ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2006-1

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

Introduction

1. On February 13, 14 and 15, 2006, 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. "O", a former staff member of the Fund.

2. Applicant contests the terms of his reemployment with the IMF following service with its Executive Board (1995-1999) and his subsequent separation from service with the Fund in 2003. In Applicant's view, the terms upon which he resigned to take up the position of Advisor to an Executive Director, as well as applicable Fund regulations, entitled him to return to the Fund on the same basis upon which previously he had been employed, i.e. as a regular staff member with an appointment of indefinite duration. Applicant alleges that instead the Fund acted arbitrarily to convert his employment status to that of an appointee with a term of limited duration, while at the same time referring to his appointment as a "regular appointment." Following several extensions, Applicant's appointment was allowed to expire without, he contends, the proper procedures required for separation from service. Applicant additionally maintains that his career with the Fund and the termination of his employment were impermissibly affected by racial discrimination.

3. Respondent, for its part, contends that the Administrative Tribunal does not have jurisdiction over the Application, on the ground that Applicant failed to exhaust channels of administrative review in a timely manner. Alternatively, maintains the Fund, if jurisdiction obtains, the Application should be denied on the merits because the contested decision, which, in the Fund's view, was to condition Mr. "O"'s return to the staff following service as Advisor to an Executive Director upon his taking up an appointment of limited duration, was a reasonable act of managerial discretion. Additionally, Respondent urges the Tribunal to deny as untimely and not supported by the record Applicant's claims that his Fund career and separation from service were impermissibly affected by racial discrimination.

The Procedure

4. On August 5, 2004, Mr. "O" filed an 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 the requirements of para. 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The

Application, having been brought into compliance within the indicated period, is considered filed on the original date.[1]

5. The Application was transmitted to Respondent on August 20, 2004. On August 26, 2004, pursuant to Rule XIV, para. 4,[2] the Registrar issued a summary of the Application within the Fund. Respondent filed its Answer to Mr. "O"'s Application on October 4, 2004. On November 9, 2004, Applicant submitted his Reply. The Fund's Rejoinder was filed on December 9, 2004. On January 25, 2006, Applicant submitted a statement of his legal costs, for which he had requested reimbursement in the Application. Pursuant to his authority under Rule XXI, para. 3,[3] the President directed that the statement be transmitted to the Fund for its observations, which were submitted on February 13, 2006.

---

[1] Rule VII, as framed in the version of the Rules of Procedure that apply to Applications filed prior to January 1, 2005, provides in pertinent part:

> *"Applications*
>
> …
>
> 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.
>
> …
>
> 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:

> "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] Rule XXI, para. 3 provides:

> "The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules."

Requests for Production of Documents

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

1. All Executive Board documents establishing the rights of Executive Directors' staff to continued employment with the Fund, including, but not limited to, relevant parts of the Handbook on Executive Board Administrative Matters and the document EB/CAM/86/29 and EB/CAM/86/38 (6/30/86);

2. Documents relating to Applicant's long-term career assessments in 1986 and 1989 other than those at Annex 8, B 065 and B 073;

3. Applicant's Personnel Action Form dated August 1, 2000;

4. Applicant's pension record for the years 1999 to 2003;

5. Documents setting forth the terms and conditions for participating in the Discrimination Review Exercise;

6. Applicant's Confidential Personnel file.

7. In accordance with Rule XVII[4] of the Tribunal's Rules of Procedure, Respondent had the opportunity to present its views. With the filing of the Answer, the Fund satisfied

---

[4] "***RULE XVII***

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)

Requests 3, 5, and 6, either by attaching the responsive documents or by providing them separately to the Applicant. Requests 1, 2 and 4 remained, either wholly or partially, in dispute. On February 13, 2006, the Tribunal took the following decisions on Applicant's requests for production of documents.

8. As to Request 1, Respondent partially satisfied the request by providing as an attachment to the Answer excerpts from the Handbook on Executive Board Administrative Matters that relate to the employment of both Advisors and Assistants to Executive Directors. It objected, however, to Applicant's request for Executive Board documents EB/CAM/86/29 and EB/CAM/86/38, asserting that these documents are irrelevant to the case as they relate only to the employment of Secretarial and Clerical Assistants to Executive Directors. Such Assistants do have the right to resume regular employment status upon expiration of appointment with the Executive Board, while Advisors do not. The Tribunal is not of the view that the documents relating solely to the employment of Assistants are relevant to the issues of the case. Accordingly, the Fund's objection to the disputed portion of Request 1 is sustained.

9. As to Request 2, for documents "relating to" Applicant's long-term career assessments of 1986 and 1989 (which assessments are attached to the Application), Respondent objects on grounds of relevancy. Respondent additionally contends that Applicant has no right of access to background documents used by HRD in the preparation of the long-term career assessments, citing Staff Bulletin No 85/09 (Access to Personnel Files). The Tribunal concludes that the responsive documents are not relevant to the issues of the case, and the request accordingly is denied.

10. As to Request 4, for Applicant's "pension record for the years 1999 to 2003," Respondent objects on the grounds of relevancy and additionally contends that the request is "overly vague." The Tribunal concludes that the request shall be denied on the ground that the responsive documents are not relevant to the issues of the case.

Request for Oral Proceedings

11. In his Application, Applicant requested oral proceedings[5] on the ground that because the Grievance Committee dismissed his grievance as untimely, a full evidentiary hearing on the merits of the case has not been held. The Fund responds that the Grievance Committee hearing on its Motion to Dismiss gave Applicant an opportunity to testify on factual matters and his counsel an opportunity to present oral argument. In addition, Respondent maintains

---

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

[5] Applicant requested, alternatively, that the Tribunal issue an order providing for Applicant to take the depositions of relevant witnesses. There is no foundation in the Tribunal's Rules for such a procedure.

that the "written record of this case is extraordinarily clear and complete" and that there is nothing to be gained from the Tribunal's hearing witness testimony.

12. In accordance with Rule XIII of the Tribunal's Rules of Procedure, "[o]ral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case."[6] The principal benefit of holding such proceedings in this case

---

[6] Rule XIII provides in full:

> *"Oral Proceedings*
>
> 1. Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them.
>
> 2. At a time specified by the Tribunal, before the commencement of oral proceedings, each party shall inform the Registrar and, through him, the other parties, of the names and description of any witnesses and experts whom the party desires to be heard, indicating the points to which the evidence is to refer. The Tribunal may also call witnesses and experts.
>
> 3. The Tribunal shall decide on any application for the hearing of witnesses or experts and shall determine, in consultation with the parties or their counsel, the sequence of oral proceedings. Where a witness is not in a position to appear before the Tribunal, the Tribunal may decide that the witness shall reply in writing to the questions of the parties. The parties shall, however, retain the right to comment on any such written reply.
>
> 4. The parties or their counsel may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.
>
> 5. Each witness shall make the following declaration before giving evidence:
>
> > 'I solemnly declare upon my honor and conscience that my testimony shall be the truth, the whole truth and nothing but the truth.'
>
> 6. Each expert shall make the following declaration before giving evidence:
>
> > 'I solemnly declare upon my honor and conscience that my testimony will be in accordance with my sincere belief.'
>
> 7. The Tribunal may disregard evidence which it considers irrelevant, frivolous, or lacking in probative value.
>
> 8. The Tribunal may limit oral testimony where it considers the written documentation adequate.

(continued)

would have been to receive testimony from Fund witnesses (in particular, a former Deputy Managing Director and a former Chief of the Staff Development Division) as to the negotiating history of whatever agreement was reached with Mr. "O" at the time of his resignation from the staff to serve as Advisor to an Executive Director, memorialized in the letter of May 4, 1995 (*see infra)*.

13. As appears below in the Tribunal's disposition of the merits of the claim of the Applicant, the Tribunal, in the light of its examination of the written record, including the proceedings before the Grievance Committee, has reached a decision on the merits. It has been able to do so without oral hearings because it has found the record–despite its ambiguities–to be sufficiently clear. Accordingly, oral proceedings are not "necessary for the disposition of the case." (Rule XIII, para. 1.) That conclusion is reinforced by the fact that, in the Grievance Committee's proceedings, Applicant had the opportunity to set out his understanding of the facts in dispute.

The Factual Background of the Case

14. 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.

15. Applicant began his career with the Fund on July 12, 1982 as an Economist at grade H (equivalent to A13) in "Department 1."[7] In January 1988, Mr. "O" transferred to "Department 2," also at Grade A13. In 1995, Applicant resigned from the staff of the Fund to take up the position of Advisor to an Executive Director. The terms upon which Applicant resigned and of his subsequent reemployment with the Fund in 1999, and his ultimate separation from service, form the basis of the dispute in this case.

16. At the center of the controversy is a letter of May 4, 1995 to Applicant from the Chief of the Staff Development Division (SDD), Human Resources Department (HRD), which provides in pertinent part:

> "As agreed in your recent conversation with [a Deputy Managing Director], upon completion of your assignment as Advisor to Executive Director, the Fund will guarantee your reappointment to the staff until the end of February, 2000. In addition, it is

---

9. The President is empowered to issue such orders and decide such matters as are necessary for the orderly disposition of cases, including ruling on objections raised concerning the examination of witnesses or the introduction of documentary evidence."

[7] In accordance with the Administrative Tribunal's policy on protection of privacy, adopted in 1997, the departments of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal's Judgment.

> understood that, irrespective of when your assignment as Advisor to Executive Director ends, every effort will be made at that time to place you in a suitable Resident Representative assignment. Your reappointment to the staff will be at a salary level reflecting your current salary plus an adjustment for the period you have served in [the Executive Director]'s office."

In dispute is the meaning of the phrase "will guarantee your reappointment to the staff until the end of February, 2000." In Applicant's view, this provision was meant to record the period during which the Fund would hold open the guarantee of reemployment. The Fund, for its part, maintains that the provision set a terminal date for any period of reemployment with the Fund following Mr. "O"'s service with the Executive Board.

17. In 1999, Applicant concluded his service as Advisor to an Executive Director and returned to the staff of the Fund. The terms of this reemployment were set out in a letter of July 14, 1999 from the Chief, Recruitment Division, HRD, which referred to the letter of May 4, 1995:

> "It is a pleasure to offer you a regular appointment with the International Monetary Fund as an Economist in ["Department 2"], Grade A13 …. Your reappointment to the Fund staff is from July 1, 1999 to February 29, 2000, as outlined in [the Chief, Staff Development Division]'s memorandum to you dated May 4, 1995.
>
> ....
>
> As a staff member on regular appointment with the International Monetary Fund, you will be subject to present and future administrative regulations for the governance of such staff."

18. Applicant accepted this appointment by his signature on August 17, 1999 to a form stating that the acceptance was "subject to the conditions set forth in [the] offer of appointment dated July 14, 1999." The associated Personnel Action form shows the words "Fixed-term appointment to Feb. 29, 2000" struck out to say "Regular" appointment, with effective date of July 1, 1999.

19. As summarized below, Applicant's appointment was extended on five subsequent occasions, apparently without a break in service.

20. On March 8, 2000, Applicant was offered "an extension of your regular appointment … through May 31, 2000," at the same grade and within the same Department. Applicant signed his acceptance on the following day. The associated Personnel Action form indicates that the term "fixed-term" had been struck out and replaced by "Regular," so as to read "Extension of Regular appointment," with effective date of March 1, 2000.

21. By letter of June 1, 2000, Applicant again was offered and accepted "an extension of your regular appointment …. through July 31, 2000," continuing in "Department 2" at Grade 13. The associated Personnel Action form states "Extension of fixed-term appointment," effective June 1, 2000.

22. Once again, on July 21, 2000, Applicant received an "extension of [his] regular appointment," this time through September 15, 2000. He indicated his acceptance by signature on July 27, 2000. The Personnel Action form states the type of action as "Extension of Fixed Term Appointment," effective August 1, 2000.

23. On August 15, 2000, Applicant was offered (and later accepted) "an extension of your appointment through September 13, 2002" for the purpose of assuming the position of Resident Representative and transferring to "Department 1." This letter of appointment incorporated conditions set out in an attachment from the HRD Director. The attachment was "...to clarify the conditions under which [Applicant's] fixed-term staff appointment is being extended...." These conditions included Mr. "O"'s "working to high professional standards," and specified that "any shortcomings in work performance or behavior on your part which are inconsistent with the Fund's Code of Conduct will result in the prompt termination of your resident representative assignment.... [and] your staff appointment will also be terminated...." In an earlier Memorandum to Files, the "Department 1" Deputy Director noted that a similar caution had been conveyed to Mr. "O" orally with the news of his appointment to the Resident Representative post. The Deputy Director recorded: "Mr. ["O"] indicated that he was aware that there is some suspicion with regard to his performance record but he believed he was up to the challenge...."

24. In August 2002, as the expiration of Mr. "O"'s Resident Representative appointment approached, Applicant met with the SDD Chief, who, in a follow-up email communication to the Applicant, summarized the Fund's view as to the circumstances of Applicant's reemployment following his service with the Executive Board:

> "... the main intent [of the Resident Representative appointment] was to fulfill the agreement, made when you left the staff to take up your previous post in the Executive Director's office, to try and find a resident representative position for you at the conclusion of your term in the ED's office. As you will recall, when you left the staff to join [the Executive Director]'s office in May 1995, it was agreed with ..., then Deputy Managing Director, that your reappointment to the staff would be guaranteed through February 2000, at which point you would become eligible for a Fund pension. As noted above, it was further agreed that efforts would be made to place you in a Resident Representative assignment when you returned to the staff. At the time you returned to the staff in July 1999, there were no suitable Resident Representative assignments available (I recall that you applied for a few) and none had materialized by the end-date of your

> appointment (February 2000). To provide you with some more time to find an assignment your department, ["Department 2"], extended your appointment three times until, [o]n September 16, 2000, you took up your current assignment in .... At that time, the appointment was extended for an additional two years (through September 15, 2002) expressly for the purpose of taking up this Resident Representative assignment. ....
>
> ... it is important that we are all clear as to the background to your current appointment and the fact that it is of a fixed-term duration; originally in the form of a guarantee to carry you to a pension and subsequently extended for the purpose of taking up your current assignment. In this connection, as I mentioned to you in our meeting, HRD would have no objection to a further extension of your appointment **if** ["Department 1"] wished to extend your current assignment. Similarly, if you were to obtain a new assignment, HRD would not be opposed to extending your appointment for the duration of that assignment. However, as I reiterated to you, in the absence of either of these occurrences, your appointment will end on September 15, as scheduled.
>
> Please let me know if you have any questions on this."

(Emphasis in original.) There is no indication in the record before the Tribunal that Applicant did raise question about the foregoing portrayal of the nature of his appointment, particularly that it was "of a fixed-term duration" scheduled to end on September 15, 2002. Later that day, Applicant wrote to the Deputy Director of "Department 1" to request a "**final** extension of [his Resident Representative] assignment through June 2003," noting "I hope that at that point I will have found a suitable arrangement for my future career plans." (Emphasis in original.)

25. On October 30, 2002, Applicant received from the Deputy Director of the Human Resources Department a "final extension" of his employment with the Fund, to coincide with a third year of service as Resident Representative:

> "Management has approved the extension of your resident representative assignment in ... for a third year, through September 9, 2003. In this connection, a final extension to your staff appointment is being made through September 9, 2003."

This communication was followed on November 21, 2002 by a letter informing Applicant that "your appointment with the International Monetary Fund will be extended through September 9, 2003." Applicant declined, however, to sign the letter, which would have confirmed the appointment, and instead embarked upon correspondence addressed to the Managing Director, challenging his employment status and his treatment at the Fund.

26. Thus on November 24, 2002, Applicant directed a letter to the Fund's Managing Director[8] identifying the "points at issue" as "(1) my career development and (2) my current employment status with the Fund." Applicant contended that he had remained in an entry-level position since his initial appointment to the Fund in 1982 and that HRD staff "... have constantly subjected me to a discriminatory and humiliating treatment.... I have reasons to believe that the main thing some HRD staff members have against me is my racial origin." Applicant went on to assert:

> "Another arbitrary decision taken by some HRD staff members was to transform my regular employment status into a 'Fixed term appointment'. When I was appointed an 'Advisor to Executive Director' in 1995, the Administration Department sent me a letter transforming my regular employment status into a 'Fixed term' appointment without my consent. This was not in line with arrangements which are usually made between the Fund and staff members who are appointed to the Executive Board. Some HRD staff members have alleged that the decision to transform my employment conditions reflected the terms of an agreement between [the former Deputy Managing Director] and me. This is far from the truth as there was no legal basis for that decision and I am not aware that such a change in employment status has ever occurred with another staff member simply because she/he was joining the Executive Board."

Applicant further questioned "... why HRD sent me a letter recently stipulating that my current third-year assignment as Resident Representative in ... is my 'final staff appointment with the Fund.'" Accordingly, Applicant requested that Fund management "... investigate and correct these mistakes by (1) **reinstating my regular employment status** and (2) **determining the grade**, which would be today commensurate with my academic background and professional experience." (Emphasis in original.) Applicant further asserted that he had requested review under the Discrimination Review Exercise (DRE)[9] in the 1990s but that the request had not been "granted at the time because I was still an 'Advisor to an Executive Director,'" and that "[s]ince then, there has never been a follow-up."

27. The Deputy Managing Director responded on January 17, 2003, stating that "management has carefully reviewed your case" and found no evidence of discrimination by

---

[8] The letter indicates that Applicant copied it to the Deputy Managing Directors, the Director of his Department, and the Director of HRD. A copy stamped "Received Dec. 4, 2002, Director, HRD" is included in the record before the Administrative Tribunal, annotated by one of the Deputy Managing Directors to the HRD Director to "[p]lease comment."

[9] *See generally* Ms. "Z", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-4 (December 30, 2005), paras. 19-30.

HRD and that Applicant's performance did not support promotion to the next grade. As to Applicant's employment status, the Deputy Managing Director concluded:

> "Moreover, the decision to offer you a reemployment guarantee on a fixed-term basis was warranted since your performance was considered unsatisfactory and in need of improvement, and your department had decided to place you on probation. In these circumstances, the Deputy Managing Director at the time, ..., considered that the reemployment guarantee that is usually given to a staff member resigning to transfer to an Advisor position in an Executive Director's office should be for a fixed-term period and not open-ended."

28. Approximately two months later, on March 10, 2003, Applicant again wrote to the Managing Director.[10] Applicant disputed that the former Deputy Managing Director ever had proposed to him that his return to the staff be on a fixed-term basis. Rather, according to Mr. "O", the former Deputy Managing Director had stated that "it would be advisable for me to return to the staff before my 55th birthday, i.e. February 2000 in order to resume my career and avoid some adjustment difficulties." Accordingly, concluded Applicant:

> "[t]he decision to transform my employment status was taken by HRD not by [the former Deputy Managing Director]. When I returned to staff in July 1999, I was surprised to learn from HRD that I had become a fixed-term employee and was expected to leave the Fund by end February 2000."

29. Additionally, Applicant contended:

> "**Hitherto, I was not aware that ["Department 2"] had decided to put me on probation in the framework of the 1994 APR**. Representatives of ["Department 2"] and/or HRD have never discussed my 1994 APR with me. Nobody indicated to me that I was to be put on probation and what was expected of me during the period of that probation. In fact I was never given a write-up of my APR for that year until this day."

(Emphasis in original.) Applicant again requested Fund management "to conduct a thorough review of my case."

30. The Deputy Managing Director responded on April 15, 2003 to Applicant's "request for a further review of [his] employment status." Having "thoroughly reviewed the facts of

[10] Applicant again copied the Deputy Managing Directors, the Director of his Department, and the Director of HRD on the correspondence.

the case and ... perused the related documentation," management concluded that had Mr. "O" remained in "Department 2," his performance would have been rated 4 (unsatisfactory) and he would have been placed on probation. As Applicant had resigned in May 1995 to assume the position of Advisor to an Executive Director, the 1994 annual performance review was not completed. Furthermore, concluded the Deputy Managing Director:

> "... in the circumstances, [the former Deputy Managing Director] instructed HRD that your reappointment to the staff should not be unconditional but should be guaranteed only until February 2000. [The former Deputy Managing Director] also instructed that efforts should be made to find a resident representative post for you at the end of your assignment as Advisor to the Executive Director. These two elements were reflected in [the SDD Chief]'s letter to you of May 4, 1995, which was cleared by, and copied to, [the former Deputy Managing Director]. Both of these elements of your reemployment on the staff have been implemented and management finds no justification for overturning [the former Deputy Managing Director]'s original decision and changing your employment status."

31. Finally, the Deputy Managing Director warned Applicant that if he did not sign the extension of appointment that had been offered in fall 2002 he would be separated from the staff.

32. On April 29, 2003, Applicant directed a third letter to the Managing Director.[11] Applicant disputed the appraisal of his performance for 1994, asserting that his rating "could not have been unsatisfactory," alleging bias in the process and that "... it is not surprising for me to learn that my 1994 APR exercise was not completed, leaving ample room for its manipulation." Furthermore, Applicant contested his final letter of appointment of October 30, 2002:

> **"I have been asked to 'sign a letter of appointment'** in order to justify my current assignment as IMF Resident Representative in .... If I were to sign that letter, it would amount to confirming an arbitrary change in my employment status, which had no legal basis and could not be justified by any performance argument. My signature on that letter would also be tantamount to accepting the terms of the attached letter, **which was sent to me by HRD on October 30, 2002**. In that regard, it would be very helpful to know who instructed HRD to send me a letter implying that my current assignment was 'a final extension to your staff appointment'. If

[11] Once again, Applicant copied the Deputy Managing Directors, the Director of his Department, and the Director of HRD on the correspondence.

> indeed a decision was already taken in October 2002 to separate me from the staff after my current assignment, what is the relevance of my signature on the 'letter of appointment'?"

(Emphasis in original.) Following this exchange, Applicant's letter of appointment for his "final extension" remained unsigned.

33. On July 2, 2003, Applicant was advised by HRD that as he had refused to sign the letter of appointment he should make arrangements to vacate his Resident Representative post and that the effective date of his separation would be August 1, 2003. Applicant responded July 15, 2003, contending that his 1999 letter of appointment upon return from service with the Executive Board evidenced that he had a "regular appointment" with the Fund "the extension of which is at issue." Applicant questioned "[s]ince there are no predetermined time limits on and no extensions are required for regular appointments, why is an extension required in my case?" Applicant furthermore requested, for logistical reasons, that he be permitted to defer his return to Washington, D.C. until the first week of September.

34. The HRD Director responded on July 29, 2003, offering to extend the appointment through September 9, 2003 if Mr. "O" returned the signed letter of appointment by the following day. Mr. "O" then signed the appointment letter which bears a signature date of August 1, 2003.

The Channels of Administrative Review

35. Among the issues for consideration is whether Applicant has met the requirement of Article V, Section 1 of the Tribunal's Statute by exhausting on a timely basis all available channels of administrative review.[12] As described *supra*, beginning on November 24, 2002, Applicant addressed communications to the Managing Director contesting his employment status and other matters relating to his career with the Fund.

36. On August 4, 2003, Applicant responded to the HRD Director's July 29, 2003 memorandum, stating that "[t]his is to indicate that **I am appealing the decision to separate me from the Fund against my will**." Applicant contended:

> "... the terms and conditions of my employment as specified in the **letter of my appointment dated July 14, 1999**, are not in line with Fund employment policies [and] therefore are discriminatory. Because of that a legal interpretation of that **appointment letter** by an Administrative Review or the **Grievance Committee** is necessary."

[12] *See infra* Consideration of the Issues of the Case; A. Admissibility of Applicant's Allegations Relating to Separation from Service.

(Emphasis in original.) Applicant further alleged that his "career development was unrelated to [his] qualifications and experience, [and] therefore was also discriminatory."

37. Thereafter, on November 21, 2003, Applicant's counsel directed a "Request for Administrative Review and Provisional Relief" to the HRD Director, maintaining that Applicant had retained counsel to assist him in a dispute over his "... employment status, his summary dismissal from the Fund, invasion of his privacy and other administrative actions that constitute discrimination against him on racial grounds." The request additionally sought, as provisional relief, administrative leave status so that Mr. "O" could settle visa and other matters relating to his separation from service with the Fund.

38. The Director of HRD responded on December 12, 2003, authorizing a period of unpaid administrative leave from September 10 through December 31, 2003 (which was later extended through February 27, 2004) and informing counsel that Mr. "O" would become eligible to begin receiving his Fund pension as of January 1, 2004. As to the request for administrative review, the HRD Director cited deficiencies in the request, noting that "[w]e are prepared to undertake such a review, but we will first require more complete and concrete information on the decisions in dispute." Applicant's counsel responded December 16, 2003, again seeking administrative review of Mr. "O"'s alleged wrongful termination, which he contended was part of a history of discrimination. On December 22, 2003, the HRD Director agreed that HRD would undertake the review.

39. On March 19, 2004, the Director of HRD communicated to Applicant the results of her administrative review. At the same time, she reserved the Fund's right to challenge the jurisdiction of the Grievance Committee on the ground that the request for review had been untimely:

> "I will begin by stating that because the decision you challenge was made and communicated to you years ago, and in light of the fact that you received the results of a management review of this decision in early 2003, I do not consider your request for Administrative Review to be timely. I have decided to undertake a review of your case nevertheless, but you should be aware that the Fund reserves the right to challenge on these grounds the jurisdiction of the Grievance Committee over this claim, should you decide to pursue a grievance."

As for the substance of the complaint, the HRD Director concluded that Mr. "O"'s interpretation of the May 4, 1995 letter was incorrect, that Applicant's signature to the July 14, 1999 reemployment letter, as well as subsequent extensions thereof, made unambiguous his acceptance of a limited term of employment, and that the October 30, 2002 "final extension" letter put Applicant "undeniably on notice" that his Fund employment would terminate on September 9, 2003. The HRD Director accordingly concluded that Applicant's rights as a Fund staff member had not been violated. The administrative review did not address Applicant's contentions of discrimination.

40. On April 14, 2004, Mr. "O" filed a Grievance with the Fund's Grievance Committee, contesting "an arbitrary decision by HRD to terminate my employment despite my satisfactory performance during 1999-2003 and discriminatory impact of decisions affecting my career." The Fund responded to the Grievance with a Motion to Dismiss, contending that Mr. "O" had failed to exhaust in a timely manner the administrative remedies antecedent to Grievance Committee review, as required by GAO No. 31.

41. Following an exchange of briefs and oral argument on the Motion, at which Applicant was present and offered his account of disputed events, the Grievance Committee on June 30, 2004 issued an Order granting the Fund's Motion to Dismiss and recording the Committee's findings and conclusions on the issue presented by the Motion. The Committee found that Applicant agreed to the limited term of any future reemployment with the Fund at the time he resigned in 1995. Furthermore, concluded the Grievance Committee, even if the "final extension" letter of October 30, 2002 represented the decision point at issue, Mr. "O" waited more than a year until November 21, 2003 before initiating formal administrative review pursuant to GAO No. 31. Additionally, the Grievance Committee held that the "day for day" extension of time provided for in Section 6.07[13] of GAO No. 31 is intended to cover staff who are on mission or in a recognized leave status and was therefore inapplicable to Mr. "O", who was serving in an assigned duty station overseas during the period in question. The Committee additionally held that Applicant's broad claim of discriminatory treatment likewise was untimely.

42. On August 5, 2004, Mr. "O" filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

Admissibility

43. The principal arguments presented by Applicant in his Application and Reply in respect of the admissibility of the Application may be summarized as follows.

[13] GAO No. 31, Section 6.07 provides:

> "6.07 *Time Limits*. A staff member shall be required to exhaust the applicable channels of administrative review within the required time limits before submitting a grievance to the Grievance Committee. The time limits prescribed in Sections 6.02, 6.03, 6.04 and 6.06 shall be extended, day for day, for each day that the grievant is working on Fund business outside Washington D.C. or is in recognized leave status, except for administrative leave and separation leave."

1. Until Respondent acted on the claim that Applicant's status was that of a fixed-term employee, there was no basis for a grievance; it is the fact of actual termination of the staff member which set in motion the grievance. Applicant sought administrative review within six months of that act and therefore his claim is timely.

2. The earliest that Applicant could have known that the Fund was terminating his appointment as a fixed-term appointment was October 30, 2002 when the Fund communicated "a final extension to your staff appointment is being made through September 9, 2003."

3. Applicant was overseas serving in his Resident Representative assignment when he received the October 30, 2002 notice that the Fund would be terminating his appointment effective September 9, 2003. He was, accordingly, "working on Fund business outside Washington, D.C." until September 9, 2003 and, pursuant to GAO No. 31, Section 6.07, is entitled to a 314 day suspension of time for seeking administrative review.

4. Applicant's claim of discrimination is also timely as it involves a continuing harm.

Merits

44. The principal arguments presented by Applicant in his Application and Reply in respect of the merits of the Application may be summarized as follows.

1. The language of the May 4, 1995 letter was unambiguous in guaranteeing Applicant reappointment to the Fund staff as long as he returned to staff status by the end of February, 2000. It did not condition reappointment upon retirement at age 55.

2. Applicant accepted the position of Advisor to an Executive Director only because the Fund guaranteed that he could return to a regular staff appointment at the conclusion of that service. Applicant had expressed concern about resigning without a guarantee of reappointment.

3. The Deputy Managing Director's instruction to the SDD Chief was not communicated to Applicant and there was no meeting of the minds. The letter of May 4, 1995 may have deliberately concealed the writer's intent so as to induce Applicant to move to the Executive Board.

4. The Fund did not have discretion pursuant to GAO No. 16 to impose a fixed-term appointment upon Applicant's return to the Fund. Reappointment to the staff without a break in service means reappointment as regular staff and not on a fixed term, unless specified.

Staff who have a reentry guarantee fall under the staff rule and are entitled to its benefits.

5. Pursuant to GAO No. 3, Rev. 5, there are only two types of appointments, regular and fixed-term, and all appointments shall be made in writing. There are no Fund rules that allow for "hybrid" appointments.

6. When the Fund terminated Applicant on September 9, 2003 under the rationale that his fixed-term appointment had expired, the Fund separated a regular staff member in violation of GAO No. 16. Termination of Applicant's employment without due process and appropriate severance payment was an abuse of power.

7. If no position was available for Applicant following the completion of his Resident Representative assignment, the Fund should have invoked its rules governing redundancy.

8. The issue of Applicant's troubled career in "Department 2" must be viewed in the context of his discrimination claim. The possibility of probation was never communicated to Applicant. His evaluations during his service on the Board and on his return as Resident Representative were fully satisfactory.

9. Applicant's lack of career progression and his treatment at the Fund were impermissibly affected by racial discrimination. Applicant was treated in a disparate manner; guarantees of reemployment after Board service are typically provided on an unqualified basis.

10. Applicant seeks as relief:

    a. A finding by the Tribunal that Applicant's separation from service was taken in violation of Fund regulations;

    b. Rescission of the separation from service and reinstatement of Applicant to the staff with retroactive compensation and benefits;

    c. damages of two years' net salary for mental and emotional suffering resulting from the Fund's arbitrary actions and discrimination; and

    d. legal costs.

Respondent's principal contentions

Admissibility

45. The principal arguments presented by Respondent in its Answer and Rejoinder in respect of the admissibility of the Application may be summarized as follows.

1. Applicant understood and accepted in 1995 that the guarantee of reemployment with the Fund following his service as Advisor to an Executive Director was conditional upon his concluding that reemployment by the end of February 2000. Accordingly, Applicant's November 21, 2003 request for administrative review was filed more than eight years after he was first notified of the contested decision.

2. Upon his reemployment with the Fund in July 1999, Applicant accepted without objection the limited term of his reappointment. Applicant accepted without objection a series of extensions of his appointment, each of which was made with a fixed end date.

3. Applicant does not dispute that he was on notice as of November 2002 of the final termination date of his Fund employment; however, he did not seek administrative review until a year later.

4. The day-for-day extension provision of GAO No. 31, Section 6.07 is not applicable to excuse Applicant's failure to initiate administrative review while serving away from Washington, D.C. as a Fund Resident Representative.

5. The mere expiration of an appointment whose end-date had earlier been determined does not constitute a new decision.

6. Applicant's contentions of discrimination are also untimely.

Merits

46. The principal arguments presented by Respondent in its Answer and Rejoinder in respect of the merits of the Application may be summarized as follows.

1. The Fund's regulations do not require that it offer a reemployment guarantee, conditional or otherwise, to a staff member who resigns to serve as Advisor to an Executive Director.

2. The events leading up to Applicant's resignation to serve as Advisor to an Executive Director demonstrate that the Fund reasonably rejected Applicant's request for an unconditional reemployment guarantee for

reasons directly relating to his performance history and instead offered a guarantee of reemployment to the staff for a fixed duration, just long enough to bridge him to a Fund pension when he reached age 55 in February 2000.

3. The decision to offer reemployment for a limited duration was not contrary to any Fund rule and was well within management's unilateral prerogative.

4. The Fund exercised its discretion reasonably, and indeed generously, in the case of Applicant.

5. The creation of a "hybrid" appointment, limited in duration but with the benefits applicable to regular employment, was an accommodation that was entirely to Applicant's advantage.

6. Applicant knew or should have known that his performance was less than satisfactory.

7. Applicant's contention that discriminatory treatment impeded his Fund career is controverted by the record.

Consideration of the Issues of the Case

A. Admissibility of Applicant's Allegations Relating to Separation from Service

47. The Tribunal must consider at the outset Respondent's challenge to the admissibility of the Application on the ground that Applicant allegedly failed to exhaust channels of administrative review in a timely manner, and, accordingly, has not satisfied the exhaustion of remedies requirement of Article V, Section 1 of the Tribunal's Statute.[14] The jurisdiction *ratione materiae* of the Administrative Tribunal is limited to challenges to the legality of an "administrative act" of the Fund, defined as "...any individual or regulatory decision taken in the administration of the staff of the Fund."[15] Accordingly, to resolve Respondent's challenge to the admissibility of the Application, the Tribunal must determine (a) what is the "administrative act" (or "acts") at issue before the Administrative Tribunal, and (b) when did

[14] Article V, Section 1 provides:

> "When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review."

[15] Statute, Article II, Sections 1 and 2.

he initiate administrative review of that act (or acts). In addition, the Tribunal may consider whether there are exceptional circumstances that may excuse any delay in Applicant's seeking administrative review. *See* Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 102.

48. The Tribunal takes note of the Grievance Committee's decision that Mr. "O"'s Grievance was barred from consideration by that body on the ground that Applicant failed to initiate in a timely manner the administrative review procedures of GAO No. 31 prerequisite to the Grievance Committee's review.[16] In Estate of Mr. "D", para. 91, the Tribunal held that such a determination of the Grievance Committee is "relevant to but not necessarily dispositive of" the question of whether an applicant has exhausted channels of administrative review, as required by Article V, Section 1 of the Statute, for purposes of bringing an Application before the Administrative Tribunal. While the Grievance Committee rules upon its own jurisdiction for purposes of proceeding with a grievance, the Administrative Tribunal, in adjudging a challenge to the Tribunal's jurisdiction, necessarily decides for itself whether channels of administrative review have been exhausted (*Id.*, para. 85):

> "... the recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to debar them. If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse."

(*Id.*, para. 102.)

49. Accordingly, the Tribunal has held that it has the authority to consider the "presence and impact of exceptional circumstances" at anterior stages of the dispute resolution process. (*Id.*) In evaluating factors that may excuse failure to initiate administrative review on a timely basis, the Tribunal shall consider "... the extent and nature of the delay, as well as the purposes intended to be served by the requirement for exhaustion of administrative remedies." (*Id.*, para. 108.)

50. At the same time, the Tribunal in Estate of Mr. "D" affirmed the importance of timely pursuit of administrative review:

> "International administrative tribunals have emphasized the importance not only of the exhaustion of administrative remedies but also that the process be pursued in a timely manner. The timeliness of the review process is directly linked to the purposes of that review:

---

[16] *See supra* The Channels of Administrative Review.

> 'Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors – when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies, as is the case here.' (Alcartado, AsDBAT Decision No. 41, para. 12.)"

(*Id.*, para. 95.) The Tribunal cautioned, "... in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal processes, such requirements should not be lightly dispensed with and 'exceptional circumstances' should not easily be found. Applicants having knowledge of internal review requirements may not simply choose to ignore them...." (*Id.*, para. 104.) *See also* Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-2 (March 5, 2002), para. 40.

1. What is the contested "administrative act"? Was there more than one "administrative act" by which Applicant was "adversely affected"?

51. To assess whether Applicant has met the exhaustion of remedies requirement of Article V, Section 1, the Administrative Tribunal first must identify what administrative act (or acts) are being challenged. In Respondent's view, "...the decision at issue in this case is the decision initially establishing that Applicant was serving on an appointment with a fixed end-date--- a decision the Fund maintains took place in 1995, but that even Applicant acknowledges took place no later than October of 2002." By contrast, Applicant identifies the contested decision as his "[s]eparation from service on September 9, 2003, at the initiative of the Fund," and "[i]llegal conversion of Appointment from 'regular' to 'fixed term' carried out in violation of fair and due process and notified to Applicant without explanation in a document dated November 21, 2002."

52. The question accordingly is posed whether there was more than one "administrative act" that "adversely affected" Applicant under Article II of the Statute, namely: (1) the 1995 decision of the Fund to guarantee reemployment only through February 2000; and (2) the "final extension" of Applicant's appointment, notified to him October 30, 2002 and expiring September 9, 2003.

53. Even if the disputed language of the May 4, 1995 letter, i.e. "….the Fund will guarantee your reappointment to the staff until the end of February, 2000," is read, as Respondent argues, not to refer to the period during which it would hold open the opportunity to return to Fund employment but rather to denote the duration of the reemployment that was guaranteed, it was simply that--- a "guarantee." The text is open to the interpretation that reemployment with the Fund was guaranteed up to a particular date, but not necessarily limited to that period.

54. Accordingly, while the Fund maintains that what it granted in 1995 was a guarantee of a period of employment to end at a date certain, i.e. end of February, 2000, the text itself

does not preclude the possibility that Mr. "O"'s employment might be extended past that date. Indeed, the Fund acted on a series of occasions to extend the duration of Applicant's reemployment beyond the guaranteed date of February 2000, for approximately two and one-half years, into September 2003.

55. As to the 1995 decision, it may be said that Applicant was "adversely affected" because that decision altered the situation that otherwise would have obtained if he had returned to service under the terms which, as the Fund acknowledges, are normally afforded members of the staff who resign to take up the position of Advisor to an Executive Director. The Fund's 1995 guarantee of reemployment had "some present effect" on Applicant's position and, accordingly, he was "adversely affected" thereby. *See* Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications), IMFAT Judgment No. 2005-3 (December 6, 2005), paras. 19-21 (while the Applicants had not suffered negative financial consequences in 2005, the contested decision of the Executive Board, by widening the range of discretion to be exercised in setting staff salaries, opened the possibility for negative financial consequences through the application of that decision in future years, a possibility that had not existed prior to that decision; Applicants were therefore "adversely affected" under Article II of the Statute).

56. As contemplated in Baker, in the present case the 1995 act set in motion a series of acts, any one of which Applicant might have challenged, culminating in the action of October 30, 2002, when the final extension of appointment was made. The appointment of July 14, 1999 is significant because it marks the time when reemployment with the Fund was first realized. While the 1995 act made possible subsequent acts, it did not necessarily determine them. Accordingly, the question arises whether acts subsequent to the 1995 act may be considered separate "administrative acts" subject to challenge in the Administrative Tribunal. The Tribunal concludes that they may. The decision of October 30, 2002 did adversely affect Applicant because it resulted directly in the termination of his Fund employment, an event that was not necessarily required by terms of the 1995 guarantee.

2. Did Applicant's 1999 letter of reemployment with the Fund (and the five subsequent extensions thereof) put Applicant on notice of the Fund's decision to return him to Fund employment for a limited rather than an indefinite period?

57. Even if it were accepted that Applicant was not on notice in 1995 of an administrative act of the Fund adversely affecting him, the question arises whether such notice arose with his first letter of reemployment with the Fund of July 14, 1999.

58. It may be noted that Applicant signed his acceptance of the 1999 reappointment on August 17, 1999, the terms of which appear above at para. 17, and which specify that "[y]our reappointment to the Fund staff is from July 1, 1999 to February 29, 2000...." Less than 6 months later, i.e. within the period during which Applicant would have been required to initiate administrative review pursuant to GAO No. 31, Applicant was offered an extension of his appointment with effect from March 1, 2000.

59. Applicant contends that the reappointment letters were ambiguous in their purport, often using the term "regular appointment" while at the same time designating a termination date for the appointment. Respondent has explained that the term "regular appointment" was used for administrative purposes to indicate to Human Resources personnel that Mr. "O" was to continue to receive such staff benefits as participation in the Staff Retirement Plan and home leave, even though the appointment was for a fixed duration, creating a "hybrid" appointment. The undeniable ambiguity of the reappointment letters and Personnel Action forms characterizing Mr. "O"'s employment both as "regular" and as "fixed-term" gives rise to the question whether Applicant was justified at the time of those appointments in not challenging their fixed-term provision.

60. It should, nonetheless, be noted that in his March 10, 2003 communication to the Managing Director, Mr. "O" asserted that "[w]hen I returned to staff in July 1999, I was surprised to learn from HRD that I had become a fixed-term employee and was expected to leave the Fund by end February 2000." Whatever Mr. "O"'s surprise, this statement by Mr. "O" demonstrates his recognition of the position of the Fund that, in July 1999, an employment term of limited duration, a term that was to expire by the end of February 2000, governed.

3. Treating the October 30, 2002 "final extension" of Applicant's appointment as the contested administrative act, did Applicant initiate timely administrative review of that decision for purposes of Article V, Section 1 of the Tribunal's Statute?

61. In any event, the Tribunal has concluded above, para. 56, that the decision of October 30, 2002 to offer Mr. "O" a final extension of his appointment with the Fund was a separate administrative act adversely affecting Applicant which he may, accordingly, challenge in the Administrative Tribunal. Respondent, however, maintains that even if the October 30, 2002 letter offering Applicant a "final extension" were the decision at issue, Applicant failed to initiate timely administrative review of that decision because his formal request for administrative review was not submitted to the Director of Human Resources until November 21, 2003.

62. On August 4, 2003, Applicant responded to the HRD Director's July 29, 2003 memorandum, stating that "[t]his is to indicate that **I am appealing the decision to separate me from the Fund against my will**." Applicant contended:

> "... the terms and conditions of my employment as specified in the **letter of my appointment dated July 14, 1999**, are not in line with Fund employment policies [and] therefore are discriminatory. Because of that a legal interpretation of that **appointment letter** by an Administrative Review or the **Grievance Committee** is necessary."

(Emphasis in original.) Applicant further alleged that his "career development was unrelated to [his] qualifications and experience, [and] therefore was also discriminatory."

63. The Tribunal will address below whether exceptional circumstances, i.e. either Applicant's pursuit of his complaint through the Managing Director or Applicant's posting at an overseas duty station, excused the failure to file a formal request for administrative review with the Director of Human Resources within six months of October 30, 2002.

a. Did Applicant initiate timely administrative review on November 24, 2002 by addressing his complaint to the Fund's Managing Director?

64. Respondent asserts: "That Applicant pursued his complaint to the Managing Director and not through the proper avenues set forth in the staff rules offers him no special status. Staff members must be held to awareness of the staff rules, and must file their claims through proper channels in a timely manner." Furthermore, Respondent characterizes Applicant's correspondence with the Managing Director as requests for reconsideration of the contested decision(s), rather than requests for administrative review, invoking the Tribunal's decision in Mr. "X".

65. Staff members ordinarily are held to a knowledge of the organization's administrative review procedures, Estate of Mr. "D", para. 120, and it is highly desirable that these procedures exclusively be followed. However, when a staff member brings his complaint to the highest levels of Fund management and when management elects to review that complaint rather than advising the staff member that his complaint either should be reviewed through prescribed channels or is untimely, the Tribunal is of the view that that election by management exceptionally stands in lieu of seeking administrative review pursuant to the procedures of GAO No. 31.

66. The language of the Deputy Managing Director's responses of January 17, 2003 and April 15, 2003 suggests that management regarded Applicant's letters of November 24, 2002 and March 10, 2003 as requests for review of the contested decisions and reacted accordingly: "Management has thoroughly reviewed the facts of the case and has perused the related documentation." The Tribunal in previous cases has taken account of the effect of the Fund's communications to a staff member in assessing his actions in seeking further review. *See* Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2004-1 (December 10, 2004), para. 43 ("While it may be also contended that Applicant's eliciting a further decision from the Fund should not be permitted to defeat a defense of *res judicata*, it is notable that .... the Fund reacted to Mr. "R"'s April 2002 request as if it were distinct from the request disposed of by the Administrative Tribunal only one month earlier. These actions may have led Mr. "R" to believe that HRD was open to considering his interpretation of the policy and later to pursue his claim through the channels of administrative review culminating in its present consideration by the Tribunal.") *Compare* Mr. "X", para. 26 ("Nor did the Fund give the Applicant reason to believe that the decision at issue was open to reconsideration or adjustment; on the contrary, he was officially informed by the Fund that the decision was 'a final disposition of the matter and it will not be reopened.'")

67. Furthermore, the Deputy Managing Director's investigations of Applicant's complaint may be said to have served the functional purposes of administrative review. Among the factors taken into account in finding exceptional circumstances in Estate of Mr. "D" was that "...the Fund has on several occasions reviewed the claim, creating opportunities for resolution of the dispute and building an evidentiary record." (Para. 125.)

b. The effect of Applicant's overseas assignment

68. Applicant contends that the "day for day" extension of time provided by GAO No. 31, Section 6.07 to staff members "working on Fund business outside Washington, D.C." should apply to extend until September 9, 2003 the period during which Applicant was permitted to contest the October 30, 2002 decision, as he was serving overseas during the period as a Fund Resident Representative. The Grievance Committee expressly rejected this interpretation of GAO No. 31, Section 6.07 for purposes of proceeding with Mr. "O"'s Grievance, holding that the provision was "…intended to cover staff who are on mission or in a recognized leave status," rather than a staff member such as Mr. "O" serving in an assigned duty station overseas. The question accordingly is whether Applicant's assignment to a duty station outside of Washington, D.C. for the duration of the period October 30, 2002 to September 9, 2003 created an additional "exceptional circumstance" excusing the delay in his filing a formal request for administrative review.

69. GAO No. 31, Section 6.07 provides that:

> ".... The time limits prescribed in Sections 6.02, 6.03, 6.04 and 6.06 shall be extended, day for day, for each day that the grievant is working on Fund business outside Washington D.C. or is in recognized leave status, except for administrative leave and separation leave."

70. In the view of the Tribunal, the provision for extension "day for day" for each day that the Grievant is working on Fund business outside Washington D.C. is meant to cover the frequent absences from Headquarters of Fund personnel on missions overseas of limited duration. It is not a provision that is directed to the case of a Fund official who is stationed abroad, as was Mr. "O." Unlike a traveling official stationed in Washington whose office, files, etc. remain at Headquarters, an official who is in resident status abroad has his office facilities at hand. There is no persuasive reason why such officials cannot exhaust prescribed channels of administrative review within the required time limits. At the same time, as just noted, Applicant's August 4, 2003 letter to the HRD Director stated that "I am appealing the decision to separate me from the Fund against my will," and advised "I would like to return to Washington as soon as possible to organize my legal defense." There is room for the conclusion that this memorandum initiated a request for administrative review pursuant to GAO No. 31 before Mr. "O"'s counsel in Washington submitted a formal request for administrative review on November 21, 2003.

71. Nevertheless, because Mr. "O" launched his appeal by way of letters to the Managing Director just one month after the October 30, 2002 issuance of a final extension of his appointment, the Tribunal concludes that the claim of Mr. "O" is not time-barred.

B. Admissibility of Applicant's Allegations of Discrimination

72. Respondent additionally challenges the admissibility of Applicant's allegations of discrimination, which, like Mr. "O"'s other claims, it urges the Tribunal to dismiss as untimely. Applicant, for his part, maintains that the discrimination he alleges represents a "continuing harm."

73. In Mr. "F", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), the Tribunal reviewed allegations that a former staff member had been subjected to incidents of religious hostility and workplace harassment over the course of his career. Citing the Fund's Discrimination Policy, the Tribunal considered "...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.'" (*Id.*, para. 90.) As the Tribunal recently observed, in Mr. "F" it "... took cognizance of a pattern of conduct where separate administrative review had not been undertaken as to each individual act." Ms. "W", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 120. In the case of Mr. "F", the ultimate act of alleged discrimination had been subject to timely administrative review.[17]

74. As the Tribunal has concluded that Mr. "O"'s complaint that he was impermissibly separated from service with the Fund, an act he challenged in part as a culminating act of discrimination, is not time-barred, it may, on the basis of Mr. "F", likewise consider whether Applicant has put forth evidence that would sustain a claim that he has been the object of discriminatory treatment in his career with the Fund.

75. In this regard, it should be noted that Applicant in his communications of 2002 and 2003 to the Managing Director, in his formal request for administrative review to the Director of Human Resources, and in his Grievance, expressly raised the issue of discrimination, along with the issue of his employment status and separation from service. For example, in Mr. "O"'s November 21, 2003 request for administrative review he alleged that the decisions taken in his case appeared to be "the culmination of a long history of discrimination against him." The Deputy Managing Director made express findings as to Applicant's contentions of discrimination.

---

[17] In Mr. "F", the Tribunal upheld as a reasonable exercise of the Fund's discretion the decision contested by Applicant as the ultimate act of discrimination, i.e. the abolition of his position. At the same time, it sustained Mr. "F"'s claim that he had been the object of religious intolerance and workplace harassment to which Respondent had failed to take effective measures in response and awarded relief on that ground.

C. Merits of Applicant's Allegations Relating to Separation from Service

76. The Fund's regulation GAO No. 16, Rev. 5 (July 10, 1990), Section 6, requires that for a staff member to serve as an Advisor to an Executive Director, he must resign from the staff of the Fund for the duration of that service. When such resignation is made "with a written understanding with the Fund that at the conclusion of his service with the Executive Board he will be reappointed to the staff without a break in service," (Section 6.04), then additional provisions apply. These provisions include that "[t]he period during which an understanding regarding reappointment to the staff applies shall be determined by the Fund and recorded in writing before the staff member's resignation." (Section 6.04.2.) Persons thereby returning to the staff of the Fund without a break in service receive service credit and accrued benefits that have been held in abeyance during the period of Executive Board service. (*Id*.) In the case in which the former staff member is not reappointed to the staff of the Fund, he is entitled to separation benefits at the conclusion of his service with the Executive Board. (Section 6.04.3.) The applicable provisions provide in full:

> "Section 6. Mandatory Resignation
>
> ...
>
> 6.04 Service with the Fund's Executive Board. A staff member who takes up the position of Executive Director, Alternate Executive Director, or Advisor to Executive Director, shall resign from the staff. When a staff member resigns to take up a position as Advisor to Executive Director with a written understanding with the Fund that at the conclusion of his service with the Executive Board he will be reappointed to the staff without a break in service, the additional arrangements set forth in Subsections 6.04.1-6.04.3 below shall apply.
>
> 6.04.1 Effective Dates. In order to avoid a break in service and to preserve the continuity of the staff member's benefits, his resignation from the staff will be effective at the close of business on the calendar day preceding the day on which he assumes his new position with the Executive Board. The staff member's subsequent reappointment to the staff, if applicable, will be effective at the opening of business on the calendar day following the last day of his service with the Executive Board.
>
> 6.04.2 Continuation of Service. The period during which an understanding regarding reappointment to the staff applies shall be determined by the Fund and recorded in writing before the staff member's resignation. This period may subsequently be extended. During the period of service with the Executive Board, the service

> credit and accrued benefits which are not available to his new position will be held in abeyance until his return to the staff. If, after the termination of his service with the Executive Board, the individual is reappointed to the staff without a break in service, the service credit and accrued benefits which have been held in abeyance shall be restored to his account. The period during which he occupied the position with the Executive Board shall be counted as applicable service for the purpose of determining entitlements for benefits which are available both to the service with the Executive Board and the staff. A staff member who resigns and is reappointed in this manner shall not be eligible for any resettlement benefits or the separation grant.
>
> 6.04.3 Separation Benefits at the Conclusion of Service with the Executive Board. If a former staff member who had resigned to take up a position with the Executive Board is not reappointed to the staff upon the conclusion of such service, he shall be paid the separation grant earned while on the staff, and an amount in lieu of his accrued annual leave outstanding on the date of his resignation from the staff (subject to a maximum of 60 days). The amounts of these benefits shall be calculated on the basis of his salary as of his last day on duty as a staff member. Eligibility for resettlement benefits shall be subject to regulations and procedures governing members of the Executive Board.
>
> ..."

These provisions indicate that a staff member who resigns from the Fund's staff to serve as an Advisor to an Executive Director has no assured right of reappointment to the staff; he may not be reappointed even if normally he is.

1. Was there a meeting of the minds between Applicant and the Fund as to the terms of the reemployment guarantee with which Applicant resigned from the staff of the Fund to assume the position of Advisor to an Executive Director, i.e. did Applicant agree to the terms of which he now complains?

77. According to Respondent, the letter of May 4, 1995 memorialized an agreement between the Fund and Applicant that any reemployment of Mr. "O" following his service with the Executive Board would terminate at the end of February 2000, at which time Applicant would reach his 55th birthday and, thereby, become eligible for a Fund pension.

78. In support of Respondent's interpretation, it offers the following account of the events upon which it contends the letter of May 4, 1995 was predicated. On April 25, 1995, the Chief of the Staff Development Division wrote to the then Deputy Managing Director seeking his views as to how to respond to a request from Mr. "O" for an unconditional

guarantee of reemployment to the staff, in light of Mr. "O"'s performance over the preceding three years and the view of "Department 2" that "… there was little option but to place Mr. ["O"] on probation."[18] The SDD Chief advised the Deputy Managing Director:

> "On February 10, 1995, I sent you a memorandum (copy attached) summarizing the performance difficulties experienced by Mr. ["O"] during his Fund career, and particularly his recent years in ["Department 2"]. Since then, we have received a copy of his 1994 performance report which describes his performance as 'generally unsatisfactory' and details a number of specific problems including analytical shortcomings, inaccuracies, poor drafting, and missed deadlines. I discussed the report with [the Senior Personnel Manager] who, on the basis of this and the previous two years' performance assessments, felt that there was little option but to place Mr. ["O"] on probation.
>
> Recently, however, Mr. ["O"] has been offered the position of Advisor in [an Executive Director]'s office; a Board notification has been issued appointing Mr. ["O"] to the position effective May 1, 1995. In talking with Mr. ["O"] he has made it clear that, despite the considerably higher salary, he will accept the position only if he is provided with an unconditional guarantee of reemployment on the staff. He envisages serving as an Advisor to Executive Director for three or four years (he has a letter from [the Executive Director] proposing an 18-month term, renewable for another 18 months) and then returning to [his home country] to assume a senior government post. However, in case these plans do not materialize, he wishes to remain in Fund employment for another seven years by which time he feels that his personal and financial circumstances will allow him to retire. He is currently 50 years old and has 13 years of Fund service.
>
> Normally, a staff member resigning to take up an Advisor position in an Executive Director's office receives a formal guarantee of reemployment in the department in which he or she is working at the time of resignation. In this case, however, given

[18] It is a matter of factual dispute as to whether Applicant was on notice that his 1994 Annual Performance Review might result in probation for unsatisfactory performance and, accordingly, whether such fact might have entered into his consideration of the prospects for employment with the Executive Director and his later return to employment with the Fund. The Deputy Managing Director, in his review of Applicant's complaint, concluded that the 1994 performance review had not been completed for Applicant because of his then impending move to the Executive Board position. Applicant contends that he did not see the APR; his supervisor, in remarks noted on the form, asserts that she discussed the review with Mr. "O" who was disappointed by the evaluation.

> Mr. ["O"]'s performance record, ["Department 2"] is not prepared to provide this reemployment guarantee."

The SDD Chief therefore proposed two options to the Deputy Managing Director: (a) informing Mr. "O" that, on the basis of his performance, he cannot be provided with a reemployment guarantee; or (b) providing a reemployment guarantee that would leave unspecified the department to which he would return.

79. The Deputy Managing Director, however, rejected both options, responding:

> "We should not give an unconditional guarantee. We should say that if Mr. ["O"] takes the ED Office position, he can return to the staff but must retire at the age of 55. If he does not take up the ED Office position, we should tell him that he will be put on probation now – or whatever is the appropriate time."

(Emphasis in original.) The following day, the SDD Chief replied, endorsing the Deputy Managing Director's comments as offering a "fair and reasonable approach." He further reported that "[t]he initial reaction from Mr. ["O"] is to remain in [Department 2"] if he cannot be guaranteed reemployment until the age of 57, rather than 55." A few days later, the SDD Chief issued the May 4, 1995 letter to Mr. "O".

80. Since Mr. "O" was contemporaneously reported to have given an initial reaction to the apparently conveyed position of the Deputy Managing Director, there is room to doubt his subsequent contention that he was not then informed of the Fund's position. Applicant nevertheless contends that these exchanges between the SDD Chief and the Deputy Managing Director, purporting to demonstrate the intent of the Fund in issuing the letter of May 4, 1995, never were communicated to him and do not comport with his understanding of the events leading up to his departure to serve as Advisor to an Executive Director. At the Grievance Committee proceedings on the Fund's Motion to Dismiss, Applicant offered his own account of the events leading up to the issuance of the disputed letter.

81. According to Mr. "O", he called upon the Deputy Managing Director sometime between April 28 and 30, 1995 because he had been told that "no department is ready to give me the guarantee of re-entry and so forth." The Deputy Managing Director, according to Applicant, told him that "only the Fund can guarantee you" because his Senior Personnel Manager (SPM) did not want Mr. "O" to return to "Department 2." Furthermore, Applicant asserted:

> "... [the Deputy Managing Director] told me but the Fund can guarantee you re-entry ..., provided you come back before you reach the age of 55. After which the Fund ... will be in no obligation to accept.

> He never discussed the type of employment, the type, whether it would be fixed or regular, whatever. It was understood that I come back ... as a regular."

A similar account provided by Applicant in his March 10, 2003 letter to the Managing Director also noted "During the meeting, [the Deputy Managing Director]...expressed full support for my transfer to the Executive Board in order to broaden my experience."

82. It may be observed that Applicant's interpretation of the disputed provision of the May 4, 1995 letter, i.e. that it was to record that the period during which the Fund would hold open the guarantee of reemployment following service with the Executive Board would terminate at the end of February 2000, is consistent with the Fund's assertion that normally staff members are given an unconditional guarantee of reemployment when resigning for Executive Board service and, equally, with the requirement of GAO No. 16, Section 6.04.02 that "[t]he period during which an understanding regarding reappointment to the staff applies shall be determined by the Fund and recorded in writing before the staff member's resignation."

83. The Tribunal observes that while the May 4, 1995 letter opens by stating "As agreed in your recent conversation with [a Deputy Managing Director]…" (emphasis supplied), it does not, on its face, bear any evidence of an agreement of the parties to its terms. It is signed only by the administration of the Fund without any apparent provision for signature by Applicant. At the same time, the record shows no objection at the time or for years thereafter by Mr. "O" to the Fund's statement that the arrangements described were agreed.

84. A further question arises. Do the letters of appointment of July 14, 1999 and subsequent dates, to which applicant did affix his signature, bar Applicant from challenging the limited terms of those appointments? In Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), the Tribunal rejected the Fund's contention that the terms and conditions in a letter of appointment are explicitly accepted by the staff member and not open to challenge:

> "11. The Respondent argues that terms and conditions in a letter of appointment, such as grade and salary, are explicitly accepted by the staff member; that initial terms do not involve the exercise of unilateral authority by the Fund; that therefore, these terms and conditions are presumptively binding upon the staff member who accepted them, absent a showing that they are blatantly mistaken (e.g., arithmetical or typographical error) or contrary to a mandatory rule of the Fund (e.g., a salary below the range associated with the grade of the position), or that their acceptance was induced by fraud or misrepresentation.
>
> 12. The Tribunal sustains the Fund's position on this question as a matter of presumption; the fact that a staff member accepts an offer

> that he or she is free to decline does weigh against challenge to the terms of the contract so accepted. But it is a question only of presumption. The Fund and an applicant for a position in the Fund are not in an equal negotiating position; e.g., as this case shows, the Fund is in possession of relevant information not within the knowledge of an applicant. Accordingly, while the presumption holds, the staff member nonetheless can be heard to argue contrary claims, as in this case, of misrepresentation of facts or irregularity in the process of appointment. The Tribunal concludes that the fact that Mr. D'Aoust accepted his initial grade and salary does not bar him from challenging the legality of the Fund's determination of grade and salary.
>
> 13. Moreover, precisely what Mr. D'Aoust did accept may be open to question. When the then Director of Administration considered Mr. D'Aoust's request for a revision of his grade and salary, he found that there had occurred in the process of Mr. D'Aoust's appointment events that possibly created a certain degree of misunderstanding and confusion in his mind concerning 'the exact status of the job.'.... From these facts the Tribunal deduces that there is room for doubt as to whether there was a true meeting of the minds regarding the nature of the job at the time Mr. D'Aoust accepted his position. If there were not such a meeting of minds, Mr. D'Aoust cannot be treated to his detriment as if there were...."

85. Nevertheless, on the facts of this case, as the record reveals them to be, the Tribunal concludes, for reasons elaborated below, that actually Mr. "O" did acquiesce in the Fund's position affording him a limited, rather than indefinite, reentry.

2. <u>In view of GAO No. 16, Section 6, was it permissible for the Fund to offer Applicant the arrangements of 1995?</u>

86. Applicant contends that conditioning his return to service on taking up a limited term appointment was inconsistent with the internal law of the fund, in particular, GAO No. 16, Section 6, which governs the mandatory resignation of and subsequent reemployment of staff who serve as Advisors to Executive Directors. Respondent, for its part, maintains that it is within its "unilateral prerogative" to make such an offer. Respondent observes that it is not required to offer any guarantee, conditional or unconditional, in such circumstances. Applicant counters that while no guarantee is required, any guarantee of return to employment with the Fund must be consistent with the terms of GAO No. 16, Section 6, which contemplate that the staff member will resume a regular appointment of indefinite duration.

87. Applicant furthermore contends that the Fund's devising of a "hybrid" appointment for Mr. "O", i.e. of limited duration and with no process or benefits attached to separation but

retaining such employment benefits of regular staff appointments as participation in the Staff Retirement Plan, runs counter to GAO No. 3, Rev. 5 (1989). GAO No. 3, Rev. 5 provided[19] for two kinds of staff appointments, "fixed term" and "regular": "Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members." (Section 3.01.) Respondent, for its part, contends that Applicant cannot complain about an arrangement which, it maintains, was entirely to his advantage.

88. The question then arises whether, when a staff member resigns to serve as an Advisor to an Executive Director, it is within the discretion of the Fund to conclude an arrangement for the staff member's return that is of limited duration. Is it within the discretion of the Fund under such circumstances to create an appointment of fixed duration but carrying such benefits of staff employment as home leave and participation in the Staff Retirement Plan? In the view of the Tribunal, the answer to these questions is affirmative for the reasons indicated below.

3. Did the Fund exercise its discretion reasonably in concluding arrangements with Mr. "O" in 1995?

89. Respondent maintains that the Fund exercised its discretion reasonably, indeed generously, in the case of Mr. "O" when it conditioned his return to the staff on taking up an appointment of limited duration, in view of his performance record.

90. Respondent maintains: "In effect, the Fund had worked out an agreed separation with Applicant in 1995, and the terms of this reappointment were crafted to carry out to the fullest extent possible the spirit of the agreement. It is difficult to see how the exercise of flexibility by management, to a staff member's personal advantage, can be characterized as an 'illegal act' by the very staff member who benefited from that flexibility."

91. GAO No. 16, by its terms, "...sets forth the policies and administrative procedures governing the separation of staff members from the Fund," (Section 1.01) and provides that "[t]he separation of a staff member from the Fund may take place in one of the following ways: (a) voluntary resignation, including early retirement (Section 5); (b) mandatory resignation to take up a position with the Executive Board of the Fund, with the World Bank, and acceptance of a position of a political nature (Section 6); (c) abandonment of position (Section 7); (d) expiration of fixed-term appointment (Section 8); (e) expiration of probationary period (Section 9); (f) mandatory and extended retirement (Section 10); (g) separation for medical reasons (Section 11); (h) death of a staff member (Section 12); (i) separation upon abolition of the staff member's position, change in job requirements, or when a reduction in strength is required (Section 13); (j) separation for unsatisfactory performance (Section 14); and (k) separation for misconduct." (Section 3.01.) A variety of procedures and benefits apply, depending on the reason for separation.

[19] GAO No. 3 was again revised in 2003.

92. The Applicant observes that he could not have been separated for unsatisfactory performance because such separation is governed by the terms of GAO No. 16 which were not followed. In the case of separation for unsatisfactory performance, a staff member is entitled to a probationary period of at least six months before a decision is taken to separate him. In such case, "[t]he staff member shall be informed in writing of the specific areas in which he is required to improve. If, at the end of the probationary period, the Department Head determines, in consultation with the Director of Administration, that the staff member has continued to perform unsatisfactorily, his employment shall be terminated." (Section 14.02.) In addition, a staff member separated for unsatisfactory performance is entitled to a 30-day notice period. (Section 14.04.)[20]

93. However, the Administrative Tribunal has recognized the validity of settlement and release agreements like the one considered in Mr. "V", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-2 (August 13 1999). In that case, the applicant and the Fund had entered into an agreement providing for Mr. "V"'s early retirement and settling all claims he may have had against the Fund arising up to that date.[21] The Tribunal recognized "... the importance both to staff members and to the Fund of enforcing negotiated settlement and release agreements ... in which a staff member receives special compensation or benefits upon separation from service in exchange for the release of claims against the organization." (Para. 78.) Moreover, concluded the Tribunal, "[i]n enforcing such agreements, international administrative tribunals have looked for ... evidence of individualized bargaining and the exchange of consideration as indications that the agreement was entered into freely and reflected a real balancing and resolution of interests between the parties." (Para. 79.) Are such indicia present in the case of Mr. "O"?

94. In this case, the weight of the evidence indicates that in 1995 the Fund decided that, while approving the Applicant's resignation for purposes of serving as Advisor to an Executive Director, it would not agree to take back Applicant as a staff member regularly appointed, as is the norm. It did not so agree because the work performance of Applicant over a number of years was evaluated as being in the lowest percentiles of staff performance. At the same time, the Fund was sensitive to the desirability of the Applicant's attaining a pensionable extent of service. Moreover, the Fund supported the Applicant's search for a position as a Resident Representative. How that support coheres with the Fund's evaluation of Applicant's abilities is unclear.

95. What is clear, however, is the intent of the Fund in making the 1995 arrangements as evidenced, in particular, by the memorandum to the Deputy Managing Director of

---

[20] At the discretion of the Director of Human Resources, if a staff member appeals his separation under Section 13 (Reduction in Strength, Abolition of Position or Change in Job Requirements), Section 14 (Unsatisfactory Performance) or Section 15 (Misconduct), the notice period may be extended. (Section 17.01.)

[21] In his Application before the Administrative Tribunal, Mr. "V" contended that the Fund had violated terms of the agreement; the Tribunal denied the applicant's claims.

April 25, 1995, quoted above at para. 78, and the handwritten comments thereon of the Deputy Managing Director. What is less clear is whether Applicant accepted these arrangements. However, on balance, the Tribunal is satisfied that the weight of the evidence shows that Applicant did understand, accept, and effectively agree to the terms of the Fund as laid down in 1995. There is no record of any protest of those terms by Applicant in 1995 or for many years thereafter. In 1999, Applicant received a letter of the Fund expressly relying upon its interpretation of the 1995 arrangements. Mr. "O" took no exception to that reliance. Moreover, Applicant stated in a letter of November 24, 2002 to the Managing Director: "When I was appointed an 'Advisor to Executive Director' in 1995, the Administration Department sent me a letter transforming my regular employment status into a 'Fixed term' appointment without my consent." That statement indicates the Applicant's appreciation of what the Fund intended by its 1995 letter.

96. In 2003, the Applicant acknowledged that he was surprised in 1999 to learn that his status at the Fund had mutated into an appointment of limited duration. Mr. "O" asserted in a communication of March 10, 2003 to the Managing Director: "When I returned to staff in July 1999, I was surprised to learn from HRD that I had become a fixed-term employee and was expected to leave the Fund by end February 2000." Whatever Mr. "O"'s surprise, this statement by Mr. "O" demonstrates again his recognition of the position of the Fund, that, in July 1999, an employment term of limited duration, a term that was to expire by the end of February 2000, governed.

97. In the event, Applicant, with the support of the Fund, did serve an appointment as Resident Representative, an appointment that lasted for 3 years. It was only late in that period that Applicant protested the 1995 arrangements, claiming that he had never agreed to them and sought administrative review, recourse to the Grievance Committee and finally recourse to this Tribunal. The result is that for years the Applicant received the benefits of the arrangements fashioned by the Fund, while at a late stage he repudiated the burdens. The Fund's approach to ensuring the pension of the Applicant was proper, and its support of his appointment as Resident Representative in the circumstances may be seen as indulgent; certainly, it evidences no actionable discrimination. It is true that the handling of the matter leaves the Fund's administration open to criticism. It would have done well to have more clearly established the assent of Applicant to the 1995 arrangements at the time they were made. Its coincident description of his status as a "regular" appointee and a "fixed-term" appointee, if understandable in the circumstances, seems confused. Nevertheless, in light of the foregoing analysis, the Tribunal has arrived at the conclusion that the contentions of Applicant challenging reentry for only a limited term are not well-founded. The arrangements of 1995 do not squarely comport with the provisions of GAO No. 16, but in the view of the Tribunal, it was open to the Fund to vary those provisions for the benefit of a staff member provided that he agreed to or acquiesced in those variations. While the record is not free from doubt, on balance the Tribunal concludes that Mr. "O" did assent to the 1995 arrangements by his acceptance of their benefits and failure to question the content of those arrangements until he had exhausted those benefits.

D. Merits of Applicant's Allegations of Discrimination

98. In addition to the contentions considered above, Applicant alleges that his career with the Fund has been adversely affected by impermissible discrimination on the basis of his race. Applicant cites a lack of career progression, observing that in twenty years he did not advance from Grade 13 at which he entered. In addition, Mr. "O" maintains that he has been the object of incidents of discrimination that "merit investigation." Finally, Applicant alleges that the terms upon which his reemployment with the Fund was conditioned and his ultimate separation from service represent disparate treatment and further evidence of discrimination.[22]

99. The Fund responds that the contention that discriminatory treatment impeded Applicant's career is controverted by his performance record.

100. In the view of the Tribunal, Applicant has not shown that his Fund career, or its termination, was affected by racial discrimination. The exiguous evidence advanced by Applicant is insufficient to support that claim. The fact that he was not promoted in the course of his service is not of itself probative of discrimination.

[22] Applicant additionally maintains that he sought review of discrimination claims pursuant to the Discrimination Review Exercise (DRE) initiated by the Fund beginning in 1996, *see generally* Ms. "Z", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-4 (December 30, 2005), paras. 19-30, but that his request for review was denied because he was at that time not a staff member, as he was serving with the Executive Director's office. Respondent asserts that it has no record of any request by Mr. "O" for DRE review, but that in any event it is correct that the DRE was intended for then current staff members only.

Decision

FOR THESE REASONS

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

The Application of Mr. "O" is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

_____
Stephen M. Schwebel, President

_____
Celia Goldman, Registrar

Washington, D.C.
February 15, 2006