ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2008-1

Mr. M. D'Aoust (No. 3), Applicant v. International Monetary Fund, Respondent

Introduction

1. On November 16, 2007, 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. Michel D'Aoust, a staff member of the Fund. The Judgment was adopted by the Tribunal on January 7, 2008.

2. Applicant, a staff member serving in the Compensation and Benefits Policy Division ("CBD") of the Human Resources Department ("HRD"),[1] contests a decision by senior officials of that Department, communicated to him at the time of his candidacy for election to the governing board of the Staff Association (the Staff Association Committee or "SAC") that if he were elected he would be required to transfer to another position within HRD on the ground that the particular responsibilities of his job and those of a member of the SAC would pose a conflict of interest. (The decision followed, and apparently modified, an email directive to all HRD staff members that running for election to the SAC was considered a conflict of interest and consequently not permitted of HRD staff.) As Mr. D'Aoust was not successful in his bid for election to the SAC, he was not transferred. Applicant contests both an alleged policy of HRD and its application in his individual case. Applicant contends that the challenged actions of HRD contravened his right to association under Fund Rule N-14 and constituted intimidation and harassment in violation of the Fund's internal law. Additionally, Applicant alleges that the Grievance Committee denied him due process in summarily dismissing his Grievance at the request of the Fund.

3. Respondent, for its part, maintains that Applicant's claim that the Fund violated his right to association is inadmissible on the ground that Applicant has not been "adversely affected" by an administrative act of the Fund as required by Article II of the Tribunal's Statute because he was neither prevented from running for election to the SAC nor transferred from his position. Nor, in the view of Respondent, did Applicant suffer any "moral consequences" as a result of the Fund's actions. The Fund also urges the Tribunal to reject the view that Applicant has challenged

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[1] The Tribunal's "Revised Decision on the protection privacy and method of publication" (June 8, 2006), para. 3, provides in part: "The departments and divisions of the Fund shall be referred to by numerals unless specification is desirable for the comprehensibility of the Judgment or Order." In the instant case, identification of the department and division is necessary to the consideration of the issues of the case. *See* Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2007-3 (May 22, 2007), note. 1; Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), note. 1.

a "regulatory decision" of the Fund. In the event that the Tribunal reaches the merits of Applicant's claim, Respondent urges that it be denied on the ground that the challenged actions of HRD management did not infringe on Applicant's right to association, as his job functions would have been in conflict with concurrent duties as a member of the SAC. Respondent additionally asks the Tribunal to reject as unfounded Applicant's claims of harassment and intimidation. As to Applicant's challenge to the actions of the Grievance Committee, the Fund asserts that the claim is not properly before the Tribunal and, in any event, is without merit.

The Procedure

4. On August 9, 2006, Mr. D'Aoust filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on the next day. On August 14, 2006, pursuant to Rule IV, para. (f),[2] the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

5. Respondent filed its Answer to Mr. D'Aoust's Application on September 25, 2006. On September 28, 2006, Applicant submitted his Reply. The Fund's Rejoinder was filed on November 2, 2006.

6. On August 30, 2007, pursuant to Rule XVII, para. 3,[3] the Tribunal issued a request for information from the Fund, to which it responded on September 10, 2007. Applicant filed a comment on that response on September 26, 2007.

7. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not deemed useful to the disposition of the case.[4]

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[2] Rule IV, para. (f) provides:

> "Under the authority of the President, the Registrar of the Tribunal shall:
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> ...
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> (f) upon the transmittal of an application to the Fund, unless the President decides otherwise, circulate within the Fund a notice summarizing the issues raised in the application, without disclosing the name of the Applicant, in order to inform the Fund community of proceedings pending before the Tribunal; ..."

[3] Rule XVII, para. 3 provides:

> "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, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order."

The Factual Background of the Case

8. The relevant factual background may be summarized as follows.

9. Applicant began his employment with the Fund in 1993 as a Human Resources Officer. At the time of the events at issue in this case, he was serving as a Senior Human Resources Officer in the Compensation and Benefits Policy Division of the Human Resources Department.

10. On January 12, 2006, the Senior Personnel Manager ("SPM") of the Human Resources Department circulated to all staff members within the Department an email notification advising that because they are "engaged in advisory and policy work on staffing and organizational issues and/or have access to privileged knowledge and information in these areas" that "running for election to the SAC is considered a conflict of interest and consequently not permitted for HRD staff."

11. The following day, the Staff Association Election Committee posted the roster of candidates for the seven-member 2006 Staff Association Committee ("SAC"), the governing board of the Staff Association. Among the candidates was Mr. D'Aoust.

12. According to Applicant, on that same day his Division Chief confronted him with the fact that he had chosen to run for election in contravention of the SPM's notice to all HRD staff. On January 17, 2006, Applicant was called to a meeting with the SPM and the Division Chief at which he was advised that although he would be permitted to stand for election to the SAC, if elected, he would be transferred to a different position and that consequently he had a "decision to make."

13. According to Respondent's version of the events, following the January 13 announcement of the candidates for the 2006 SAC, HRD reconsidered the position reflected in the SPM's email to all HRD staff of the previous day and "modified it considerably." Accordingly, on January 17, the SPM and the Division Chief informed Applicant that he would not be barred from running for the SAC, but that because in their view his functions in CBD involved matters that were the subject of consultation between the SAC and the Human Resources Department, his election would pose a conflict of interest. Accordingly, Applicant was informed that in the event that he were elected, he would be reassigned to another position within HRD that would not pose a conflict of interest.

14. In a follow-up memorandum to the SPM of January 19, 2006, Mr. D'Aoust asserted:

> "… I view this notice as another attempt to dissuade me to pursue my nomination to the SAC. Similarly, your email of January 12 to HRDALL, which specified that '*running for election to the SAC is considered a conflict of interest and consequently not permitted for*

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

> *HRD staff*", was to serve the same purpose. These actions constitute attempts at interfering in the exercise of my rights under Fund rules, and amount to nothing less than intimidation. Furthermore, I would consider any unilateral action to transfer me to another HRD division following my election to the SAC as unwarranted and retaliatory."

(Italics in original.)

15. The SAC election took place as scheduled on January 25 and 26, 2006. Mr. D'Aoust's candidacy failed to garner a sufficient number of votes for election to the seven-member board. Accordingly, no further action was taken by HRD in respect of his candidacy or his job assignment.

The Channels of Administrative Review

16. By memorandum of January 30, 2006 to the Director of HRD, Applicant sought administrative review pursuant to GAO No. 31, alleging that the actions of the SPM and the Division Chief had contravened his right to association under Fund Rule N-14, constituted intimidation and harassment, and had caused him stress and prejudice. On February 10, 2006, the HRD Director responded as follows: "HRD stands by its position that, had you been elected to the SAC, your role as an officer there would have presented a conflict of interest with your current responsibilities in CBD, and the department would have been within its rights to transfer you to another position that did not present such a conflict." At the same time, noted the HRD Director, as Mr. D'Aoust had not succeeded in his candidacy for election to the SAC, "no action by the department was necessary and none was taken." Accordingly, it was the view of the HRD Director that Mr. D'Aoust had not been "adversely affected" by a decision of the Fund. His request for administrative review and related relief was denied.

17. On the same day, following denial of his request for administrative review, Applicant filed a Grievance with the Fund's Grievance Committee. Applicant sought as relief (as he had in his request for administrative review) that the "… January 12, 2006 email be formally rescinded and that a formal memorandum be issued to FUNDALL [i.e. by email to all Fund staff] confirming all staff members' eligibility for membership in the Staff Association and for nomination to the Staff Association Committee." Applicant also sought compensatory damages for "moral injury."

18. On March 3, 2006, the Fund submitted to the Chairman of the Grievance Committee written comments on Applicant's Grievance, requesting that the Committee "dismiss th[e] grievance without further proceedings" on the ground that Mr. D'Aoust had not alleged any "adverse impact" to provide a basis for invoking the jurisdiction of the Grievance Committee.[5]

[5] GAO No. 31, Rev. 3, Section 4.01 provides:

(continued)

19. On June 6, 2006, the Grievance Committee Chairman issued an Order granting the Fund's "Motion to Dismiss" the Grievance, concluding that Mr. D'Aoust had failed to allege that he had been "adversely affected" by any decision of the Fund because "no decision or action was taken that affected his career in any way."

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. HRD's actions in respect of Applicant's candidacy for the SAC contravened his right to association, constituted intimidation and harassment, and caused him stress and prejudice.

2. Applicant was "adversely affected" by HRD's actions. Although Applicant was not transferred to another position as he was not elected to the SAC, HRD's actions had "moral consequences" by altering his right to association.

3. As reflected in its memorandum of February 10, 2006, HRD stands by its decision that it would be within its rights to transfer Applicant should he be elected to the SAC in the future. The decision also "implicitly" affects other staff members in CBD. Accordingly, the decision is of a "regulatory nature."

4. HRD's actions contravened Applicant's freedom of association and accordingly constituted an abuse of discretion.

5. HRD's actions amounted to intimidation and harassment, causing Applicant further injury. In addition, the SPM's email of January 12, 2006 to all HRD staff prejudiced Applicant's candidacy in the SAC election.

6. Applicant was not afforded due process before the Grievance Committee.

7. Applicant seeks as relief:

"4.01 *Committee's Jurisdiction*. Subject to the limitations set forth at Section 4.03, the Grievance Committee shall have jurisdiction to hear any complaint brought by a staff member to the extent that the staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service."

a. damages for "moral injury" in the amount of $50,000 for alleged breach of his right to association and denial of due process before the Grievance Committee;

b. punitive damages in the amount of $50,000; and

c. costs.

Respondent's principal contentions

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

1. The Application should be dismissed on jurisdictional grounds. If held to be admissible, it should be rejected on the merits.

2. Applicant was not "adversely affected" within the meaning of Article II of the Tribunal's Statute, as he was neither prevented from running for election to the SAC nor required to transfer to another position since his SAC candidacy was unsuccessful. Nor did Applicant suffer any "moral consequences" as a result of the Fund's actions.

3. No "regulatory decision" was applied to Applicant by HRD and, accordingly, the Application is not receivable as a challenge to a "regulatory decision" of the Fund.

4. The challenged actions by HRD management did not infringe on Applicant's right to association, as his functions in CBD would have been in conflict with concurrent duties as a member of the SAC had he been elected.

5. Applicant's claims of "harassment" and "intimidation" are unfounded.

6. Applicant's allegation that he was denied due process by the Grievance Committee is not properly before the Tribunal and, in any event, is without merit.

Consideration of the Issues of the Case

Admissibility

22. The Administrative Tribunal must determine as a preliminary matter what administrative act or acts of the Fund Applicant contests and whether Applicant's claims are admissible for the Tribunal's review. In his Application, Mr. D'Aoust challenges "decisions and actions by senior managers of the Human Resources Department (HRD) with regards to my nomination to the Staff Association Committee (SAC)." Applicant cites in particular the SPM's January 12, 2006 email to all HRD staff; the alleged reaction of the Division Chief on January 13 to the announcement of Applicant's candidacy for the SAC; and the January 17 meeting at which the SPM and the Division Chief advised Applicant that he had a "decision to make."

23. Respondent maintains that Applicant's principal claim—that the Fund violated his right to association in presenting him with a choice between forgoing nomination to the SAC while retaining his then current job responsibilities in CBD or standing for election on condition that he would be transferred to a different post in HRD if elected—is inadmissible on the ground that Applicant was not "adversely affected" by an administrative act of the Fund as required by Article II of the Tribunal's Statute. In the Fund's view, Applicant has not met the "adversely affected" requirement because "there has been no adverse impact on Applicant's right of association or on his career, nor is there any other basis for concluding that Applicant has suffered 'moral damages.'"

24. Applicant counters that by presenting him with a "decision to make" between potential service on the governing board of the Staff Association and retaining his particular job responsibilities within the Compensation and Benefits Policy Division of HRD the Fund adversely affected his right to association. Additionally, Applicant maintains that the Fund's decision was of a "regulatory nature" and continued to have a "present effect" that affected Applicant's decision-making in respect of future elections, thereby altering his right to association. Applicant further contends that the decision of January 17, 2006 "implicitly" affected other staff members in CBD. The Fund responds that no "regulatory decision," as defined by the Tribunal's Statute, was applied to Applicant.

25. Article II of the Tribunal's Statute provides in relevant part:

> "***ARTICLE II***
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> 1. The Tribunal shall be competent to pass judgment upon any application:
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> a. by a member of the staff challenging the legality of an administrative act adversely affecting him; ...
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> ....
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> 2. For purposes of this Statute:
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> a. the expression 'administrative act' shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;
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> b. the expression 'regulatory decision' shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;
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> …."

26. The associated Commentary on the Tribunal's Statute further explains:

> "The tribunal would be competent to hear cases challenging the legality of an 'administrative act,' which is defined as all individual and regulatory decisions taken in the administration of the staff of the Fund. This definition is intended to encompass all decisions affecting the terms and conditions of employment at the Fund, whether related to a staff member's career, benefits, or other aspects of Fund appointment, including the staff regulations set forth in the N Rules. In order to invoke the jurisdiction of the tribunal, there would have to be a 'decision,' whether taken with respect to an individual or a broader class of staff, identified in the application filed by the staff member."

(Report of the Executive Board, p. 14.)

Was Applicant "adversely affected" by an administrative act of the Fund as required by Article II of the Tribunal's Statute?

The January 17, 2006 decision in respect of Applicant's candidacy

27. The decision of which Applicant chiefly complains is the decision communicated to him on January 17, 2006 that in light of his particular job responsibilities he would be reassigned within HRD in the event that he were elected to the SAC. Was Applicant "adversely affected" by this decision within the meaning of Article II of the Tribunal's Statute?

28. In interpreting Article II of its Statute, the Tribunal has emphasized that the "intendment of [the 'adversely affected'] requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy." In Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 61, the Tribunal explained the requirement as follows:

> "With respect to the requirement that an applicant be 'adversely affected' by an administrative act of the Fund, the Commentary observes as follows:
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> > '...a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.'
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> (Report of the Executive Board, p. 13.) …. [I]t is clear that the Applicant is adversely affected, because her claim is not hypothetical nor is the response that she seeks to her claim merely advisory."

The same formulation has been applied by this Tribunal in subsequent Judgments. *See* Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications),

IMFAT Judgment No. 2005-3 (December 6, 2005) ("Baker I"), para. 17; Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 65.

29. In D'Aoust (No. 2), the Tribunal examined the "adversely affected" requirement in the context of a claim of intangible injury and concluded that the applicant had standing to challenge alleged procedural irregularities in the selection process for the filling of a vacancy for which he had been an unsuccessful candidate. The Tribunal held that the applicant need not contend that he himself was the candidate best suited to fill the vacancy in order to maintain that he was "adversely affected" by the appointment decision as well as by those acts that necessarily led up to it. *Id.*, para. 69. The Tribunal cited the right of a staff member to have his candidacy for a vacancy fairly considered in accordance with the internal law of the Fund and general principles of international administrative law. *Id.*, para. 67. Similarly, in the instant case, Mr. D'Aoust asserts that he was "adversely affected" by a decision of the Fund that allegedly caused him intangible injury by infringing on his right to association, a right protected under the Fund's internal law.

30. In Ms. "G", the applicant challenged both a "regulatory decision" of the Fund and its application in her individual case. The injury alleged by Ms. "G" was that she was unfairly denied expatriate benefits for which she would have been eligible had her visa status differed. In the view of Ms. "G", she should have been entitled both to retain her LPR visa status and to receive expatriate benefits. Accordingly, like Mr. D'Aoust in the instant case, Ms. "G" contended that the contested decision of the Fund, to allocate expatriate benefits on the basis of visa status, presented her with an impermissible choice. Her Application had been prompted by an amendment that had opened eligibility for expatriate benefits to staff in LPR visa status on the condition that they convert to G-4 visa status. *Id.*, para. 82. In Ms. "G", the applicant was "adversely affected" by a decision of the Fund that rendered her and other staff members in her visa status ineligible to receive a particular class of employment benefits. Here, Mr. D'Aoust alleges he was "adversely affected" by a decision of the Fund that made him ineligible to seek SAC office unless he were willing to transfer job responsibilities if elected.

31. Respondent in the instant case maintains that Mr. D'Aoust was not "adversely affected" by the decision of January 17, 2006 because he was neither prevented from running in the SAC election nor transferred from his post, as he did not succeed in being elected. The Tribunal observes that in considering whether Applicant was "adversely affected" within the meaning of Article II of the Statute, the analysis should not differ depending upon the choice that Applicant made in response to the contested decision. Had Applicant chosen not to run in the SAC election in response to HRD's decision, it would perhaps be even more clear that he had been "adversely affected" by an administrative act of the Fund. In that event, he would have been deterred from seeking SAC office while other staff members were free to take a decision on running for election without any consequence to their job assignments on the basis that their job responsibilities were not deemed to pose a conflict of interest.

32. The Tribunal concludes that Applicant's challenge to the January 17, 2006 decision of HRD management is not a hypothetical one, nor does Applicant seek merely an advisory opinion. (Report of the Executive Board, p. 13.) Rather, Mr. D'Aoust seeks damages for a decision that in his view unfairly put him to a choice between his job assignment and the

opportunity to serve in a representative role with the Staff Association, a decision that he alleges wrongfully infringed upon his right to association. The Tribunal has emphasized that the question of whether an applicant has been "adversely affected" by a decision of the Fund for purposes of determining the admissibility of a claim before this Tribunal is distinct from the inquiry as to whether the challenged decision constitutes an abuse of discretion on which an applicant may prevail on the merits. *See* D'Aoust (No. 2), para. 69, citing Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent, IMFAT Judgment No. 2007-1 (January 24, 2007), para. 87.

Does Applicant challenge a "regulatory decision" of the Fund?

33. Applicant contests not only the "individual nature" of the decision communicated to him on January 17, 2006, but also the "… regulatory nature of HRD's decision to unilaterally transfer me, *or implicitly any other staff member of the Compensation and Benefits Policy Division (CBD)*, to another position that does not allegedly present a conflict of interest, should I be elected to the SAC at some point." (Emphasis supplied.) Applicant additionally contends that the decisions of January 2006 continued to affect his decision-making as to future elections.

34. Respondent sets out the history of HRD's actions in respect of Applicant's candidacy for the SAC as follows. According to the Fund, prior to January 2006, HRD responded to inquiries from staff on the subject of running for the SAC on a case-by-case basis. However, in the context of the ongoing Employment, Compensation and Benefits Review ("ECBR"), which was the principal focus of the SAC's activities during the relevant period and about which HRD and the SAC were engaged in regular consultations,[6] HRD senior managers considered an approach to avoiding potential conflicts of interest between the duties of a SAC official and the job responsibilities of an HRD staff member. It was "following discussion with management colleagues," that the SPM on January 12 announced via Department-wide email that running for election to the SAC was "considered a conflict of interest and consequently not permitted for HRD staff." According to Respondent, following the January 13 announcement by the Staff Association Election Committee of the candidates for the 2006 SAC, however, HRD "reconsider[ed]" that position and "modified it considerably."

35. Respondent maintains that while a "regulatory decision" of the Fund as to how it will address potential conflicts of interest between a staff member's job responsibilities and duties as a SAC official could be subject to the Tribunal's review, there is no "regulatory decision" for review in this case. Rather, asserts the Fund, "… the practice challenged by Applicant – that is, proposing to reassign an HRD staff member to other duties within the department that would not present a conflict of interest, in the event that the staff member were elected to the SAC – was neither published nor circulated, and it is indeed a practice that has only been used by a small number of officials of HRD on an ad hoc basis, in response to specific requests from staff." This

[6] *See infra* Consideration of the Issues of the Case; In presenting Applicant with a choice between forgoing nomination to the SAC while retaining his then current job responsibilities or standing for election on condition that he would be transferred to a different post in HRD if elected, did the Fund abuse its discretion by violating Applicant's right to association as set out in the Fund's internal law?

position was, in the words of the Fund, " … simply communicated to Applicant during a meeting, and it has never been formalized or disseminated by HRD in any manner as a statement of policy." Accordingly, Respondent maintains that the practice contested by Mr. D'Aoust is not a "regulatory decision" of the Fund within the meaning of Article II, Section 2.b. of the Tribunal's Statute.

36. It is recalled that the Tribunal's Statute defines a "regulatory decision" as "any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund." (Statute, Article II, 2.b.) That definition has been elaborated in the Tribunal's jurisprudence. In Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 35, the Tribunal concluded that the practice of truncating at ten years the weight given to previous experience in setting initial salaries of non-economist staff members was not a "regulatory decision" as contemplated by the Tribunal's Statute:

> "The practice is distilled in no rule, General Administrative Order, handbook or handout, statement on conditions of employment, contract or other published official paper of the Fund. Rather, at the time that that practice was applied to Mr. D'Aoust, it was an unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund."

In Ms. "B", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-2 (December 23, 1997), para. 60, the Tribunal observed that "[i]n D'Aoust, the Tribunal held that a particular practice fell short of meeting the essential criteria for a regulatory decision because it did not afford reasonable notice to the staff." In Ms. "B", para. 49, the Tribunal distinguished the practice challenged in D'Aoust from the rule at issue in the case brought by Ms. "B":

> "The Tribunal concludes that the Memorandum was a lawful form for the issuance of a personnel policy. It was a written statement of an adjustment in personnel policy, based on a pattern of practice, clearly related to its antecedents, which sets forth the policy change to be made, and which was circulated to senior personnel officers of every Fund Department, to their administrative officers, and to the Staff Association."

37. Applicant also maintains that he remained affected by the alleged "regulatory decision" applied to him on January 17, 2006, which he contends affected his decision-making as to any future nomination for the SAC, thereby altering his right to association. In support of his contention that he was adversely affected by a "regulatory decision" of the Fund, Applicant invokes this Tribunal's Judgment in Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications), IMFAT Judgment No. 2005-3 (December 6, 2005) ("Baker I"). In Baker I, the Tribunal was presented with a challenge to a "regulatory decision" – an amendment by the Fund's Executive Board to the system of staff compensation – whose tangible effects had yet to be realized by the applicants. Although the amendment theretofore had not had financial consequences for the applicants, the Tribunal

concluded that they were "adversely affected" within the meaning of Article II because the contested "regulatory decision" had "some present effect" on them:

> "20. …. an international civil servant need not await the realization of the institution's adverse decision to seek a remedy in respect of it; an application is receivable in such circumstances to challenge a regulatory decision affecting the individual's rights if the organization's rules allow such a direct challenge. ….
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> 21. In the view of the Tribunal, in respect of the Applications before it, there is 'some present effect.' That effect is inherent in the wider discretion that the Executive Board has assumed in respect of salary adjustments which, in the absence of further action by the Executive Board, will be applied in 2006."

Id. (The Tribunal also noted that its conclusion was supported by the Commentary on the Statute, which "… looks to resolution of a question of the legality of regulatory decisions '… before there has been considerable reliance on, or implementation of, the contested decision.'" *Id.*, para. 22, quoting Report of the Executive Board, p. 25.)

38. Citing the Tribunal's decision in Baker I, Applicant contends that he was adversely affected by a "regulatory decision" of the Fund and that the decision continues to have "some present effect" upon him by altering his decision-making as to future elections. Respondent maintains that the practice of determining on a case-by-case basis the risk of conflict of interest between a staff member's job functions and service on the SAC is not a "regulatory decision" within the meaning of the Tribunal's Statute; therefore, in the Fund's view, the argument that the Tribunal's jurisdiction may be grounded on the theory that Applicant challenges a "regulatory decision" that has "some present effect" must fail.

39. Subsequent to the closure of the pleadings in this case, in response to a request for information,[7] the parties have informed the Tribunal that Applicant currently is on leave from the Fund and is not anticipated to return to active service before separating from the Fund. Accordingly, even if the January 17, 2006 decision were held to be a "regulatory decision," the element of "present effect" no longer obtains. *See* Baker et al, Applicants v. International Monetary Fund, Respondent (Dismissal of the Applications as Moot), IMFAT Judgment No. 2006-4 (June 7, 2006) ("Baker II") (dismissing as moot the applicants' challenge to a "regulatory decision" because the decision no longer had any "present effect," having been rescinded and replaced by another). Nonetheless, the decision may be contended to have continued to affect Mr. D'Aoust during the remainder of his active service with the Fund, as it would have been reasonable for him to infer that such decision might again be applied should he seek election to the SAC in a subsequent year.

40. As the Tribunal has concluded above that Applicant has been "adversely affected" by the contested decision of January 17, 2006, it need not reach the question of whether that decision

[7] *See supra* The Procedure.

was a "regulatory decision." Applicant's contention that he was subject to the "present effect" of a "regulatory decision" has become moot. What is clear is that Mr. D'Aoust was "adversely affected" by the decision communicated to him on January 17, 2006 that he would have to make a choice between standing for election to the SAC and accepting a transfer to different job responsibilities should he be elected. Whether cast as a "regulatory" or "individual" decision, insofar as the contested decision implicates the underlying principle invoked by the Fund that it may take measures to avoid the risk of conflict of interest between a staff member's job functions and service on the SAC, that principle will be subject to the Tribunal's review in considering whether the Fund abused its discretion in the application of the principle in the case of Applicant.[8]

The January 12, 2006 email to all HRD staff

41. A further question arises. Was Applicant "adversely affected" by the January 12, 2006 email circulated to all HRD staff, the effect of which was later modified. It is recalled that in his January 19, 2006 memorandum to the SPM, Mr. D'Aoust protested not only the January 17 modification of the policy, which he referred to as "another attempt" to dissuade him from pursuing his nomination to the SAC, but also the SPM's "… email of January 12 to HRDALL, which specified that '*running for election to the SAC is considered a conflict of interest and consequently not permitted for HRD staff,*' [which] was to serve the same purpose." (Italics in original.) Applicant alleged that both actions "… constitute attempts at interfering in the exercise of my rights under Fund rules, and amount to nothing less than intimidation." *Id.*

42. Respondent, for its part, asserts that even if an intradepartmental email from the SPM were deemed by the Tribunal to meet the definition of a "regulatory decision" of the Fund, the position reflected in the January 12, 2006 communication to all HRD staff "never became HRD policy" because it was "immediately modified," and it is not the decision that is at issue in this case. Nonetheless, it may be observed that the view stated in the January 12 email apparently remained the position of the Fund until it was modified several days later. Applicant defied this directive by pursuing his nomination to the SAC, and he alleges that he was subjected to intimidation and harassment as a result.[9]

43. In defending against Applicant's claim of intimidation and harassment, the Fund states that "… Applicant's managers did not focus the discussion on Applicant's arguably insubordinate act; rather, they modified the position reflected in [the SPM]'s January 12 e-mail and offered Applicant a choice of actions that was entirely reasonable under the circumstances." Respondent's approach to this question indicates that the policy or practice of January 12 did remain in effect, and that Applicant was in violation of it, until it was modified on January 17.

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[8] *See infra* Consideration of the Issues of the Case; In presenting Applicant with a choice between forgoing nomination to the SAC while retaining his then current job responsibilities or standing for election on condition that he would be transferred to a different post in HRD if elected, did the Fund abuse its discretion by violating Applicant's right to association as set out in the Fund's internal law?

[9] *See infra* Consideration of the Issues of the Case; Did the Fund's actions in respect of Applicant's decision to run for election to the SAC, including the January 12, 2006 notification to all HRD staff, constitute "harassment" or "intimidation" in violation of the Fund's internal law?

Indeed, the only evidence in the record that the decision of January 12 was rescinded or "reconsidered" is that it was not enforced against Mr. D'Aoust.

44. It is recalled that Applicant alleges that on January 13, his Division Chief confronted him with the fact that he had chosen to run for election in contravention of the SPM's notice to all HRD staff. Additionally, in his request for relief from the Tribunal, Applicant seeks punitive damages on the basis that HRD "knowingly and intentionally acted to restrict my freedom of association," contending that the SPM "… issued his email of January 12, 2006, alleging that HRD staff were not permitted to be nominated to the SAC, even though he knew, or should have known in light of his status and tenure in the Fund, it to be untrue." As noted above,[10] in both his request for administrative review and his Grievance, Mr. D'Aoust sought as relief that the "… January 12, 2006 email be formally rescinded and that a formal memorandum be issued to FUNDALL [i.e. by email to all Fund staff] confirming all staff members' eligibility for membership in the Staff Association and for nomination to the Staff Association Committee." Applicant has not, however, included rescission of the January 12 email as an element of the relief he seeks before the Administrative Tribunal. Nor has Respondent indicated that any formal rescission of the notification was ever taken.

45. Having stated that the decision reflected in the January 12 email is not at issue in this case, the Fund does not defend the position set out in it, i.e. that all staff members in the Human Resources Department are barred from serving on the governing board of the Staff Association. Respondent explains that "[t]he senior management of HRD … expressly moved away from such a generalized approach after having considered it, and instead examines the risk of conflict of interest for HRD staff on a case-by-case basis, as it did in Applicant's case."

46. In view of Applicant's contention that he experienced "intimidation" and "harassment" as a result of the circulation of the January 12 notification to all HRD staff, as well as from subsequent acts modifying the position stated therein, the Tribunal concludes that Applicant was "adversely affected" by the January 12 email within the meaning of Article II of the Statute for purposes of alleging that he suffered intimidation and harassment as a result.

> In presenting Applicant with a choice between forgoing nomination to the SAC while retaining his then current job responsibilities or standing for election on condition that he would be transferred to a different post in HRD if elected, did the Fund abuse its discretion by violating Applicant's right to association as set out in the Fund's internal law?

47. Having concluded that Applicant's principal claim—that the Fund violated his right to association by its decision of January 17, 2006—is admissible for review, the Tribunal now examines the merits of that contention.

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

48. The right of staff members to associate for the presentation of their views to Fund management is set out in Rule N-14 of the Fund's N-Rules (Staff Regulations),[11] which provides:

> "Persons on the staff of the Fund shall have the right to associate in order to present their views to the Managing Director and the Executive Board, through representatives, on matters pertaining to personnel policies and their conditions of service.
> *Adopted June 22, 1979*"

49. In 1979, following adoption by the Fund's Executive Board of Rule N-14, the Managing Director recognized the existing Staff Association (and the Staff Association Committee as its representatives) as an association with which the Fund would deal and through which the views of staff would be presented on matters concerning personnel policies and conditions of service. (Memorandum from Managing Director to Members of the Staff, July 25, 1979.)

50. The Staff Association of the IMF, which was founded and adopted its original Constitution in 1948, pre-dated the adoption by the Executive Board of Rule N-14. As this Tribunal observed in Mr. "V", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-2 (August 13, 1999), paras. 107, 113, the Staff Association is a self-governing organization, bound by its own Constitution and Bylaws, which acts independently of the Fund. In Mr. "V", paras. 104-14, the Tribunal recognized the separate interests of the Staff Association and Fund management, holding that an act of the SAC was not an "administrative act" within the jurisdiction *ratione materiæ* of the Administrative Tribunal because it was not an act taken in the administration of the staff of the Fund. In so concluding, the Tribunal identified as the Staff Association's "primary purpose … to act as representative of staff (vs. management) interests." *Id.*, para. 113.

51. As set out in its Constitution (as amended December 18, 2002), the Staff Association has determined its purposes to be two-fold:

> "a. to promote the interests and general welfare of the staff on matters pertaining to personnel policies and conditions of service; and
>
> b. cooperate with the Managing Director in furthering the efficient conduct of the work of the staff."

(Staff Association Constitution, Article II.) Similarly, the Staff Association's activities are defined to include to "arrange for communicating the views of the staff to the management and the Executive Board on matters pertaining to personnel policies and conditions of service." (*Id.*, Article III.a.)

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

52. Membership in the Staff Association is governed by Article IV of its Constitution:

> "Article IV –Membership
>
> 1. All members of the staff shall be eligible for membership in the Association.
>
> 2. All members of the staff shall include all officers or employees of the Fund other than the Managing Director, the Deputy Managing Directors, and those whose contracts state that they are not staff members. Members of the staff shall not include Executive Directors, Alternate Executive Directors, Advisors, or Assistants to Executive Directors, or contractuals.
>
> …."

53. The Staff Association is governed by a seven-member Staff Association Committee ("SAC"), elected from the membership on an annual basis. (Staff Association Constitution, Articles V and VI; Staff Association Bylaws, Section 4.) The SAC is charged with "carry[ing] out the purposes and promot[ing] the activities of the Staff Association as set forth in the Constitution." (Staff Association Bylaws, Section 3.)[12]

54. The Staff Association's Bylaws further provide under Section 1 (Membership) that "[e]very member of the Staff Association shall be entitled to enjoy the full benefits of membership in the Staff Association," and "[e]very member of the Staff Association shall be entitled to nominate or to be nominated in any nomination; to vote or be a candidate in any election; and to vote in any referendum." (*Id.*, Section 1 (3) and (4).) Citing these provisions, Applicant asserts that the benefits of membership in the Staff Association include the right to serve in a representative capacity on the SAC. Accordingly, he contends that HRD's actions contravened his right to association as provided for not only by the Fund's Rule N-14 but also by the Staff Association's Constitution and Bylaws. The Tribunal addresses this assertion at the outset.

55. The alleged conflict between the contested acts of the Fund and the Staff Association's Constitution and Bylaws lies outside the compass of the Tribunal's jurisdiction. Article III of the Tribunal's Statute provides in pertinent part: "In deciding on an application, the Tribunal shall *apply the internal law of the Fund*, including generally recognized principles of international administrative law concerning judicial review of administrative acts." (Emphasis supplied.) Accordingly, it is not within the Tribunal's competence to test the legality of acts of the Fund against the Constitution and Bylaws promulgated by the Staff Association. The constitutive instruments of the Staff Association, a self-governing body, are not part of the internal law of the

[12] From among its seven members, "[t]he Staff Association Committee shall elect a Chair, Vice-Chair, and Treasurer, and may elect other officers as it sees fit." (Staff Association Constitution, Article V, para. 3; *see also* Staff Association Bylaws, Section 8.)

Fund. It follows that the Fund cannot be held to have violated the Staff Association's Constitution and Bylaws.

56. The following questions, however, remain. In presenting Applicant with a choice between forgoing nomination to the SAC while retaining his then current job responsibilities or standing for election on condition that he would be transferred to a different post in HRD if elected, did the Fund abuse its discretion by violating Applicant's right to association as set out in the Fund's internal law (Rule N-14)? Does the Fund have discretion to take measures on a case-by-case basis to avoid the risk of conflict of interest between a staff member's job functions and service on the governing board of the Staff Association?

57. Respondent maintains that the right to association embodied in Rule N-14 by its terms does not grant to each staff member an "absolute right" to represent the staff by serving as a member of the Staff Association's governing board regardless of the impact on his job responsibilities. Rather, in the Fund's view, the Rule establishes a right of the staff to be represented by elected representatives. Applicant, for his part, maintains that Respondent "misreads" Rule N-14 in concluding that the right to association is limited to association "through representatives."

58. The Tribunal sustains the Fund's interpretation of the right set out in Rule N-14. In the view of the Tribunal, that interpretation is consistent both with the text of the Rule and with the concept underlying the right to association, which looks to the channeling of staff interests through representatives for the mutual benefit of individual staff members and for the orderly presentation of views to the organization. At the same time, the significance of the right to association, which underlies the language of Rule N-14, requires that the Fund weigh carefully any potential incompatibility between job functions and service as a SAC official so as not to restrict unduly the right to association. "[T]he right to associate, flowing as it does from a general principle of law, will to some extent have a legal dimension of its own, regardless of the statutory or written law of the organization concerned." C.F. Amerasinghe, The Law of the International Civil Service (2nd ed. 1994), Vol. II, p. 370.

59. Accordingly, the following questions arise. What measures may the Fund properly take to avoid the risk of conflict of interest between job functions and membership on the SAC, consistent with the guarantees of Rule N-14 and the legitimate interests of the Fund in the proper administration of its staff? On a case-by-case basis, may the Fund limit Staff Association governance to staff members whose current job responsibilities, including a duty of confidentiality as to personnel policy development, do not present a conflict of interest with the role of representing staff interests?

60. Respondent maintains that the validity of the distinction it has drawn between serving as a staff representative and simply receiving the benefits of such representation is grounded in the practices of the Fund. According to Respondent, SAC officials are given particular access to Fund information in the discharge of their duties as staff representatives, access that is not afforded to the members of the staff at large. As explained by Respondent, the SAC is provided a formal opportunity to review proposals on personnel policies and to convey its views on such proposals to management and the Executive Board. These proposals, however, first are debated by HRD internally on a confidential basis before being shared with the SAC. (Applicant has not

disputed the Fund's characterization of this process.) In Respondent's view, protection of the confidential deliberative process within HRD would pose a conflict of roles for a staff member engaged in internal policy deliberations who also carried responsibility for representing staff interests as an elected member of the SAC.

61. It may be observed that protecting against conflicts of interest is an objective that serves the interests not only of management but also of the staff in maintaining the independence of its representatives. This understanding is reflected in the jurisprudence of international administrative tribunals. In Suárez de Castro v. Director General of the Inter-American Institute for Cooperation on Agriculture, OASAT Judgment No. 89 (1985), Consideration 3, the Organization of American States Administrative Tribunal concluded that the fact that the applicant held a "position of trust" within the organization did not prevent his carrying out the duties of President of the Staff Association. The OASAT observed that "[t]he incompatibility between being simultaneously a high-level staff member and the leader of the employees' organization lies in the difficulty – but not the impossibility—of such a staff member's properly representing the interests of the employees." *Id.*, Consideration 14. In the circumstances of the case, the OASAT did not find that any such incompatibility existed and held that the Director General, by suggesting that the applicant resign as President of the Staff Association, had "violat[ed] the principle of trade-union freedom." *Id.*, Consideration 3. The International Labour Organisation Administrative Tribunal also has commented on the "special obligations" of a staff representative, which include the "obligation to act solely in defence of the interests of the staff" as well as the "strict duty not to abuse these rights by using methods or expressions incompatible with the decorum appropriate both to his status as a civil servant and to the functions entrusted to him by his colleagues." In re Di Giuliomaria, ILOAT Judgment No. 87 (1965), Consideration 2. *Cf.* Mr. "V", para. 113 (Staff Association's "primary purpose is to act as representative of staff (vs. management) interests.")

62. Applicant cites In re Gran Olsen (Nos. 1 and 2), ILOAT Judgment No. 1806 (1998) in support of his contention that his candidacy for the SAC should not have been conditioned on agreement to relinquish his post in CBD in the event that he were elected. In Gran Olsen, the applicant was serving as President of the Staff Association of EURO, the WHO's Regional Office for Europe. As such, she was an "officer" of the "Staff Committee," i.e. the "executive body" of the Staff Association. *Id.*, Consideration 1. Ms. Gran Olsen's post was abolished as a result of a reduction in force and she was required to decide on short notice between termination of her employment and taking up an appointment in the Personnel unit, in which she was informed the "'practice is that staff in the Personnel unit do not hold office on the Staff Committee to avoid conflict of interest.'" *Id.*, Consideration 4. The ILOAT concluded that such condition should not have been attached to the applicant's appointment and questioned the validity of the distinction drawn by the organization between office-holders and other members of the Staff Committee (the executive body of the Staff Association):

> "Yet the Organization does not argue that the 'practice' requires mere members of the Staff Committee, i.e. those who not hold office, to resign an appointment to a post in a personnel unit, and it is difficult to see what valid distinction it can draw between office-holders and other members of the Staff Committee as to conflict of interest. And, independent though the WHO may be, the fact that

> other international organisations have no such policy does argue in the complainant's favour. It is important both to protect the right of association and to maintain a staff association's independence. The conclusion is that the condition should never have been attached to the offer that the WHO made to the complainant."

Id., Consideration 17.

63. Accordingly, the ILOAT in Gran Olsen concluded that a theory of conflict of interest did not support the action of the WHO and suggested that the organization had drawn an arbitrary distinction between members of the Staff Association's executive body and the officers thereof. In contrast, in the instant case of Mr. D'Aoust, the Fund has set out a reasonable basis, supported by evidence, for differentiating between SAC officials and the membership whom they represent, based upon the particular role played by the SAC in staff-management relations. Accordingly, the Tribunal concludes that it is within the Fund's discretionary authority to determine on a case-by-case basis the risk of conflict of interest between a staff member's job functions and service on the SAC. The Tribunal now addresses the question of whether in applying that general principle in the case of Applicant the Fund has abused its discretion.

64. In cases involving the review of individual decisions taken in the exercise of managerial discretion, this Tribunal consistently has invoked the following standard set forth in the Commentary on the Statute:

> "... with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."

(Report of the Executive Board, p. 19.) *See generally* Ms. "J", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 106.

65. At the same time, the Tribunal has recognized that the degree of scrutiny it applies to discretionary acts of the Fund may vary according to such factors as the nature of the contested decision and the grounds on which the applicant seeks that it be impugned. Ms. "J", para. 107. When an applicant's claim implicates a fundamental human right, the Tribunal has held that "[t]he very nature of this grave complaint requires a greater degree of scrutiny over the Fund's exercise of its discretion." Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-6 (November 29, 2006), para. 117, and has recognized that "… international administrative tribunals have applied universally accepted principles of human rights as a constraint on discretionary authority." *Id.*, para. 125.

66. Similarly, in examining contentions of discrimination, this Tribunal has distinguished between a general principle of equality of treatment and a principle of non-discrimination that implicates universally accepted principles of human rights. *See* Mr. "F", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005),

para. 81 ("… the IMFAT has been called upon to address an allegation that a staff member's career has been adversely affected by religious prejudice, a source of discrimination prohibited by the Fund's internal law[footnote omitted] as well as by universally accepted principles of human rights. Other applicants have alleged discrimination of a distinctly different and less serious type, i.e. that a classification scheme relating to Fund salary or benefits unfairly favored one category of staff members over another.")

67. The Tribunal has established a "rational nexus" test for assessing classification schemes against a general principle of equality of treatment.[13] Applying that test in Ms. "G", paras. 76-80, the Tribunal considered whether there was a "rational nexus" between the goals of the expatriate benefits policy and its method for allocating benefits; the Tribunal concluded that it was "… reasonable to accord benefits to G-4 visa holders that are withheld from those in LPR status because the advantages of LPR status run counter to a fixed intention of the staff member concerned to return to his home country upon the completion of his Fund service." In contrast, applying the stricter standard of review applicable to challenges implicating universally accepted principles of human rights, the Tribunal in Ms. "M" and Dr. "M" concluded that a Pension Plan provision, which later had been revised, was not dispositive of the applicants' requests to give effect to court-ordered child support for Ms. "M" relating to the period pre-dating the Plan's revision. The Tribunal held that "… the Fund's apparent failure to provide consideration to the effect of this classification on children born out of wedlock is not compatible with contemporary standards of human rights." *Id.*, paras. 132 – 33 (citing provision of Universal Declaration of Human Rights prohibiting discrimination against children born out of wedlock).

68. In the instant case, Applicant maintains that the Fund's actions contravened his freedom of association, which he terms a "fundamental human right in international civil service law." The United Nations Administrative Tribunal in one of its early decisions identified the right precisely in such terms: "The right of association is recognized by articles 20 and 23 (4) of the Universal Declaration of Human Rights, adopted by the third General Assembly."[14] Robinson v.

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> "... the Tribunal may ask whether the decision '…could … have been taken on the basis of facts accurately gathered and properly weighed.' (Lindsey, para.12.) Second, the Tribunal must find a '… rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.' (Mould, para. 26.) Thus, the Tribunal may consider the stated reasons for the different benefits and assess whether their allocation to the two categories of staff is rationally related to those purposes. …"

Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 47.

[14] The cited provisions of the Universal Declaration of Human Rights (1948) provide:

> ***"Article 20***
>
> (1) Everyone has the right to freedom of peaceful assembly and association.

(continued)

Secretary-General of the United Nations, UNAT Judgement No. 15 (1952), para. 11. In Robinson, the UNAT awarded relief for non-renewal of the applicant's contract, stating: "It is an indispensable element of the right of association that no action should be taken against a member of the staff on the ground that he is or has been an officer or representative of the Staff Association or otherwise has been active in the Association." *Id.*, para. 14.

69. It has been observed that "… while the right of association may be recognized in the written law of an organization, it derives from a broader general principle of law…." Amerasinghe, *supra* at p. 370. The ILOAT similarly has recognized: "The rights conferred by these rules [of the Organization] must be taken together with those that are derived from the general principle; they are referred to below compendiously as the 'right to associate'. By each contract of appointment the Organization accepts as part of the contractual terms the obligation not to infringe the right to associate." In re García and Márquez (No. 2), ILOAT Judgment No. 496 (1982), Consideration 6.

70. Whether or not the right to association, which has been given expression in the Fund's internal law through Rule N-14, is regarded as a "fundamental human right," it is indisputably a right, like the right to non-discrimination, that imposes a substantive limit on the exercise of the Fund's discretionary authority. The ILOAT has articulated the relationship between the right to association and review of discretionary authority as follows:

> "… in accordance with the principle of freedom of association officers and members of the Staff Association may act in furtherance of their common interests and shall not be penalised by the Administration for any such activity that is not otherwise improper. It is not disputed that any such penalisation would be an abuse of the Director's discretion and within the power of the Tribunal to review."

In re Olivares Silva, ILOAT Judgment No. 495 (1982), Considerations 1, 3, 23 (quashing non-renewal of contract on ground that it was more probable than not that bias as a result of Staff Association activities was a factor in termination of the contract).

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(2) No one may be compelled to belong to an association.

....

Article 23

….

(4) Everyone has the right to form and to join trade unions for the protection of his interests."

71. Respondent cites GAO No. 11, Rev. 4 (January 16, 2004), Section 5.07,[15] for its authority to transfer staff members for business reasons, maintaining that HRD properly took the position that, in cases where it determines that a staff member's election to the SAC would create a conflict of interest with his duties within HRD, the Department has the right to reassign the staff member to a function within the Department that would not pose such a conflict. This Tribunal has held that it is within the Fund's discretionary authority to transfer staff members. *See* Ms. "C", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 30 ("The administrative authority is generally at liberty to organize its offices to suit the tasks entrusted to it and to assign its staff in the light of such tasks.") That authority, however, is subject to review for abuse of discretion, for example, as being improperly motivated or discriminating impermissibly among staff members or, as alleged in this case, for contravening a staff member's right to association.

72. In Ishak v. Secretary-General of the United Nations, UNAT Judgement No. 924 (1999), the United Nations Administrative Tribunal addressed the problem of protecting the right to association as it relates to possible career consequences for a staff representative. The applicant served as Chairman of the UNHCR Staff Council. As the regulations of the organization provided that the position was an ungraded post, he retained the grade level of his prior post during his service as Chairman. During the period, he was recommended for promotion, "subject to assignment to a post at that level." The organization's regulations further provided that because the grade of the post of chairperson of the Staff Council is ungraded, the grade of the post cannot be considered as an impediment to his promotion. The purpose of keeping the post ungraded was so that staff may be able to elect anyone they wish as chairperson. *Id.*, Considerations I, IV, and VI. The applicant protested when he was recommended for promotion but the High Commissioner declined to implement the recommendation.

73. The UNAT in Ishak identified the issue as "… whether the condition imposed on the Applicant's promotion … affects the freedom of association of both the Applicant and the staff members whom he represents." *Id.*, Consideration IV. The UNAT observed that, in general, the performance of functions at a higher level is a basic condition for implementing a recommendation for promotion to a higher level; therefore, as long as the applicant remained in his "post" as Chairman of the Staff Council, he could not fulfill that condition:

> "VIII. The Applicant argues that the decision to impose a condition on his promotion interferes with the freedom of association and prevents staff members from being represented by the Chairman of their choice. It is true that freedom of association is a highly

[15] GAO No. 11, Section 5.07 provides:

> "*5.07 Transfers*. A staff member may be transferred by the Head of his or her department from one position to another within the department, provided that the grade or the established range of grades of the two positions are the same. Other intradepartmental or interdepartmental transfers will be made in accordance with procedures established by the Director of Human Resources."

> important interest, for both the staff and the Administration, and it must be protected against abuses of power by the authorities. (Cf. Judgments No. 15, Robinson (1952); and No. 679, Fagan (1994). But it is also true that the coexistence of freedom of association and good administration of the organisation must be reasonably balanced. Exceptions must be made in favour of the staff association, and they have been made as implied by the APPB Guidelines: staff members may elect colleagues of any grade as chairperson, the chairperson of the association must not suffer any adverse consequence for his or her functions in defence of the interests of the staff. In particular his or her career must not be negatively affected. Freedom of association must be protected, but within the limits of reason. The Tribunal finds that the Guidelines referred to above provide a fair and reasonable framework for reconciling the interests of both the staff association and the Administration. The decision by the High Commissioner to impose a condition on the Applicant's promotion does not interfere with the freedom of association or violate the administrative rules and practices, as alleged by the Applicant."

74. Similarly, in the instant case of Mr. D'Aoust, by providing for a staff member serving in a representative capacity as a SAC official to transfer to a post not presenting a conflict of interest, the Fund preserves the staff member's right to serve in a representative capacity. Any possible adverse consequence to his career is outweighed by the principle of protecting against conflict of interest, an objective that serves both staff and management interests. The Fund has stated that the transfer would have been only for the duration of Applicant's tenure on the SAC and would not have involved any diminution in salary or grade level. Accordingly, such a practice, in general terms, cannot be said to violate the right to association. Having concluded that it is within the Fund's discretionary authority to determine on a case-by-case basis the risk of conflict of interest between a staff member's job functions and service on the SAC, the Tribunal now considers the question of whether that discretion was reasonably exercised in the case of Applicant. Did Applicant's job functions at the time of his nomination for election to the SAC pose a conflict of interest in the event that he were elected?

75. The Fund asserts that while Applicant's "core assignment" in CBD at the time of the events at issue was to oversee the job grading function, he was additionally assigned two special projects (an analysis of Washington-area housing costs and a study of market data on Grade A1-A8 salary levels) in 2005 and early 2006 that were undertaken in connection with the Fund's Employment, Compensation and Benefits Review ("ECBR"). The ECBR resulted in revision of the Fund's system of staff compensation, the lawfulness of which was challenged unsuccessfully by some members of the SAC.[16] *See* Daseking-Frank et al., Applicants v. International Monetary

[16] Under the Tribunal's Statute and Rules of Procedure, the Staff Association may be neither an applicant (Art. II, Section 1) nor an intervenor (Rule XIV, para. 1) before the Tribunal. The Report of the Executive Board notes: "The Staff Association would not be entitled to bring actions in its own name before the tribunal."(pp. 15-16.) Rule XV of the Tribunal's Rules of Procedure, however, makes provision for the communication of the views of the Staff Association as *amicus curiae:* "The Tribunal may, at its discretion, permit any person or persons, including the duly (continued)

Fund, Respondent, IMFAT Judgment No. 2007-1 (January 24, 2007). Applicant has not disputed that his job responsibilities at the time that he sought election to the SAC involved matters relating to the ECBR.

76. The Fund further maintains that the Compensation and Benefits Policy Division has the most significant role within HRD in respect of policy analysis and development and that its staff members were heavily involved in ECBR-related work, particularly during the second half of 2005 and first quarter of 2006. Accordingly, in the view of the Fund: "Particularly at the time of his candidacy, but also on an ongoing basis, a role or position within CBD, at Mr. D'Aoust's grade level, could not be identified that would not have posed actual or potential conflicts of [interest]. If Mr. D'Aoust had been elected to the SAC, it would have been necessary, and entirely reasonable, to transfer him for the period of his term on the SAC to another division and position within HRD where he would have a less direct role in policy issues subject to consultations with the SAC."

77. Respondent characterizes the ECBR as the "main focus" of the SAC's attention during the period at issue. The prominent role played by the SAC in the consultative process that resulted in revision by the Executive Board of the system of staff compensation was recognized in the Tribunal's Judgment in Daseking-Frank. The Tribunal noted that the ECBR Steering Committee, in preparing its assessment of the issues, undertook consultation with what it termed "key stakeholders," including representatives of the SAC. SAC representatives also had the opportunity to participate in informal briefings that the Steering Committee undertook with the Executive Board during 2005. *Id.*, para. 20. "During the first quarter of 2006, as the outcome of the ECBR's review of the compensation system neared decision by the Executive Board, the process was punctuated by exchanges of views between the SAC and the Managing Director…." *Id.*, para. 22. The Tribunal observed that "[t]he staff of the Fund, individually, and through its representatives in the SAC, exercised multiple opportunities to voice opinions and proffer alternative proposals, as did the Fund's Management, through its Managing Director." *Id.*, para. 94.

78. For the foregoing reasons, the Tribunal concludes that the Fund did not abuse its discretion in taking the measures that it did in respect of a staff member whose job functions may reasonably be said to have presented a conflict of interest with membership on the governing board of the Staff Association. In order to protect the right to association embodied in the Fund's internal law, such measures must be supported by evidence and be narrowly tailored to serve the objective of protecting against conflict of interest.

79. In the view of the Tribunal, in presenting Applicant, who was serving as a Senior Human Resources Officer in the Compensation Policy and Benefits Division of the Human Resources Department during the period of the ECBR, with a choice between forgoing nomination to the SAC while retaining his then current job responsibilities or being transferred to a different post in HRD at the same salary and grade level in the event that he were elected to the SAC, the Fund

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authorized representatives of the Staff Association, to communicate views to the Tribunal as *amici curiae*." *See, e.g.,* Ms. "J", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), paras. 15-20.

did not abuse its discretion by infringing on Applicant's right to association. The Tribunal is unable to conclude that the Fund's decision was either improperly motivated or discriminated impermissibly among members of the staff. In the words of the UNAT: "It is true that freedom of association is a highly important interest, for both the staff and the Administration, and it must be protected against abuses of power by the authorities…. But it is also true that the coexistence of freedom of association and good administration of the organisation must be reasonably balanced." Ishak, Consideration VIII. In the view of the Tribunal, that balance was reasonably struck by the Fund in the circumstances presented by the case of Mr. D'Aoust.

> Did the Fund's actions in respect of Applicant's decision to run for election to the SAC, including the January 12, 2006 notification to all HRD staff, constitute "harassment" or "intimidation" in violation of the Fund's internal law?

80. Applicant contends that HRD's actions in respect of his decision to run for election to the SAC in January 2006 constituted "harassment" and "intimidation" in violation of the Fund's internal law, causing him stress and prejudice. In Applicant's words, "HRD's actions may not have had effect on my position but, nevertheless, constituted intimidation and thus caused me injury." Applicant summarizes these claims as follows:

> "On January 12, 2006, I was advised via [the SPM's] email…, along with all staff of HRD, that I was not permitted to be nominated to the SAC. On two occasions shortly thereafter, on January 13 and 17, I was told by [the SPM] and [the Division Chief] that, if elected, I could not remain in my position and would be transferred. … [The SPM's] and [the Division Chief's] actions were intimidating ...."

It is recalled that in his January 19, 2006 memorandum to the SPM, Applicant protested both the initial email notification of January 12 to all HRD staff and its subsequent modification in his case, characterizing the latter decision as "another attempt" to dissuade him from pursuing his nomination to the SAC. Mr. D'Aoust alleged that both actions "… constitute attempts at interfering in the exercise of my rights under Fund rules, and amount to nothing less than intimidation." (Memorandum from Applicant to SPM, January 19, 2006.) Additionally, Applicant contends that the SPM's email of January 12, 2006 to all HRD staff caused him prejudice in the election, as some voters may not have cast votes for him believing that he was ineligible for election.

81. As to the decision of January 17, Applicant maintains:

> "Intentionally or not, [the SPM] and [the Division Chief] forced me in a situation where I either had to agree with them or risk suffering the consequences. This created a very hostile environment. It caused me grave stress."

Applicant further explains: "… I had to decide, on short notice, whether I would stand for nomination, knowing that if I were elected I would not be allowed to remain in my position, and yet not knowing where I might be transferred." Mr. D'Aoust also describes the conduct of the SPM and Division Chief as "dictatorial and intimidating."

82. Respondent, for its part, maintains that Applicant's claims of harassment and intimidation are without foundation, observing that they "… rely most heavily on the fact that the dilemma he faced—that is, being required to choose between serving in elected office on the SAC and being transferred to another position, or foregoing service on the SAC—caused him stress." Respondent's approach to the question suggests that the issue of whether Applicant's claim of harassment and intimidation is well-founded is inextricably linked to the validity of the contested decisions themselves. In Respondent's view, the stress of which Applicant complains is the stress inherent in the choice with which he was presented.

83. The question of whether the Fund abused its discretion by its January 17, 2006 decision, presenting Applicant with a choice between forgoing nomination to the SAC while retaining his then current job responsibilities or standing for election on the condition that he would be transferred to a different post in HRD in the event that he were elected, has been answered by the Tribunal in the negative above. Applicant's claim of intimidation and harassment, however, also implicates the earlier decision of January 12 by which all HRD staff were notified that they were barred from seeking election to the SAC. Accordingly, the question arises whether Applicant suffered moral injury to his right to association as a result of that decision.

84. Applicant alleges that on January 13 the Division Chief confronted him with the fact that he had chosen to run for election in contravention of the SPM's email notice to all HRD staff. The Fund characterizes the "confrontation" of January 13 as follows: In light of the SPM's email to all HRD staff of the previous day, "… Applicant himself appears to have been determined to bring on a confrontation with his managers…." Accordingly, the Fund maintains that it is "disingenuous" for Applicant to claim "harassment" on the basis of the conversations that followed. Additionally, the Fund refers to Applicant's decision to pursue his nomination to the SAC (before the January 12 decision had been modified) as an "arguably insubordinate act." Nonetheless, it notes that only a few days later HRD senior management "reconsidered" and "modified … considerably" the decision to prohibit all HRD staff from running for the SAC.

85. The Fund's Policy on Harassment (1999) defines prohibited "harassment" as "… behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment. It can take many different forms, including intimidation or sexual harassment." ("Policy on Harassment," Staff Bulletin 99/15 (Harassment – Policy and Guidance to Staff) (June 18, 1999, revised July 21, 1999), para. 3.) "Intimidation," as a form of "harassment" prohibited by that same Policy, "…includes physical or verbal abuse; behavior directed at isolating or humiliating an individual or a group, or at preventing them from engaging in normal activities." As examples of "intimidation," the Policy on Harassment cites: "degrading public tirades by a supervisor or colleague; deliberate insults related to a person's personal or professional competence; threatening or insulting comments, whether oral or written—including by e-mail; deliberate desecration of religious and/or national symbols; and malicious and unsubstantiated complaints of misconduct, including harassment, against other employees." (Policy on Harassment, para. 4.)

86. The question arises whether Applicant has established that the conduct of which he complains amounts to "harassment" or "intimidation" in contravention of the Fund's Policy on Harassment. In the view of the Tribunal, with the exception of his unsupported assertion that the conduct of the SPM and the Division Chief was "dictatorial and intimidating," Applicant has not proffered any evidence of the kind that ordinarily would underlie a claim pursuant to the Fund's Harassment Policy. *See generally* Mr. "F", paras. 91-101; Ms. "BB", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2007-4 (May 23, 2007), paras. 59-93; Mr. "DD", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2007-8 (November 16, 2007), paras. 60-90.

87. Moreover, the Policy on Harassment is directed at protecting against impermissible conduct rather than impermissible "decisions," which may be separately challenged. Under the caveat of "**Conduct that would not be considered harassment**," the Policy emphasizes:

> "13. It is also important to note that, in the course of their work, supervisors have a responsibility to take difficult decisions, e.g., about moving people or changing work assignments. These decisions do not, in themselves, constitute harassment."

88. In the view of the Tribunal, Applicant was not the object of "harassment" or "intimidation" as those terms are defined by the Fund's Policy on Harassment. Applicant further alleges that he felt "intimidated" (as that word is commonly used) by the decision of the Fund of January 12, 2006 that would have prevented him as an HRD staff member from running for the SAC altogether, rather than presenting him with the option of reassignment as offered on January 17. Applicant resisted this directive by pursuing nomination to the SAC and alleges that he suffered moral injury as a result. The Fund has not defended the decision of January 12 and emphasizes that it was quickly modified. Mr. D'Aoust was not declared ineligible for nomination to the SAC but rather was invited to choose between his job assignment and his possible mandate to the Staff Association Committee. He did not suffer "intimidation" or "moral injury" because the Fund accepted not to apply the directive contained in the January 12 email, quickly corrected its effects, and accepted the candidacy of Mr. D'Aoust without taking any disciplinary action against him. In the circumstances, the Tribunal concludes that Applicant did not suffer moral injury to his right to association by the existence of that policy until its revision on January 17, 2006.

Allegation of denial of due process by the Grievance Committee

89. Applicant contends that he was not afforded due process by the Grievance Committee, on the following grounds: the Grievance Committee is not authorized to issue an order for summary dismissal; such decision in any event could not be taken solely by the Committee's Chairman; and a decision to summarily dismiss a grievance may not properly be made without hearing both parties on the issue.

90. The Fund responds that Applicant's claim of denial of due process by the Grievance Committee is not properly before the Tribunal and that, in any event, it is without merit. Respondent states that Applicant was on copy of the Fund's submission and that he could have

filed a response to the Fund's comments. The decision of the Grievance Chairman was issued some three months later.

91. This Tribunal consistently has held that it does not serve as an appellate body vis-à-vis the Fund's Grievance Committee; the Committee's recommendations do not constitute "administrative acts" in the sense of Article II of the Tribunal's Statute. At the same time, the Tribunal "… may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee" and "is authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17; D'Aoust (No. 2), para. 171.

92. Accordingly, the Tribunal has dismissed a series of challenges to acts of the Grievance Committee, concluding that these decisions rest exclusively within the authority granted to the Grievance Committee under its constitutive instrument GAO No. 31. *See, e.g.*, Mr. "V", paras. 125-31 (challenge to application of Committee's standard of review); Ms. "Z", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 119 (challenge to decisions as to admissibility of evidence and production of documents); D'Aoust (No. 2), paras. 170-76 (challenges to evidentiary rulings, standard of review, "re-stating" the question presented by the grievance). The Tribunal recently has reaffirmed that "… the proceedings of the Grievance Committee are not dispositive of matters before the Tribunal, which consistently has insulated the other elements of the Fund's dispute resolution system from the adjudicatory role served by the Administrative Tribunal." Mr. "DD", para. 168.

93. As this Tribunal has recognized, the Grievance Committee, pursuant to GAO No. 31, Section 4.04, decides its own jurisdiction for purposes of proceeding with a Grievance, although the Tribunal may reconsider that decision in deciding such matters as whether an applicant has exhausted channels of administrative review for purposes of considering the admissibility of an Application before the Administrative Tribunal. *See* Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 85; Ms. "AA" , Applicant v. International Monetary Fund, Respondent (Admissibility of the Application), IMFAT Judgment No. 2006-5 (November 27, 2006), para. 30.

94. The instant case of Mr. D'Aoust raises the question whether the Grievance Committee's process for deciding its jurisdiction in a particular case may be challenged before the Administrative Tribunal. While GAO No. 31 provides that the Committee decides its own jurisdiction for purposes of proceeding with a grievance, that regulation does not specify any procedure governing summary dismissal of a grievance. Applicant maintains that the principle of *audi alteram partem* ought to govern summary dismissal proceedings in the Grievance Committee. Under the Rules of Procedure of the Administrative Tribunal, for example, Rule XII (Summary Dismissal), para. 5 provides an applicant the opportunity to file an Objection to a Motion for Summary Dismissal of an Application. The Fund responds that Mr. D'Aoust at his own initiative could have responded to its submission seeking dismissal of the Grievance.

95. Applicant is correct in stating that GAO No. 31 does not make express provision for the exercise of authority individually by the Grievance Committee Chairman, and at Section 2.02 provides for the hearing of cases by a panel consisting of the Chairman and two other members.

Additionally, Section 7.06.1 provides that the parties are entitled to a full and impartial hearing before "the Committee," or, if the parties agree, to a decision by "the Committee" on the basis of written submissions. The Tribunal has noted the practice of the Grievance Committee Chairman to act individually in dismissing a Grievance for lack of jurisdiction. *See* Estate of Mr. "D", note 18 ("Ambiguity as to the construction of Article V [of the Tribunal's Statute, relating to exhaustion of administrative review] arose from the fact that the Grievance Committee Chairman, in dismissing the grievance on jurisdictional grounds, notified Ms. "D" directly of the dismissal rather than making a recommendation to the Managing Director as is contemplated by GAO No. 31.") In other instances, the Grievance Committee as a whole has acted on such matters. *See* Ms. "AA", para. 26 ("Following an exchange of written submissions by the parties on the question of admissibility, by order of December 20, 2005, the Grievance Committee dismissed the Grievance as untimely….")

96. The Tribunal declines to pass upon the propriety of the procedural actions of the Grievance Committee in summarily dismissing Mr. D'Aoust's Grievance. The precise issue raised by the Grievance Committee's summary dismissal of Mr. D'Aoust's Grievance, that is, whether Applicant was "adversely affected" by an administrative act of the Fund has been decided by this Tribunal's Judgment.[17] *Cf.* D'Aoust (No. 2), para. 175 (dismissing contention that Grievance Committee had re-stated the question presented by the Grievance: "The controversy as to the formulation of Applicant's complaint has been raised and resolved before this Tribunal.")[18] Accordingly, the Tribunal denies Applicant's claim that he was not afforded due process by the Grievance Committee.

[17] *See supra* Consideration of the Issues of the Case; Was Applicant "adversely affected" by an administrative act of the Fund as required by Article II of the Tribunal's Statute?

[18] *See also* Ms. "Z", para. 120, noting that the Tribunal could rectify any lapse in the evidentiary record of the Grievance Committee, for purposes of the Tribunal's consideration of the case, through the Tribunal's authority to order the production of documents, to request information and to hold oral proceedings.

Decision

FOR THESE REASONS

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

The Application of Mr. D'Aoust is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

_____
Stephen M. Schwebel, President

_____
Celia Goldman, Registrar

Washington, D.C.
January 7, 2008