over the previous year. Due to his superior organizational skills, the Section did not miss a deadline. .... [Mr. "F"] rose to the occasion and did a superior job. In fact, he performed at the level of a research assistant. I relied on him.
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> One objective for Mr. ["F"] was the production of the ["Language 1"] WEO in-house using Desk Top Publishing (DTP) techniques. He was able to produce a dummy version. However, due to the pressures from his work as TCA, the DTP received a lower priority. In addition, he completed the ["Language 1"] Currency list for the first time."

26. It is noted that the senior economist's views of Mr. "F"'s skills differed from the views expressed by the TGS officials in charge of Language Services during the same period. In particular, it was stated in Mr. "F"'s 2000 Annual Performance Review (APR), his final review before the abolition of his position, that Applicant had fallen short of some expectations, including that he "... bears some responsibility in the fact that team spirit and open communication were still lacking in the ["Language 1"] Section last year...." It was further suggested that "... training will be needed to enhance his DTP [Desk Top Publishing] skills and his supervisory skills, his ability to handle stress, and most importantly to bring his written English skills up to Fund standards.... [Mr. "F"] must realize that poor writing and communication skills will remain a serious handicap in his career development." Nonetheless, on the recommendation of the senior economist, Mr. "F" received a "1" performance rating for 2000. Applicant's APRs for 1996-1999, which are part of the record before the Tribunal, evidence none of the strong reservations regarding his performance found in the 2000 APR, and throughout his Fund career Mr. "F" uniformly received "1" and "2" performance ratings.

27. It is evident from the testimony in the Grievance Committee's hearings that, over time, the senior economist's relationship with the Language Services senior officials became increasingly strained. Ultimately, amid controversy and maintaining that he was receiving inadequate support in his mission, he resigned from the assignment in frustration in mid-2000.

2001 Reorganization and Abolition of Mr. "F"'s position

28. By January 2001, following the departure from the ["Language 1"] Section of both the senior economist and the Section Chief whose administration had been the subject of his investigation, the time was seen as opportune finally to resolve the longstanding problems in the Section. Accordingly, the Director of TGS urged the Director of Human Resources to consider a proposal for reorganization of the BLS Language Sections, including the ["Language 1"] Section:

> "... BLS urgently needs to launch a campaign to recruit a new ["Language 1"] Section Chief while at the same time solving permanently the remaining problems of the Section.
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> [At a meeting of senior TGS, BLS, and Human Resources officials,] a solid consensus emerged that the ["Language 1"] Section needs to be rebuilt on new foundations, and without those staff members that have been at the heart of the Section's continuous problems for many years under different supervisors. The view is that the hiring of a new Chief for the Section while the current staffing remains unchanged is likely to result in failure."

Accordingly, the plan proposed in January 2001 was designed

> "... to permanently solve the long-standing problems of the ["Language 1"] Section on the occasion of the recruitment of a new Section Chief and, at the same time, to strengthen and streamline the structure of its language sections generally...."

It contemplated combining three small language Sections, including the ["Language 1"] Section into a single Division. It was noted:

> "Economies of scale would be achieved also at the level of the Translation Coordination Assistant (TCA) function, where there is now a clear duplication of effort with each section operating as an independent unit. In a new 'combined' division, only one TCA would control the flow of documents for all three language sections under the supervision of the Chief of the new Division."

29. Moreover, the proposal suggested:

> "The proposed restructuring of the language sections would offer a unique opportunity to solve some long-standing personnel problems in the ["Language 1"] Section. It would allow for the elimination of the ["Language 1"] Section Translation Coordination Assistant (TCA) position, and for the consolidation

> of the Text Processing Assistant/Desktop Publishing (TPA/DTP) and proofreader positions in the ["Language 1"] Section into **a single position**, the functions of which would be roughly similar to those already associated with the corresponding position in the [other small language] Sections. The two 'saved' positions would be redefined as the new division chief and the new divisional TCA positions, and the operation would be budget-neutral. It is unlikely that any of the current incumbents in the ["Language 1"] Section would have the range of skills required for such a 'combined' TPA/DTP/proofreader position, and a new person would therefore need to be hired.
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> .... This would permit the transition to a new team essentially made up of translator/interpreters and one support staff hired by the new managers of the ["Language 1"] Section.
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> The new Division Chief would have as a priority task to hire new staff and implement the new structure of the ["Language 1"] Section, in close cooperation with the new Section Chief. Such an approach would maximize the chances of success of the new Section Chief, while streamlining some BLS operations in the context of the crucial need to curb the demand for services and to reduce staff resources."

(Emphasis in original.)

30. Meanwhile, by March 2001, plans were also emerging for a further "Phase 2 Reorganization" of the entire TGS Department. The purpose of "Phase 2" was to "... give the Director of the department an opportunity to establish his own TGS front office management team by dissolving a layer of management overhead in the Bureaus and reshaping/redeploying functions performed by the incumbents." The proposal included removing senior management teams from what formerly was denominated as the Bureau of Language Services (BLS).

31. In June 2001, a final proposal for "Restructuring of the BLS ["Language 1"] Section and Other Smaller Language Service Units," modifying somewhat the plan proposed in January and placing the restructuring within the context of the "Phase 2 Reorganization" of TGS, was presented jointly by the HRD Director and TGS Director for endorsement by the Deputy Managing Director. Whereas the January plan was to create a new Division by combining three small Sections, the new plan was to merge the smaller language Sections into pre-existing Divisions. Once again, the proposal emphasized at the outset the relationship between the restructuring proposal and efforts to resolve the problems in the "Language 1" Section, suggesting that the Section should be rebuilt without those staff members who were seen as having been at the heart of its troubles:

"The purpose of this note is to inform you of the efforts under way to permanently resolve the long-standing problems of the ["Language 1"] Section of the Bureau of Language Services, and to seek your approval for a plan of action involving this Section and other small language service units as part of the restructuring of TGS. ... The proposed restructuring of the BLS sections would be budget neutral, as abolished positions would be redeployed within BLS to areas facing an increased workload.

....

This new structure will require some streamlining of the reporting lines for language services through a merger of certain functions at the section level or below. At the same time, a number of measures have already been taken to find a lasting solution for the problems of the ["Language 1"] Section. Taken together, these steps should help ensure the success of the restructuring of the BLS ["Language 1"] Section.

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In order to reduce the number of direct reports to the Advisor in charge of language services, it is proposed to integrate the ["Language 1"] and [other small languages] Sections into existing divisions ...

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At the support staff level, this integration would make some functions redundant, including the current ["Language 1"] Section Translation Coordination Assistant (TCA) position, of which up to three would be redeployed.

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... the consensus between HRD and TGS regarding the ["Language 1"] Section has been that, given the Section's difficult past, the hiring of a new Chief while the current staffing remained essentially unchanged would likely result in failure. ... Against this background, we believe that the Section needs to be rebuilt on new foundations, and without those staff members who have been at the

> heart of its continuous problems for many years under different supervisors."

The proposal further suggested that, following the integration of the "Language 1" Section into the new "Languages 1 & 2" Division (under the direction of the former "Language 2" Division Chief who was also a "Language 1" speaker), the TCA position held by Mr. "F", the Applicant, would be abolished "immediately."

32. The June 2001 proposal received the Deputy Managing Director's approval in July, and the merger creating the "Languages 1 & 2" Division took effect August 1. There was, however, a delay until October in implementing the full restructuring plan, owing to concerns about Mr. "F"'s health. The head of the Counseling and Consultation Service of the Joint Bank/Fund Health Services Department testified that between May and the end of September 2001 (as well as for a period in 1995-1996) he had provided counseling to Mr. "F" for work-related stress. According to the Counseling Services head, Mr. "F" was at the time concerned about his job security, perceiving that work was gradually being taken away from him and that he had "... not really felt support in that office for a long time." Mr. "F" had also expressed to the counselor "...concerns about the differences, both personal and religious differences in the office and how he thought the kind of office environment had been a very difficult one." In mid-summer, Mr. "F"'s emotional health had declined further, and he was placed on sick leave for a month.

33. Concerns relating to Mr. "F"'s health abated in the fall, and on October 18, 2001, the Division Chief informed the TGS Advisor for Language Services that he was ready to proceed with the abolition of Applicant's position, along with that of another support position. It appears that the other position, the Translation Editorial Officer at A10 in the "Language 1" Section, was to be redefined as a Text Processing/Proofreading Assistant ("TP/PA") position at A7 and advertised accordingly. Furthermore, "... with a view to aligning the ["Language 1"] Section's text-processing, typesetting, and proofreading/editing function with those of the [other smaller language Sections] ..., we recommend that [the incumbent Text Processing Assistant (TPA) at Grade A6] be kept in the team. [He] is developing well in desk top processing and typesetting and has also successfully completed a number of proofreading assignments." (Additionally, the Division Chief recommended abolition of the Translation Editorial Assistant position serving the "Language 2" part of the Division.)

34. The TGS Advisor forwarded these recommendations with approval to the TGS Assistant Director on October 22, 2001, who in turn sought approval from the HRD Director and TGS Director the following day, noting that the positions earmarked for abolition were to be redeployed elsewhere in Language Services.

35. Accordingly, a total of three positions in the newly merged "Languages 1 & 2" Division were abolished in October 2001. Thereafter, within the "Language 1" Section, two support positions were in place, the new Text Processing/Proofreading Assistant ("TP/PA") position, and a Text Processing Assistant ("TPA") position. The incumbent TPA was

appointed to the TP/PA job following a vacancy announcement in February 2002 which specified that there was a qualified internal candidate. The TPA position so vacated was filled through external recruitment. The TCA duties earlier performed by Mr. "F" were to be reallocated to the two TCAs who previously functioned solely in the "Language 2" sector of the Division.

36. On October 25, 2001, Applicant was provided official notice of the abolition of position effective November 1, 2001, having been informed of the decision in a meeting a day earlier with his Division Chief and the TGS Advisor for Language Services. By way of explanation, the notice stated: "In its ongoing effort to adjust available resources to changing requirements, Language Services has reviewed its current and future needs in the area of word processing, desk top publishing, proofreading, and translation editorial and coordination services." The notification additionally referred Mr. "F" to a Human Resources Officer "... regarding reassignment assistance, training, career counseling, outplacement assistance and other benefits the Fund can offer you in this connection."

37. Administrative arrangements in connection with the abolition of Mr. "F"'s position were confirmed by letter of January 16, 2002. These arrangements included, pursuant to GAO No. 16, a six-month reassignment period of November 1, 2001 - April 30, 2002, and, in the event that efforts to identify a reassignment during the period were not successful, an extended notice period of 120 days, followed by the maximum 22.5 months of separation leave at full pay based upon Applicant's years of service. It has not been disputed that these benefits were received by Mr. "F" and that he was separated from service effective July 31, 2004.

The Channels of Administrative Review

38. On February 21, 2002, pursuant to GAO No. 31, Rev. 3 (November 1, 1995), Section 6.02, Applicant through counsel sought administrative review by his department head, i.e. the Director of TGS. This request was later transferred to the Human Resources Director. (*See* Section 6.04.)[10]

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[10] *See* GAO No. 31, Rev. 3 (November 1, 1995):

> "*Section 6. Administrative Review*
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> ...
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> 6.02 *Grievances Concerning a Staff Member's Work or Career*. With respect to decisions that pertain to a staff member's work or career in the Fund, the staff member shall first submit a request for review in writing to his or her Department Head or other official designated by the Department Head for this purpose, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. Except as provided in Section 6.02.1, the request must be submitted within six months after the challenged decision was made or communicated to the staff member, whichever is later. The

(continued)

39. Alleging that the abolition of position was the culmination of a history of religious discrimination, Applicant requested review of the abolition decision itself and surrounding issues of discrimination, retaliation and harassment. Following several exchanges with Applicant and his counsel, on April 11, 2002, the Human Resources Department confirmed by letter to Applicant and his counsel arrangements to carry out the review on "two tracks," with the "technical" aspects of the abolition to be considered internally by HRD and the charges of discrimination, retaliation and harassment to be investigated by an outside consultant engaged for that purpose. The terms of reference for the consultant were attached to that letter.

40. Applicant cooperated in providing information to the consultant and later, after the exhaustion of the administrative review process, he and his counsel met with the consultant to discuss the findings. A copy of the consultant's Report, however, was not provided to Applicant. This Report became the subject of a request for production of documents in both the Grievance Committee and the Administrative Tribunal.[11] Applicant also has contended that he was " lull[ed] ... into an inactive pursuit of his Grievance," while the Respondent prepared its defense for litigation, and that the investigation was not objective because the consultant had sought regular employment with the Fund.

41. Having considered the circumstances and terms of the consultant's appointment, as well as the consultant's Report, the Tribunal concludes that Applicant sustained no prejudice in these respects.

42. On August 8, 2002, the Director of Human Resources rendered her decision marking the exhaustion of the administrative review process anterior to the Grievance Committee proceedings. In a detailed opinion, relying on the findings of both the internal investigation and the consultant's investigation, the HRD Director concluded a) that TGS acted properly

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> Department Head, or his or her designee, shall have 15 days in which to respond in writing to the request for review.
>
> ...
>
> 6.04 *Appeal to the Director of Administration*. If dissatisfied with the response to a request under either Section 6.02 or 6.03, or if no response is received within 15 days after submission of such a request, then the staff member may request in writing a review by the Director of Administration. The written request must be submitted within 30 days after the response from the division chief or Department Head, as applicable, has been received or the deadline for a response has passed, whichever is earlier."

.

[11] *See supra* Requests for Production of Documents.

and fully within the rules of the Fund in deciding to abolish Mr. "F"'s position and separate him from service, and b) that neither these decisions nor Mr. "F"'s career with the Fund were adversely affected by discrimination, harassment, or retaliation.

43. Applicant filed his Grievance with the Fund's Grievance Committee on October 3, 2002. The Committee issued its Recommendation and Report on July 31, 2003, recommending denial of the Grievance on the basis that Mr. "F" had "... been unable to show a nexus between the alleged religious intolerance displayed by [former colleagues] and the TGS reorganization, which resulted in the abolition of his position," and "... has been unable to prove that the decision to abolish his position was arbitrary, capricious or discriminatory, or procedurally defective in a manner which substantially affected the outcome." By letter of August 26, 2003, the Deputy Managing Director notified Applicant that Fund management had accepted the Committee's recommendation.

44. On November 20, 2003, Mr. "F" filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. The decision to abolish Applicant's position and terminate his employment was motivated by discrimination on religious grounds and was the culmination of a history of discrimination. The abolition was improperly motivated to resolve personnel problems grounded in religious intolerance.

2. During his career with the Fund, Applicant experienced a hostile and discriminatory work environment in which co-workers of the majority religion resented Applicant's authority in the unit. Religious symbols were placed in the workplace as a deliberate provocation to Applicant, while his own religious expression was not tolerated.

3. Applicant repeatedly brought the issue of religious prejudice and harassment to the attention of management, but management failed to investigate the allegations.

4. Applicant suffered mentally and physically due to management's conduct.

5. Applicant's functions were not actually abolished but were redistributed to two positions at levels A6 and A7. The redundancy did not arise from any skills mismatch, abolition of functions, or budget reduction.

6. Applicant's position embraced functions beyond that of a TCA, and there was no material difference between the old and new positions. The TP/PA and TPA positions required skills that Applicant used as TCA and back-up TPA. He was more than qualified to perform either of these functions.

7. It was not credible that the remaining TCAs in the Division could perform Applicant's former duties without having a knowledge of "Language 1."

8. Applicant's performance was not at issue, as he always performed at a fully satisfactory level.

9. Respondent failed to give Applicant appropriate advance notice of the abolition of his position when he could have raised relevant issues about his continued employment.

10. No genuine efforts were made to find an alternative position in the Fund for Applicant. Nor was Applicant offered, or given an opportunity to compete for, either the TP/PA or TPA position.

11. Applicant seeks as relief rescission of the abolition decision or a "directed settlement protecting his economic security on the basis of a pension equal to what he would have had at normal retirement age" and such other relief as may be adjudged.

Respondent's principal contentions

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

1. The decisions to abolish Applicant's position and other positions within Language Services were taken for legitimate, business-related reasons, to consolidate functions so as to redeploy positions to other areas of the department where increased staffing was needed.

2. Applicant's Section traditionally had an insufficient amount of work to justify a full-time TCA position.

3. Applicant's TCA duties, which were mainly administrative and did not require language skills other than English, were genuinely reassigned to the two other TCAs who had come from the "Language 2" side of the merged "Languages 1 & 2" Division.

4. There were material differences between Mr. "F"'s abolished TCA position and the new TP/PA position in the Section. That position does not involve the administrative tasks of the TCA but does require the proofreading and editing

responsibilities of the abolished TEO position, along with desk top publishing skills as a primary responsibility and not just as a back-up.

5. Applicant lacked the qualifications required to perform the functions of the new TP/PA position in his Section.

6. Applicant has failed to show that religious discrimination adversely affected his career or played any role in the decision to abolish his position.

7. The impact of the abolition decisions did not fall disproportionately on a single religious group. There is no demonstrable link between any alleged prejudices of Mr. "F"'s co-workers and the TGS senior managers who were responsible for the abolition decisions. No witness corroborated Applicant's belief that he was the target of religious discrimination.

8. The weight of the evidence shows that, while there may have been isolated instances over more than twenty years in which some of Applicant's colleagues alluded to his religion in derogatory terms, the supervisors who became aware of these incidents dealt with them appropriately, and Applicant's career did not suffer any consequences as a result of religious bias.

9. Applicant contributed to problems with colleagues and these were work-related.

10. Applicant has failed to show that the process undertaken in abolishing his position or separating him from the Fund was procedurally flawed. The process was consistent with applicable rules.

11. The Fund fully satisfied its obligations under GAO No. 16 to make efforts to assist Applicant in finding alternative employment, but Applicant did not seriously pursue the assistance offered. Applicant passed up the opportunity to compete for the TP/PA position and to attempt to demonstrate, through the normal selection process, that he had stronger qualifications than the individual selected. Applicant was not qualified for the TPA position that was vacated and filled by an external candidate; the Fund was under no duty to invite him to apply for a position for which he was clearly unqualified.

Consideration of the Issues of the Case

Did Respondent abuse its discretion in abolishing Applicant's position?

47. The case of Mr. "F" is the first brought to the IMFAT in which an Applicant directly contests the lawfulness of an abolition of position.[12]

48. That the abolition of a post is an individual decision taken in the exercise of managerial discretion and subject to review only for abuse of that discretion is well recognized in international administrative jurisprudence:

> "The decision to declare a position redundant under the applicable Staff Rules is an exercise of discretion by the Bank. The Tribunal will not review such a decision unless it constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of fair and reasonable procedures."

Fidel v. IBRD, WBAT Decision No. 302, (2003), para. 23. *See also* Mr. J. C., ILOAT Judgment No. 139 (1969), Consideration 1:

> "The decision to suppress a post lies within the Director-General's discretion. It follows that the Tribunal will not interfere with such a decision unless it is tainted by procedural irregularities or by illegality or is based on incorrect facts, or unless essential facts have not been taken into consideration, or again, unless conclusions which are clearly false have been drawn from the documents in the dossier."

49. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the IMFAT consistently has invoked the standard set forth in the Commentary on the Statute as follows:

> "... with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown

[12] In Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal considered a challenge to conclusions under the Discrimination Review Exercise (DRE) in which the applicant had contested the abolition of her position, along with other actions, as discriminatory. Given the limited scope of review available in the Tribunal for challenges to decisions arising from the DRE, the Tribunal did not consider directly the lawfulness of the abolition of position in that case.

> 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."

(Report of the Executive Board, p. 19.) *See* Ms. "J", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 20, 2003), para. 106 (summarizing IMFAT's jurisprudence relating to standard of review). At the same time, the Tribunal has observed that some of the factors subsumed in the standard of review contemplate stricter scrutiny on the part of the Tribunal than do others. (Ms. "J", para. 107.)

50. Accordingly, the following sections consider: 1) whether the decision to abolish Applicant's position was based on an error of law or fact, i.e. whether it was taken consistently with the requirements of GAO No. 16; 2) whether the decision was improperly motivated so as to vitiate an otherwise lawful decision; 3) whether the decision was discriminatory because of Applicant's religion, a serious charge that may be subject to particular scrutiny by the Tribunal; 4) whether Applicant was subjected to a hostile work environment during his career with the Fund; and 5) whether the abolition decision was carried out in violation of fair and reasonable procedures.

1. Was the abolition of Applicant's position taken consistently with the requirements of GAO No. 16?

51. Abolition of position in the IMF is governed by GAO No. 16, Rev. 5 (July 10, 1990), Section 13, which provides:

> "Section 13 Reduction in Strength, Abolition of Position or Change in Job Requirements
>
> 13.01 General. A staff member may be separated in the event of the abolition of his position, when the position is redesigned to meet institutional needs and the incumbent is no longer qualified to meet its requirements or when a reduction in strength is required. In the event of a reduction of staff positions in the Fund, efforts shall be made to reassign staff members consistent with their qualifications and the requirements of the Fund. In reassigning staff members, consideration shall be given to their performance record, seniority, and length of service. In the event that a staff member's position is abolished, or the position is redesigned to meet institutional needs and he is no longer qualified to meet its requirements, efforts shall be made over a period of not less than six months to reassign him to another position consistent with his qualifications and the requirements of the Fund. During this period, the Fund shall also provide the staff member with appropriate training if such training will facilitate his placement in

> an alternate position. If all efforts to identify a reassignment fail, his appointment shall be terminated.
>
> 13.02 Notice. A staff member separated under the provisions of Section 13.01 shall be entitled to 60 calendar days' notice. However, the Director of Administration may extend this period up to 120 calendar days in order to allow the staff member a reasonable time, before his separation, to settle his affairs. The Director of Administration may also excuse a staff member from reporting for duty during part or all of the period of notice and place the staff member on administrative leave with pay during this period.
>
> 13.03 Resettlement Benefits. A staff member who is separated under the provisions of Section 13.01 shall be eligible for resettlement benefits. However, the minimum period of service required as specified in General Administrative Order No. 8 (Relocation Benefits and Separation Grant) shall not apply in such a case.
>
> 13.04 Payment from Separation Benefits Fund. A staff member separated under the provisions of Section 13.01 shall be granted a separation payment from the Separation Benefits Fund in accordance with the provisions of Section 4.06."

Therefore the essential requirements for a lawful abolition of position are that the position has been abolished or redesigned to meet institutional needs and the incumbent is no longer qualified to meet its requirements.

a. Was Applicant's position abolished or redesigned to meet institutional needs?

52. International administrative jurisprudence suggests that the test for whether a position has been abolished or redesigned to meet institutional needs is whether there are material differences between the old position and the new:

> "The question thus arises in this case whether the new positions that were created were in fact different from the one previously occupied by the Applicant or whether, on the other hand, they were in fact essentially the same."

Arellano (No. 2) v. IBRD, WBAT Decision No. 161 (1997), para. 32. Later, in the same decision, the Tribunal on the basis of its finding of sufficient difference between the abolished position and the newly created position, states that:

> "The Tribunal concludes that the two positions were sufficiently different to justify the classification of the action in relation to the original position as an 'abolition' of a post rather than as a reduction."

(Para. 35.) The emphasis here appears to be on sufficient difference between the original position and the newly created one. In Brannigan v. IBRD, WBAT Decision No. 165 (1997), the Tribunal considered what kinds of "material difference" should there be between the post declared redundant and the new position. It also deliberated upon the issue of "significant change" in functions between the abolished post and the newly created post:

> "23. On the assumption that the purported abolition of a position can properly be justified in the interests of efficient administration, the question still remains whether it has been truly abolished so as to warrant the application of Staff Rule 7.01, paragraph 8.02(b). This is a matter of comparing the 'old' position with any relevant 'new' position. To demonstrate the abolition of a position it is not enough that there may be some differences between the old and new positions; the differences must be ones of substance. The Tribunal has emphasized in this respect the need for the Bank to show a clear material difference between the new position and the position that was made redundant (*Fabara-Núñez*, Decision No. 101 [1991], para. 44; *Arellano*, Decision No. 161 [1997], para. 33).
>
> 24. In the present case, EXT was indeed subject to a process of reorganization in order to provide a new approach to media relations and to adjust to the introduction of new technologies. This reorganization entailed a number of changes, including the mutually agreed separation of some existing staff members and the recruitment of some new ones. However, in the judgment of the Tribunal, the changes that were effected in the Applicant's position were not material.
>
> 25. If the substantive work of the Senior Public Information Officer position originally held by the Applicant before redundancy is compared with the new position of External Affairs Counsellor, or even with some of the other positions that became available, a striking similarity can be noted. Many of the responsibilities are substantially the same, particularly as to the requirements of contact and liaison with the media. Although the Bank emphasizes the need in the new position for familiarity with new broadcasting technologies, particularly in the television field, it does not explain how this familiarity necessarily extends beyond

> the requirements of the Applicant's position that he deal with television and radio broadcasters and journalists.
>
> 26. Nor is the Tribunal persuaded that the transfer of certain functions to other staff positions materially altered the position previously held by the Applicant. Much of the Respondent's justification of the 'abolition' of the Applicant's position relates to the transfer to Paris of the production of the Daily Development News. However, this particular change does not appear to be significant for several reasons: this assignment had only recently been added to the Applicant's usual duties as an ad hoc task; part of the production of this service remained in Washington; and the Applicant had devoted only a limited proportion of his time to that task. The addition of a foreign language ability to the new position in connection with the production of the Daily Development News does not appear to be an element which significantly changed the content of the position held by the Applicant. Similarly, the elimination of the responsibility to liaise with the Vice President and the reassignment to others of specific minor tasks did not change the essence of the work of the Senior Public Information Officer."

53. The question therefore arises whether there were material differences between Mr. "F"'s duties as TCA and those of the position of TP/PA that was introduced in the "Language 1" Section following its restructuring.

54. As described in his Annual Performance Review for the period 1/1/2000 to 12/31/2000, the final full year in which he served in that position before his separation, Applicant as TCA was responsible for receipt and distribution of job requests to staff members of the Section, monitoring and follow up with outside contractors, dispatch of finished jobs after completing relevant entries in the database, producing statistical reports, making available word count statistics of the staff members for budgetary purposes, collecting and submitting attendance information on a daily basis, collecting time reports from the Section staff members, verifying them and submitting them to the Section Chief and ensuring availability of adequate supplies for the Section. Applicant also provided transcription support for important documents such as the World Economic Outlook ("WEO") as part of his text processing duties. It is a matter of factual dispute how much of Applicant's duties as TCA involved back-up text processing responsibilities. Some supervisors reported that in the TCA position in the "Language 1" Section, a significant portion of the Applicant's work involved text processing duties. The senior economist held that Applicant's work concerning desk top publishing was impressive and that he was the main player in the successful in-house production of two large pieces of publications using such techniques.

55. The position of Text Processing/Proofreading Assistant ("TP/PA") in the Section was a newly created one consequent to the restructuring of the Language Services. As per the Vacancy Announcement for this position in 2002, the TP/PA was required to possess considerable desk top publishing skills, particularly in connection with the in-house production of the "Language 1" version of the WEO. The TP/PA was expected to type, transcribe, and format a wide variety of technical and specialized "Language 1" documents and publications, and perform the full range of desk top publishing functions. Among the position's functions are proofreading and editing of final translated documents and publications against drafts or the original in the source language to verify that they conform to "Language 1" spelling, syntax and grammatical practice, and also that the translations are complete and consistent in language and format.

56. Performance of these functions required the incumbent to have "Language 1" as a mother tongue along with an excellent command of English and, preferably some other languages. The incumbent was also expected to be proficient in the use of Quark Xpress, familiar with the Fund's style and form for producing the documents, and able to keep abreast of technical innovations in office automation. State-of-the-art skills in desk top publishing were essential. The incumbent should be able to train and supervise Text Processing Assistants ("TPAs").

57. The Text Processing Assistant (TPA) position, following the restructuring, was one grade below the TP/PA position. The Vacancy Announcement for this post in the year 2002 shows that the occupant of this post was required to work under the supervision of the Text Processing/Proofreading Assistant (TP/PA) and the guidance of the Section Chief. The incumbent was required to prepare "Language 1" documents in final form (including tabular material, equations, and charts), which did not require formal proofreading, in accordance with the Fund's and the Section's style and formatting standards. Like the TP/PA, he too was expected to perform a wide range of desk top publishing functions with full proficiency. The TPA also was expected to be fully familiar with the state of the art in desk top publishing and the Fund's style and practice, and was expected to check the accuracy of the language, grammar, spelling, and consistency in text and tables.

58. The "Languages 1 & 2" Division Chief described the work of the TCA as essentially a data management job with a high communications content. He stated that the TCA is the central point for the receipt of all jobs, the distribution within the Division of the jobs, and finally the dispatch electronically to all the requesters. The Division Chief described the job of the TPA as a purely text processing job; however, the TPA has to be thoroughly conversant with the latest technologies and the desk top publishing programs. According to the Division Chief, the newly created Text Processing and Proofreading Assistant's job involved desk top publishing as well as an additional language element of proofreading in the target language, "Language 1." The incumbent was expected to possess a very good command of the target language especially its workings and usage. The incumbent was also required to have a good grasp of the grammar, spelling, punctuation and usage, to the extent that the TP/PA could even correct errors in the translation.

59. In the light of the evidence set out in the foregoing paragraphs, the Tribunal concludes that the TP/PA position involved responsibilities materially different from, and more demanding than, those that Applicant performed as TCA. They particularly required an excellent aptitude in the use of English not possessed by Applicant.

60. The following decisions of other international administrative tribunals bear on the question of whether the restructuring in question was a legitimate exercise of managerial discretion or one designed solely to abolish the position of the Applicant. The ILOAT laid out the conditions for a valid restructuring exercise when it stated that:

> ".... Admittedly, precedent has it that international organizations can undertake restructuring where it is necessary to achieve greater effectiveness, or indeed to make savings, and can therefore regroup certain functions and make staff reductions. But any job abolitions arising out of such a policy must be justified by real needs, and not be immediately followed by the creation of equivalent posts. ..."

In re Mrs. A.M.I., ILOAT Judgment No. 2156 (2002), Consideration 8. Also pertinent is the ruling of the WBAT in Njovens v. IBRD, WBAT Decision No. 294 (2003):

> "18. The next question to be addressed by the Tribunal is whether the reorganization of INT was a genuine exercise of managerial discretion, or a pretext to terminate the Applicant. The Tribunal is satisfied that the reorganization was properly motivated, as evidenced, for example, by the memorandum ... explaining in detail the reorganization envisaged.
>
> 19. This memorandum proposed a complete reorganization of that Department and its restructuring in connection with the Ethics Office ....
>
> 20. ...There is no basis for a finding that the Bank undertook a major reorganization just to terminate the Applicant, who could in any event have been terminated through non-confirmation had performance been the problem."

61. In considering whether the abolition of Mr. "F"'s TCA position was taken to meet institutional needs, it is appropriate to examine the merit of the rationale set forth by Respondent for the structural changes made in Language Services. The reasons given by the Fund include: redeployment of positions to areas of Language Services with a growing need for increased staffing; alignment of positions within the newly formed "Languages 1 & 2" Division parallel to those in other Language Divisions; economies of scale achieved by reducing the number of TCAs following the merger of the smaller Language Sections into pre-existing Divisions; insufficient TCA responsibilities attached to the "Language 1" Section to occupy a TCA full-time. It is significant that reduction of TCA positions was a

feature even of the January 2001 restructuring plan in which it was proposed to combine three small Language Sections into one Division, in which it was noted that "economies of scale would be achieved at the level of the TCA." Under the January 2001 plan, it could not have been expected that the TCA, a support level position, would have capability in three unrelated languages. The plan was designed to be budget neutral, with abolished positions redeployed to areas facing increased workload.

62. The Tribunal considers that the reasons advanced by the Fund in justification for the structural changes made in Language Services are credible and sufficient to justify abolition of the position of Mr. "F".

b. Did the Fund act reasonably in concluding that Applicant was not qualified to meet the requirements of the redesigned position?

63. The second prong of the test for a lawful abolition of position taken in accordance with GAO No. 16, Section 13 is that the Applicant is not qualified to meet the requirements of the redesigned position.

64. The TGS Assistant Director testified before the Grievance Committee that in the newly created Division after the merger the TCA was "a sort of traffic cop for the translation flow" which required the performance of a key function of communication. The incumbent had to communicate with the outside world and possess a good ability for oral and written communication in English. Knowledge of "Language 1" was not crucial to discharge the functions of the job but would be an added advantage. He maintained that even though Mr. "F" had earlier worked as a TCA in the Section, he did not possess the right communication skills to be able to handle the work in a large and complex Division involving many different languages coming in and going out. The job of the TCA had become more demanding since work pressure was increasing, and deadlines were becoming shorter, and it was felt that Mr. "F" would not be able to meet the requirements for the job.

65. This testimony was supported by the TGS Advisor in charge of Language Services who testified that the decision to abolish the TCA position in the "Language 1" Section and retain the other TCAs in the Division was taken because the combined Division was a very big Division involving a number of different languages, multiple contacts with free-lancers and requesters, and interaction with translators in a much more complex way than just in the "Language 1" Section. The view was that Applicant had difficulty in communicating with requesters in English. In a larger Division, the interaction would be more complex, a challenge that it was felt Applicant would not be able to handle. The Fund maintains that all of the Applicant's principal TCA duties (rather than only minor tasks) were reassigned to other, existing staff members including the two TCAs from the Division.

66. So far as the job of Text Processing and Proofreading Assistant (TP/PA) was concerned, the TGS Assistant Director testified that it was an intermediate position between the transcriber/typing position and a position in the editorial and proofreading career streams. The TP/PA position involved a considerable amount of skills in desk top publishing,

composition and very strong skills in proofreading. The TGS Assistant Director stated that both the Applicant and the staff member who was selected for the TP/PA position had been given extensive training in desk top publishing. In order to find the best candidate for the newly created TP/PA position, the TGS Assistant Director conducted a test for Applicant and the other staff member using a previous version of the World Economic Outlook so as to judge the skills of the two. The TGS Assistant Director found that Applicant gave him just one page out of a number of pages that he was expected to produce, whereas the other staff member produced something that was not perfect, but was a sufficient indication of his capabilities in the area to show that he could handle the work in that area. The Fund management therefore took the decision to place the other staff member in the TP/PA position. The TGS Assistant Director also states that the persons who were running the "Language 1" Section such as the "Languages 1 & 2" Division Chief and the TGS Advisor in charge of Language Services found that the other staff member had made significant progress in the area of desk top publishing and favored his retention.

67. Applicant contends that there was no real abolition of post, but merely a marginal redefining of two existing positions, and that the work handled by the newly created positions was previously being performed by Applicant. Applicant observes that he previously produced major "Language 1" documents through desk top publishing, i.e. preparation of "camera ready" copy for printing. He had received congratulatory memoranda from an earlier supervisor, the Director of the BLS and an Executive Director's Office for the first desk top publication of the WEO. That supervisor even praised the resourcefulness and efforts of Applicant before the Grievance Committee in the desk top publication of the WEO. The senior economist testified that Applicant had shown to his satisfaction that he could prepare the WEO for desk top publishing, which the senior economist shared with the BLS Deputy Director who appreciated the effort. Applicant alleges that the official who organized the test for the WEO desk top publication had no competence in desk top publishing and the competition was not credible. Applicant alleges that the Division Chief, who knew little or nothing about Applicant's competencies and performance, relied upon the counsel of the acting Section Chief who, he alleges, was prejudiced against Applicant's interests because of Mr. "F"'s religion.

68. The Fund, for its part, submitted that the main duties of a TCA were administrative and did not require language skills other than English. There is, the Fund maintained, no evidence that language skills other than English were an essential component of the position. The Fund contends that the new combined Division following the restructuring was working "excellently," under the new arrangements in which the functions of TCA had been successfully reassigned to other two TCAs in the "Languages 1 & 2" Division who came from the "Language 2" side of the Division.

69. In the Fund's view, Applicant lacked the skills and experience to perform the proofreading and editing duties of the new TP/PA position, such as "an excellent command of English," proficiency "in the use of Quark Xpress," and ability to prepare documents in final form "in accordance with IMF norms and style and format guidelines for publications." The Fund also submits that it relied upon the written appraisal of the computer systems

officer who worked with Applicant and judged that Applicant did not have the required expertise to handle desk top publishing assignments. The Fund contends that Applicant had not shown any evidence about his proofreading skills and admitted that his English skills were not strong. The Fund relies upon the testimony of an earlier supervisor to say that the version of the WEO that Applicant produced while working under him in 1991 did not require the kind of sophisticated software and hardware that is currently required for desk top publishing and that it was this latest kind of technology in which Applicant had been found lacking. The Fund seeks to discount the senior economist's testimony praising Applicant's desk top publishing skills by saying that his testimony has been contradicted by other witnesses and by the written appraisal of the computer systems officer.

70. In light of the record before the Tribunal, the Tribunal concludes that the position of the Fund in finding that the Applicant was not qualified for the redesigned position is persuasive. In this regard the Tribunal has borne in mind the Commentary on the Statute with respect to managerial discretion:

> "... this principle is particularly significant with respect to decisions which involve an assessment of an employee's qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility."

(Report of the Executive Board, p. 19.)

2. Was the abolition of Applicant's position improperly motivated?

71. In the case of Jassal v. IBRD, WBAT Decision No. 100 (1991), para. 31, the Tribunal cautioned:

> ".... In such a case, a finding of redundancy must turn upon a conclusion that the content of the position was so defined as to render its previous occupant no longer qualified to discharge its responsibilities. Unsatisfactory performance by a staff member in his or her position prior to the Reorganization cannot alone furnish a basis for terminating service with the Bank on the ground of redundancy. To do so would be an improper use of the Reorganization procedures in order to avoid the protections otherwise afforded by the Bank's governing documents – Staff Rule 7.01 in particular – for termination of employment, and would therefore constitute détournement de pouvoir, subject to reversal by the Tribunal."

72. In the case of Harou v. IBRD, WBAT Decision No. 273 (2002), para. 37, the Tribunal while dealing with redundancy stated:

> ".... Care is needed in such an exercise since the redundancy provisions may not be used to deal with unsatisfactory performance."

Similarly, in the case of Marchesini v. IBRD, WBAT Decision No. 260 (2002), para 54, the Tribunal stated that:

> "However, careful examination of the Guidelines shows that managers are thereby advised to resort to redundancy only as 'the last option' and are reminded that 'the redundancy route is not a substitute for managing performance.'...."

In the case of Taborga v. IBRD, WBAT Decision No. 297 (2003), para 42, the Tribunal reiterated and cautioned that:

> ".... As the Tribunal has found in the past, the redundancy provisions must not be used to deal with unsatisfactory performance, but this does not mean that the performance or skills of a staff member may not be taken into account when deciding who should be rendered redundant in the context of a redundancy procedure under Staff Rule 7.01, paras. 8.02(d) and 8.03. ..."

Also relevant is the case of del Campo v. IBRD, WBAT Decision No. 292 (2003), para. 56, wherein the Tribunal repeated that:

> ".... Redundancy is not a tool that may be used to deal with unsatisfactory performance; and if one were in a situation of examining unsatisfactory performance as a ground for severance, any 'allegations' must be the subject of an adversarial debate between the parties."

In an important decision connected with the issue of performance evaluation and its effect on declaration of redundancy, the WBAT in Njovens v. IBRD, WBAT Decision No. 294 (2003), explained:

> "38. In cases where the staff member is being evaluated with respect to performance problems and then is suddenly made redundant under paragraph 8.02(b), the requirements of fairness and reasonableness become even more stringent, as the possible confusion between one alternative and the other is likely to raise doubts in the staff member's mind and justifies a heightened level

> of scrutiny on the part of the Tribunal in assessing the validity of the redundancy.
>
> 39. In this case, as noted in paragraph 34 above, the Bank did not fully live up to its obligations toward the Applicant with respect to his performance evaluation as a probationer. This failure of due process was compounded by the complete absence of advance warning with respect to the Applicant's redundancy. While this last aspect does not affect the genuineness of the reorganization, it inflicted compensable damage on the Applicant."

Recently in the case of del Campo v. IBRD, WBAT Decision No. 292 (2003), the Tribunal laid out certain vital parameters for declaration of a valid redundancy:

> "49. On the other hand, the implementation of the Staff Rules dealing with redundancy must be effected with strict observance of fair and transparent procedures lest managers pay no more than lip-service to the required standards; 'prerogatives of discretion must be exercised exclusively for legitimate and genuine managerial considerations in 'the interests of efficient administration'.' (*Yoon (No. 2)*, Decision No. 248 [2001], para. 28.)
>
> 50. When a redundancy is decided under para. 8.02(d), the issue is not whether the Applicant is performing satisfactorily. It may well be that every person in the 'type' or 'level' of position targeted for reduction is more than able to fulfill his or her job requirements. The issue is whether the basis upon which a particular individual is chosen for redundancy is legitimate.
>
> 51. Any notion that a complainant could resist redundancy on the basis of his good performance would imply that if he were correct on that account the Bank could not make him redundant. That is obviously not so. If he is one of several persons in the relevant category, a reversal of his redundancy would imply that the correct decision should have been to declare someone else redundant – even if that other person was also performing satisfactorily. In other words, the reference in para. 8.03 to 'performance' as a factor to be taken into account when making the selection does not address the issue of whether an individual's performance has been satisfactory or not in the sense of a minimum required standard, but whether an individual is *relatively* more likely to contribute to the Bank's effective operations. If there are two absolutely first-class performers in a relevant grade, the Bank may nevertheless have to face the unpleasant choice of deciding whose loss would be *relatively* less disruptive of effective operations.

> 52. Thus, while unsatisfactory performance alone cannot furnish a basis for terminating service on the ground of redundancy (because such a termination would not be properly classifiable as a redundancy), 'performance or skill' may be taken into account when deciding who should be retained; *see Hoezoo*, Decision No. 181 [1997], at para. 6. As the Tribunal held in *Jassal*, Decision No. 100 [1991], at para. 37, the Bank's assessment of a staff member's performance and qualifications is an important exercise of its managerial discretion, and the Tribunal will review such an assessment only for *abuse* of discretion."

(Emphasis in original.) The Fund's position in this case appears to be akin to that in Denning v. IBRD, WBAT Decision No. 168 (1997), para. 27, when the Tribunal observed:

> "...the extent of the Applicant's skills was indeed considered by the Respondent, not to justify the redundancy on these grounds but, on the contrary, to consider whether she could be kept in the new structure of the Division. ..."

73. Applicant has alleged an improper motive on the part of the Fund management in abolishing his position, namely, the objective of overcoming personnel problems. International administrative tribunals have found improper motive on the part of international organizations to be an abuse of discretion. The general principle guiding international administrative tribunals regarding improper motive is that there must exist a causal link between the alleged irregular motive and the decision that is being attacked.

74. Jurisprudence of international administrative tribunals therefore suggests that a decision could constitute an abuse if an organization exercises its discretionary power for a purpose other than that for which the power was granted. In the context of abolition of posts or redundancy, administrative tribunals have considered the abolition of positions improperly motivated if the aim of the decision was to terminate a particular person for misconduct or unsatisfactory performance.

75. Applicant argues that the true reason for restructuring was to resolve "personnel problems" grounded in religious intolerance, and that the problem of intolerance and discriminatory attitudes was resolved through elimination of Applicant's post.

76. The draft plan pertaining to restructuring states that "[t]he proposed restructuring of the language sections would offer a unique opportunity to solve some long-standing personnel problems in the ["Language 1"] Section." The same document also says that "[i]t is unlikely that any of the current incumbents in the ["Language 1"] Section would have the range of skills required for such a 'combined' TPA/DTP/proofreader position, and a new person would therefore need to be hired." The June, 21, 2001 proposal notes:

> "The purpose of this note is to inform you of the efforts under way to permanently resolve the long-standing problems of the ["Language 1"] Section of the Bureau of Language Services, and to seek your approval for a plan of action involving this Section and other small language service units as part of the restructuring of TGS.
>
> ...
>
> .... Against this background, we believe that the Section needs to be rebuilt without those staff members who have been at the heart of its continuous problems for many years under different supervisors."

77. The question accordingly arises whether the real purpose for restructuring was to resolve long-standing personnel problems of the Section rather than to achieve institutional efficiency. In his Grievance Committee testimony, the TGS Assistant Director testified as to solving the "problems:"

> "... incidentally, that was something we were going to achieve, but it was not the purpose of the reorganization, it was not to deal with personnel issues in that manner."

78. Does the fact that the Fund saw the restructuring not only as justified by the several considerations set out in paragraph 61 above but as carrying the further advantage of overcoming the Section's notorious personnel conflicts deprive the restructuring of its legitimacy? In Mr. J. C., ILOAT Judgment No. 139 (1969), Considerations 1 and 2, the ILOAT considered the question of dual motives:

> "The suppression of a post is not tainted by such abuse when it is designed to have a lasting effect in the interest of the service and at the same time, terminates the appointment of a staff member whose services were unsatisfactory. It is true that the desire to terminate the contract of an unsatisfactory staff member is not in itself a ground for suppressing his post; that would mean depriving the staff member concerned of the legal remedies to which he is entitled, or at least, by disguising the true reasons for his termination, would make it difficult for him to defend his interests. If, however, the result of a suppression of post is to effect a permanent saving, it is not irregular simply because it also has the effect of removing an official.
>
> ....

> The above-mentioned facts show that the complainant's differences with his chiefs were the root cause of the suppression of his post. Such a measure might never have been even considered if the complainant's conduct had always been above criticism. It does not, however, follow that this is a case of abuse of discretionary power. On the contrary, trial of the arrangement for several months showed the expediency of distributing the complainant's duties among other staff members. This arrangement has continued ever since, and it has not proved necessary to appoint another staff member, this being explained, in particular, by the fact that the complainant's duties partly overlapped with those of one of his chiefs. It follows that in the case at issue the suppression of post was based on two grounds, one related to the person of the complainant, and the other to the interests of the service. It is clear from the preceding consideration that this second ground is sufficient to justify the decision taken in the circumstances of the case."

79. The Fund management has clearly stated on several occasions that the restructuring of Languages Services was motivated by a desire to enhance the efficiency of the TGS Department as a whole. In the view of the Tribunal, the evidence available, including the communications among the management personnel responsible for abolishing Applicant's position, while supporting the Fund's stated reasons for the restructuring, also demonstrates that the Fund saw in the restructuring the means of overcoming the personnel conflicts that had plagued the "Language 1" Section. In the view of the Tribunal, this additional desideratum does not deprive this exercise of the Fund's managerial discretion of its legitimacy.

3. Was the abolition of Applicant's position discriminatory?

80. Applicant's principal contention in this case is that the abolition of his position as TCA in the "Language 1" Section was not a lawful abolition to meet institutional needs but rather was the result of religious discrimination. This contention is closely related to Mr. "F"'s claim (considered below) that during his career with the Fund he was subjected to a hostile work environment arising out of religious harassment. The Fund responds that Mr. "F" has failed to show any nexus between alleged religious prejudice among colleagues and the decision to abolish his position. Applicant counters that the decision was rooted in religious hostility he experienced within his Section.

81. Applicant's case is the first in which the IMFAT has been called upon to address an allegation that a staff member's career has been adversely affected by religious prejudice, a

source of discrimination prohibited by the Fund's internal law[13] as well as by universally accepted principles of human rights. Other applicants have alleged discrimination of a distinctly different and less serious type, i.e. that a classification scheme relating to Fund salary or benefits unfairly favored one category of staff members over another. *See* Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996) (economist v. non-economist staff); Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002) (overseas Office Directors v. Resident Representatives); Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002) (Legal Permanent Residents v. G-4 visa holders). In Mr. "R", the Tribunal established that "... the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization." (Para. 30.)

82. Discrimination on religious grounds is prohibited by the internal law of the Fund,[14] having been first set forth in the N Rules.[15] Rule N-2 provides:

> "N-2. Subject to Rule N-1 above, the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, creed, or nationality.
> *Adopted as N-1 September 25, 1946, amended June 22, 1979,"*

83. Having recognized from its inception the importance to a global institution of maintaining a nondiscriminatory workplace, the Fund in recent years has taken additional steps evidencing the significance which it attaches to this matter.[16]

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[13] In Ms. "Y" (No. 2), the Tribunal was confronted with a gender discrimination claim only indirectly in reviewing conclusions under the Discrimination Review Exercise (DRE). In Ms. "S", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1995-1 (May 5, 1995), an application that included a claim of gender discrimination was found to be outside the Tribunal's jurisdiction *ratione temporis*, as the complained of acts occurred prior to the effective date of its Statute.

[14] Article III of the Tribunal's Statute provides *inter alia*: "In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts."

[15] The "N Rules" represent the section of the Rules and Regulations of the International Monetary Fund dedicated to "Staff Regulations." By their terms, the Fund's Rules and Regulations supplement the Articles of Agreement and By-Laws adopted by the Board of Governors. *See Rule A-1*.

[16] *See, e.g.,* "Steps to Achieve Greater Diversity and Address Discrimination Among the Fund's Staff" (June 1, 1995); Fund's Advisory Group on Discrimination, "Discrimination in the Fund" (December 1995); "Measures to Promote Staff Diversity and Address Discrimination" (July 26, 1996). For a discussion of the Discrimination Review Exercise (DRE), *see* Ms. "Y" (No. 2), paras. 14-19.

84. On July 3, 2003, the Fund's Managing Director transmitted to the members of the staff a policy designed by its terms to "consolidate in one document the policies and safeguards in place" with respect to discrimination. It begins by defining discrimination within the context of the Fund:

> "In the Fund, discrimination should be understood to refer to differences in the treatment of individuals or groups of employees where the differentiation is not based on the Fund's institutional needs and:
>
> - is made on the basis of personal characteristics such as age, creed, ethnicity, gender, nationality, race, or sexual orientation;
>
> - is unrelated to an employee's work-related capabilities, qualifications and experience_this may include factors such as disabilities or medical conditions that do not prevent the employee from performing her or his duties;
>
> - is irrelevant to the application of Fund policies; and
>
> - has an adverse impact on the individual's employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment.
>
> Discrimination can occur in various ways, including but not limited to the following:
>
> ...
>
> - creating or allowing a biased work environment that interferes with an individual's work performance or otherwise adversely affects employment or career opportunities;
>
> ...
>
> Discrimination can be manifested in different ways, for example, by a **single decision** that adversely affects an individual or through a **pattern** of words, behaviors, action, or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment.

> While the former may be readily identified (e.g., a decision not to convert a fixed-term appointment, a denial of a promotion), the latter may be less obvious, as there is no specific act or decision at issue. Nevertheless, the failure to provide fair and impartial treatment, even if through inaction, can have harmful effects on an employee's career."

(Discrimination Policy, July 3, 2003, p. 4.) (Emphasis in original.)

85. Applicant testified during the Grievance Committee's proceedings to a number of incidents that he perceived as representing religious hostility. Two co-workers, he reported, told him directly that if he did not convert to their religion they would make his life in the Section "miserable." He also testified that these same staff members refused to take direction from Applicant in the course of their work.

86. Other allegations relate to the display of "religious symbols." Mr. "F" testified that his own religious expression was not tolerated in the Section. He contends that he was told to remove from his work area a verse from a holy text and also was told to remove a religious symbol from his office key ring. Mr. "F" alleges that staff members of the majority religious group displayed posters depicting their own holy sites with the purpose of provoking him. The senior economist later testified that it was during his period in the Section that the allegedly provocative posters were placed and that he had encouraged the decoration of the Section to reflect the flavor of the region of the world which it represented. He then noticed that the decorations reflected the majority religion and he therefore insisted that additional posters be placed to represent other religious groups. At the same time, the senior economist before the Grievance Committee testified that he did not observe "any religious discrimination" against Mr. "F".

87. Applicant explained what he saw as the link between religious hostility of co-workers and the abolition of his position, saying that "... they create problems for me as something usual to keep question mark on me about how they get the front office or Administration to fire me."

88. Applicant maintains that over the years he reported religious hostility to supervisors, as well as to the Ombudsperson and the counselor at the Health Services Department. The Division Chief testified that in the early 1990's Mr. "F" had reported that he felt he was the object of religious intolerance. The senior economist testified that Mr. "F" had spoken to him about his perception of religious hostility. According to the senior economist an incident also took place in which two staff members "... came to my office one day, and actually it left a bad taste in my mouth, they said something about [Mr. "F"] and they say he is [his religion], something like that. And I said that I don't care about it and I will not tolerate this.... I made it 100 percent clear that I'm not going to tolerate this." The senior economist also distributed to members of the Section copies of the Fund's Code of Conduct.

89. In Respondent's view, "... the weight of the evidence shows that, while there may have been a couple of isolated instances over more than twenty years when some of Applicant's colleagues alluded to his religion in derogatory terms, the supervisors who became aware of these incidents dealt with them appropriately and Applicant's career suffered no consequences as a result of any alleged religious bias."

90. Two questions arise. The first is: Was the decision to abolish the post motivated by religious discrimination? In the view of the Tribunal, the answer is decidedly negative. There is no evidence that those who took the decision to abolish Mr. "F"'s position were so motivated. The second question is whether Applicant has shown that he has been subjected to a "... pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment." (Discrimination Policy, July 3, 2003, p. 4.) This question will be answered at the end of the next section.

4. Was Applicant subjected to a hostile work environment?

91. Accordingly, a further question is whether, though it has been concluded that Applicant did not experience discrimination on the basis of his religion in the abolition of his position, Mr. "F" nonetheless was subjected to a hostile work environment in contravention of the Fund's internal law. It is important to recall that while discrimination and harassment are closely related under the law of the Fund inasmuch as harassment on the basis of specified characteristics may amount to discrimination on such grounds, at the same time the Fund's prohibition on harassment provides more broadly:

> "Harassment is any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment."

(Policy on Harassment, January 1995; Staff Bulletin 99/15 Harassment – Policy and Guidance to Staff, June 18, 1999.)

92. The Policy on Harassment also describes intimidation:

> "4. **Intimidation** includes physical or verbal abuse; behavior directed at isolating or humiliating an individual or a group, or at preventing them from engaging in normal activities. Behaviors that might constitute intimidation include, inter alia:
>
> - degrading public tirades by a supervisor or colleague;
>
> - deliberate insults related to a person's personal or professional competence;

- threatening or insulting comments, whether oral or written—including by e-mail;

- deliberate desecration of religious and/or national symbols; and

- malicious and unsubstantiated complaints of misconduct, including harassment, against other employees."

93. The Fund's Discrimination Policy, p. 5, explains that harassment can manifest itself as a form of discrimination:

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

94. In 1998, the Fund introduced the Code of Conduct which provides *inter alia*:

> "**Courtesy and respect**
>
> 14. You should treat your colleagues, whether supervisors, peers, or subordinates, with courtesy and respect, without harassment, or physical or verbal abuse. You should at all times avoid behavior at the workplace that, although not rising to the level of harassment or abuse, may nonetheless create an atmosphere of hostility or intimidation.
>
> **Diversity**
>
> 15. In view of the international character of the Fund and the value that the Fund attaches to diversity, you are expected to act with tolerance, sensitivity, respect, and impartiality toward other persons' cultures and backgrounds."

95. The Policy on Harassment likewise emphasizes the importance of tolerance to be exercised by staff members in their behavior towards one another:

> "9. In the multicultural environment of the Fund, there is clearly room for one person to be offended by actions that might not be offensive to another person. Therefore, it is important for all staff members to exercise tolerance, sensitivity, and respect in their

> interactions with others. It is also important for all staff to be familiar with what constitutes harassment and the Fund's policies concerning the conduct of staff members. One important element to consider is that the definition of harassment concerns not only a person's intent in engaging in certain conduct, but also the effect of that conduct on others. Therefore, if a specific action by one person is reasonably perceived as offensive or intimidating by another, that action might be seen as harassment, whether intended or not."

96. Staff members who believe they have been subjected to discrimination are further advised:

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

(Discrimination Policy, July 3, 2003, p. 7.)

97. The relevant policies also speak to the responsibilities of supervisors. In matters of harassment, the Fund's policy states: "The Fund strives for a harassment-free environment, and supervisors are expected to support this objective, including stopping harassment in the areas under their supervision." (Policy on Harassment, para. 18.) Similarly, the Fund's Code of Conduct specifies:

> "**Conflict resolution**
>
> 19. Managers have a responsibility to make themselves available to staff members who may wish to raise concerns in confidence and to deal with such situations in an impartial and sensitive manner. Managers should endeavor to create an atmosphere in which staff feel free to use, without fear of reprisal, the existing institutional channels for conflict resolution, [footnote omitted] and to express concerns about situations which are, or have the potential to be, conflictive."

98. There is evidence that conduct in the "Language 1" Section did not meet the standards set forth in the Code of Conduct, and that the Fund's supervisors did not take effective measures to correct that problem. At the same time, in September 1995, Mr. "F"'s conduct during discussion of his mid-year review of performance was recorded as being

marked by an "adversarial attitude, aggressive tone, and personal attacks [that] were not inconsistent with his record." In a follow-up memorandum copied to Mr. "F", a BLS official observed: "It was essential for him to recognize that he also shared responsibility for the atmosphere of animosity which had prevailed in the past and seriously disturbed the operation of the Section, and that maintaining such an attitude would rekindle previous tensions." In November 2000, Mr. "F" was advised by the TGS Advisor for Language Services: "... as discussed with you on two occasions recently, I would urge you to control your tendency to easily get worked up and show anger in your conversations with [colleagues]." Moreover, Applicant was warned, "... such an attitude, including raising your voice and becoming verbally aggressive ... is not acceptable conduct in the Fund, and any such conduct in the future would result in disciplinary action against you."

99. Nonetheless, there is also reason to believe that Mr. "F" was uniquely vulnerable on account of his religious affiliation, a vulnerability perhaps magnified by his coordinating responsibilities. As one of his supervisors commented: "In a proper environment, things should have worked well, yes. The environment was not proper in the ["Language 1"] Section, I agree."

100. Finally, the Tribunal is obliged to address the question of whether Mr. "F" was subjected to a hostile work environment during his career with the Fund, which the Fund did not take adequate measures to rectify. Having reviewed the admittedly contradictory and uneven evidence as to whether Mr. "F" was a victim of religious discrimination and harassment on the part of certain of his colleagues, the Tribunal concludes as follows. As noted above, the decision to abolish the position of Mr. "F" was not motivated by religious discrimination of any of the decision makers. Nevertheless, the evidence predominantly sustains the conclusion that the Section in which Mr. "F" worked suffered from an atmosphere of religious bigotry and malign personal relations among certain of its members, and that he in particular suffered accordingly. There is no evidence in the record that Fund supervisors took effective action to deal with that unacceptable situation. They did appoint the senior economist who appears to have made some effort to rebuke expressions of religious hostility but the atmosphere of hostility persisted after his departure. Moreover, there is ground to conclude that Applicant suffered from harassment in the workplace, as that concept is defined in the Fund's Policy on Harassment, though there is also evidence that he may have contributed to the malign atmosphere in the Section by his own behavior.

101. Accordingly, there is evidence in the record that Mr. "F" felt, and had reason to feel, that he was the object of hostility on the part of certain of his colleagues because his religion was different from theirs. The senior economist assigned by the Fund to investigate and resolve the personnel problems plaguing the "Language 1" Section reported religiously intolerant remarks made to him which he refuted and criticized when they were made. But there is no other evidence that the supervisors of the Section concerned moved vigorously, or indeed moved at all, to investigate Mr. "F"'s complaints of religious hostility or to discipline staff members found to be the source of such hostility. The senior economist was appointed to survey, and recommend corrective measures in respect of, the personnel problems of the "Language 1" Section. But that of itself is not enough to absolve the Fund of responsibility

for not addressing Mr. "F"'s complaints of religious hostility. Moreover, there is also evidence that an atmosphere of religious animosity was tantamount to harassment that adversely affected the work performance and perhaps health of Mr. "F". Harassment also appears to have had origins not of a religious kind. The deportment of Mr. "F" himself was at times offensive, combative and excessive but, on the evidence in the record, not such as to excuse the behavior of which he was the victim.

5. Was the abolition of Applicant's position, and his consequent separation from service, taken in accordance with fair and reasonable procedures?

a. Was Applicant given adequate notice of the abolition of his position?

102. GAO No. 16, Section 13.02 provides:

> "Section 13 Reduction in Strength, Abolition of Position or Change in Job Requirements
>
> ...
>
> 13.02 Notice. A staff member separated under the provisions of Section 13.01 shall be entitled to 60 calendar days' notice. However, the Director of Administration may extend this period up to 120 calendar days in order to allow the staff member a reasonable time, before his separation, to settle his affairs. The Director of Administration may also excuse a staff member from reporting for duty during part or all of the period of notice and place the staff member on administrative leave with pay during this period."

It should be noted that the foregoing provision addresses the period of notice once a stage of separation has been reached. It does not, at any rate expressly, address when a staff member whose position is to be abolished is entitled to a specific notice period in advance of abolition. Applicant contends that the Fund violated GAO No. 16 "... when it failed to give Applicant warning about the redundancy decision before the decision was taken, i.e. at a time when he could have raised relevant issues about his continued employment." It is recalled that Applicant was informed of the abolition of his position effective November 1, 2001 during a meeting on October 24, 2001, followed on the next day by written confirmation. The Fund has responded that it fully satisfied its obligations under GAO No. 16 in providing Applicant with the required notice, and that Applicant has failed to demonstrate that the process followed in abolishing his position and separating him from the Fund was deficient. In the Fund's view, the 60-day (or extended 120-day) "notice" period does not begin to run until the six-month reassignment period has expired. Accordingly, the period functions as notice of the separation from service rather than of the abolition of position. The procedures followed by the Fund in the case of Mr. "F" are consistent with this interpretation of Section 13.02, and Mr. "F" was granted the maximum extended notice period of 120 days. Moreover,

the Fund delayed informing Mr. "F" of the decision to abolish his position for a few months while he was recovering from what was diagnosed to be work-related stress disorder. [17]

103. The notice requirements for separation from service under GAO No. 16 as a result of "Reduction in Strength, Abolition of Position or Change in Job Requirements" (Section 13) may be distinguished from the notice requirements when the separation is the result of unsatisfactory performance (Section 14) or misconduct (Section 15 and GAO No. 33, Section 10) where an opportunity is afforded the staff member to rebut evidence against him.

104. In the case of Garcia-Mujica v. IBRD, WBAT Decision No. 192 (1998), paras. 18-20, the WBAT concluded:

> "... While the approach followed does not invalidate the reorganization or the objective evaluation of the Applicant's skills, it resulted in a situation where he was deprived of an adequate opportunity to defend himself against the managers' complaints because no information was provided to him on a timely basis.
>
> ...the Applicant was only informed orally of the possibility of redundancy in the meeting held on March 26, 1996. Although Staff Rule 7.01 does not provide for a specific advance warning about the issuance of a notice of redundancy, a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work. In this case, such guarantee was not complied with in a satisfactory manner since, as explained above, a number of matters that could affect his career were known to the managers as early as October 1995.
>
> As a result, the Applicant was declared redundant on very short notice. ... While an administrative review can follow, as indeed was the case here, it is important for a staff member to be able to make his views known before a final decision affecting him is adopted."

105. In the case of Njovens v. IBRD, WBAT Decision No. 294 (2003), paras. 37, 39, the WBAT made clear:

> "....However, fairness and reasonableness dictate that, as stated in *Garcia-Mujica*, adequate information should be provided to the

[17] *See supra* The Factual Background of the Case.

> concerned staff member with 'all possible anticipation.' This is particularly so when the Bank is aware of the likelihood of redundancy substantially in advance of it being decided upon and implemented.
> ....
>
> .... This failure of due process was compounded by the complete absence of advance warning with respect to the Applicant's redundancy. While this last aspect does not affect the genuineness of the reorganization, it inflicted compensable damage on the Applicant."

106. While the Fund's interpretation of the Section 13.02 of GAO No. 16 is not unreasonable, the Tribunal's view is that the fair and transparent procedures that govern or should govern the operations of the Fund require that a staff member whose position is abolished be given reasonable notice of that prospect. The staff member should be in a position when such a decision first is conveyed to him to set out any reasons that he or she may have to contest the propriety or equity of the abolition decision.[18] The summary notice given to Mr. "F" in this case was hardly adequate for that purpose. Thus, on this ground, the Tribunal concludes that the Fund did not follow fair and reasonable procedures.

> b. Did Respondent make the requisite efforts to reassign Applicant to another position consistent with his qualifications and the requirements of the Fund?

107. GAO No. 16, Section 13.01 provides in pertinent part:

> "In the event that a staff member's position is abolished, or the position is redesigned to meet institutional needs and he is no longer qualified to meet its requirements, efforts shall be made over a period of not less than six months to reassign him to another position consistent with his qualifications and the requirements of the Fund. During this period, the Fund shall also provide the staff member with appropriate training if such training will facilitate his placement in an alternate position. If all efforts to identify a reassignment fail, his appointment shall be terminated."[19]

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[18] The IMF Administrative Tribunal consistently has applied notice and hearing as essential principles of international administrative law. *See, e.g.*, Ms. "C", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 37; Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent, (Admissibility of the Application), IMFAT Judgment No. 2001-1 (March 30, 2001), paras. 116-128; Mr. "P" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-2 (November 20, 2001), para. 152.

[19] Efforts at reassignment are also required in cases of reduction in strength:

(continued)

108. Applicant alleges that insufficient efforts were made by the Fund to find him an alternative position. For its part, Respondent contends that Applicant did not seriously pursue any of the positions in the Fund or the testing, training, or outplacement assistance offered, and that "... the duty to assist a staff member during the reassignment period is precisely that- a duty to assist; the staff member has the prime responsibility to seek out opportunities, pursue training to enhance his skills in order to bring them in line with the requirements of available positions, and to take the tests that are prerequisite for the positions. [footnote omitted]."

109. Applicant alleges that the Human Resources Officer responsible for counseling staff members whose position had been abolished met with Applicant and his wife only twice during the six-month period after Applicant was delivered the notice of abolition of his position. During the first meeting, Applicant was informed of the separation process and the placement agency choices available to him. During the second meeting details were reviewed about Applicant's separation. Applicant asserts that it was only once during the six-month period that the Human Resources Officer informed him regarding an opening, for which French language skills were required. Applicant decided that the position would not fit his own set of skills.

110. However, the Human Resources Officer's testimony before the Grievance Committee was that she met with Applicant and his wife three or four times and spoke with them over the telephone several more times over the subsequent six months, including an intervention on Applicant's behalf regarding a job opportunity at the IMF Institute, drawing Applicant's attention to a vacant data management assistant's position in TGS and helping Applicant to obtain a certification of his "Language 1" typing skills for an outside opportunity. In the Fund's view, the prime responsibility for seeking out reassignment opportunities lies with the staff member whose position has been abolished. In Applicant's case, he had to periodically review the Fund's job vacancy listing as well as vacancies outside the Fund and bring to the Human Resources Officer's attention any position in which he was interested so that she could assist him through her contact with the hiring department.

111. The Fund maintains that Applicant made little effort during the six-month job search period to actively seek out other employment possibilities within the Fund or outside. He neither took any of the tests that would have qualified him for numerous vacancies in the secretarial career stream, nor did he pursue any training opportunities. Applicant also failed to take advantage of the outplacement service that was available to him at the Fund's expense. He dropped out of an English skills course that would have been essential for most

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> "In the event of a reduction of staff positions in the Fund, efforts shall be made to reassign staff members consistent with their qualifications and the requirements of the Fund. In reassigning staff members, consideration shall be given to their performance record, seniority, and length of service."

GAO No. 16, Section 13.01.

of the vacancies in the Fund even though he had been assured that the Fund would reimburse for that course.

112. The Fund claims that it is under no duty to invite Applicant to apply to positions for which he is clearly unqualified. Also, the Fund states that for several years it has posted all job vacancies on its internal website, to which all staff members have access. Accordingly, staff members interested in reassignment opportunities can easily obtain the most current list of vacancies. The Fund argues that Applicant never expressed any interest in remaining in the Section and being considered for either the TP/PA position or the TPA position which was at a level lower than the position he had held. During Applicant's meetings with the Human Resources Officer, he expressed optimism about pursuit of other possibilities such as opening a business. Applicant never communicated to the Fund that he would have applied for either the TP/PA or TPA position if he had been invited to do so. The Fund maintains that it fully satisfied its obligations under GAO No. 16 to make efforts to find an alternative position for Applicant.

113. The ILOAT in its decision in the case of Gracia de Muniz, ILOAT Decision No. 269 (1976), Consideration 2, referred to a general principle of law that requires international organizations to make efforts to find alternate employment for staff declared redundant:

> " Moreover, there is a general principle whereby an organization may not terminate the appointment of a staff member whose post has been abolished, at least if he holds an appointment of indeterminate duration, without first taking suitable steps to find him alternative employment."

114. In the case of Arellano (No. 2) v. IBRD, WBAT Decision No. 161 (1997), para. 42, the WBAT clarified:

> "The obligation of the Respondent, in this respect, is not to reassign staff members whose employment was declared redundant under Staff Rule 7.01 but to try genuinely to find such staff members alternative positions for which they are qualified. It is an obligation to make an effort; it is not an obligation to ensure the success of such effort."

115. The WBAT in the case of Marchesini v. IBRD, WBAT Decision No. 260 (2002), paras. 45-46, considered:

> "The question, therefore, is whether the Bank fulfilled its obligation and actively and in good faith assisted the Applicant in his effort to seek reassignment....
>
> The record shows that the Bank tried actively to assist the Applicant in seeking another position within the Bank Group by

> providing access to the Job Search Center and the Job Posting System, and through the services of the Applicant's Human Resources Officer, but that the search was not fruitful and the Applicant was not offered a position. Although the Applicant attributes this unfortunate result to what he considers as only a sporadic, reactive and half-hearted effort by the Human Resources Officer, the record does not substantiate such a finding. To the contrary, it shows that the Human Resources Officer actively tried to arrange several interviews for the Applicant, before and after he left for home leave. She even submitted some applications for him when he was not available to submit them. That the Applicant's search, with the assistance of the Bank's management, was not successful is attributable in part to the fact that he was seeking reassignment when the job market was tight."

116. The ILOAT in its decision in the case of Mr. S. S., ILOAT Decision No. 2294, (2004), Consideration 9, cautioned against presumptive and arbitrary decisions not to offer vacant posts to redundant staff members without first making appropriate inquiries about their suitability for those posts. The Tribunal stated:

> "Those provisions do not authorise the Secretary General to decide arbitrarily that there is no post for which he considers the official concerned has the requisite qualifications. Rather, they require him to undertake appropriate enquiries in order to identify vacant posts, or posts falling vacant within a certain time, depending on the circumstances, and to explain, if such posts exist, the reasons why the official concerned is not suitable to perform adequately the duties attached to those posts.
>
> The Secretary General should have terminated the complainant's appointment, therefore, only after completing all appropriate enquiries."

117. The jurisprudence of administrative tribunals accordingly indicates that international organizations must make genuine, serious, and pro-active efforts in reassignment of their employees whose positions have been abolished. A further complaint of Applicant is that the Fund failed to make appropriate efforts to reassign Applicant to another position for which he was qualified. The evidence on this question is not clear-cut. On the one hand, the efforts made by the Fund to identify another position for Mr. "F" may not have been energetic or pro-active. On the other hand, Mr. "F" himself appears to have shown little initiative in finding another position in the Fund. Apparently, he did not apply to fill the TPA position in the "Language 1" Section after the TP/PA position was filled by its incumbent. The Tribunal concludes that there is fault to be borne by both parties for a failure to energetically pursue such possibilities as there may have been to identify a position for Applicant after the

abolition of his position. But it does not feel justified in awarding compensation to Applicant on this count.

Remedies

118. Article XIV, Section 1 of the Statute provides:

> "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."

119. In his Application, Mr. "F" seeks as relief "... rescission of the redundancy decision or a directed settlement protecting his economic security on the basis of a pension equal to what he would have had at normal retirement age," as well as "such other relief as may be adjudged."

120. The Tribunal has concluded that Applicant has not met his burden of showing abuse of discretion in the decision to abolish his position and therefore this decision is sustained. However, this Tribunal has concluded elsewhere that it "... has authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision." Ms. "C", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44. In that case, the Tribunal awarded Applicant the sum equivalent to six months salary for irregularities of process in the non-conversion of a fixed-term appointment. There is also ample authority in the jurisprudence of other international administrative tribunals for such relief. In Jakub v. IBRD, WBAT Decision No. 321 (2004), para. 76, the WBAT, while upholding the decision to abolish Applicant's position against a claim of age discrimination, nonetheless granted six months salary as compensation for failure to give the applicant an opportunity to compete for a position in his department for which it found he was entitled to be considered.

121. Since the Tribunal has concluded that Mr. "F" was the object of expression of religious intolerance and was subjected to a hostile work environment, the question arises as to the measure of compensation that may be awarded because of that finding. In the view of the Tribunal the relevant jurisprudence establishes that, as demonstrated in cases of procedural irregularity, relief may be awarded for intangible injury. In Chhabra v. IBRD, WBAT Decision No. 139 (1994), para. 57, the WBAT, awarding $50,000 in compensation for "mismanagement of the Applicant's career," explained:

> "... although no particular decision of the Respondent is to be quashed, the Respondent's behavior towards the Applicant from the Reorganization onwards, taken as a whole, constitutes mismanagement of the Applicant's career. It reveals errors of

> judgment which taken together amount to unreasonableness and arbitrariness. Such behavior falls short of the standards of treatment required of the Bank under the Principles of Staff Employment."

122. Since it has been decided that the decision of the Fund that entailed restructuring of the "Language 1" Section and the Department of which that Section is part was not improper insofar as it affected the Applicant, Mr. "F" is not entitled to relief on this count. The Tribunal, however, has concluded that Mr. "F" is entitled to financial compensation on two grounds: first, that the Fund did not take effective measures to deal either with the religious intolerance in the "Language 1" Section directed at Mr. "F" or the harassment by certain of his former colleagues of the Section that was visited upon him; and second, the Fund failed to give him reasonable notice of abolition of his position. In the view of the Tribunal, on these two counts, Mr. "F" is entitled to compensation as set forth below.

Costs

123. Pursuant to Article XIV, Section 4 of the Statute, costs may be awarded to an applicant who is successful either in whole or in part:

> "4. 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."

As the Tribunal had found grounds upon which relief may be granted to Mr. "F", reasonable legal costs may be awarded as well. In the case of Ms. "C", the IMFAT awarded only a proportion of the costs claimed "[g]iven the limited degree to which Applicant was successful in comparison with her total claims, that is, that she prevailed not on her main claim but only on a related claim...." IMFAT Order No. 1998-1 Assessment of compensable legal costs pursuant to Judgment No. 1997-1 (December 18, 1998).

124. In his plea for costs, Mr. "F" seeks "... payment on an exceptional basis of his legal costs for his representation during the investigation, for the presentation of his grievance and his Application to the Tribunal." The Fund has responded that there is no authority for the request for costs "on an exceptional basis." Presumably, the Fund refers to the request for costs incurred during the administrative review process. In light of the IMFAT's jurisprudence, however, a request for costs deriving from representation in proceedings antecedent to the Tribunal's review has been found to be within the scope of the Tribunal's remedial authority:

> "The phrase 'legal representation' in para. 'Third' of the Decision in Judgment No. 1997-1 embraces Applicant's representation in the administrative review that she had to exhaust pursuant to Article V of the Statute prior to the filing of an Application with the Tribunal, as well as the proceedings before the Tribunal."

IMFAT Order No. 1997-1, Interpretation of Judgment No. 1997-1 (December 22, 1997). Accordingly, Mr. "F"'s request for costs will be considered on the same basis following the further submissions of the parties.

Decision

FOR THESE REASONS

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

1. The abolition of the post of Mr. "F", in the context of the reorganization of the Fund's Department of Technology and General Services, was an act of managerial discretion, whose conception and implementation do not provide cause for reconsideration by the Tribunal on grounds of abuse of right or otherwise.

2. Mr. "F" is entitled to financial compensation for the Fund's failures

a) to take effective measures in response to the religious intolerance and workplace harassment of which Mr. "F" was an object; and

b) to give him reasonable notice of the abolition of his post.

3. Consequently, Mr. "F" is awarded the sum of $100,000.

4. The Fund shall pay Applicant the reasonable costs of his legal representation, in an amount to be assessed by the Tribunal following the further submissions of the parties.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

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Stephen M. Schwebel, President

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Celia Goldman, Registrar

Washington, D.C.
March 18, 2005