ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2010-2

Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent

Introduction

1. On February 8 and 9, 2010, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and two members designated by him,[1] Judges Nisuke Ando and Michel Gentot, met to adjudge the case brought against the International Monetary Fund by Mr. Christopher Faulkner-MacDonagh, a former staff member of the Fund.

2. Applicant contests the Fund's decision to refuse his request for voluntary separation under the terms of the Fund's 2008 downsizing program. Applicant challenges elements of the regulations implementing the Fund's right of refusal following the over-subscription of the voluntary phase of the exercise, as well as their application in his individual case. Applicant additionally challenges budgetary decisions relating to the financing of the downsizing, which he contends improperly limited the total number of staff who were able to separate under the terms of the downsizing program and substantially affected the outcome of his request. In particular, Applicant contests as discriminatory the decision to permit all volunteers whose positions fell within Grades A1-A8 and B-levels to separate under the beneficial terms of the downsizing program while staff members, such as himself, who occupied positions in the Grade A9-A15 range were subject to the Fund's exercise of the right of refusal.[2] Furthermore, Applicant challenges the process applied to differentiate among volunteers in the Grade A11-A15 fungible macroeconomist group and asserts, as to his individual case, that the Fund erred in assessing his relative competency vis-à-vis other volunteers in the group, based upon MARs ("Merit-to-

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[1] Article VII, Section 4 of the Tribunal's Statute provides in part:

> "The decisions of the Tribunal in a case shall be taken by a panel composed of the President and two other members designated by the President."

[2] Grades A1-A8 comprise support level positions, Grades A9-A15 comprise professional positions, and B-levels comprise senior staff with managerial responsibilities.

Allocation Ratios"). Applicant maintains that the Fund's decision-making was not consistent with its stated intent to base the refusal of volunteers upon either budgetary constraints or the business needs of the institution. Applicant additionally contends that the Fund's Grievance Committee improperly failed to consider his claims on the ground that they fell outside of its jurisdiction, and he asserts that his Application was timely filed with the Tribunal following exhaustion of available channels of administrative review.

3. Respondent raises as a threshold objection that the Application is inadmissible on the ground that Mr. Faulkner-MacDonagh's complaint did not fall within the subject matter jurisdiction of the Fund's Grievance Committee, and, consequently, there being no channels of administrative review to exhaust, that his Application should have been filed with the Administrative Tribunal within three months of the decision to refuse Applicant's request for separation pursuant to the downsizing exercise. Addressing the merits of the Application, Respondent maintains that the refusal of Applicant's request flowed directly from the proper application of the governing regulations, in particular those applicable to the Fund's exercise of its right of refusal following the over-subscription of volunteers for the downsizing. The applicable regulations, maintains the Fund, represent a proper exercise of its discretionary authority, free from impermissible discrimination, and based upon appropriate institutional considerations in "refocusing" the mission of the Fund. Applicant's MARs percentile placed him within the group of Grade A11-A15 fungible macroeconomists whose refusal was automatic; neither his department nor the Institutional Panel constituted under the downsizing exercise determined that he should be placed in the "Assessment Group"; nor did Applicant avail himself of the opportunity to present his views thereon to the Panel. Finally, the Fund maintains that there was nothing improper in the budgetary treatment of the restructuring exercise.

The Procedure

4. On August 11, 2009, Mr. Faulkner-MacDonagh filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6,[3] of the Tribunal's Rules of Procedure, the Registrar advised Applicant that the Application did not fulfill all of the requirements of that Rule. Accordingly, Applicant was given a period of time in which to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.

[3] Rule VII, para. 6 provides in pertinent part:

> "If the application does not fulfill the requirements established in Paragraphs 1 through 5 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time 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. . . ."

5. The Application was transmitted to Respondent on August 20, 2009. On August 28, 2009, pursuant to Rule IV, para. (f),[4] the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

6. Respondent filed its Answer to Mr. Faulkner-MacDonagh's Application on October 5, 2009. On November 16, 2009, Applicant submitted his Reply. The Fund's Rejoinder was filed on December 16, 2009.

Requests for production of documents

7. Pursuant to Rule VII, para 2(h),[5] and Rule XVII[6] of the Tribunal's Rules of Procedure, in his Application, Mr. Faulkner-MacDonagh made the following requests for production of documents:

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[4] 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; . . ."

[5] Rule VII, para. 2(h) provides:

> "An application instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:
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> . . .
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> (h) any request for production of documents as provided by Article X of the Statute and Rule XVII below."

[6] Rule XVII provides:

> "*Production of Documents*
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> 1. The Applicant, pursuant to Rule VII, Paragraph 2(h), may 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. The request shall contain a statement of the Applicant's reasons supporting production accompanied by any documentation that bears upon the request. The Fund shall be given an opportunity to present its views on the matter to the Tribunal, pursuant to Rule VIII, Paragraph 5.
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> 2. The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that

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1. All relevant documents, emails, or other communication sent to or from the Managing Director, his office, or other Fund officials in the context of the Applicant's claims that the discretionary decisions taken by the Managing Director in the context of the downsizing exercise were discriminatory against the Applicant and/or were based on erroneous assessment of information and in disregard of essential facts;

2. All relevant documentation regarding the Applicant's case, including but not limited to the discretionary decision to categorically accept all volunteers from the A1-A8 and B-level grades, all documentation relevant to the discussions between the Managing Director, department heads, and Fund staff or contractors concerning the separation program, as well as all documentation on the Fund's budgeting process regarding the program and its revisions, and the contingency plans in the event there were over and under-runs in the restructuring budget;

3. All documents showing any B-level staff hired back to the Fund after accepting voluntary separation;

4. All documents showing the Fund's revisions to the voluntary separation program allowing B-level staff to remain at the Fund after May 13, 2009;

5. The October 7, 2008 email from OBP on the restructuring exercise; and

6. The report of the Working Group Reviewing the Size of Divisions and Support Across the Fund.

8. In accordance with Rule XVII and Rule VIII, para. 5,[7] of the Tribunal's Rules of Procedure, Respondent was provided the opportunity to present its views as to whether the

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compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of deciding on the request, 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, 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."

[7] Rule VIII, para. 5 provides:

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document requests should be granted. Respondent accepted the document requests included in the Application and attached responsive documents to the Answer.

9. In his Reply, Applicant included an additional document request, for Annexes to the "Report and Recommendations of the Institutional Panel on the Exercise of the Right of Refusal" (May 16, 2008). Applicant maintains that without its Annexes the Report of the Panel is "deficient in documenting the claim of the Applicant as to **why his individual request** was not granted." (Emphasis in original.) Applicant cites the statement in the Report that "[t]he recommendations of the IP [Institutional Panel] on individual volunteers resulting from its deliberations are appended separately in the Annex." (Report, p. 1.) In Applicant's view:

> "Thus far, neither in the Grievance Committee, nor in the proceedings before the Administrative Tribunal has the Applicant been provided with any factual reason why or documentation showing why his individual request was denied as recommended by the [Institutional] Panel in the Report's Annex on 'individual volunteers.' Accordingly, the Applicant requests that the Tribunal order the Fund to produce all of the Annexes to the Panel's Report, even with the redaction of staff names (except for Applicant's) but showing all of the data the Panel relied on, so the Applicant can prove the merits of his claims. . . . [I]t is the Annexes which show **why the Applicant's individual request** was denied, in that his MARs were incorrect and his 'relative competency' was illegally and erroneously assessed by the Panel."

(Emphasis in original.)

10. In its Rejoinder, the Fund has responded to Applicant's request for the Annexes to the Report of the Institutional Panel by appending a redacted copy of Annex III. According to Respondent, the Annexes to the Panel's Report do not contain reasons for the acceptance or denial of individual requests for voluntary separation. Rather, asserts the Fund, ". . . the principles, procedures and criteria applied by the IP are described in the body of the Report itself, and the Annexes are simply lists of the names of staff members whose applications were accepted and rejected." According to Respondent, Annexes I and II are lists of those staff members as to whom the IP recommended acceptance, and Annex III is a "list of those volunteers, including Applicant, who had not been placed in the Assessment Group and who therefore were not individually assessed by the IP. The volunteers listed in Annex III were automatically either accepted or refused, in accordance with the methodology set out in Staff Bulletin 08/03, Supp. 2."

> "The Fund shall include in the answer its views on any requests for production of documents, oral proceedings, or anonymity that the Applicant has included in the application."

11. The redacted Annex III, produced to Applicant with the Rejoinder, is titled "Volunteers Not Individually Assessed by the Institutional Panel (Automatically Accepted/Refused)." Applicant's name (along with his department, job title and grade) is included in the section of the document designated for Grade A11-A15 fungible macroeconomists whose requests were automatically refused. Respondent has redacted the names of all other staff members from Annex III, and it maintains its objection to producing to Applicant Annexes I and II, in light of the "serious privacy interests at stake and the lack of any probative value of those documents to the issues in dispute." The Fund has offered to provide all of the Annexes, unredacted, to the Tribunal for its *in camera* inspection.

12. Applicant seeks reasons for the refusal of his own request for separation under the downsizing exercise. Annexes I and II of the Report, according to the Fund, are simply lists of those volunteers whose acceptance for separation under the exercise was recommended by the Institutional Panel (as contrasted with those volunteers, listed in Annex III, who were either automatically accepted or automatically refused based on the MARs cut-offs).[8] As such, Annexes I and II would appear to have no probative value in the case.

13. Accordingly, no document requests appear to remain pending in the case. Applicant's request for the Annexes to the Report makes clear that he is not seeking the names of other staff members but rather "data the Panel relied on" so that he can prove the merits of his claims. The redacted Annex III, already provided to Applicant, demonstrates that his name was included among those volunteers automatically refused.

14. It may be observed that the exchanges between the parties relating to Applicant's request for documents reflect the parties' competing theories of the case. Applicant alleges, among other things, that his "relative competency" was erroneously and illegally assessed by the Institutional Panel. Respondent, in contrast, maintains that Applicant's request for separation under the downsizing was denied automatically by application of the governing regulations, on the ground that his MARs percentile (of which he was informed during the voluntary phase of the exercise) was sufficiently high as to place him above the cut-off set for automatic refusals and that neither his department nor the Institutional Panel found reason to place him in the "Assessment Group."

Request for oral proceedings

15. In his Application, Applicant has requested oral proceedings, pursuant to Rule VII, para. 2(i)[9] and Rule XIII.[10] In his Reply, Applicant renews his request, maintaining that there are

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[8] *See infra* The Factual Background of the Case.

[9] Rule VII, para. 2(i) provides:

> "An application instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:
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> . . .
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> (i) any request for oral proceedings as provided by Article XII of the Statute and Rule XIII below."

[10] Rule XIII provides:

"*Oral Proceedings*

1. Oral proceedings shall be held if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views pursuant to Rules VII–X, the Tribunal deems such proceedings useful. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel or representatives, and may examine them. In accordance with Article XII of the Statute, oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.

2. At a time specified by the President, 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 or representatives, 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 or representatives may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.

(a) 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.'

(b) 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.'

5. 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.

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"critically relevant facts in dispute which can only be substantiated by the Annexes to the Panel's Report, and the testimony of witnesses with first hand knowledge of the decision made against the Applicant."

16. Applicant's request for oral proceedings echoes his request for production of documents:

> ". . . Applicant submits that his request for oral proceedings as well as his document requests should be granted because there are a number of relevant material facts in dispute with respect to all his claims, but particularly his claim that the discretionary decision to deny his individual request for voluntary separation was based on an illegal erroneous determination of his relative competency[,] given that the Grievance Committee did not give the Applicant an opportunity to present evidence on his claims at oral proceedings or order the Fund to produce documents supporting his claims."

17. Respondent, having had the opportunity to present its views in accordance with Rule VIII, para. 5, and Rule XIII, opposes Applicant's request for oral proceedings. In the Fund's view, there are no material facts in dispute because the decision contested by Mr. Faulkner-MacDonagh flowed directly from the proper application of the regulations governing the downsizing process; the documentary record and pleadings before the Tribunal fully address the issues of the case.

18. Rule XIII of the Tribunal's Rules of Procedure provides that "[o]ral proceedings shall be held if, on its own initiative or at the request of a party following an opportunity for the opposing party to present its views pursuant to Rules VII – X, the Tribunal deems such proceedings useful." In the view of the Tribunal, the extensive documentary record and the written pleadings of the parties provide a sufficient basis for the Tribunal to take a decision in the case.

The Factual Background of the Case

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

The Fund's 2008 Downsizing Exercise

20. The case of Mr. Faulkner-MacDonagh—and another decided this day of Mr. Billmeier—arises from the Fund's 2008 downsizing exercise. In total, 492 volunteers separated under the beneficial terms of the downsizing program: all of the 206 volunteers in the A1-A8 grade range; all of the 110 volunteers in the B1-B5 grade range; and 176 of the 275 volunteers in the A9-A15 grade range. (Message [to the staff] from the Managing Director on the Completion of the Voluntary Phase, May 19, 2008.) Mr. Faulkner-MacDonagh and Mr. Billmeier are two of the 99

> 6. The Tribunal may limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate."

staff members whose applications for voluntary separation were declined as a result of the over-subscription of the downsizing program.

21. Central to the controversy in this case is the regulatory framework established by the Fund to implement its 2008 downsizing exercise. Staff Bulletin No. 08/03 (February 29, 2008) set the overall parameters for the downsizing. Supplement 2 (May 6, 2008) to the Staff Bulletin elaborated procedures for the exercise of the Fund's right of refusal of volunteers. These regulations are described below.

Regulatory Framework for the Downsizing – Staff Bulletin No. 08/03

22. On February 29, 2008, the Fund issued Staff Bulletin No. 08/03 ("Refocusing and Modernizing the Fund: the Framework for the Downsizing Exercise"), announcing "management's objective . . . to achieve staff reductions in a manner that will support the ongoing strategy to refocus and modernize the Fund." The framework envisioned a "voluntary phase," followed by a "mandatory phase": "While the intention is to rely on volunteers to the extent possible, achieving the necessary reductions in those specific areas that are needed to implement this refocusing and modernization strategy may require some reliance on mandatory separations." Staff Bulletin No. 08/03 provided for a brief window from March 1 through April 21, 2008, during which staff could submit requests for voluntary separation under the downsizing program. After the voluntary phase closed, the staff member's offer to leave the Fund became irrevocable. (Staff Bulletin No. 08/03, pp. 1-2.)

23. The Staff Bulletin specified that ". . . it may be necessary to refuse volunteers because of either budgetary constraints or the business needs of the institution. However, to the maximum extent possible, the Fund will accept all volunteers." (*Id.*, p. 2.) The Fund's right to refuse volunteers under the terms of the program was elaborated as follows:

> ***"Refusal by the Fund***
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> Once the voluntary window closes on April 21, the overall number and composition of volunteers will be assessed so that management may determine whether it is necessary to exercise a right of refusal because of budgetary constraints or the business needs of the Fund. In the event that management determines that the right of refusal must be exercised, the factors that will be taken into account will include: (a) whether the volunteers are within a fungible category of staff that is subject to reductions in force, and (b) if so, the extent to which there may be more volunteers in that category than is needed to achieve the reductions called for by the refocusing strategy. To the extent that exercising the right of refusal requires an assessment of the relative competency of individual staff (so as to enable the Fund to retain the most qualified staff), the Institutional Panel, whose composition and terms of reference are described in Annex I, will meet with relevant Department Directors to make recommendations to Management as to which volunteers should be refused."

(*Id*., p. 3.)

24. While a mandatory phase proved unnecessary as a result of the number of volunteers who sought separation under the beneficial terms of the downsizing (*see infra*), the framework for anticipated mandatory separations is relevant to the issues of the case because principles that were to govern the mandatory phase were expressly applied in designing the terms of the exercise of the Fund's right of refusal of volunteers. Additionally, as envisioned by the regulations themselves, anticipation of a mandatory phase influenced decisions taken by staff during the voluntary stage of the downsizing: "to the extent that the features of the mandatory phase are sufficiently transparent and predictable—particularly with respect to the criteria to be used to identify staff that may be separated—these features will enable staff members to make fully informed decisions during the voluntary phase." (Staff Bulletin No. 08/03, p. 1.)

25. The Staff Bulletin advised that any mandatory separations pursuant to the 2008 downsizing would be implemented under the authority of the reduction-in-force provision of GAO No. 16. An amended GAO No. 16 was attached as Annex III to Staff Bulletin No. 08/03. Revised Section 4 reflected adoption by the Executive Board of modifications to the Separation Benefits Fund policy. Revised Section 12 (Reduction in Strength, Abolition of Position or Change in Job Requirements) made explicit the criteria to be applied in selecting staff for separation in a reduction-in-force situation, e.g., the possible "mandatory phase" of the 2008 downsizing. The touchstone was "relative competency": "For purposes of determining which staff to separate when the function they perform continues . . . it is necessary to assess the relative competency of those staff that are qualified to perform the function in question ('fungible groups of staff')." (Staff Bulletin No. 08/03, p. 4.) Furthermore, in respect of possible mandatory separations, the Staff Bulletin recognized the issue of equity across the Fund:

> ***"A key challenge in designing and implementing a framework that provides for a reduction in force is that a number of the large fungible groups of staff that are being reduced (e.g. macroeconomists and staff assistants) cut across departments.*** For these categories, it would not be equitable to make selections on a purely department-by-department basis. Such an approach would, for example, subject a macroeconomist to more vigorous competition simply because he or she may be in a department that is subject to larger cuts than others. More generally, assessments of relative competency within each group, to be meaningful, should be conducted on an institution-wide basis, given the possible variation of average competency levels among different departments. Moreover, the distribution of volunteers is unlikely to be uniform across departments, and staff should not be placed at a disadvantage if the demographics and preferences of staff result in relatively few volunteers coming forward from their department."

(*Id.*) (Emphasis in original.)

The Role of the Institutional Panel

26. Staff Bulletin No. 08/03 additionally notified the staff of the creation of an Institutional Panel ("IP" or "Panel"). Annex I of the Staff Bulletin set out its Terms of Reference. The Panel was to have a role in the "mandatory phase" and—in the event that it was necessary for the Fund to exercise the right of refusal—in the "voluntary phase" as well. In either circumstance, the Panel's mission was to "ensure that the decisions on separations among fungible staff are made in a reasonable, consistent and non-discriminatory fashion and involve assessments of competency that are made on an institution-wide basis." (Staff Bulletin No. 08/03, Annex I, p. 1.) In the event that the Fund determined that the right of refusal needed to be exercised, ". . . and the exercise of this right requires an assessment of the relative competency of volunteers, the IP shall make recommendations to the Managing Director regarding the staff with respect to whom the Fund should exercise such right of refusal." (*Id.*)

Results of the voluntary phase

27. On April 29, 2008, a week following the close of the period for requests for voluntary separation, the Managing Director reported to the staff the results of the voluntary phase of the downsizing. While the downsizing had envisioned that the staff was to be reduced by 380 positions, 591 staff members had requested separation under the program. (Message [to the staff] from the Managing Director on the Voluntary Separation Phase, April 29, 2008.) Based upon the distribution of volunteers among the grade levels of their positions, the Managing Director concluded: "The goal of restructuring the staff in a manner that will help us achieve the refocusing strategy has also been achieved. The conclusions of the Working Group on Reviewing the Size of Divisions and Support were clear: the Fund was top-heavy at the B levels and, at the same time, had too many support staff relative to other institutions." Noting that "[g]reater than proportionate reductions in B level and A1-A8 level staff were required," the Managing Director announced, "we have achieved that goal through the voluntary process. We will therefore be able to achieve the targeted rebalancing, without recourse to mandatory separation. . . ."[11]

28. In considering "next steps," the Managing Director stated that "[b]ecause of budgetary constraints, it is not possible to accommodate all requests." Nonetheless, taking account of savings resulting from the shorter average time that volunteers sought to stay at the Fund and because average payments from the Separation Benefits Fund were lower than budgeted, it was possible to accommodate about 30 percent of volunteers in excess of the target number of 380, while staying within the three-year restructuring budget approved by the Board.

29. In this announcement, the Managing Director communicated to the staff that, in exercising the right of refusal, the Fund would differentiate among volunteers based upon within which of three grade ranges the staff member's position fell:

[11] The Managing Director qualified this statement, noting that ". . . there may still be a need for a few mandatory separations in some specialized work groups."

> "In both the A1-A8 and B-level groups, the number of requests was such that we will be able to accommodate all requests. For the A9-A15 group, we will need to exercise the right of refusal. The number of requests from this group was low relative to their share in total staff numbers. However, the number of separations targeted in this group was also low, so that requests still exceed the number targeted by more than the 30 percent threshold. We therefore need to retain about 100 to 125 staff out of the total of 275 volunteers in this grade range."

(*Id.*) The Managing Director concluded that "the basic objective will be—as it has always been—for these decisions to be taken on the basis of the business needs of the Fund," and that "[i]n making these decisions, I will seek the Institutional Panel's input." (*Id.*)

30. Following this announcement, some staff questioned the fairness of applying the right of refusal only in the case of Grade A9-A15 volunteers. In response, Management published a Q & A on the Fund's intranet, providing, in part, as follows:

> **"Isn't it unfair that the right of refusal will only be exercised vis-à-vis the A9-A15 grade group?**
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> As with the mandatory framework, the notion of what is 'fair' must be understood in terms of the institutional considerations that shaped the downsizing exercise. The three categories of staff—A1-A8, A9-A15, and B-level—are the categories on which the budget is constructed and was a key basis for the design of the downsizing exercise. In particular, when departments were given their budgetary allocations for the medium term in January/February, they were also informed about the positions they would need to reduce in the three categories—whether through voluntary or mandatory separations.
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> The different levels of targeted reductions for each of these grade groups (set forth in the above table) reflected a key institutional consideration that was central to the Managing Director's strategic vision—namely, in order to align the Fund's organizational structure with industry standards, it was considered necessary to both increase the size of divisions and reduce the size of front offices. Accordingly, when determining how to exercise the right of refusal, it is appropriate—and fair—for the Fund to take into account these different levels of reductions. For this reason, the number of voluntary separations that will be permitted to take place under the framework that is in excess of the targeted reduction will correspond to a uniform percentage of the total reductions required under each of the grade groups. In light of the existing budgetary shortfall, this percentage is 30 percent—again, as mentioned in the MD's Fundall.

> This implies that all volunteers in the B1-B5 grades (where the excess was 25 percent of the required reductions) will be accepted and all volunteers in the A1-A8 grades (where the excess was 27 percent of the required reductions) will also be accepted. With respect to A9-A15 grades, however, the total number of volunteers represent 110 percent of the reductions envisaged in that category of staff. Since the budget can only accommodate additional volunteers equal to 30 percent of the required reductions at the A9-A15 [grades] (which is actually slightly higher than the percentage applicable to other groups), A9-A15 volunteers above this threshold will need to be refused.
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> As a general matter, it should be emphasized that accommodating volunteers beyond the number actually needed to achieve the required reductions in each of the three grade groups identified above is also consistent with institutional needs. For example, accommodating the excess number of volunteers within the B1-B5 grades will enable the Fund to facilitate an increased number of promotions to the B-level, thus relieving a bottleneck that has been considered to be [a] serious problem for the institution."

("Updated: Right of Refusal," 5/2/08, http://www-intranet.imf.org/News?Pages?QAonRightofRefusal.aspx.)

> Framework for Exercise of the Fund's Right of Refusal – Staff Bulletin No. 08/03, Supplement 2

31. On May 6, 2008, the Fund issued Staff Bulletin No. 08/03, Supplement 2 ("Framework for the Fund's Exercise of the Right of Refusal in Voluntary Separations"), which confirmed that "[s]ince the budget can only accommodate additional volunteers up to 30 percent more than the required reductions at the A9-A15 level, the A9-A15 volunteers above this threshold will need to be refused." (Staff Bulletin No. 08/03, Supplement 2, p. 3.) Supplement 2 also reaffirmed the language of the earlier Staff Bulletin No. 08/03, advising that the Fund reserved the right to refuse applications for voluntary separations on the basis of: "(i) budgetary constraints; or (ii) the business needs of the Fund." (*Id.*, p. 1.) Having determined that the cost of accepting all of the applications would exceed the $185 million multi-year restructuring budget approved by the Executive Board, the Fund would need to exercise the right of refusal.

32. The framework to be used to determine how to allocate the exercise of the right of refusal among A9-A15 staff was to be guided by the principles underlying the downsizing exercise and the design of the mandatory phase: ". . . the primary criterion that the Fund will use to identify individual volunteers for whom the right of refusal must be exercised to meet the quantitative parameters identified above will be that of relative competency, with the objective of enabling the Fund to retain the most qualified staff with[in] each of the fungible groups." (*Id.*, p. 3.) Procedures for this determination were to vary depending upon whether the fungible group in question was (a) a large fungible group, (b) a small fungible group, or (c) a fungible group within a single department.

33. As to the "Large fungible group: A11-A15 macroeconomists," Supplement 2 explained: ". . . a uniform MARs cut-off percentile will be established across all relevant departments (the 'MARs cut-off'). [12] This cut-off will be set at a level such that the number of volunteers with MARs averages above the cut-off percentile will be equal to the number of A11-A15 macroeconomists for whom the right of refusal will need to be exercised (the 'MARs cut-off group')." MARs cut-offs were to be employed in making refusal/acceptance decisions only in respect of this staff group.

34. It is not disputed that Applicant, as a Grade A14 Senior Economist in one of the Fund's area departments, was classified as a member of the "large fungible group" of Grade A11-A15 macroeconomists, and, accordingly, was subject to the following terms governing the exercise of the right of refusal of volunteers:

> ***"Large fungible group: A11–A15 macroeconomists . . .***
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> 11. All A11–A15 macroeconomists (the Macroeconomist Group) have already been ranked within their department according to their 3-year MAR averages, thereby giving each volunteer a MARs percentile. The MARs percentile is calculated on the basis of the methodology set forth in the February Staff Bulletin. Staff were advised of their MARs percentiles at the start of the voluntary phase.
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> 12. Taking into account the number and profile of all volunteers, a uniform MARs cut-off percentile will be established across all relevant departments (the 'MARs cut-off'). This cut-off will be set at a level such that the number of volunteers with MARs averages above the cut-off percentile will be equal to the number of A11-A15 macroeconomists for whom the right of refusal will need to be exercised (the 'MARs cut-off group')."

35. Based upon their MARs percentiles, the A11-A15 macroeconomist volunteers were divided into three groups:

- Institutional Panel Assessment Group:

> "13. An Institutional Panel Assessment Group will be established within the Macroeconomist Group and will include the following:
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> (a) volunteers whose MARs averages place them in the bottom 10-20 percent of the MARs cut-off group, and a group of staff equal in number to 10-20 percent of the MARs cut-off group whose MARs averages are the highest among those below the

[12] The MAR (Merit-to-Allocation Ratio) is the ratio of a staff member's actual merit increase to the amount budgeted for this purpose. (Staff Bulletin No 08/03, note 4.)

MARs cut off (the 'Assessment Band'). The precise ranges will take into account the distribution among the MARs (including the 'bunching' among MARs).

(b) all volunteers within the Macroeconomist Group who do not have a MARs average; and

(c) any volunteers above the Assessment Band whom the relevant Department Director or the Institutional Panel (in consultation with the Director and taking into account the views expressed by staff under paragraph 22 below) represents should be included in the Institutional Panel Assessment Group on the grounds that their MARs percentile does not reflect their relative competence. Such representations by Department Directors should be made on an exceptional basis and must be supported by a detailed written explanation."

- Automatic acceptance group:

"14. All volunteers whose MARs fall below the Assessment Band shall be notified that their application for separation under the voluntary separation framework has been accepted."

- Automatic refusal group:

"15. All volunteers whose MARs fall above the Assessment Band and who have not been placed in the Institutional Panel Assessment Group under 13(c) above shall be notified that the Fund will exercise the right of refusal with respect to them."

36. As to the assessment of volunteers within the Institutional Panel Assessment Group, Supplement 2 provided:

"16. The Institutional Panel, together with the relevant Department Directors, will assess all of the volunteers within the Institutional Panel Assessment Group for purposes of identifying those volunteers who, when taken together with the volunteers who will be refused under paragraph 15, constitute a group containing the most competent volunteers within the Macroeconomist Group the size of which equals the number of volunteers for whom the right of refusal must be exercised. The Institutional Panel will recommend to management that: (a) the right of refusal be exercised with respect to those volunteers so identified, and (b) the Fund accept the applications for separation under the voluntary framework with respect to all other volunteers in the Institutional Panel Assessment Group.

> 17. When making the assessments under paragraph 16 above, consideration will be given to the additional criteria set forth in the attachment, which will be applied by Department Directors in a standardized form and provided to the Institutional Panel in advance."

The referenced "additional criteria" were set out as follows:

> "(i) Whether there are any reasons why a staff member's MAR may not be indicative of relative performance.
> (ii) The number of outstanding ratings from 1998–2007.
> (iii) Trends in performance; for this purpose, an assessment of whether the staff member's performance since May 1, 2007 was consistent with, higher than or lower than the last APR, will be given consideration. (iv) The extent to which the staff member has the skills, experience required for the future that would be costly or difficult to replace. (v) The length of time in grade, as a possible indication of the degree to which a staff member may have plateaued. (vi) The staff member's potential, defined as capacity for growth, either upwards or laterally, to contribute effectively to the organization in the longer term. This may include competencies such as learning agility, ability to resolve and reconcile differences, ability to operate on both strategic and tactical levels, degree of respect of peers, demonstrated behaviors of inclusion and respecting diverse views, etc."

37. Finally, Supplement 2 advised volunteers of the opportunity to present views to the Institutional Panel:

> ***"Opportunity to present views***
>
> 22. Volunteers have the opportunity to present their views in writing to the Institutional Panel as to why their 3-year MARs average is not reflective of their relative competency, including taking into account the feedback they had previously received from their supervisors. Such views must be received by 5:00 p.m., Monday May 12, 2008 in order to be taken into account by the Panel. Such views may be emailed to INSTITUTIONAL PANEL."

Results of the Exercise of the Right of Refusal

38. The Institutional Panel met over the period of May 9-16, 2008. On May 16, 2008, the Panel issued its "Report and Recommendations of the Institutional Panel on the Exercise of the Right of Refusal," which became the basis for Management's decisions to accept or refuse individual volunteers.

39. The Report reiterated the process that had been set out in the Staff Bulletin:

> "**For the large fungible group of macroeconomists, an Institutional Panel Assessment Group was established based on the procedures described in paragraph 13 of the May Staff Bulletin.** This group included economists within the Assessment Band [footnote omitted], as well as any volunteer whose MARs percentile placed them above the Assessment Band but whom the Department or the Panel nevertheless felt should be considered for voluntary separation based on relative competence. Volunteers from the macroeconomist group whose MARs percentiles were below the Assessment Band were automatically accepted for separation. Volunteers from the macroeconomist group whose MARs percentiles were above the Assessment Band and who were not placed in the Assessment Group were automatically refused for separation."

(Report, pp. 4-5.) (Emphasis in original.)

40. The Managing Director communicated to staff shortly thereafter:

> "It still means that 99 volunteers cannot be accepted. Over the past week or so, I have met several times with representatives of the A9-A15 group and listened to their concerns about the refusal process. I told them that I would like them to stay at the Fund. I also offered to them, should they decide to leave anyway, to use the option of leave without pay. They will always be welcome back here. I understand that some will still be upset, but I hope they will also recognize that there has been a serious and good faith effort to help them in this unexpected and difficult situation."

(Message [to the staff] from the Managing Director on the Completion of the Voluntary Phase, May 19, 2008.)

Applicant's Request for Voluntary Separation Pursuant to the 2008 Downsizing

41. Mr. Faulkner-MacDonagh began his employment with the Fund on April 23, 2001. On April 21, 2008, the final day of the voluntary window, Applicant, then serving as a Grade A14 Senior Economist in one of the Fund's area departments, requested—via the automated mailbox provided for that purpose—voluntary separation pursuant to the downsizing exercise. He indicated May 13, 2009 as his preferred last day of active service and received an automated confirmation of his request. (Applicant had been informed on March 4, 2008 that his 3-year average MAR was "0.98, which puts you in the 30th percentile of the distribution of A11-A15 economists in [his department].")

42. One month later, on May 21, 2008, Mr. Faulkner-MacDonagh was notified by email that ". . . after careful consideration, your application has been declined. . . . If you have any questions, please feel free to contact your HR Support Team."

43. Applicant continued to serve as a member of the Fund's staff until September 5, 2008, when he resigned to take other employment. As his request for separation pursuant to the downsizing exercise had been denied, Applicant did not receive the enhanced separation benefits available under the program.

The Channels of Administrative Review

44. On December 24, 2008, Mr. Faulkner-MacDonagh filed a Grievance with the Fund's Grievance Committee contesting the decision to deny his request for voluntary separation pursuant to the downsizing program. In his Grievance, Mr. Faulkner-MacDonagh articulated similar arguments to those that he now presents to the Administrative Tribunal.

45. The Fund responded to Applicant's Grievance with a Motion to Dismiss for lack of subject matter jurisdiction on the ground that Applicant challenged only systemic decisions reflected in the regulations governing the downsizing, rather than whether the regulations were correctly applied or interpreted in his individual case. Following the further submission of Mr. Faulkner-MacDonagh on the issue of jurisdiction, the Grievance Committee on May 28, 2009 issued a decision granting the Fund's Motion. In the view of the Grievance Committee, Mr. Faulkner-MacDonagh was "seeking to challenge the rules promulgated by the Fund to implement the restructuring program, rather than the manner in which these regulations were applied to him personally." (Grievance Committee Decision, p. 17.) Accordingly, the Committee concluded that it did not have jurisdiction over Applicant's complaint, as the Grievance Committee's jurisdiction is limited to claims that an individual decision is not consistent with governing regulations.[13] *(Id.,* pp. 20- 23.)

46. On August 11, 2009, Mr. Faulkner-MacDonagh, filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

[13] GAO No. 31, Rev. 4 (October 1, 2008), Section 4.01, limits the Grievance Committee's jurisdiction to "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." Section 4.03 expressly excludes from the Committee's jurisdiction "any challenge to (i) a decision of the Executive Board; (ii) staff regulations as approved by the Managing Director; or (iii) a decision arising under the Staff Retirement Plan that is within the competence of the Administration or Pension Committees of the Plan." *See generally Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 17; *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 20 (distinguishing the jurisdiction of the Grievance Committee from that of the Administrative Tribunal).

1. The Fund's decision to deny Applicant's request for voluntary separation pursuant to the 2008 downsizing exercise was erroneous, discriminatory, and illegal.

2. The Fund's decision-making in Applicant's case, and in the downsizing exercise generally, was not consistent with its stated intent to base the refusal of volunteers upon either budgetary constraints or the business needs of the institution.

3. The regulatory decision to apply additional criteria only to staff members occupying positions in Grades A9-A15, while categorically accepting the requests of all Grade A1-A8 and B-level volunteers, was inconsistent with the Fund's own rules and generally recognized principles of international administrative law. Neither budgetary constraints, business needs, nor relative competency provide a rational basis for treating Applicant, as a Grade A9-A15 staff member, differently from staff occupying positions in the Grade A1-A8 and B-level ranges.

4. The Fund discriminated and erroneously assessed Applicant's request for voluntary separation by failing to assess properly his MAR score vis-à-vis others in his grade range. A significant number of volunteers in the A11-A15 macroeconomist fungible group with higher—or similar—MARs to Applicant's were accepted under the downsizing. There was no rational basis for denying Applicant's request.

5. The Institutional Panel made factual and legal errors in not recommending that Applicant's request for voluntary separation be granted based on relative competency. To meet its business needs, the Fund was required to conduct an individual analysis of Applicant's performance and apply his MAR correctly in deciding into which of the three groups of relative competency he was to be placed.

6. The Deputy Director of Applicant's department stated in a department meeting, and individually to Applicant, that all requests from department staff for separation pursuant to the downsizing exercise would be granted.

7. The Fund's budgetary approach to the downsizing exercise was illegal.

8. The Fund's Grievance Committee erred in dismissing Applicant's Grievance on the ground that it lacked subject matter jurisdiction over his complaint.

9. The Tribunal has jurisdiction *ratione temporis* to review Applicant's claims. Applicant is challenging both the individual decision in his case and the policy on which it is based. The Application was timely filed with the Tribunal following exhaustion of available channels of administrative review.

10. Applicant seeks as relief:

    a. quashing of the Grievance Committee's decision to dismiss Applicant's Grievance for lack of subject matter jurisdiction;

b. "that the Applicant's claims be heard";

c. rescission of the decision denying Applicant's request for separation under the downsizing exercise;

d. monetary relief in the sum that Applicant would have received had he separated effective September 5, 2008, under the terms of the downsizing program, plus tax allowances as applicable;

e. moral and punitive damages in the amounts of six months salary each; and

f. legal costs incurred for representation in the Administrative Tribunal and in the exhaustion of channels of administrative review.

Respondent's principal contentions

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

1. The Tribunal lacks jurisdiction *ratione temporis* over the Application because there were no channels of administrative review applicable to Applicant's claims, and, accordingly, Article VI of the Statute required that the Application be filed within three months of the decision refusing Mr. Faulkner-MacDonagh's request for separation under the downsizing program.

2. The Fund's right of refusal was properly exercised in the case of Applicant, consistent with the framework established for the 2008 downsizing exercise and applicable legal principles.

3. The Fund did not abuse its discretion in formulating the framework for exercising the right of refusal, which was based on appropriate institutional considerations. The paramount objective of the downsizing exercise, and the attendant use of the restructuring budget, was to accomplish the refocusing of the Fund, not simply to accept the maximum number of volunteers.

4. Applying the right of refusal only to Grade A9-A15 staff was a reasonable exercise of the Fund's discretionary authority. The approach chosen by management was reasonable, fair, and related to the goals of the downsizing.

5. The refusal of Applicant's request for separation under the downsizing program was a direct consequence of the operation of the framework established for refusal of volunteers, as Applicant's MARs ranking placed him in the category of Grade A11-A15 macroeconomists whose requests were automatically declined.

6. A simple comparison of MARs scores among volunteers was not relevant to, or dispositive of, the issue of acceptance or refusal of a request for separation under the downsizing framework.

7. Neither his department nor the Institutional Panel determined that Applicant should be placed in the "Assessment Group," and he did not avail himself of the opportunity to present views to the Institutional Panel as to why his 3-year MARs average did not reflect his relative competency.

8. Applicant's assertion that, in making his decision to separate from the Fund, he relied on statements allegedly made by the Deputy Director of his department as to the availability to him of the separation benefits of the downsizing program is not credible and is contradicted by Applicant's actions.

9. The budgetary treatment of the restructuring exercise was proper. Although the restructuring budget was adopted in order to fund the cost of staff separations in the downsizing, its primary objective was to accomplish the restructuring strategy rather than to accept the maximum number of volunteers as a goal in itself.

Consideration of the Issues of the Case

49. Mr. Faulkner-MacDonagh's Application raises the following principal issues for the consideration of the Administrative Tribunal: (1) Was the Application timely filed with the Tribunal following exhaustion of available channels of administrative review? (2) Did the Fund abuse its discretion in refusing Applicant's request for voluntary separation pursuant to the 2008 downsizing exercise? Did the decision violate the Fund's internal law or any general principle of international administrative law? (3) Did the Fund discriminate impermissibly among categories of staff by permitting all volunteers who occupied positions in the A1-A8 and B-level grade ranges to separate under the beneficial terms of the downsizing exercise, while staff members who held positions in the A9-A15 range were subject to the exercise of the right of refusal? (4) In exercising its right of refusal under the downsizing, did the Fund act arbitrarily or in violation of fair procedures in differentiating among Grade A11-A15 fungible macroeconomist volunteers? (5) Did the Fund err in assessing Applicant's relative competency vis-à-vis other volunteers in his large fungible group, based upon his Merit-to-Allocation Ratios (MARs)? (6) Did the Fund impermissibly mislead Applicant as to the prospects that his request for separation would be granted? (7) Did the Fund's budgetary decisions relating to the financing of the downsizing exercise improperly limit the total number of staff who were able to separate under its terms, substantially affecting the outcome of Applicant's request?

Admissibility

Was the Application timely filed with the Tribunal following exhaustion of available channels of administrative review?

50. The Administrative Tribunal must consider as a threshold issue whether, as Respondent maintains, the Tribunal lacks jurisdiction *ratione temporis* over the Application on the ground that there are no channels of administrative review applicable to Applicant's claims, and, therefore, in accordance with Article VI of the Statute, the Application should have been filed within three months of the decision refusing Applicant's request for separation under the downsizing exercise.

51. Article VI of the Tribunal's Statute provides in pertinent part:

"***ARTICLE VI***

> 1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.
>
> 2. An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.
>
> 3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.
>
> . . ."

52. Article VI must be read in conjunction with the requirement of Article V, which provides that "[w]hen 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." (Article V, Section 1.) Article VI, Section 1, confirms that the Statute contemplates that channels of administrative review are typically applicable only in cases challenging individual and not regulatory decisions. It also recognizes that there may be individual decisions for which channels of administrative review have not been provided.

53. A singular feature of the IMFAT Statute is that it expressly confers upon the Tribunal subject matter jurisdiction over challenges to both "individual" and "regulatory"[14] decisions of the Fund. In cases in which the challenge to an individual decision is closely related to a challenge to a regulatory decision, the question may arise, as it does in the instant case, as to the relationship between the admissibility requirements of Article V (exhaustion of administrative review) and Article VI (statute of limitations) of the Statute.

54. As the Tribunal has observed on a number of occasions, the Grievance Committee's jurisdiction does not extend to challenges to regulatory decisions. The jurisdiction of the Fund's

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[14] Pursuant to Article II, Section 2.b. of the Tribunal's Statute, "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."

Grievance Committee, in contrast to that of the Administrative Tribunal, is limited to complaints alleging that a staff member has been "adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service," and specifically excludes "challenge[s] to . . . staff regulations as approved by the Managing Director." *See* GAO No. 31, Rev. 4, Section 4; *Mr. S. Ding, Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2009-1 (March 17, 2009), note 6; *Mr. "R", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-1 (March 5, 2002), para. 17 (distinguishing jurisdiction of Grievance Committee from that of Administrative Tribunal).

55. Section 2 of Article VI governs a case in which an applicant challenges both a regulatory decision and an individual decision taken on the basis of the regulatory decision: "An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision."

56. It is not disputed that Applicant made an individual request for voluntary separation pursuant to the downsizing exercise and that his request was individually denied. Applicant contends that in taking that individual decision the Fund failed to assess properly his relative competency vis-à-vis other volunteers. From Respondent's perspective, the challenge is to a decision that necessarily flowed from the applicable rules. Applicant questions the validity of the rules and whether they were properly applied in the circumstances of his case. While Applicant additionally challenges "regulatory" decisions governing the operation of the downsizing exercise, in particular, the exercise of the Fund's right of refusal, that fact does not detract from the fact that, equally, he challenges the "individual" decision to deny his individual request to separate under the beneficial terms of the program. The case of Mr. Faulkner-MacDonagh may be distinguished from the cases of *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications),* IMFAT Judgment No. 2005-3 (December 6, 2005) and *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007), in which the applicants challenged "regulatory" decisions directly within three months of their announcement or effective date, and the Tribunal noted that there are no channels of review to exhaust in such cases. *Baker*, para. 13; *Daseking-Frank*, para. 39.

57. Accordingly, the following question arises. Was Mr. Faulkner-MacDonagh required to have brought his complaint directly to the Administrative Tribunal within three months of the refusal of his request for voluntary separation pursuant to the downsizing exercise?

58. Assuming, as Respondent contends, that the case of Mr. Faulkner-MacDonagh presents the issue of how the Tribunal shall apply its statute of limitations when an applicant challenges an individual decision solely on the basis that an underlying regulatory decision is invalid, the Tribunal's jurisprudence is instructive. In *Mr. "R",* the Staff Benefits Division of the Human Resources Department (HRD) had advised the applicant that, as the denial of his requests for an overseas assignment allowance and an increased housing allowance was a decision of Fund Management, Mr. "R" could proceed directly to the Grievance Committee. The Grievance Committee determined that it did not have jurisdiction to consider the Grievance because, in its

view, the complaint represented a challenge to a Fund policy rather than a challenge to the consistency of its application in an individual case. *Mr. "R"*, paras. 16-17.

59. When the case reached the Tribunal, it observed that ". . . in this case the 'individual decision' and 'regulatory decision' are essentially indistinguishable analytically, inasmuch as the decision taken not to grant Mr. "R" an exception to the policy may be said to be tantamount to upholding the validity of the policy itself." *Id.*, para. 25. At the same time, the Tribunal found that it was "clear that an 'individual decision' was taken . . . when management declined Applicant's request for exceptions to the benefits policy," *id.*, para. 25, and noted that if the case were solely a challenge to a "regulatory decision," it would be subject to dismissal for being out of time whereas "if a 'regulatory decision' is challenged in the context of an 'individual decision,' its timeliness is determined by the date that administrative review of the individual decision has been exhausted," pursuant to Article VI, para. 2," *id.*, note 10. The Fund, in the case of *Mr. "R"*, did not challenge the admissibility of the applicant's claim in the Tribunal.

60. In the later case of *Ms. "G"*, *Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), in which the applicant sought exception in her case to a rule denying her expatriate benefits based upon her visa status, the applicant initially filed her application with the Administrative Tribunal within three months of the individual decision denying her request for exception to the policy. She later filed a Grievance, to preserve her right to review in that forum, in the event that exhaustion of that procedure were required. The Fund in that case took the position in the Grievance Committee that the Committee did not have subject matter jurisdiction, and Ms. "G"'s Grievance was dismissed by the Grievance Committee on the same basis as was that of Mr. "R". *Ms. "G"*, paras. 18-20 and note 8.

61. The Tribunal's jurisprudence favors recourse to the Grievance Committee where that avenue is available. *See Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42. It is not disputed that Applicant made an individual request for voluntary separation pursuant to the downsizing exercise and that his request was individually denied. Applicant contends that in taking that individual decision the Fund failed to assess properly his relative competency vis-à-vis other volunteers. From Respondent's perspective, the challenge is to a decision that necessarily flowed from the applicable rules. Applicant questions the validity of the rules and whether they were properly applied in the circumstances of his case.

62. In deciding questions of admissibility, this Tribunal on a number of occasions has taken account of the effect of the Fund's communications to potential applicants in assessing actions in seeking further review. *See Mr. "O", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-1 (February 15, 2006), para. 66; *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (November 29, 2006), para. 107; *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application),* IMFAT Judgment No. 2001-1 (March 30, 2001), para. 126 ("The vacillation on the part of Respondent as to whether or not Ms. "D" was or was not required to follow the administrative review procedures of GAO No. 31 may also suggest flexibility in the application of those review requirements"). Applicant cites a communication from the Fund to Mr. Billmeier, in which the representative of the Director of Human Resources

stated, in response to his inquiry as to recourse procedures governing the refusal of his request for separation under the downsizing:

> ". . . you have access to the same dispute resolution mechanism as for all formal grievances, as set forth in GAO No. 31. . . . If you do want to pursue a formal challenge to the decision not to accept your application for voluntary separation, ... your challenge should go directly to the Grievance Committee, within six months of the date you were informed of the decision."

63. In deciding whether applicants have met the admissibility requirements of Articles V and VI of the Statute, the Tribunal additionally has looked to such factors as whether the applicant's conduct evidenced a "casual disregard of legal requirements." *Ms. "M" and Dr. "M",* paras. 106, 111; *see also Estate of Mr. "D",* para. 104. Applicant's timely filing with the Grievance Committee may be said to have evidenced a good faith effort at seeking review, especially in light of Applicant's theory of the case as stated in the Grievance, a theory he maintains in his contentions before the Administrative Tribunal. The Tribunal has held that ". . . 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." *Estate of Mr. "D"*, para. 102; *Mr. "O"*, para. 48.

64. While staff members ordinarily are held to knowledge of the Fund's review procedures, *see Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application),* IMFAT Judgment No. 2006-5 (November 27, 2006), para. 41 and note 12, the Fund may also have been expected to have envisioned how its dispute resolution system was to respond to the 99 denials of requests under the downsizing. Instead, the Fund's communications on the subject may have led Applicant to pursue a channel of recourse that Respondent now states was debarred. The communications suggest that Respondent itself, at the time, regarded the Grievance Committee as the appropriate venue in which to bring a complaint as to refusal of a request for voluntary separation under the downsizing. *Cf. Ms. "M" and Dr. "M"*, para. 111 (finding application admissible where "availability in this case of internal recourse procedures appeared to be uncertain both to the Fund and to the Applicants").

65. In the view of the Tribunal, the instant case is one in which the Applicant is challenging the application of a regulatory decision to his particular circumstances. Accordingly, it was understandably raised in the Grievance Committee. The Application to this Tribunal was submitted within three months of the Grievance Committee's decision dismissing the Grievance for lack of subject matter jurisdiction. The Application accordingly is admissible.

> <u>The issue of the Grievance Committee's dismissal of Applicant's Grievance for lack of subject matter jurisdiction</u>

66. Applicant has raised as a separate challenge in his Application before the Tribunal that the Grievance Committee improperly concluded that it did not have jurisdiction over his Grievance. Among the remedies that Mr. Faulkner-MacDonagh seeks is that the Grievance Committee's decision denying jurisdiction be quashed.

67. This Tribunal has long held that it does not serve as an appellate body vis-à-vis the Fund's Grievance Committee; the Committee's decisions do not constitute "administrative acts" within the meaning of Article II of the Statute. *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, Judgment No. 1996-1 (April 2, 1996), para. 17. 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", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), paras. 125-131 (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); *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), paras. 170-176 (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", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 168.

68. 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, while the Tribunal decides for itself 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",* para. 85; *Ms. "AA" ,* para. 30.

69. Consistent with its relevant jurisprudence, the Tribunal declines to pass on whether the Grievance Committee erred in dismissing Mr. Faulkner-MacDonagh's Grievance for lack of subject matter jurisdiction.

70. Having concluded that the Application is admissible, the Tribunal accordingly turns to the merits of the case.

Merits

Did the Fund abuse its discretion in refusing Applicant's request for voluntary separation pursuant to the 2008 downsizing exercise? Did the decision violate the Fund's internal law or any general principle of international administrative law?

71. The principal question that the Tribunal has been called upon to decide in this case is whether, when choosing to leave the Fund in 2008, Applicant was improperly denied enhanced separation benefits under the terms of a program designed by Respondent to encourage the voluntary separation of staff members in order to trim and re-shape the Fund's workforce for the purpose of reducing expenditures and refocusing the mission of the organization. The Tribunal notes that Applicant has not been required to leave the Fund. Nor has he been denied the opportunity to do so. What is at issue in this case is the value of the separation package that Applicant would have received had his request for voluntary separation been accepted under the

terms of the downsizing exercise and his allegation that he was unfairly denied this benefit. Applicant challenges elements of the regulations governing the downsizing and the decision to deny his individual request. While some 492 staff members did separate under the favorable terms of the downsizing program, Mr. Faulkner-MacDonagh and 98 other volunteers were denied the benefit of the incentives to voluntary separation when the Fund exercised the right of refusal it had expressly reserved in the event of the over-subscription of the program.

72. Applicant does not dispute that the contested decision to refuse his request under the terms of the downsizing was a discretionary one on the part of the Fund's Management. Like other discretionary decisions, it is only subject to review under the standard consistently applied by this and other international administrative tribunals. Accordingly, the Tribunal may ask whether the individual decision was "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures." Commentary on the Statute,[15] p. 19.[16] *See also Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-1 (January 24, 2007), paras. 46-47 (Tribunal's deference to discretionary authority is at its height in reviewing regulatory decisions, especially policy decisions taken by the Executive Board).[17]

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[15] Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992), reprinted in 2009 to incorporate the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009). Page references are to the consolidated Commentary (2009 edition).

[16] As to review of individual decisions, the Commentary states:

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

Commentary on the Statute, p. 19.

[17] As to review of regulatory decisions, the Commentary states:

> "As applied to the review of regulatory decisions, the case law of administrative tribunals in general demonstrates that although there exists a competence to review regulatory decisions, the scope of that review is quite narrow. There are broad and well-recognized principles protecting the exercise of authority by the decision-making organs of an institution from interference by a judicial body. The Fund tribunal would have to respect those principles in reviewing the legality of regulatory decisions."

Commentary on the Statute, p. 19.

73. Applicant alleges that the Fund failed to follow the rules it initially set out in undertaking the downsizing, that in taking the decision to exercise the right of refusal only as to Grade A9-A15 volunteers it unfairly disadvantaged a particular category of staff members, and that it improperly assessed Applicant's "relative competency" in relation to other volunteers in the category of Grade A11-A15 fungible macroeconomists. In Applicant's view, these decisions were not consistent with the statement in Staff Bulletin No. 08/03, p. 2, that ". . . it may be necessary to refuse volunteers because of either budgetary constraints or the business needs of the institution. However, to the maximum extent possible, the Fund will accept all volunteers."

74. Respondent counters that in adopting Staff Bulletin No. 08/03, it did not legally obligate itself to accept the "maximum number of volunteers," and that it properly took account of institutional needs in designing the downsizing program. In the view of the Fund, the refusal of Applicant's request reflected the necessary outcome of the proper application of sound regulations, there was a rational basis for applying the right of refusal only to Grade A9-A15 staff members, and the Fund's method for differentiating among Grade A11-A15 macroeconomists in respect of the exercise of the right of refusal was fairly drawn and properly applied in Applicant's case.

> Did the Fund discriminate impermissibly among categories of staff by permitting all volunteers who occupied positions in the A1-A8 and B-level grade ranges to separate under the beneficial terms of the downsizing exercise, while staff members who held positions in the A9-A15 range were subject to the exercise of the right of refusal?

75. Applicant seeks at the outset to impugn the decision of the Fund to accept the requests of all A1-A8 and B-level volunteers, while exercising its right of refusal only as to staff members occupying positions in the A9-A15 grade ranges. Applicant asserts that this central element of the regulations governing the exercise of the right of refusal under the downsizing program was inconsistent with the Fund's own rules and generally recognized principles of international administrative law. Applicant's allegation is essentially one of discrimination.

76. The IMFAT has articulated its standard for assessing classification schemes against a general principle of equal treatment[18] by means of a "rational nexus" test:

> "Respondent's proffered reasons for the distinction in benefits . . . must be supported by evidence. In other words, the Tribunal may ask whether the decision '. . . could . . . have been taken on the basis of facts accurately gathered and properly weighed.' . . . Second, the Tribunal must find a '. . . rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.' . . . Thus, the Tribunal may

[18] In examining contentions of discrimination, this Tribunal has distinguished between a general principle of equality of treatment and a principle of nondiscrimination 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 (religious discrimination); *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2006-6 (November 29, 2006), para. 124 (child born out of wedlock).

> 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", para. 47. Accordingly, the Tribunal in *Mr. "R"* proceeded to consider whether the reasons proffered by the Fund for the differential treatment of overseas Office Directors and Resident Representatives, such as differences in job responsibilities, recruitment needs and security concerns, were "supported by evidence and [were] rationally related to the purposes of the employment benefits at issue." *Mr. "R"*, para. 53.

77. Similarly in *Ms. "G",* in considering whether the method of allocating expatriate benefits discriminated impermissibly among categories of Fund staff, the Tribunal examined whether there was a "rational nexus" between the "goals of the expatriate benefits policy" and the "method for allocating these benefits":

> "The Tribunal in the case before it must assess whether there is a rational nexus between the goals of the expatriate benefits policy—i.e. to compensate staff for costs associated with maintaining and renewing ties with their home countries (through home leave and education allowances), to facilitate their repatriation following service with the Fund, and to recruit and retain a diverse staff sustaining the international mission of the Fund—and its method for allocating these benefits. It is noted that the Tribunal's reasoning in *Mr. "R"* suggests that a 'rational nexus' does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and indeed that the categories employed may rest upon generalizations."

Ms. "G", para. 79.

78. In addition, the Tribunal has recognized that the exercise of the Fund's policy-making discretion extends to making choices among reasonable alternatives.

> "In the view of the Tribunal, the Fund's choice of a visa criterion for allocation of expatriate benefits is reasonable. The procedure of selecting it was not arbitrary but deliberate. The substance of the Fund's choice is rational and defensible. So, perhaps even more so, was its earlier selection of the nationality criterion. But if in the exercise of its undoubted legislative authority and managerial discretion the Executive Board chooses a visa policy in 1985, reconsiders and reaffirms that policy in 1994, and refines that policy as of 2002, these decisions in the exercise of its managerial authority cannot be overridden by this Tribunal when they are rationally related to the mission and objectives of the Fund, in particular as regards expatriate benefits."

Ms. "G", para. 80; *see also Daseking-Frank et al.,* para. 101. In *Ms. "G"*, the Tribunal described the "rational nexus" as follows: "It is 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." The Tribunal observed: "This may not necessarily be true in every case, but, in the large, the LPR visa status holder seeks a broadening of options to permit continued residence in the United States, not return to the country of his nationality." *Ms. "G"*, para. 80.

79. In the instant case, Respondent maintains that the approach chosen by management was reasonable, fair, and related to the goals of the downsizing. In its view, applying the right of refusal to only one group of staff was a reasonable exercise of the Fund's discretionary authority because targeting staffing cuts differentially among three grade groups (A1-A8, A9-A15, and B1-B5) was to align the Fund's structure with "industry standard," as the Fund was "top-heavy" at the B-levels and, at the same time, it had too many support staff relative to other institutions. In order to decide which volunteers to accept or refuse, the Fund designed a process intended to take account of the overall objective of refocusing and modernizing the Fund.

80. In contrast, Applicant objects to the categorical acceptance of the A1-A8 and B-level volunteers as follows: "the Fund cannot plausibly maintain that *all* of the rejected volunteers in the A9-A15 category were more essential to the business needs of the Fund than were *all* of the volunteers in the B level group (all of whom were accepted)." (Emphasis in original.) Applicant additionally maintains that had the Fund applied a "reverse merit" criteria across all grade levels, it would have had greater reason to deny some of the applications from the groups that received categorical acceptances. In particular, he asserts that many of the rejected A9-A15 level staff were less valuable to the Fund than B-level staff who had acquired specialized knowledge that was difficult to replace.

81. The Tribunal's jurisprudence, however, embraces the position that the existence of a rational nexus between the goals of a policy and the method for allocating its benefits "does not require that there be a perfect fit between the objectives of the policy and the classification scheme established, and . . . may rest upon generalizations." *Daseking-Frank et al.,* para. 52, quoting *Ms. "G,"* para. 79. It may be that some B-level or A1-A8 volunteers, all of whose requests were accepted, were less "competent" than some volunteers at the A9-A15 grade levels whose requests were refused. That fact, if it is true, does not in itself invalidate the exercise. The Fund has advanced tenable reasons why it was important to the institution to retain Grade A9-A15 staff at a greater rate than staff members in other job groups and, accordingly, has established a rational nexus between the objective of the policy to offer incentives to voluntary separation and the allocation of those benefits differentially across different staff groups.[19]

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[19] The Fund currently states on its intranet:

> "Grade & Salary Structure
>
> Positions in the Fund are evaluated and grouped into19 job grades so that positions with broadly similar job content are placed in the same grade, and positions in each successively higher grade have progressively greater duties and

(continued)

82. Applicant additionally contends that the Fund should have notified staff before the close of the period for making requests for voluntary separation that a smaller percentage of Grade A9-A15 staff would be accepted for separation under the downsizing. In Applicant's words, the Fund ". . . knew what it did before the period closed and what it was then planning to do after the period closed—change the rules, with the result that some staff, like the Applicant, would apply for voluntary separation without knowing what criteria would be applied to them before they applied for it."

83. It is recalled, however, that in reserving its right to refuse volunteers in Staff Bulletin No. 08/03, the Fund envisaged that the right of refusal would be exercised in relation to categories of staff:

> "In the event that management determines that the right of refusal must be exercised, the factors that will be taken into account will include: (a) whether the volunteers are within a fungible category of staff that is subject to reductions in force, and (b) if so, the extent to which there may be more volunteers in that category than is needed to achieve the reductions called for by the refocusing strategy."

(Staff Bulletin No. 08/03, p. 3.) It was made clear from the start of the downsizing exercise that once the voluntary window closed the "overall number and composition" of volunteers would be assessed to determine whether it would be necessary to exercise a right of refusal "because of budgetary constraints or the business needs of the Fund." (*Id.*) The exercise of the right of refusal was thereby linked to management's "objective . . . to achieve staff reductions in a manner that will support the ongoing strategy to refocus and modernize the Fund." (*Id.*, p. 1.) Thus, the Fund did place staff on notice that the disposition of applications would be influenced by the category of staff in which an applicant found himself and the number of volunteers in that category.

84. Respondent has explained in its pleadings before the Tribunal and in supporting documents that its reason for treating staff within the A9-A15 grade ranges differently from other staff was directly related to its refocusing strategy and its effort to streamline its operations. Grade A9-A15 staff, especially fungible macroeconomists, form the core of its workforce while the B-level was over-staffed. In the view of the Tribunal, it was a rational decision, supported by evidence, for the Fund to decide that relatively more staff members from the A9-A15 category were to be retained in order to carry forward the mission of the organization following its

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> responsibilities. The 19 grades are identified as Grades A1-A15 and Grades B1-B5. Grades A1-A8 comprise office assistance and other support staff positions; Grades A9-A15 are professional positions; and Grades B1-B5 cover more senior staff positions with managerial responsibilities. The grade structure is the foundation for the salary structure."

http://www-intapps.imf.org/HRW/CMT/t1/pageView.cfm?menu=872&page=872. Posted on 4/21/09.

downsizing. At the same time, a disproportionate number of staff members in this category opted to seek the benefit of voluntary separation under the downsizing. Confronted with this combination of circumstances, the Fund decided to accept all volunteers in the Grade A1-A8 and B-level ranges but to accept only some of the volunteers in Applicant's grade range, applying additional criteria to differentiate among candidates in that group. Applicant's challenge to those additional criteria is considered in the section below.

> In exercising its right of refusal under the downsizing, did the Fund act arbitrarily or in violation of fair procedures in differentiating among Grade A11-A15 fungible macroeconomist volunteers?

85. Applicant contends that the Fund's method for differentiating among volunteers in the Grade A11-A15 fungible macroeconomist group was arbitrary or inconsistent with fair procedures. Respondent replies:

> "With respect to A11-A15 macroeconomists (the largest fungible group), given the need to ensure comparable and consistent treatment across staff in the same career stream across multiple departments, a more detailed set of procedures was adopted, drawing on the framework that would have been invoked for mandatory separations and with the same objective in mind—i.e., to retain the relatively most competent staff among any given fungible group. For this group, the Staff Bulletin explained that all macroeconomist volunteers had been ranked within their departments according to their 3-year MAR averages, thereby giving each volunteer a MARs percentile. A uniform cut-off would then be established across all relevant departments (the 'MARs percentile cut-off'), such that the number of staff above the MARs percentile cut-off corresponded to the number of staff with respect to whom the right of refusal needed to be exercised within the macroeconomist group."

86. The Institutional Panel was charged with ensuring that "decisions on separations among fungible staff are made in a reasonable, consistent and non-discriminatory fashion and involve assessments of competency that are made on an institution-wide basis." (Staff Bulletin No. 08/03, Annex I, p. 1.) The question accordingly arises whether the Fund's method for distinguishing among Grade A11-A15 macroeconomist volunteers was consistent with its stated objectives (a) to "retain the relatively most competent staff among any given fungible group," and (b) to "ensure comparable and consistent treatment across staff in the same career stream across multiple departments." In particular, was the use of the MARs percentile cut-off to automatically refuse volunteers such as Applicant arbitrary or capricious?

87. It is recalled that the MARs percentile cut-offs were set as follows:

> "12. Taking into account the number and profile of all volunteers, a uniform MARs cut-off percentile will be established across all relevant departments (the 'MARs cut-off'). This cut-off

> will be set at a level such that the number of volunteers with MARs averages above the cut-off percentile will be equal to the number of A11-A15 macroeconomists for whom the right of refusal will need to be exercised (the 'MARs cut-off group')."

(Staff Bulletin No. 08/03, Supplement 2.)

88. It may be observed that, to forestall arbitrariness at the margins, a mechanism was established whereby a department or individual could bring evidence to the Institutional Panel designed to show that the volunteer's MARs percentile was not reflective of his "relative competency":

> "13. An Institutional Panel Assessment Group will be established within the Macroeconomist Group and will include the following:
>
> (a) volunteers whose MARs averages place them in the bottom 10-20 percent of the MARs cut-off group, and a group of staff equal in number to 10-20 percent of the MARs cut-off group whose MARs averages are the highest among those below the MARs cut off (the 'Assessment Band'). The precise ranges will take into account the distribution among the MARs (including the 'bunching' among MARs).
>
> (b) all volunteers within the Macroeconomist Group who do not have a MARs average; and
>
> (c) any volunteers above the Assessment Band whom the relevant Department Director or the Institutional Panel (in consultation with the Director and taking into account the views expressed by staff under paragraph 22 below) represents should be included in the Institutional Panel Assessment Group on the grounds that their MARs percentile does not reflect their relative competence. Such representations by Department Directors should be made on an exceptional basis and must be supported by a detailed written explanation."

The Tribunal finds the foregoing procedure, which allowed volunteers to bring to the Panel's attention circumstances that merited further consideration, adequately met any need for staff claims that the application of MARs percentiles in their particular cases required adjustment.

> Did the Fund err in assessing Applicant's relative competency vis-à-vis other volunteers in his large fungible group, based upon his Merit-to-Allocation Ratios (MARs)?

89. Applicant asserts that the Institutional Panel made factual and legal errors in not recommending that his request for voluntary separation be granted. Accordingly, the following questions arise. In respect of Applicant's case, did the Institutional Panel act consistently with its

mandate pursuant to the governing regulations? Did the Fund's regulations, or any general principle of international administrative law, require that the Fund make an individualized assessment (beyond the application of the MARs cut-off) of Applicant's "relative competency" vis-à-vis the "relative competency" of all other volunteers, or all other volunteers within his fungible group? Did the use of the 3-year MARs average and percentile provide a reasonable basis for assessing relative competency for purposes of the Fund's exercise of its right of refusal?

90. In Applicant's view,

> "[U]nder the standard in Staff Bulletin 08/03 . . . the Fund could only deny an application for voluntary separation 'because of either budgetary constraints or the business needs of the institution.' To meet the 'business needs' of the Fund required the Fund to conduct an individual analysis of the performance of the Applicant, applying his MAR correctly, in deciding into which of the three groups of 'relative competency' the Applicant fell under Staff Bulletin 08/03, Supplement 2. . . . Thus, the Applicant's claim is that the denial of his application was erroneous in that it was not based on the 'business needs' of the Fund, which was stated to be fulfilled by retaining the better performing staff, i.e., those with the higher MARs, thereby constituting an unlawful decision . . . ."

Applicant maintains that ". . . staff members were not required to present their individual submissions to the Panel in order to have their request for voluntary separation granted, or even properly considered by the Panel." As to Applicant, asserts the Fund: "As neither he nor his department made any submission to the IP, his case was not assessed by the IP and he was included in the group of volunteers recommended for refusal, in accordance with the framework set forth in the Staff Bulletin."

91. Applicant additionally asserts that in making the final determination of which requests to refuse, the Institutional Panel, in cooperation with Department Directors, was required to consider a specified list of "additional criteria." The applicable regulations are clear, however, that the "additional criteria" referenced at Paragraph 17 of Staff Bulletin No. 08/03, Supplement 2, related only to the Panel's responsibilities "when making the assessments under paragraph 16 above," i.e., when assessing those volunteers who had been placed in the "Institutional Panel Assessment Group." There was no requirement that the IP examine the "additional criteria" in deciding which volunteers were to be individually assessed. Rather, that decision was governed by paragraph 13 c., which provided:

> "(c) any volunteers above the Assessment Band whom the relevant Department Director or the Institutional Panel (in consultation with the Director and taking into account the views expressed by staff under paragraph 22 below) represents should be included in the Institutional Panel Assessment Group on the grounds that their MARs percentile does not reflect their relative competence. Such representations by Department Directors should be made on an

> exceptional basis and must be supported by a detailed written explanation."

Applicant does not contend, and there is no evidence, that there was any cause for the Panel to have placed him in the Assessment Group. He did not, in any event, bring to the Panel's attention any such cause.

92. It is not clear whether Applicant contends that the Institutional Panel had scope under its governing regulations to make an individualized assessment of Applicant's relative competency or whether he contends that it should have had such scope. The initial Staff Bulletin No. 08/03 stated:

> "To the extent that exercising the right of refusal requires an assessment of the relative competency of individual staff (so as to enable the Fund to retain the most qualified staff), the Institutional Panel, whose composition and terms of reference are described in Annex I, will meet with relevant Department Directors to make recommendations to Management as to which volunteers should be refused."

(Staff Bulletin No. 08/03, p. 3.)

93. While this provision could have been interpreted to suggest that an individualized assessment (as opposed to automatic cut-off) would have been applied to all volunteers, the significant over-subscription of Grade A11-A15 macroeconomists relative to their targeted reduction provided a reasonable basis for the Fund to create a method for differentiating among these volunteers that relied, in part, upon automatic cut-offs. Because the Fund has discretion to amend non-fundamental conditions of employment, *see Daseking-Frank et al.*, paras. 54-60, the fact that Supplement 2 may have added additional requirements governing the Institutional Panel's role with respect to the exercise of the right of refusal does not signify that it contravened the mandate of the initial Staff Bulletin No. 08/03, which required that the decisions under the downsizing be made in accordance with business needs and budgetary constraints.

94. Respondent additionally explains that the fact that some accepted volunteers may have had similar or higher MARs averages than Applicant does not demonstrate any error in the application of the refusal criteria: ". . . a pure comparison of MARs scores between different volunteers was not relevant to, or dispositive of, the issue of acceptance/refusal." "In both the mandatory and voluntary frameworks, this assessment [of relative competency] would initially be made at the departmental level. However, for job groups found in multiple departments, specific features were introduced in order to account for inter-departmental discrepancies in their use of MARs and, more generally, in the relative strength of staff in different departments. These features were intended to balance administrative efficiency with the need to ensure internal equity both within and across departments." Accordingly, states the Fund, the "MARs averages . . . that fell above or below the uniform percentile cut-off in different departments were not identical."

95. The Tribunal observes that the record indicates that Mr. Faulkner-MacDonagh was notified that his MARs average placed him in the 30th percentile of macroeconomists in his department.[20] The Fund's statement in its pleadings before the Tribunal that Applicant's MARs average "reflected a high 3-year average MARs relative to those in his peer group in [his department]," would seem to be at odds with his ranking in the 30th percentile. The Tribunal, nonetheless, accepts the documentary evidence of the case that this percentile placed Applicant above the cut-off for automatic refusal under the downsizing exercise.

96. The redacted Annex III of the Report of the Institutional Panel is titled "Volunteers Not Individually Assessed by the Institutional Panel (Automatically Accepted/Refused)." The initial section on "Macroeconomists (A11-A15)" includes the following introductory note: "In cases where staff made submissions to the Panel, the submissions were reviewed by the Panel. In one instance, a staff member was moved to the assessment band, in consultation with the department." The Annex additionally indicates that there were 26 automatic acceptances and 50 automatic refusals among the Grade A11-A15 macroeconomist group of volunteers. Applicant's name (along with department, job title and grade) is listed in the automatic refusal section of the document. An additional note emphasizes that the total number of A11-A15 economist volunteers who were not individually assessed by the Institutional Panel was 76.[21]

97. Accordingly, the documentary evidence of the case confirms that Mr. Faulkner-MacDonagh's request was not subject to any additional assessment by the Institutional Panel, but rather was automatically refused on the basis that his MARs percentile fell within the "automatic refusal group." At the same time, Applicant failed to raise with the IP any ground for consideration that the MARs formula used to assess the "relative competency" of A11-A15 fungible macroeconomists such as himself was not valid in his case. Nor does he put forth such argument, i.e., that his three-year MARs average did not reflect his relative competency, in his pleadings before the Tribunal. Nor, apparently, did Applicant alert the Human Resources Department that there might be any inaccuracy in respect to the calculation of his three-year MARs average, pursuant to Supplement 1 of Staff Bulletin No. 08/03, during the voluntary window.[22]

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

[21] Annex III indicates that in all job categories (including A11-A15 Macroeconomists), the total number of automatic acceptances was 72 and the total number of automatic refusals was 50, resulting in 122 volunteers not individually assessed by the Institutional Panel.

[22] Supplement 1 (March 21, 2008) of Staff Bulletin No. 08/03 advised staff as follows:

> "Great care has been taken to ensure that individual MARs calculations for staff have been performed in accordance with the methodology set out in Staff Bulletin 08/03. Staff are encouraged to carefully review the information they were provided concerning their three-year MARs averages. If you have any concerns about the calculation of your MARs average following this methodology, you should contact HRD through your Senior Personnel Manger no later than March 31, 2008."

98. In conclusion, the evidence shows that the Fund acted to refuse Applicant's request for separation under the beneficial terms of the downsizing by automatically applying the MARs cut-off as set out in Supplement 2 of the Staff Bulletin. In the Tribunal's view, it was not an abuse of discretion for the Fund to have applied MARs calculations as a Fund-wide indicator of relative competency to decide Applicant's request. It was not bound to give the Applicant more individualized consideration. Nevertheless, the Fund's communication to Applicant in refusing his request was cryptic and unrevealing. It would have been well for the Fund to have more fully explained the reason for refusal, as, for example, by stating that his MARs percentile placed him in the category for automatic refusal. Its failure to do so, however, is not ground for a complaint that the Tribunal can sustain.

Did the Fund impermissibly mislead Applicant as to the prospects that his request for separation would be granted?

99. Applicant additionally maintains that the Fund was estopped from refusing Applicant's request for voluntary separation under the downsizing because it misled him in believing that his request for separation would be granted. In particular, Applicant asserts that the Deputy Director of his department stated in a department meeting, and individually to Applicant, that all requests from department staff for separation pursuant to the downsizing exercise would be granted.

100. The Fund counters that Applicant's assertion that he relied on statements allegedly made by the Deputy Director of his department in making his decision to separate from the Fund is not credible, as such a statement would have been at odds with the clear reservation of the right of refusal set out in the Staff Bulletin.

101. It is clear that in an effort to avoid mandatory separations, encouragement was given to the staff to take advantage of the voluntary incentives, and many requests for separation were made near the close of the voluntary window. Accordingly, the question arises whether the Fund impermissibly misled Applicant as to the prospect that his request would be granted. Was the Fund estopped from exercising the right of refusal by statements made by the Managing Director or in Staff Bulletin No. 08/03 to rely on volunteers "to the maximum extent possible"?

102. Concerned that they might be asked to leave the Fund against their will in a potential "mandatory phase" of the 2008 downsizing, some staff members may have opted to seek employment opportunities outside of the Fund and thus to volunteer for separation under the downsizing. It is in the light of this perspective that Applicant's claim of impermissible misleading arises. While it is understandable that some staff members may have so acted, they did so in the knowledge that the Fund expressly reserved the right to refuse separation of staff members. Accordingly, there is no persuasive ground for a finding of estoppel in favor of the Applicant.

Did the Fund's budgetary decisions relating to the financing of the downsizing exercise improperly limit the total number of staff who were able to separate under its terms, substantially affecting the outcome of Applicant's request?

103. Finally, Applicant maintains that budgetary decisions of the Fund relating to the financing of the downsizing exercise improperly limited the total number of staff members who

were able to separate under the terms of the program, substantially affecting the outcome of Applicant's request. This contention is closely related to his assertion that the Fund had obligated itself to accept the maximum number of volunteers. In Applicant's view, the Fund implemented the restructuring budget in a manner that did not allow it to accept requests for voluntary separation under the downsizing exercise "to the maximum extent possible" (Staff Bulletin No. 08/03), thereby transgressing the rules governing the downsizing and improperly limiting the total number of staff who were able to separate under its terms, substantially affecting the outcome of his request. Respondent, for its part, maintains that there was nothing improper in the budgetary treatment of the downsizing.

104. In the Tribunal's view, the Fund, in the exercise of its managerial discretion, was entitled to decide which charges were to be allocated to the restructuring budget. The Tribunal accepts that, although the restructuring budget was approved in order to fund the cost of staff separations in the downsizing exercise, the preeminent objective of these budgetary resources was to accomplish the restructuring strategy. It was not, contrary to Applicant's argument, to accept the maximum number of volunteers as an end in itself. Accordingly, even if it were to turn out that resources remain in the restructuring budget at the conclusion of the exercise (which will not be until the end of FY 2011), it does not follow that the Applicant, or any other refused volunteer, has a legal right to require that the full amount of these resources be spent on additional acceptances of volunteers.

Decision

FOR THESE REASONS

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

The Application of Mr. Faulkner-MacDonagh is denied.

Stephen M. Schwebel, President

Nisuke Ando, Judge

Michel Gentot, Judge

_____
Stephen M. Schwebel, President

_____
Celia Goldman, Registrar

Washington, D.C.
February 9, 2010