ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2011-2

Ms. D. Pyne, Applicant v. International Monetary Fund, Respondent

Introduction

1. On November 14, 2011, the Administrative Tribunal of the International Monetary Fund, composed for this case[1] of Judge Catherine M. O'Regan, President, and Judges Michel Gentot and Andrés Rigo Sureda, met to adjudge the Application brought against the International Monetary Fund by Ms. Debra Pyne, a former staff member of the Fund.

2. The Application of Ms. Pyne raises three principal claims. First, Applicant contends that the Fund failed to meet its obligation under GAO No. 16, Rev. 6, Section 12.02, to assist her in securing an alternative position with the Fund following the abolition of her position as part of a reduction in force within her Department. Second, Applicant alleges that the Fund improperly failed to extend to her the same separation benefits option relating to access to a "Rule of Age 50" pension with a bridge to retiree medical benefits as was made available to staff members separating under the 2008 Fund-wide downsizing exercise. Finally, Applicant asserts that Fund Management abused its discretion in declining to accept the recommendation of the Grievance Committee that she be awarded 50 percent of legal fees and costs incurred in her representation before that Committee, in accordance with GAO No. 31, Rev. 4, Section 7.04.

3. Applicant seeks as relief monetary compensation based on a comparison between her current pension entitlement and the pension and other income that she purportedly could have attained had the Fund either reassigned her to another position under GAO No. 16, Section 12.02, or offered her the same retirement benefits options offered to staff members separating under the 2008 Fund-wide downsizing. Applicant also seeks the 50 percent of legal fees and costs that she maintains was wrongfully denied her following the Grievance Committee's recommendation, along with legal fees and costs that the Tribunal may award in accordance with Article XIV, Section 4, of the Statute, if it concludes that the Application is well-founded in whole or in part.

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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."

4. Respondent, for its part, maintains that the Fund fully met its obligations to Applicant under GAO No. 16, Section 12.02, and did not wrongfully fail to assist her in attaining reassignment in the Fund following the abolition of her position. In the Fund's view, Applicant did not express an interest in reassignment, no suitable vacancies were available, and the decision to fill a personnel need that arose in Applicant's former Section with a contractual hire was entirely appropriate. The Fund also maintains that it did not discriminate impermissibly against Applicant in not offering her the same separation benefits as those afforded staff members separating under the 2008 Fund-wide downsizing. As to Applicant's claim that the Fund abused its discretion in not following the Grievance Committee's recommendation that she be partially reimbursed for legal fees and costs associated with pursuing her Grievance, the Fund maintains that the decision was a reasonable one and within Management's authority.

The Procedure

5. On May 4, 2011, Ms. Pyne filed an Application with the Administrative Tribunal.[2] The Application was transmitted to Respondent on the following day. On May 9, 2011, pursuant to Rule IV, para. (f),[3] the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

6. Respondent filed its Answer to Ms. Pyne's Application on June 20, 2011. The Answer was supplemented on the next day, in accordance with Rule VIII, para. 4.[4] On July 25, 2011, Applicant submitted her Reply.

7. The Reply was held in the Office of the Registrar while the Fund submitted its Response to Applicant's request for documents. Applicant was then asked to supplement her Reply in

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[2] The Tribunal on April 20, 2011 had denied Applicant's request of April 18, 2011 for waiver of the statute of limitations to extend the time for filing her Application. In the view of the Tribunal, the circumstances raised by the request, in particular, the competing work demands of her counsel's law office, did not constitute "exceptional circumstances" within the meaning of Article VI, Section 3, of the Tribunal's Statute.

[3] 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; . . ."

[4] Rule VIII, para. 4, provides:

> "Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Fund's answer to the Applicant. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the answer."

accordance with Rule IX, para. 4,[5] and to provide a Comment on the Fund's Response to her request for documents. The Reply, as supplemented, was transmitted to Respondent on August 4, 2011. The Fund's Rejoinder was filed on September 6, 2011.

8. On October 12, 2011, pursuant to Rule XVII, para. 3,[6] the Tribunal issued to the Fund a Request for Information, seeking additional documents and information that the Tribunal deemed useful to the consideration of the issues of the case. The Fund's Response was filed on October 19, 2011 and transmitted to Applicant for her Comment, which was submitted on October 28, 2011.

Applicant's request for anonymity

9. Applicant seeks anonymity pursuant to Rule XXII[7] of the Tribunal's Rules of Procedure. Applicant asserts that her submissions to the Tribunal include "extensive discussion about

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[5] Rule IX, para. 4, provides:

> "Upon ascertaining that the formal requirements of this Rule have been met, the Registrar shall transmit a copy of the Applicant's reply to the Fund. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the reply."

[6] Rule XVII, para. 3, provides:

> "The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment, within a time period provided for in the order. The President may decide to suspend or extend time limits for pleadings to take account of a request for such an order."

[7] Rule XXII provides:

> "*Anonymity*
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> 1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.
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> 2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.
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> 3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.
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> 4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual."

Applicant's financial situation," in particular her salary and pension entitlements. In Applicant's view, these are "precisely the very private issues that Rule XXII was intended to protect."

10. Respondent opposes Applicant's request. In the Fund's view, none of the issues raised in the instant case may be considered matters of personal privacy within the meaning of the applicable legal standard, and cases before international administrative tribunals frequently involve issues relating to a staff member's compensation and benefits.

11. As Respondent correctly notes, in interpreting Rule XXII, this Tribunal repeatedly has affirmed that granting anonymity to an applicant stands as an exception to the general rule of making public the names of parties to a judicial proceeding. The IMFAT has applied the principle, supported by international administrative jurisprudence, that anonymity generally is to be granted only in such cases as those involving alleged misconduct or matters of personal privacy such as health or family relations. *See generally Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), paras. 9-11 and cases cited therein.[8] *Compare Mr. S. Ding, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2009-1 (March 17, 2009), paras. 8-11 (anonymity request denied where Applicant challenged policy governing eligibility for Education Allowances and its application in his individual case) *with Ms. "EE"*, para. 11 (anonymity request granted where Applicant challenged misconduct proceedings, made accusations relating to the conduct of other staff members, and the evidence concerned sexual relationships among staff members).

12. In the light of the Tribunal's jurisprudence and the circumstances of this case, in which Applicant challenges decisions of the Fund relating to her separation from service as the result of a reduction in force and her related benefits entitlements, the Tribunal concludes that Applicant has not shown good cause, as required by Rule XXII, for not making her name public in this Judgment. Accordingly, it denies her request for anonymity.

Applicant's request for production of documents

13. Pursuant to Rule XVII[9] of the Tribunal's Rules of Procedure, Ms. Pyne has requested that the Fund produce: "All documents related to pension under the Rule of 50 and retention of medical benefits."

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[8] In addition to the case of *Ms. "EE"*, the Tribunal has granted requests for anonymity, pursuant to Rule XXII, in the following cases: *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 20 (allegations of misconduct against applicant; allegations by applicant of mistreatment by supervisor); *Ms. "CC", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-6 (November 16, 2007), para. 7 (disability retirement and alleged misconduct); *Mr. "N", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2007-7 (November 16, 2007), para. 8 (child support dispute affecting benefits under Staff Retirement Plan); and *Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 7 (health of applicant and allegations of mistreatment by supervisor).

[9] Rule XVII provides:

"*Production of Documents*

(continued)

14. The Fund, interpreting Applicant's request as seeking the "major governing and explanatory documents" relating to the "Rule of Age 50" of the Staff Retirement Plan (SRP) and retiree benefits under the Medical Benefits Plan (MBP), has supplemented the documentation of the case with additional responsive documents.

15. Applicant maintains that the Fund's submissions are not fully responsive to her request, which she details as follows:

> "[A]ny and all documents relating specifically to the Fund's decision-making in her own case, in particular documents on what basis Respondent decided to deny Applicant the same treatment with regard to her retirement options as received by other staff separating under the Fund-wide downsizing. Specifically, . . . any documentary evidence of the Board's alleged intent to exclude Applicant from the class of staff receiving access to the new advantageous rule or any documentary evidence supporting the Fund's claim that 'her separation was not connected to the Fund-wide downsizing exercise.'"

Applicant additionally requests "any documents evidencing Respondent's claim that Applicant inquired about the Rule of 50 only after she started receiving SBF [Separation Benefits Fund payments]."

16. The Fund, in a further response, asserts that there exists no additional documentation relating to its determination that Applicant did not qualify for the expanded access to retiree

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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 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.
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> 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."

medical benefits under the provisions announced in Staff Bulletin No. 08/06. As to Applicant's request for "documents evidencing Respondent's claim that Applicant inquired about the Rule of 50 only after she started receiving SBF," the Fund states that the only evidence it has of such inquiry is the testimony provided by a Division Chief of the Human Resources Department (HRD) during the Grievance Committee proceedings (*see* Tr. 188), stating that Applicant's inquiry and the Fund's response took the form of a telephone conversation.

17. Applicant has proffered no evidence suggesting that the Fund has in its possession additional documents responsive to her request for documentation relating to the decision-making in her individual case. Accordingly, the renewed request in Applicant's Reply is denied on the basis that Applicant has not shown that she has been denied access to documents by the Fund (Rule XVII, para. 1). *See Ms. "T" Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-2 (June 7, 2006), para. 7.

18. At the same time, the Tribunal deemed it useful to the consideration of the issues of the case to seek from Respondent, through a Request for Information, additional documentation relating to the Executive Board's adoption of pertinent provisions of the Fund's internal law, including "[a]ny documents showing why the 'Rule of Age 50' was made a permanent part of the Staff Retirement Plan while the Medical Benefits Plan amendment . . . [was] limited to staff 'separating in the context of the current downsizing in FY2009-FY2011 only.'" As the Fund has now supplemented the documentation of the case through its Response to the Request for Information and Applicant has had the opportunity to comment on that Response, the Tribunal is satisfied that all documents "related to pension under the Rule of 50 and retention of medical benefits" have been provided.

Oral proceedings

19. Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII, para. 1, of the Rules of Procedure provides that such proceedings shall be held ". . . if . . . the Tribunal deems such proceedings useful." Significantly, Applicant has not requested oral proceedings.

20. The Tribunal had the benefit of the transcript of oral proceedings held by the Fund's Grievance Committee, at which the following persons testified: Applicant; the Director of Applicant's Department; the Deputy Chief of Applicant's Division; the Senior Personnel Manager (SPM) of Applicant's Department; and a Division Chief of HRD. The Tribunal is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it." *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

21. In view of the extensive written record before it and in the absence of any request, the Tribunal decided that oral proceedings would not be useful to its disposition of the case.

The Factual Background of the Case

22. The key facts, some of which are disputed between the parties, may be summarized as follows.

23. Applicant was first employed by the Fund beginning in 1989. Throughout her Fund career, Applicant remained in the same Department, carrying out specialized functions consistent with her training and experience. At the time of the events giving rise to the Application, Applicant held a Grade A12 position in a specialized career stream.

24. In 2005, Applicant transferred to a different Section in the same Division. Applicant testified that she was not happy in her new assignment. (Tr. 309.)

25. In summer 2007, the management of Applicant's Department, confronted by a decreased workload and budgetary constraints in the Section in which Applicant was working, decided to implement a reduction in force to eliminate two staff positions in that Section. The reduction in force was effected through a call for volunteers. Applicant and another staff member volunteered to separate under the provision of GAO No. 16 relating to reduction in force and abolition of position.[10]

26. Through requests to HRD, Applicant successfully negotiated a six-month delay in the abolition of her position and resulting separation arrangements. This postponement ultimately allowed her to reach age 50 before the expiration of her separation leave and accordingly to gain access to coverage under the Fund's Medical Benefits Plan (Section 2.36 (A)) as a Fund retiree, as well as to a retirement pension under the "Rule of 75." According to the Senior Personnel Manager of Applicant's Department, the accommodation as to the timing of Ms. Pyne's separation arrangements was understood as a condition of her volunteering for separation under GAO No. 16, Section 12. (Tr. 394-396.)

27. By letter of August 23, 2007, the Deputy Director of the Human Resources Department explained the operation of the provisions applicable to the abolition of Applicant's position, including a six-month reassignment period to commence on May 1, 2008:

> "General Administrative Order (GAO) No. 16, Revision 5, Section 13, sets out the procedures relating to reduction in strength, abolition of position, or change in job requirements/redefinition of position, and this GAO was discussed fully with you. The GAO provides for a six-month redeployment period for reassignment of staff members whose positions are abolished; your reassignment period will be from May 1, 2008 to October 31, 2008. If efforts to

[10] At the time of the call for volunteers, separation from the Fund in cases of reduction in force and abolition of position was governed by GAO. No. 16, Rev. 5 (August 8, 1990), Section 13. In early 2008, just before Applicant began her reassignment period, this provision was superseded by a similar provision, GAO, No. 16, Rev. 6 (February 28, 2008), Section 12.

> identify a reassignment during this period are not successful, your appointment with the Fund will be terminated."

The letter also explained the notice period and separation benefits to which Applicant would be entitled in the event that she was not reassigned:

> "In this event, the GAO provides for a notice period of 60 days which may be extended to up to 120 days at the discretion of the Director of the Human Resources Department (HRD). In your case, a notice period of 60 days has been approved. Moreover, you will also be entitled to a payment from the Separation Benefits Fund (SBF) equal to one and one-fourth months' salary for each year of Fund service, up to a maximum of 22.5 months' salary, which will be determined at the end of the reassignment period."

(Letter from HRD Deputy Director to Applicant, August 23, 2007.)

28. In early 2008, before the beginning of Applicant's May-October reassignment period, the Fund embarked on an unprecedented downsizing initiative. *See generally Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010); *Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-2 (February 9, 2010). Staff were given a narrow window from March 1-April 21, 2008 in which to volunteer under the downsizing framework. The decision to volunteer under this initiative was irrevocable. *See* Staff Bulletin No. 08/03, pp. 1-2. To provide incentives to voluntary separation with the objective of avoiding mandatory staff cuts (as well as to afford protections to any staff separated on a mandatory basis), the Fund implemented a series of revisions to the Fund's internal law relating to separation of staff and associated benefits. Some of these amendments were specific to the downsizing, while others had lasting effect.

29. Among these revisions were the introduction of the "Rule of Age 50" pension option—an amendment with lasting effect—and, thereafter, a temporary amendment to the Medical Benefits Plan to permit staff separating under the downsizing who were not yet 50 years of age to choose the "Rule of Age 50" pension (which required relinquishment of Separation Benefits Fund benefits) while at the same time qualifying for retiree medical benefits as long as the period of their "hypothetical" SBF leave would bridge them to age 50. The MBP amendment facilitated utilization of the pension Plan amendment but, but unlike the new pension option, which was available to all staff, the MBP amendment was limited to those staff members "separating in the context of the current downsizing in FY2009-FY2011 only." (Executive Board decision, March 31, 2008.)

30. According to the HRD Division Chief who testified during the Grievance proceedings, Applicant sought access to a "Rule of Age 50" pension and was told, consistent with the terms of that provision, that ". . . the only way to do that is if you leave now and you waive your SBF." (Tr. 219-220.) Applicant also asked whether the MBP amendment, which would have bridged her to retiree medical coverage, thereby enabling her to choose the "Rule of Age 50" pension option (which required relinquishment of the SBF entitlement), was available to her. Applicant

testified that she was ". . . told that it did not apply to me because it was a temporary rule only for those people involved in the downsizing." (Tr. 345-346.)

31. It is a matter of dispute between the parties whether Applicant expressed to either the management of her Department or officials of HRD an interest in attaining reassignment in the Fund, in particular to the Section in which she had served before her transfer in 2005. It is not disputed that during the course of Applicant's job search period the Fund did not identify to Applicant any position to which she might be reassigned. Nor did Applicant apply for any vacancy within the Fund.

32. Accordingly, by letter of October 23, 2008,[11] the Acting HRD Director notified Applicant that ". . . since your reassignment period did not result in securing alternative employment in the Fund, your appointment with the Fund is being terminated." The notification further advised Applicant of her notice period, payments from the Separation Benefits Fund (SBF), and that she was not eligible for a "Rule of Age 50" pension because she had opted for the SBF payment:

> "In cases of abolition of position, General Administrative Order (GAO) No. 16, Revision 5, Section 13, provides for a notice period of 60 days which may be extended up to 120 days at the discretion of the Director of HRD. In your circumstances a notice period of 60 days has been approved. It has been agreed with you that the notice period would be November 1, 2008 to December 31, 2008. You will also be entitled to a payment from the Separation Benefits Fund (SBF) equivalent to 22.5 months of your net salary as of your last day of active duty. You have requested to receive this payment as separation leave. Therefore, you will be placed on separation leave with effect from January 1, 2009. Your separation leave will expire on October 31, 2010. At any time during the separation leave period, you may elect to receive the remaining SBF amount as a lump-sum payment, whereupon the separation leave period will end. Since you have opted to receive an SBF payment, you will not be able to withdraw a pension under the provisions of Section 4.2 (d) of the Staff Retirement Plan (Rule of Age 50)."

By her signature of October 31, 2008, Applicant confirmed receipt of the notification. (Letter from Acting HRD Director to Applicant, October 23, 2008.)

33. On October 9, 2008, as Applicant's reassignment period was drawing to a close, a staff member in the Section in which Applicant had served until her 2005 transfer resigned from the Fund, with effect from December 31, 2008. (Tr. 388.) To meet the need for the services that had been provided by the resigning staff member, the Department hired an external candidate on a contractual basis beginning in January 2009.

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[11] Although the notification was dated October 23, 2008, the reassignment period was to run until October 31, 2008.

34. Pursuant to the terms of her separation arrangements, Ms. Pyne separated from the Fund effective October 31, 2010, shortly after her 50th birthday. She will begin receiving a pension under the "Rule of 75" in November 2014.

The Channels of Administrative Review

35. By letter of June 9, 2009 to her Department Director, Applicant initiated administrative review pursuant to GAO No. 31, challenging the ". . . failure on the part of [my Division] to advertise and allow me to apply for a position for which I was qualified[,] prior to my separation." Applicant asserted that during her search period "no effort was made" by her Division or Department to assist in locating a position for her. As to the contractual hire announced by her Division in December 2008, Applicant maintained that the Division's ". . . neglect to advertise and allow me to apply for the . . . position, in contravention of the requirements of GAO 16.12.02(i), denied me the opportunity to continue working in order to meet the requirements for retirement under the Rule of 75," having an adverse impact on Applicant's lifetime earnings potential. (Letter from Applicant to Department Director, June 9, 2009.)

36. Applicant's Department Director responded shortly thereafter, stating that her separation resulted from a "call for volunteers in the context of a staff reduction in [Applicant's Section]," in summer 2007, due to that Section's declining workload. The Department Director continued:

> "During the entire period of your search and notice period, the Fund, including [Applicant's Department] underwent a massive downsizing. During the process, HRD imposed a freeze on all staff recruitment across the Fund. No staff position was available nor filled in [Applicant's Section] or [Applicant's former Section]."

As to the hiring of a contractual employee in Applicant's former Section, the Department Director asserted that this decision was made to fill a "short-term need to access additional temporary resources," that the recruitment process took place while Ms. Pyne was "on administrative leave in lieu of [her] notice period," and the appointment was made after she had begun her SBF separation leave. The Department Director stated that the contractual position was not posted because the Section had been approached by a qualified external candidate. Accordingly, the Director concluded that the Department had not failed to meet any obligation "either under GAO No. 16 or proper recruitment procedures." (Memorandum from Department Director to Applicant, June 11, 2009.)

37. On July 9, 2009, Ms. Pyne sought review by the Director of Human Resources, in which she raised additionally the issue of comparison of her situation with that of staff members separating under the rules applicable to the 2008 Fund-wide downsizing. Applicant asserted that the Fund should have taken a more "creative and flexible" approach to the rules. In particular, she contended that her Division's failure to "identify a way for me to apply for the [position that arose in my former Section] denied me the opportunity to continue working in order to meet the requirements to retire under the new Rule of 50." In Applicant's view, ". . . to properly manage the closing stages of my career, rectifying my situation should have been a significant factor in

managing, identifying and filling any upcoming positions in [my Division].” (Letter from Applicant to HRD Director, July 9, 2009.)

38. The Acting HRD Director responded on August 25, 2009, denying Applicant’s claims. After reviewing the circumstances of Applicant’s separation in connection with a reduction in force in her Section, the ensuing Fund-wide downsizing of 2008 and the related hiring freeze on staff appointments, the Acting HRD Director concluded that “. . . the contractual position to which you refer in [your former Section] did not present an opportunity to extend your staff appointment, nor was there any error in the way the hiring for that position was handled.” (Letter from Acting HRD Director to Applicant, August 25, 2009.)

39. On October 23, 2009, Applicant filed a Grievance with the Fund’s Grievance Committee. The Committee considered the case in the usual manner on the basis of an evidentiary hearing and the briefs of the parties. On August 5, 2010, the Grievance Committee issued its Recommendation and Report, recommending that the Grievance be sustained in part and denied in part. (Grievance Committee Recommendation and Report, August 5, 2010, p. 37.)

40. In the view of the Committee, the Fund had failed to assist Ms. Pyne in securing reassignment during her job search period and “[t]his failure constituted a violation of GAO 16, Section 12.” The Committee concluded that Section 12 of GAO No. 16 places an affirmative obligation on the Fund to assist the staff member in seeking reassignment in case of reduction in force or abolition of position and the fact that Ms. Pyne responded to a call for “volunteers” was immaterial to the operation of the job search provision of Section 12.02. In addition, the Committee credited Applicant’s testimony that, in conversations with her Division Chief, she had communicated that she would like to be considered for any position that might arise in the Section in which she earlier had served. In doing so, the Committee found, she had put the Fund on notice of her “interests and preferences” as contemplated by Section 12.02. (*Id.*, pp. 28-31.)

41. The Grievance Committee concluded, moreover, that had the Fund believed that the staff member was responsible for initiating a job search under GAO No. 16, Section 12.02, it should have informed her expressly of such responsibility. The Committee suggested that the Fund consider in future that in cases in which a staff member volunteers under a reduction in force, he be asked to elect whether or not he wished job search assistance. In the view of the Committee, “GAO 16, as it is currently worded, fails to adequately spell out distinctions between mandatory and voluntary separations.” (*Id*., pp. 31-32.)

42. At the same time, the Grievance Committee concluded that there was nothing improper in the Fund’s failure to inform Applicant that a temporary contract position had become available in the Section in which she had earlier worked, especially as assignment to a contractual position would not have allowed Ms. Pyne to retire with the benefits associated with retirement as a Fund staff member, including the retiree medical benefits that she sought. In the opinion of the Grievance Committee, it was a legitimate exercise of the Fund’s discretionary authority to hire a contractual employee rather than to make a staff appointment when the need for assistances arose in the Section in which Applicant had earlier worked and in which she contended she had expressed an interest in returning. Once the decision had been taken to fill the need with a contractual hire, concluded the Committee, the resulting position could not be considered a “suitable position” for reassignment under the terms of GAO No. 16, Section 12.02.

Additionally, in the view of the Committee, there was no evidence that Applicant had sustained any financial loss as a result of not having been offered the contractual position. (*Id*., pp. 34-37.)

43. Accordingly, although the Committee found that the Fund had failed to engage proactively in a job search for Applicant during the relevant period, it also concluded that it was not clear that any suitable position for reassignment could have been found. Based on these considerations, it recommended the Grievance be sustained in part and denied in part and that no financial compensation be granted to Applicant. (*Id*., pp. 37-38.)

44. On September 14, 2010, following the further submissions of the parties, the Grievance Committee rendered its Recommendation on Attorney's Fees and Costs. The Committee recommended, in view of its Recommendation that Ms. Pyne's Grievance be sustained in part and denied in part, that half of her attorney's fees and costs be reimbursed by the Fund, pursuant to GAO No. 31, Rev. 4, Section 7.04. That provision states that ". . . if the Committee concludes that a grievance is well-founded in whole or in part, it may recommend that the Fund reimburse the grievant for some or all of the reasonable costs, including legal fees, actually incurred by the grievant in pursuing the grievance."

45. The Committee noted that ". . . although [the Fund's] failure to conduct a job search resulted in no financial loss to the Grievant in the circumstances of this case, its inaction could well have resulted in such loss in another case, a matter of sheer happenstance." Additionally, it referred to its earlier conclusion that "GAO 16 itself is internally ambiguous and that this ambiguity was the cause of the Fund's failure to look for a suitable vacancy for the Grievant." (*Id*., pp. 3-4.)

46. On February 3, 2011, Ms. Pyne received notification from Fund Management regarding the Grievance Committee's Recommendations. As to the Recommendation on the merits of Applicant's complaint, Management "note[d] the Committee's findings and recommendation that your grievance be denied in part, and sustained in part, on the merits, but that your claims for financial relief be denied." As to the Recommendation for partial reimbursement of attorney's fees and costs, it stated:

> "We are not in agreement with the contention of the Grievance Committee that you have been partially successful in your claims for relief, in light of the fact that no compensable harm was found, and no financial relief awarded. Therefore, we have decided that there is no basis to accept the Committee's recommendation that you be reimbursed the amount of $22,141.50 in legal fees and costs."

(Letter from Special Advisor to Managing Director to Applicant, February 2, 2011, and cover email of February 3, 2011.)

47. On May 4, 2011, Ms. Pyne filed her Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. Respondent wrongfully failed to assist Applicant in securing an alternative position with the Fund following the abolition of her position, in contravention of GAO No. 16, Section 12.02. In particular, the Fund failed to inform Applicant of a personnel need that arose in her former Section, which it decided to fill with a contractual hire. The Fund could have transferred Applicant to that position.

2. Applicant expressed to supervisors in her Department her interest in remaining at the Fund in a position such as that which became available in her former Section.

3. GAO No. 16, Section 12.02, does not distinguish between voluntary and involuntary separations, and the terms of Applicant's separation letters expressly set out a six-month job search period. International administrative jurisprudence also supports an affirmative duty on the part of the organization to assist in the reassignment of staff members whose positions have been abolished.

4. The Fund unfairly discriminated against Applicant in failing to extend to her the same benefits package relating to access to a "Rule of Age 50" pension with a bridge to post-employment medical coverage as was made available to staff separating under the 2008 Fund-wide downsizing.

5. The Fund misapplied the Executive Board's decision by improperly failing to consider the abolition of Applicant's position in the context of the Fund-wide downsizing.

6. The Fund abused its discretion in declining to accept the Grievance Committee's recommendation that Applicant be reimbursed for 50 percent of her legal fees and costs after the Committee recommended that her Grievance be sustained in part and denied in part.

7. Applicant seeks as relief:

    a. monetary compensation based on a comparison between her current pension entitlement and the pension and other income that she purportedly could have attained had the Fund either reassigned her to another position pursuant to GAO No. 16, Section 12.02, or offered her the same retirement benefit options offered to staff members under the 2008 Fund-wide downsizing;

    b. 50 percent of legal fees and costs incurred in her representation before the Grievance Committee, consistent with the Committee's recommendation on attorney's fees and costs; and

c. legal fees and costs incurred in pursuing her case before the Administrative Tribunal.

Respondent's principal contentions

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

1. Respondent fully met its obligations to Applicant in connection with her separation from the staff pursuant to GAO No. 16, Section 12. The Fund did not wrongfully fail to assist her in seeking reassignment to a suitable position under Section 12.02.

2. Applicant did not express any interest in participating in a job search within the Fund after she volunteered for separation as part of a reduction in force within her Division. GAO No. 16, Section 12.02, does not impose a unilateral obligation on the Fund when the staff member does not express an interest in reassignment.

3. Under GAO No. 16, Section 12.02, the Fund had no obligation to inform Applicant of a contractual opening in her former Section, as a contractual appointment would not have resulted in her reassignment as a staff member as contemplated by that provision. Nor would a contractual appointment have been compatible with attaining the retiree medical benefits that Applicant sought.

4. The Fund did not fail to meet any obligation to Applicant in not extending her staff appointment in order to meet the need that arose in her former Section.

5. The IMF Executive Board's decision expanding access to post-employment medical coverage for staff members separating under the 2008 Fund-wide downsizing program did not discriminate impermissibly against other Fund staff members including Applicant. The distinction between categories of staff was directly related to the purpose of the benefit.

6. The Fund did not misapply the Executive Board's decision in the case of Applicant. The decision to abolish Applicant's position pre-dated, and was not connected with, the Fund-wide downsizing.

7. Management acted within its authority in declining to accept the Grievance Committee's recommendation relating to reimbursement of legal fees in Applicant's case. Recommendations of the Grievance Committee are not binding on Fund Management.

Relevant Provisions of the Fund's Internal Law

50. For ease of reference, the provisions of the Fund's internal law relevant to the consideration of the issues of the case are set out below.

GAO No. 16 (Separation of Staff Members), Rev. 6 (February 28, 2008), Section 12

51. Applicant's contention that the Fund wrongfully failed to assist her in securing reassignment following the abolition of her position as a result of a reduction in force in her Department arises under GAO No. 16, Rev. 6, Section 12. That Section provides for separation of staff members in cases of reduction in strength, abolition of position or change in job requirements. It includes provisions governing a period for job search and retraining, a notice period, and payments from the Separation Benefits Fund:

> *"Section 12. Reduction in Strength, Abolition of Position or Change in Job Requirements*
>
> *12.01* A staff member may be separated in the event it is decided in the interests of efficient administration, including the need to meet budgetary constraints, that:
>
> (a) the number of positions of certain types or at certain levels must be reduced ('reduction in strength');
>
> (b) a specific position must be abolished because a function or set of functions performed by an individual is being eliminated ('abolition of position'); or
>
> (c) a specific position must be redesigned to meet institutional needs and the incumbent is no longer qualified to meet its new requirements ('change in job requirements').
>
> Where positions are reduced in number, the selection of staff members who are to be separated shall be made primarily on the basis of managerial judgment about their relative competence, taking into account their performance and the skills needed by the Fund to carry out its work. Consideration shall also be given to the need to retain as diverse a staff as possible without compromising the paramount consideration of retaining the most qualified staff.
>
> *12.02 Job Search and Retraining*
>
> (i) In the event of a reduction in strength, an abolition of position or the redesign of a position resulting in a redundancy, following the effective date of the notice of separation, the Fund will assist the affected staff member over a period of not less than six months in seeking another suitable position to which he may be reassigned. Staff subject to separation will have access to information on available positions in the Fund. Based on their interests and preferences, the Fund would assist them in identifying suitable vacancies for which they may wish to compete. Staff

subject to separation will be considered for such vacancies along with other applicants, taking into account their qualifications for the vacant position. If the staff member subject to separation is considered to be equally qualified for the position as another applicant who is not being separated, preference will be given to the staff member who is subject to separation.

(ii) During the job search and reassignment period, the Fund shall provide the staff member with appropriate training if such training will facilitate his selection for an existing or known prospective vacant position.

(iii) If all efforts to reassign the staff member fail, his appointment shall be terminated.

12.03 Notice. A staff member separated under the provisions of Section 12.01 shall be entitled to 60 calendar days' notice. However, the Director of Human Resources may extend this period up to 120 calendar days in order to allow the staff member a reasonable time, before his separation, to settle his affairs. The Director of Human Resources may also excuse a staff member from reporting for duty during part or all of the period of notice and place the staff member on administrative leave with pay during this period.

12.04 Resettlement Benefits. A staff member who is separated under the provisions of Section 12.01 shall be eligible for resettlement benefits. However, the minimum period of service required as specified in General Administrative Order No. 8 (Relocation Benefits and Separation Grant) shall not apply in such a case.

12.05 Payment from Separation Benefits Fund. A staff member separated under the provisions of Section 12.01 shall be granted a separation payment from the Separation Benefits Fund in accordance with the provisions of Section 4.06."

The referenced Section 4.06 prescribes the calculation of payments from the Separation Benefits Fund, in pertinent part, as follows:

"*4.06 Payments under the Separation Benefits Fund*. Whenever, under this Order, a staff member is entitled to a payment under the Separation Benefits Fund (separation for medical reasons without access to a disability pension, abolition of position, reduction in strength, or redesign of position), the payment shall be as follows:

> A. For regular staff members with 4.8 years of service or more, an amount equivalent to 1¼ months of salary for each year of service, subject to a maximum that is the smallest of the following:
>
> (i) the equivalent of 22½ months of salary;
>
> . . . ."

Medical Benefits Plan, Sections 7.4 and 2.36 (September 1, 2008)

52. The Fund's Medical Benefits Plan (MBP) provides for continuation of coverage for the duration of the separation leave for a staff member affected by a reduction in strength, abolition of position or change in job requirements:

> "**7.4 Reduction in Strength, Abolition of Position or Change in Job Requirements**
>
> A. Termination of Coverage. Coverage of Participants who were covered at the time they were affected by a reduction in strength, abolition of position or change in job requirements, as described in General Administrative Order No. 16, as it may be revised from time to time, will continue for the Participants and their Dependents on the same basis as for Employees for the duration of the separation leave. If the Participant accepts a transfer to a position on a temporary basis prior to the separation, Benefits under the Plan associated with the separation leave will not begin until he terminates such temporary employment. If the Participant transfers to a permanent position, Benefits based on the separation leave are not initiated.
>
> . . . ."

53. Applicant successfully negotiated a six-month delay in the abolition of her position and resulting separation arrangements so that she would reach age 50 before the expiration of her SBF leave, qualifying her for continuation of medical benefits as a "retiree" under Section 2.36 (A) of the Fund's Medical Benefits Plan:

> "**2.36 Retiree**
>
> 'Retiree,' as used in this Plan, is a former Employee who satisfies either A, B, C, D, or E below:

> A. A former Employee who is entitled to receive an immediate pension or elect a deferred pension under the Fund's Staff Retirement Plan, and who:
>
> 1. separated at age 50 or older, with at least five years or more of Participation Service in the Plan, excluding periods as a contractual appointee following appointments as a staff member, and who maintained Coverage in the Plan continuously from the date of separation from employment through the commencement of his retirement benefits, i.e., no break in Participation Service following the conclusion of employment and the commencement of retirement benefits for those who elect a deferred pension;[1] or
>
> . . . .

[1] Any Retiree as defined in Section 2.36 who was at least age 50 at the time of separation from employment with the Employer, but who has less than five years of participation in the Plan, may use the 18-month post-employment Extension Option to meet the minimum five year participation requirement."

54. A separate provision, Section 2.36 (E), applicable to staff separating under the 2008 Fund-wide downsizing exercise, was not made available to Applicant:

> "E. For Former Employees who separated in the context of the downsizing beginning May 2008 through FY2011 only, the period of separation leave to which a staff member is entitled may be counted toward retiree medical coverage eligibility under the MBP even if Separation Benefit Fund (SBF) entitlements are taken as a lump sum instead of separation leave or the staff member elects a deferred pension under the Rule of Age 50 and waives his/her SBF entitlements; and with respect to staff separating in the context of the downsizing in FY2009-FY2011 only, staff members who take the 18-month extension option may elect an additional 18 months of MBP coverage, for a total extension option period of 36 months. The additional 18-month period of coverage will be on the same terms and conditions as the initial 18 months, but will not count toward retiree medical eligibility."

Section 2.36 (E) was the result of the IMF Executive Board's decision of March 31, 2008, authorizing amendment of the Medical Benefits Plan to expand eligibility for post-employment medical coverage for staff members separating under the downsizing. This provision permitted eligible staff members to qualify both for retiree medical coverage and for a "Rule of Age 50" pension (see below) even if they separated before age 50, as long as their "hypothetical" SBF leave period would have bridged them to age 50:

> "With respect to staff separating in the context of the current downsizing in FY2009-FY2011 only, the period of separation leave to which a staff member is entitled may be counted toward retiree medical coverage eligibility under the MBP even if SBF entitlements are taken as a lump sum instead of separation leave or the staff member elects a deferred pension under the Rule of Age 50 and waives his/her SBF entitlements; and
>
> With respect to staff separating in the context of the current downsizing in FY2009-FY2011 only, staff members who take the 18-month extension option may elect an additional 18 months of MBP coverage, for a total extension period of 36 months. The additional 18-month period of coverage will be on the same terms and conditions as the initial 18 months but will not count toward retiree medical eligibility."

(Executive Board decision, March 31, 2008.) The revision of the MBP was announced to the Fund's staff via Staff Bulletin No. 08/6 (April 18, 2008). The Staff Bulletin emphasized that the changes "apply only in the context of the current downsizing in FY2009-FY2011."

Staff Retirement Plan, Section 4.2

55. Applicant retired with the benefit of the Fund's Staff Retirement Plan, Section 4.2(c) ("Rule of 75"), which provides for a reduced early retirement pension as follows:

> "**4.2 Early Retirement**
>
> . . . .
>
> (c) A participant or retired participant who has (i) reached at least the age of 50 years, (ii) whose age in full months plus eligible service in months equals 900 or more, and (iii) who, by written notice filed with the Administration Committee, has elected to receive a reduced early retirement pension, shall, upon ceasing to be a participant before his normal retirement date for any cause other than death or disability retirement under the Plan, be retired under the Plan on a reduced early retirement pension that shall be equal to the deferred pension that would otherwise be payable at age 55 under the provisions of subsection (b) of this Section 4.2, reduced by 5/12 of 1 percent for each month between the effective

date of the pension and the earliest date that a pension could become effective under Section 4.2(a)(i). The reduced pension shall become effective (i) on the first day of the calendar month next following the date he ceases to be a participant (or on such date if it shall be the first day of a calendar month) or (ii) on the date of such election if later."

56. As announced to the staff by Staff Bulletin No. 08/5 (April 3, 2008), effective April 1, 2008, the Fund's Executive Board approved an amendment to the Staff Retirement Plan to provide for an additional type of a reduced early retirement pension, known as the "Rule of Age 50," which is conditional on relinquishment of Separation Benefits Fund payments:

"**4.2 Early Retirement**

. . . .

(d) A person shall be retired on a reduced early retirement pension if he (i) has ceased to be a participant on or after April 1, 2008 before his normal retirement date except by reason of death or disability retirement under the Plan; (ii) has reached the age of 50 years, (iii) has three or more years of eligible service or is age 55 or older, (iv) has not received a payment from the Employer's Separation Benefits Fund and has waived any right that may exist thereto, and (v) by written notice filed with the Administration Committee, has elected to receive an early retirement pension as provided under this Section 4.2(d). The reduced early retirement pension under this Section 4.2(d) shall be effective on the first day of the month specified by the participant, and shall be the larger of:

(i) an amount equal to the deferred pension that would otherwise become effective on his normal retirement date, decreased by 1/8 of 1 percent of such deferred pension for each full month between the date his pension becomes effective and his normal retirement date; or

(ii) an amount determined under Section 4.2(b)(ii).

No participant shall be entitled to or otherwise accrue a right to the early retirement pension under this Section 4.2(d) prior to the later of the day on which participation ceases or the day on which a participant is both eligible for and elects to receive this benefit. The early retirement pension under this Section 4.2(d) shall be in lieu of any other pension provided under the Plan.

. . . ."

57. Although the "Rule of Age 50" amendment was enacted during early 2008 in part to provide incentives to voluntary separation under the Fund-wide downsizing program,[12] its availability was not restricted to staff separating under that exercise. It was enacted with lasting effect and available to all staff members meeting its criteria. For Applicant to have availed herself of this pension option, however, she would have been required to relinquish the SBF payments that bridged her to post-employment medical coverage. It is recalled that for participants in the Fund-wide downsizing only, the Fund offered a special provision—Medical Benefits Plan Section 2.36 (E) (discussed above)—that bridged separating staff to such medical coverage *as if* they had taken SBF. It is this differentiation in benefits that is the essence of Applicant's discrimination claim. In Applicant's case, had she chosen to waive the SBF in order to qualify for the "Rule of Age 50" pension entitlement, she would have lost the bridge to continued medical coverage under MBP Section 2.36 (A), as she was deemed not eligible for access to such coverage under MBP Section 2.36 (E).

GAO No. 31 (Grievance Committee), Rev. 4 (October 1, 2008)

58. Applicant's final claim, that Management abused its discretion in declining to follow the recommendation of the Fund's Grievance Committee that she be awarded 50 percent of the legal fees and costs she incurred in her representation before that Committee, arises under GAO No. 31, which provides in pertinent part:

> "*Section 1. Purpose*
>
> The purpose of this Order, in accordance with Rule N-15, is (1) to establish a Grievance Committee to hear cases within its jurisdiction and to make recommendations to the Managing Director in order to facilitate the fair and expeditious resolution of disputes . . . .
>
> . . . .
>
> *Section 7. Submission of a Grievance to the Grievance Committee*
>
> . . . .
>
> 7.04 *Assistance of Counsel or Other*s. A staff member may seek the assistance of other staff members or individuals who are not Fund staff members in presenting the grievance to the Committee. [footnote omitted] At the conclusion of the case, if the Committee concludes that a grievance is well-founded in whole or in part, it may recommend that the Fund reimburse the grievant for some or all of the reasonable costs, including legal fees, actually incurred by the grievant in pursuing the grievance. In deciding whether to recommend reimbursement, the Committee shall take

[12] *See infra* Consideration of the Issues of the Case.

> into account the nature and complexity of the case, the nature and quality of the work performed, and the reasonableness of the fees charged in relation to prevailing rates.
>
> . . . .
>
> *Section 8. Report and Recommendation of the Grievance Committe*e.
>
> 8.01 The Committee shall have 30 days from the date on which the record is closed in which to submit a written report, including its recommendations, to the Managing Director, with copies to the Director of HRD and the grievant. The report shall include the Committee's findings and recommendations and the reasoning and basis for reaching its recommendations. The 30-day period may be extended with the mutual agreement of the parties.
>
> 8.02 *Remedies*. If the Committee concludes that a complaint concerning a decision, as provided in Section 4.01, is well-founded, the Committee in making its recommendation to the Managing Director should assess the relief needed to correct the effects of the decision, taking into account the particular facts of the case. Such remedy may include monetary relief, but may not be punitive in nature.
>
> 8.03 *Final Decision*. The Managing Director, or the Managing Director's designee, will take the final decision in the matter and will transmit the decision in writing to the grievant. within 90 days of the Committee's Report. In the event the Managing Director rejects or deviates from the Committee's recommendations, the decision shall include the reasons for such rejection or deviation."

Consideration of the Issues of the Case

59. The Application of Ms. Pyne raises three distinct issues for the consideration of the Administrative Tribunal. Did Respondent fail to assist Applicant in seeking reassignment to a suitable position within the Fund following the abolition of her position as part of a reduction in force in her Section, in contravention of GAO No. 16, Section 12.02? Did the Fund improperly fail to afford Applicant the same enhanced separation benefits relating to access to a "Rule of Age 50" pension with a bridge to retiree medical benefits as was available to staff members separating under the 2008 Fund-wide downsizing? Did the Fund's Management abuse its discretion in declining to accept the recommendation of the Grievance Committee to award Applicant partial attorney's fees for her representation before that Committee, pursuant to GAO No. 31, Rev. 4, Section 7.04?

Did Respondent fail to assist Applicant in seeking reassignment to a suitable position within the Fund following the abolition of her position as part of a reduction in force in her Section, in contravention of GAO No. 16, Section 12.02?

60. GAO No. 16, Section 12.02, provides:

> "(i) In the event of a reduction in strength, an abolition of position or the redesign of a position resulting in a redundancy, following the effective date of the notice of separation, the Fund will assist the affected staff member over a period of not less than six months in seeking another suitable position to which he may be reassigned. Staff subject to separation will have access to information on available positions in the Fund. Based on their interests and preferences, the Fund would assist them in identifying suitable vacancies for which they may wish to compete. Staff subject to separation will be considered for such vacancies along with other applicants, taking into account their qualifications for the vacant position. If the staff member subject to separation is considered to be equally qualified for the position as another applicant who is not being separated, preference will be given to the staff member who is subject to separation.
>
> (ii) During the job search and reassignment period, the Fund shall provide the staff member with appropriate training if such training will facilitate his selection for an existing or known prospective vacant position.
>
> (iii) If all efforts to reassign the staff member fail, his appointment shall be terminated."

61. That the requirements of Section 12.02 applied in Applicant's case was made explicit in the Human Resources Department's correspondence to her, initially in October 2007, when the rules applicable to the abolition of her position were first notified to her, and again in October 2008, when Ms. Pyne was informed that ". . . since your reassignment period did not result in securing alternative employment in the Fund, your appointment with the Fund is being terminated." (Letter from Acting HRD Director to Applicant, October 23, 2008.)[13] The issue is how that provision shall be interpreted in the circumstances of Applicant's case and whether Respondent met its responsibilities thereunder.

62. Applicant contends that the Fund did not undertake "any meaningful and genuine steps in assisting Applicant, such as meeting with her, discussing her options and pointing out suitable posts. Applicant was provided with no information about reassignment possibilities at all, let alone given the opportunity to compete for an opening."

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

63. In the view of the Fund, GAO No. 16, Section 12.02, does not impose any unilateral obligation on the Fund to assist a staff member in seeking a reassignment unless the staff member expresses an interest in such assistance. In the circumstances of the instant case, asserts Respondent, Ms. Pyne did not express such an interest.

64. The obligation of the organization to assist a redundant staff member in identifying opportunities for reassignment, which is given expression in the Fund's internal law by GAO No. 16, Section 12.02, is supported by general principles of international administrative law. "The jurisprudence of administrative tribunals . . . indicates that international organizations must make genuine, serious, and pro-active efforts in reassignment of their employees whose positions have been abolished." *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 117. *See, e.g., Gracia de Muniz*, ILOAT Decision No. 269 (1976), Consideration 2 ("[T]here is a general principle whereby an organization may not terminate the appointment of a staff member whose post has been abolished, at least if he holds an appointment of indeterminate duration, without first taking suitable steps to find him alternative employment.")

65. The search period is not a mere formality. As indicated by the text of Section 12.02 (iii), and confirmed in the Fund's communications to Ms. Pyne, it is only if the reassignment process is unsuccessful that the staff member may be separated. There are good reasons for this rule. As Applicant observes, reassignment of a staff member benefits both parties. The organization will save the cost of separation entitlements and the staff member will continue in gainful employment.

66. The facts of the case and the arguments of the parties raise the following questions for consideration. Did the fact that Applicant "volunteered" for separation as part of a reduction of force in her Section affect the Fund's obligations under GAO No. 16, Section 12.02? What are the Fund's obligations under Section 12.02?

The duty to offer reassignment assistance to "volunteers"

67. The Tribunal affirms at the outset that the Fund's obligation under GAO No. 16, Section 12.02, obtains irrespective of whether the staff member is subject to "mandatory" abolition of position or responds to a call for "volunteers" in the context of a reduction in force. In either event, it is the Fund's responsibility in the first instance to ascertain if the staff member desires reassignment assistance. This is so because the text of Section 12.02 makes plain that the Fund "will" assist the staff member in seeking another suitable position to which he may be reassigned. In accordance with the text of the GAO, the Fund's obligation does not vary because the staff member has volunteered. Indeed, the responsibility of the Fund to inquire about the staff member's intentions may be especially important when a staff member "volunteers," where it may not be immediately apparent whether the staff member seeks to be reassigned or not. In such cases, the possibilities for misunderstanding may be heightened, as illustrated by the facts of this case.

68. The record of this case indicates that the fact that Ms. Pyne "volunteered" for separation when a reduction in force was announced in her Section may have been regarded by Fund officials—who had not inquired of her—as an expression of interest *against* reassignment.

Applicant's Department Director testified that he was "never aware that I have to try to look for somebody who said please take me as a volunteer, that I have to subsequently try to find a job for that person." (Tr. 96.) "[F]rom what I understood from the situation, she volunteered. So it was obvious for me that I wouldn't make an effort to find a job." (Tr. 98.)

69. The Fund in its pleadings emphasizes the HRD Division Chief's testimony (Tr. 177-178) that "these same steps [of job reassignment assistance] would be taken for someone who had volunteered for a mandatory separation, if they requested the assistance." That testimony, however, indicated that the Fund may have operated under a presumption that when staff members "volunteer" in the context of mandatory separations, they are "leaving the organization because they have some other plans":

> "A: [W]hen somebody is actively looking for another position within the Fund and they've made that known to HR, we will go out to the senior personnel managers or the assistant senior—assistant personnel managers and talk about this person's skills, do you have any positions available for this individual, and try to understand what their—what future needs might be of a department, would a position be coming up, try to actively solicit what the vacancies are.
>
> Q: Would you take those steps in the context of a volunteer who had—and again, I mean a volunteer for a mandatory separation.
>
> A: We take these steps when the staff member requests the assistance. So if somebody was a volunteer and they said, well, I'm putting my hand up, that usually means that they're leaving the organization because they have some other plans. But if somebody should ask for such assistance, we would take those same sort of steps."

(Tr. 177-178.)

70. This Tribunal recently has reaffirmed the importance of clarity in the Fund's internal law and communications with staff. *See Ms. "EE",* paras. 177-183 and cases cited therein. In the instant case of Ms. Pyne, not only did the GAO provide that the Fund "will" assist in reassignment but that commitment was repeated directly to Applicant in the Fund's notifications to her. Applicant testified that no one in HRD asked her about her interest in reassignment assistance or suggested to her that the GAO operated differently in her case. (Tr. 316-317.) The Fund has not offered any evidence to the contrary. Accordingly, the Tribunal concludes that Respondent failed to take the requisite initial step of inquiring about Applicant's interest in potential reassignment within the Fund.[14]

[14] This conclusion is consistent with *Marshall v. International Bank for Reconstruction and Development*, WBAT Decision No. 226 (2000), para. 39 ("This mandate is most reasonably interpreted to require more than merely a tacit

(continued)

71. At the same time, the Tribunal recognizes that once the Fund has discharged its responsibility to inquire, the staff member must in turn apprise the Fund of her interests and preferences. The Fund cannot be presumed to know them. The jurisprudence relating to the obligation to reassign a redundant staff member emphasizes that efforts must be made by both parties. *See, e.g., Jakub v. International Bank for Reconstruction and Development, Respondent*, WBAT Decision No. 321 (2004), para. 76 ("The issues are whether the Respondent took reasonable steps to assist him, with training and his job search, and whether he was diligent in his own interests.")

72. Accordingly, in determining whether any relief should flow from the Fund's failure to inquire about Ms. Pyne's interest in reassignment assistance, an examination of Applicant's own conduct is appropriate.

Did Applicant express an interest in reassignment?

73. It is a matter of dispute between the parties whether Applicant expressed to either the management of her Department or officials of HRD an interest in attaining reassignment in the Fund, in particular to the Section in which she had served before her transfer in 2005. It is not disputed that during the course of Applicant's job search period the Fund did not identify to Applicant any position to which she might be reassigned. Nor did Applicant apply for any vacancy within the Fund.

74. Consistent with its view that the burden is on the staff member in the first instance to advise the Fund of her interests and preferences, Respondent maintains that individuals who were in a position to have assisted Applicant, including her Department Director, the Department's Senior Personnel Manager, and the HRD official who testified during the Grievance proceedings, were "kept completely unaware that their assistance with an internal job search was either expected or desired." "Under those circumstances," asserts the Fund, "it would be unreasonable to conclude that they or the Fund failed to assist Applicant, within the meaning of Section 12.02."

75. Applicant, for her part, indicated that she did not understand it to be her responsibility to express an interest in reassignment in order to have the benefit of Section 12.02. Nonetheless, Applicant asserts, she did express such an interest. Applicant maintains that she spoke a "handful of times" with her Division Chief about her interest in staying on in the Division. (Tr. 369.) Some of these conversations, she asserts, took place after the "Rule of Age 50" pension option was introduced. According to Applicant, in each case, the Division Chief indicated that there were no such opportunities. Applicant testified:

> "Q: So did anyone tell you about the duty to trigger or initiate the process lies with you?
>
> A: No.

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assumption on the part of the Bank that the Applicant would take the initiative to pursue her own job search through the Job Search Center.")

> Q: Did you then yourself specifically ever inform HR about your interests and preferences?
>
> A: No. I didn't know I had to. I mean I had—I was talking to . . . my division chief. I had let him know. Once the Rule of 50 came about, I did express that . . . if I had known they were going to do that, of course, I would have stayed. And I expressed interest in, you know, staying and was there anything else available, and he [the Division Chief] reconfirmed at that point that there was still nothing."

(Tr. 317-318.)

76. At the time of the Grievance Committee proceedings, the Division Chief was deceased. Accordingly, there is no direct evidence with which either to corroborate or to impeach Applicant's assertions. The Department's Senior Personnel Manager did testify that she and the Division Chief had consulted regularly on personnel matters and that she did not recall his ever raising with her that Ms. Pyne had expressed any interest in reassignment. (Tr. 400-401.)

77. At the same time, the evidence is undisputed that Applicant was making specific plans to continue her career outside the Fund, namely, to realize a long-held interest in joining her husband in a business venture. (Tr. 323-324.) The record further supports the view that what indications Ms. Pyne did give of her future plans and preferences were that she intended to pursue that business. The HRD Division Chief testified that Ms. Pyne never mentioned that she would like assistance in identifying alternative positions at the Fund: "I was not aware at all of any interest in working at the Fund. The interest was in starting this business." (Tr. 192, 194.) The Senior Personnel Manager for Applicant's Department also believed that Applicant "felt that she reached a sort of plateau and that she was ready to move on," in particular to join her husband in his business. (Tr. 395-396.) The Deputy Division Chief confirmed that was her understanding as well. (Tr. 131.)

78. Applicant testified that she had volunteered for separation in the reduction in force because she felt her career had reached a "dead-end" in the Section to which she was assigned and the Division Chief indicated to her that no suitable opportunities were envisioned elsewhere in the Division. (Tr. 310-311.) "I operated under good faith," Applicant asserted, "that if there was something they would have told me about it. As I said, I wasn't going back and asking constantly." (Tr. 358.) Applicant explained that she took a forward-looking approach:

> "I had gotten a very definitive answer from the Fund that there were no opportunities here. So, from the time I started on my reassignment period, I was mentally and emotionally separating myself from the Fund, and doing my best to look forward, move forward with my life. And so I made no secrets of the fact that I was going to be joining my husband in a business.
>
> . . . .

> I was looking forward, not in the past. . . . I was playing the hands I was dealt . . . ."

(Tr. 370, 372.)

79. The record additionally indicates that Applicant took advantage of training opportunities to which she was entitled under Section 12.02 (ii). Applicant testified that she enrolled in a number of business-related courses (Tr. 328) and met with the Fund's career counselor ". . . because despite, you know, knowing that I was going to go join my husband in his business, you know, I figured it would be a good idea to at least make sure my resume was up to date." (Tr. 326.)

80. Applicant additionally testified that although she had plans of joining her husband in his business following her separation from the Fund, the possibility of remaining in the employ of the Fund for an additional year or two in order to gain a more advantageous package of separation benefits, specifically to become eligible for a "Rule of Age 50" pension, appealed to her as well. (Tr. 323-324.) Nonetheless, when asked during the Grievance Committee proceedings whether she had ever had any direct conversation with either her Department Director, Deputy Division Chief, or anyone in HRD that she would like to stay on as a staff member, Applicant responded in the negative. (Tr. 359-360.)

81. In her Application, Ms. Pyne also maintains that on several occasions in mid to late 2008, her Division's Deputy Chief mentioned that there might be future work (on a project to begin in 2011 or 2012) in the Section from which Applicant had transferred in 2005. Applicant contends that she ". . . repeatedly expressed her wish to remain or return to the Fund as a consultant for this project . . . [which] was ideally suited for her experience and expertise." The Deputy Division Chief testified to the contrary that Applicant never asked her for assistance in finding a reassignment in the Fund. Nor did Applicant indicate, according to the Deputy Division Chief, that she had changed her mind about her plans for the future or had decided she would prefer to stay on at the Fund. (Tr. 132.)

82. As for the Director of Applicant's Department, he testified that he was not aware that Applicant was interested in returning to the Section in which she had worked before her 2005 transfer, but that, in any event, there were no options in that Section and that there was "consistent overstaffing in the division overall." (Tr. 102.) Since he had arrived, noted the Director, the Department "has been nothing but in a downsizing mode." (Tr. 28.)

83. In the view of the Tribunal, the weight of the evidence suggests that while the Fund failed to inquire about the Applicant's intentions, she herself took little initiative to make known to Fund officials any interest she may have had in reassignment. Applicant appeared to assume the possibilities for reassignment to be quite limited, in the light of her specialized skills and the responses of her Division Chief to the inquiries she maintains that she had made of him. In taking the decision to volunteer, Ms. Pyne appeared to believe, allegedly as a result of those conversations, that there was no opportunity for her to return to the Section in which she had worked before 2005. At the same time, Applicant's assumption that "if there was something they would have told me about it" (Tr. 358) may also be said to have been a consequence of the Fund's own failure to inquire at the outset about Applicant's plans and preferences. It may also

be that Applicant's interest in remaining at the Fund was not piqued until she learned in December 2008 of the contractual hire in her former Section.

> Did the Fund violate GAO No. 16, Section 12.02, in failing to consider the possible reassignment of Applicant when a staff member resigned from the Section in which she had worked prior to her 2005 transfer?

84. Applicant's assertion that the Fund failed to fulfill its obligation to render her job reassignment assistance focuses principally upon the Fund's response to the resignation of a staff member from the Section in which Applicant had worked before transferring in 2005. It is recalled that the staff member resigned on October 9, 2008, with effect from December 31, 2008. To fill the need for the services he had performed, the Fund hired an external candidate on a contractual basis. Applicant testified that she first learned of this decision when the contractual employee's impending arrival was announced to the Division in mid-December 2008; he began work in January 2009. (Tr. 330.)

85. The Fund does not dispute that it neither notified Applicant that it was seeking to fill a personnel need in her former Section nor considered reassigning her for that purpose. It maintains that it had no obligation to inform Applicant of a contractual opening in her former Section.

86. Applicant contends that she should have been "informed about, and given an opportunity to compete for, the position" for which she claims she would have been "perfectly suited." Additionally, she asserts: "There cannot have been any doubt on the part of Applicant's supervisors that Applicant had a genuine interest in working on the Project, and in remaining at the Fund."

87. Applicant argues in the alternative that (a) she should have been hired to fill the contractual position that was offered to the external candidate, or (b) she should have been reassigned as a staff member to fill the need on a temporary assignment.

88. Applicant's first contention is that she should have been hired to fill the position on a contractual basis. Plainly, the responsibility to assist with reassignment is to avert separation as a staff member. *See* GAO No. 16, Section 12.02 (iii) ("If all efforts to reassign the staff member fail, his appointment shall be terminated.") A contractual appointment by definition is not a staff appointment and separation from the staff would be required of a staff member seeking to fill a contractual position. Importantly, in the circumstances of this case, Applicant would not have attained the retiree medical benefits that she sought had she relinquished her SBF leave before the age of 50 in order to take a contractual appointment.[15] *See also Jakub,* para. 61 ("The Tribunal concludes that the Applicant's claim that Ms. Z's functions should have been allocated to him has no merit. She was not a permanent employee but a contractor.") The Tribunal accordingly concludes that a contractual appointment is not a "suitable position" for reassignment within the contemplation of GAO No. 16, Section 12.02. Consequently, the Fund

[15] Although contractual employees may opt to participate in the MBP during employment, they are not eligible for Retiree coverage, which is linked to participation in the Fund's Staff Retirement Plan. *See* MBP Section 2.36.

did not fail to meet any obligation to Applicant in not affording her the opportunity to compete for it.

89. Applicant additionally asserts: "Respondent claims 'the Fund is under no obligation to notify staff members of potential contractual appointments, as such an appointment would not and could not result in a reassignment.' . . . The result of this logic is that the Fund can always evade a duty to reassign by simply contracting out the position." Applicant's second contention is thus that she should have been reassigned as a staff member to fill the personnel need in her former Section on a temporary assignment. Implicit in the Applicant's argument is the proposition that the Fund, instead of establishing a contractual position to respond to the particular need that arose with the resignation of the staff member in late 2008, should have temporarily assigned the Applicant to the position.

90. The management of the Fund has a broad discretion to organize its workforce in a manner that will enable it efficiently to carry out its mission, but that discretion is not unfettered. The precise contours of the discretion have not yet been determined. *See Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999), paras. 37-43.

91. The record indicates that the choice to fill the need in Applicant's former Section with a contractual employee was supported by sound business reasons and not improperly motivated to evade the Fund's reassignment obligations. In deciding to make a contractual hire, the Deputy Division Chief testified that the Division was "at first uncertain what the workload was going to be. . . . [W]e knew we had some level of work. We just didn't know how much. . . . [T]he idea was to hire him as a temporary contractual employee to see us through." (Tr. 134-135.) Moreover, both the Department Director and the Senior Personnel Manager testified to the budgetary constraints that affected the decision, observing that while the Department may have had enough staff positions to hire against, budgetary constraints would have militated against the temporary assignment of a staff member to perform the work that needed to be done. (Tr. 109-110, 406.)

92. The decision to create a contractual position, taken in the exercise of the Fund's discretionary authority, appears to have been in pursuance of genuine business concerns and cannot be said to have been improperly motivated by any animus against Applicant, who had not manifested an interest in reassignment. Accordingly, the second contention raised by the Applicant must also fail.

Shall Applicant be awarded relief for any failure of the Fund to offer her reassignment assistance?

93. In *Mr. "F",* this Tribunal examined the question of whether the Fund had fulfilled its obligations under an earlier iteration[16] of its internal law, requiring that in cases of abolition of

[16] GAO No. 16, Rev. 5 (August 8, 1990), Section 13.01, provided in pertinent part:

> ". . . . In the event of a reduction of staff positions in the Fund, efforts shall be made to reassign staff members consistent with their qualifications and the

(continued)

position or reduction in strength ". . . efforts shall be made over a period of not less than six months to reassign [the staff member] to another position consistent with his qualifications and the requirements of the Fund." The IMFAT concluded as follows:

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

94. This Tribunal's conclusion in *Mr. "F"* suggests that the staff member's own conduct in respect of the reassignment process may deprive him of a remedy for the Fund's failure to take proactive steps. In *Marshall*, para. 47, the World Bank Administrative Tribunal (WBAT), examining a different set of facts, found that there was "some fault to be borne by both parties for a failure to pursue with reasonable initiative and effort the task of finding a position for the Applicant." Nonetheless, the WBAT concluded: "[A]lthough the Applicant's failure to discharge her personal obligation may properly be considered in assessing the extent of the remedy to which she is entitled, it does not absolve the Bank from its institutional obligation under [the applicable staff rule]." *Id.* The WBAT awarded the applicant relief, observing that the position descriptions and qualifications for particular vacant posts "seem to the Tribunal to have been sufficiently within the obvious interest and potential capacity of the Applicant that the

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

Respondent could reasonably have been expected to call them specifically to the Applicant's attention." *Id.*, para. 40.

95. In *Jakub*, the WBAT awarded six months' net base salary for the Bank's failure to give the applicant an opportunity to compete for a position in his department for which he should have been considered:

> "69. It is not clear whether the position to which Ms. Y was appointed was in fact a 'vacant position' in the sense of the Principle quoted. She presumably continued to do the same work that she had been hired to do under a Term appointment in April 2001. The Tribunal considers, however, that if this was a newly created vacant position, the Applicant ought to have had a chance to apply and to compete for it, in keeping with the Bank's obligation to act in good faith to consider the Applicant's qualifications and experience to see if he could be assigned or trained for something else. The remarks made by the TRO Manager in his testimony suggest that no consideration at all was given to the Applicant for this position. It is possible that if the Applicant had been allowed to compete for the post, he would not have been selected. The Bank was not obliged to put him into the position in preference to Ms. Y, but in keeping with its obligations, it ought to have at least considered him for the position.
>
> 70. The Tribunal considers that in failing to consider the Applicant for the position allocated to Ms. Y, the Respondent did not meet the standards set forth in Principle of Staff Employment 7.1(b)(iii) and failed to treat the Applicant with the fairness to which he was entitled under Principle 2.1. For this, the Applicant should be compensated."

96. By contrast, in *F (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 347 (2006), para. 51, in which the applicant had ". . . not contended that there were other vacancies with respect to which he possessed the requisite qualifications, but of which he was not notified," the WBAT refused to award any relief and dismissed the application. In that case, the WBAT additionally took note of budgetary considerations, in the context of reductions in force, which contributed to the difficulty of reassigning the staff member:

> "53. Furthermore, after issuance of the Notice of Redundancy, the TRE was required to carry out substantial budgetary reductions. . . . As a result, TRE was required to cut operating expenses and reduce staff. In addition to the Applicant's post, those of nine other persons were declared redundant, and the services of two others were terminated when their appointments expired. New recruitment ceased. Five openings advertised in TRE in early 2004 were either left vacant or filled by internal transfers. . . . "

97. As the WBAT has recognized, the organization's obligation is to make "genuine efforts to help the affected staff member to find a position. But it is not obliged to guarantee that a position will be found." *Jakub*, para. 56; *Arellano (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 161 (1997), para. 42. In considering what relief is appropriate in the circumstances, it is important to recall that the organization's obligation in cases of abolition of position is not to reassign but to provide proactive assistance toward that goal, consistent with the staff member's interests and preferences. Where there is evidence of assistance having been rendered, for example, of a human resources officer's actively submitting applications on the staff member's behalf and arranging interviews for him, the fact that such efforts are not successful does not entitle the staff member to relief. *See Marchesini v. International Bank for Reconstruction and Development*, WBAT Decision No. 260 (2002), paras. 45-46; *Arelleno (No. 2)*, para. 41 (Respondent genuinely tried to assist in re-positioning applicant but she did not compare favorably with competing candidates).

98. In the view of the Tribunal, when first informing Applicant of the administrative arrangements relating to the abolition of her position, the Fund should have inquired of Applicant whether or not she sought assistance in identifying reassignment possibilities. In so doing, it could have sought out information as to what types of positions Applicant might be willing to consider. Such a dialogue would have aided the Fund in effectively discharging its duties under GAO No. 16 and general principles of international administrative law. It was incumbent on the Fund to have had such a conversation with Applicant. This they plainly did not do. In sum, the Tribunal does not accept the Fund's interpretation that the burden is on the staff member in the first instance to apprise the Fund of an interest in reassignment in the event that a suitable assignment might be found.

99. The Tribunal has concluded above that the Fund is obliged by GAO No. 16, Section 12.02, to offer reassignment assistance in cases of abolition of position, including those in which the staff member "volunteers" in a reduction in force, without the staff member's having expressly asked for such assistance. That being said, the Applicant in this case gave unmistakable indications that she was making specific preparations to continue her career elsewhere. It is understandable that, in the circumstances, the Fund did not think to reassign her. Moreover, there is no evidence that any suitable position existed to which Applicant might have been reassigned. On the record before it, the Tribunal is unable to conclude that Applicant made an interest in reassignment known at the relevant time to Fund officials. Although Applicant's neglect to do so may be attributable in part to the Fund's failure to inquire about her preferences, on balance, Applicant's own failure to be "diligent in [her] own interests" *(Jakub*, para. 76) precludes relief in this case.

> Did the Fund improperly fail to afford Applicant the same enhanced separation benefits relating to access to a "Rule of Age 50" pension with a bridge to retiree medical benefits as was available to staff members separating under the 2008 Fund-wide downsizing?

100. Applicant's second claim is that the Fund unfairly denied her access to a "Rule of Age 50" reduced early retirement pension with a bridge to retiree medical benefits as was made available to staff separating within the framework of the 2008 Fund-wide downsizing. Applicant argues in the alternative that (a) the Fund "misapplied" the temporary MBP amendment by failing to consider her separation as being taken "in the context of the current downsizing in

FY2009-FY2011" (Executive Board decision, March 31, 2008), or (b) the amendment itself discriminated against staff members separating outside of the context of the Fund-wide downsizing exercise.

> Did the Fund "misapply" the Executive Board's decision in Applicant's case? Did Applicant's separation fall within the terms of MBP Section 2.36 (E)?

101. It is not disputed that MBP Section 2.36 (E) was a temporary amendment with applicability to "staff separating in the context of the current downsizing in FY2009-FY2011 only." (Executive Board decision, March 31, 2008.) As noted, Applicant seeks, alternatively, to bring herself within the terms of that amendment or to contend that she is within a category of staff that was discriminated against as a result of the provision. Was Applicant a member of the group of separating staff members to which the MBP amendment applied?

102. Applicant asserts in her Reply in the Tribunal that "Applicant never challenged the decision itself, but rather its application and specifically, the upfront denial by HRD to grant her access to the new rule, by **misapplying** the Board's March 31, 2008 decision and failing to consider her separation in the context of the 2009-2011 downsizing exercise." (Emphasis in original.) "**She was an employee of the Fund of 18 years, she was separating due to the abolition of her position in the context of downsizing in FY2009-FY2011 . . . .**" (Emphasis in original.)

103. Applicant additionally emphasizes that she

> ". . . was **in service** during the entire period in which the Fund planned and implemented its administrative decision to reduce the size of its staff (the downsizing exercise). Moreover, Applicant only entered on her reassignment period four months after the downsizing started and well after the decisions changing the Pension Plan and the MBP. **It cannot be argued that she should have any different entitlements from other staff who were then in service.** And those rights did not change by virtue of the start of the reassignment period."

(Emphasis in original.)

104. The Fund responds that Applicant's separation was not connected to the Fund-wide exercise and the "mere fact that Applicant remained in service during the implementation of the Fund-wide downsizing . . . does not change that fact." Rather, Applicant's separation arose from "long-standing departmental downsizing plans" within Applicant's Department.

105. In the view of the Tribunal, Applicant's contention that she was "separating due to the abolition of her position in the context of downsizing in FY2009-FY2011" runs counter to the evidence. The Tribunal notes that although Applicant claims that she was separating in the context "of downsizing in FY2009-FY2011," the rule against which she complains applied by its terms in the context "of *the current* downsizing in FY2009-FY2011." (Emphasis supplied.) Although Applicant's separation took place contemporaneously with the Fund-wide downsizing, it is recalled that her separation was as a result of a reduction in force taken in her Section in

summer 2007. The initiation of Applicant's separation arrangements was delayed by a period of six months, at her request, so that her SBF leave would extend until she reached age 50.

106. The record of the case supports the view that Applicant's Section underwent its own reduction in force prior to the Fund-wide downsizing. The Department Director testified that from the time he had arrived, the Department "has been nothing but in a downsizing mode. . . . We actually started . . . in 2006-2007 to reduce the number of staff, and in 2008, we sort of had a second wave . . . in the wake of the Fund-wide downsizing." (Tr. 28.) The Deputy Division Chief also testified that the Department was "subject to two different downsizings." (Tr. 145.) "[W]e were downsized before the downsizing." (Tr. 168.)

107. Applicant's testimony before the Grievance Committee indicates that the Fund and Ms. Pyne herself understood the terms of her separation to be governed solely by GAO No. 16 and not by any special enactments relating to the Fund-wide downsizing effort. (*See* Tr. 362, 365.) As to the temporary MBP amendment, Applicant testified: "I was told that it did not apply to me because it was a temporary rule only for those people involved in the downsizing." (Tr. 345-346.)

108. The downsizing was announced to the staff of the Fund as a special one-time exercise for which staff could volunteer within a narrow window from March 1-April 21, 2008. Volunteers were to be informed of the Fund's decision to accept or refuse their applications on or before April 30, 2008. The application process required a staff member to select a preferred last day of active duty between May 14, 2008 and May 13, 2009. Moreover, unlike in the case of Ms. Pyne, under the Fund-wide downsizing, staff were informed: "Your application to separate on the date of your choosing is irrevocable." "Exploring Your Options" (February 11, 2008), p. 2. *See also* Staff Bulletin No. 08/03 (Refocusing and Modernizing the Fund: The Framework for the Downsizing Exercise) (February 29, 2008).

109. Furthermore, there is no indication in the legislative history that the intention of the Board was to include staff other than those separating as part of that exercise. The MBP amendment emerged solely from concerns relating to the efficacy of the downsizing incentives. (*See infra.*) It was to "facilitate the current downsizing in FY2009-FY2011." "Proposed Changes in Personnel and Other Policies in the Context of the Fund's Strategic Directions," EBAP08/21 (March 21, 2008), p. 2. This intention was further underscored in communications to the staff. *See* Staff Bulletin No. 08/6 (April 18, 2008), p. 1 (changes to MBP "apply only in the context of the current downsizing in FY2009-FY2011"); FAQs, 4/18/2008 ("As a part of the downsizing exercise only, the MBP has now been modified so that any staff member who could have used the SBF as separation leave to bridge to the age of 50 and/or to the required MBP participation period will be considered to actually have done so for purposes of assessing eligibility for retiree coverage, even if he/she opts for a deferred pension under the Rule of Age 50 or a lump sum SBF payment").

110. Accordingly, although Applicant's separation took place within the period FY2009-FY2011, that fact of itself does not bring her separation within the terms of the benefits that were made part of the Fund-wide downsizing. It does raise a question of fair treatment of Applicant vis-à-vis staff separating within the framework of that exercise. That issue is considered below.

Did the Executive Board's decision expanding access to retiree medical benefits for staff separating under the 2008 Fund-wide downsizing discriminate impermissibly against other staff members including Applicant?

111. In asserting that the Executive Board's decision governing access to retiree medical benefits for staff separating under the 2008 Fund-wide downsizing exercise discriminated impermissibly against other staff members, Applicant contests a "regulatory decision" of the Fund. The Tribunal observes that even if Applicant's complaint is conceptualized as a challenge to the denial of a request for exception to the general rule in the circumstances of her case—namely, that she separated close in time to the Fund-wide downsizing—a request for exception to a rule of general applicability is tantamount to a challenge to the rule itself. *See Mr. "R", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 25.

112. With respect to the Tribunal's competence to review regulatory decisions of the Fund, the Commentary on the Statute 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. The Tribunal has observed that its deference to the Fund's decision-making is "at its height when the Tribunal reviews regulatory decisions (as contrasted with individual decisions), especially policy decisions taken by the Fund's Executive Board." *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 105. The Executive Board is the highest decision-making authority within the Fund whose decisions are subject to review by the Administrative Tribunal. *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007), para. 46.

113. At the same time, the Fund's discretionary authority to amend the terms and conditions of employment is circumscribed:

> "With respect to employment-related matters, the internal law of the Fund includes both formal, or written, sources (such as the Articles of Agreement, the By-Laws and Rules and Regulations, and the General Administrative Orders) and unwritten sources. These sources of internal law apply to, and circumscribe, the exercise of discretionary authority by the Executive Board in prescribing the terms and conditions of Fund employment."

Commentary on the Statute, pp. 17-18. *Daseking-Frank et al.*, para. 48. Of particular pertinence to the instant case, this Tribunal has recognized the "well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organization." *Mr. "R"*, para. 30.

114. The IMFAT has often referred to *de Merode*, WBAT Decision No. 1 (1981), para. 47, in which the World Bank Administrative Tribunal, reviewing the exercise of legislative powers of the Bank in making changes to non-fundamental terms and conditions of employment, enunciated the following standard:

> "The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and of technical competence.' Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. *They must not discriminate in an unjustifiable manner between individuals or groups within the staff.* Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal."

(Emphasis supplied.) *See Mr. "R"*, para. 31; *Daseking-Frank et al.*, para. 90.

115. Did the regulatory decision (MBP Section 2.36 (E)) providing for a hypothetical bridge to MBP coverage for staff separating with a "Rule of Age 50" pension pursuant to the downsizing discriminate impermissibly between staff members separating under the 2008 Fund-wide downsizing and other staff including Applicant? The Fund responds that the "difference in treatment among staff in this case was reasonable, carefully considered and tied to the objectives of the policies in question."

116. In a series of Judgments, this Tribunal has sustained the allocation of differing employment benefits to different categories of Fund staff where it has found a "rational nexus" between the purpose of the benefit and the category of staff on which the benefit is conferred.[17] *See Billmeier,* paras. 80-88; *Faulkner-MacDonagh*, paras. 75-84 and cases cited therein. The Tribunal has articulated its "rational nexus" test as follows:

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[17] 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",* 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).

> "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 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.

117. In *Mr. "R",* the Tribunal considered 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. Similarly in *Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-3 (December 18, 2002), 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—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." *Ms. "G"*, para. 79.

118. Significantly, 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 found a "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.

119. The Tribunal's jurisprudence additionally recognizes 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; *Daseking-Frank et al.,* para. 52; *Billmeier*, para. 86; *Faulkner-MacDonagh*, para. 81.

Was there a "rational nexus" between the purpose of the benefit and the group of staff to which it was allocated?

120. Applying the "rational nexus" test, the Tribunal will consider the stated reasons for the MBP amendment and assess whether its allocation to the category of staff separating within the framework of the 2008 Fund-wide downsizing—but not to staff separating as the result of a departmental reduction in force—was rationally related to those purposes. It will consider whether Respondent's proferred reasons for the distinction in benefits are supported by evidence. *Mr. "R"*, para. 47.

121. In the view of Applicant, "[t]he claimed bar to her benefitting from the relaxed MBP Rule on Age 50, which brought pensionable age and medical coverage into line was a simple mistake." Respondent, for its part, maintains that the decision was ". . . rational, it was taken after carefully weighing relevant facts and policy considerations, and the distinction among categories of staff was directly tied to the purpose of the benefit in question."

122. In *Billmeier* and *Faulkner-MacDonagh,* the Tribunal considered the question of whether the availability of the advantages associated with separating from the Fund pursuant to the 2008 Fund-wide downsizing could be allocated differentially across different groups of staff, specifically, whether the Fund abused its discretion in deciding that all of the volunteers in the A1-A8 and B-level grade ranges would be accepted for separation under the exercise while the acceptance of volunteers from the A9-A15 grade range would be subject to additional criteria. (It may be observed that if the staff member's application for "voluntary" separation under the downsizing was refused and he nonetheless chose to resign from the staff, he did not receive the separation benefits of GAO No. 16, Section 12, to which Applicant was entitled, much less the "enhanced" benefit of the MBP amendment that she seeks. *See* "Exploring Your Options," (February 11, 2008), p. 3: "If your application is refused by the Fund, you may still leave the Fund voluntarily but will not receive a *separation package*." (Emphasis in original.)) The Tribunal sustained the differentiation in the availability of access to the downsizing program based on grade level on the ground that there was an oversubscription of volunteers in the very grade ranges that the Fund had targeted for reduction. *Billmeier*, para. 88; *Faulkner-MacDonagh*, para. 84.

123. The Application of Ms. Pyne raises a challenge to the fairness of affording enhanced separation benefits to one group of staff—those accepted as volunteers in the Fund-wide downsizing (along with a small number of staff in specialized positions who were separated mandatorily following the voluntary phase of that exercise)—and not to other staff members

such as herself. It is recalled that Applicant separated as the result of a reduction in force in her own Department, which preceded the window for volunteering for the Fund-wide downsizing by at least six months. (Applicant's own separation was postponed by a six-month period, at her request, so that she would reach age 50 before her SBF leave expired and thereby attain eligibility for retiree medical benefits under MBP Section 2.36 (A).)

124. Respondent asserts that the Executive Board's decision to limit enhanced access to retiree medical coverage was rational and taken after weighing relevant facts and policy considerations. In the view of the Fund, the Executive Board's March 31, 2008 decision expanding eligibility for retiree medical benefits only for staff members separating under the Fund-wide downsizing did not discriminate impermissibly against other staff members including Applicant. The distinction among categories of staff was directly related to the purpose of the benefit.

125. Respondent further maintains:

> "As the reasoning set out in the Board paper reflects, the Board would not have been prepared to approve a substantial and costly expansion of eligibility for this lifetime benefit on a broad or permanent basis, so soon after having liberalized eligibility for the same benefit in 2002—particularly given the fact that the Fund still remained ahead of most comparator organizations in this regard. [footnote omitted] However, a limited, restricted liberalization of the benefit—tied expressly to the critical goal of encouraging and facilitating separations under the Fund-wide downsizing exercise . . . —was acceptable to the Board from a cost perspective, and was seen as likely to contribute to the success of the exercise."

126. In *Daseking-Frank et al.,* this Tribunal recognized that cost is a factor that properly may be considered in amending non-fundamental terms of employment. The Tribunal cited *Kepper v. International Finance Corporation*, WBAT Decision No. 149 (1996), in which cost savings was upheld as a proper consideration in limiting the time frame during which a benefit is made available:

> "Moreover, international administrative tribunals have held that taking account of cost considerations in amending terms and conditions of employment is not an improper motive. For example, in *Kepper v. International Finance Corporation*, WBAT Decision No. 149 (1996), the applicant contested the Bank's delay in implementing a new system of post allowances, contending that the delay had resulted in reduced compensation to him. The WBAT concluded: 'Among the factors pertinent to a change in policy and the timing thereof are considerations of cost-effectiveness, budget, administration and transition. The Respondent did not abuse its discretion in weighing the budgetary implications, concerning both extent and timing, of the proposed change in the post allowance index against the benefits to be derived therefrom.' (Para. 26.) *See also de Merode*, para. 87 ('The

> choice of a particular method of tax reimbursement may properly be determined by several factors: equity, ease of administration, cost, comprehensibility, confidentiality. Thus the cost of any particular system is one of several factors which the organization may take into account.')"

Daseking-Frank et al., para. 109. The Tribunal concluded that ". . . the fact that the Fund, as the result of study and deliberation, sought to correct for 'overcompetitiveness' in certain elements of its system for setting staff salaries does not establish that the decision taken was improperly motivated." *Id.*, para. 110.

127. Applicant asserts that "[t]he rational nexus in this case is the shared status of staff who were separating voluntarily from the Fund after adoption of the liberalized MBP." "Where a change is made to benefit staff leaving the Fund before age 50, qualifying for the concession offered by virtue of being short of age 50, it should be given equally to all similarly situated staff."

128. Applicant contends that she was "similarly situated" to staff separating under the 2008 Fund-wide downsizing and therefore entitled to the same benefits. In the view of the Tribunal, however, although there may have been other bases upon which the Fund might have allocated the contested MBP benefit, that fact does not invalidate the distinction drawn by the Executive Board. "[T]he Fund's policy-making discretion extends to making choices among reasonable alternatives." *Billmeier*, para. 83; *Faulkner-MacDonagh*, para. 78. In the view of the Tribunal, there was a principled basis, based on facts and deliberation, upon which the Fund drew a distinction between staff separating under the terms of the Fund-wide downsizing and those, such as Applicant, who separated close in time but not as part of that exercise. That basis was the concern for providing incentives to separation during the downsizing exercise as balanced against the costs of extending such incentives beyond the scope of that program.[18]

129. The 2008 Fund-wide downsizing was an unprecedented effort 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." *Billmeier*, para. 76; *Faulkner-MacDonagh*, para. 71. Some 492 staff members separated under the terms of the downsizing exercise. *Id.* In order to achieve such a swift and dramatic reduction in the staff, the Executive Board reasonably concluded that extraordinary measures were necessary to provide incentives to separation with the objective of avoiding mandatory staff cuts. By the time of the downsizing, Ms. Pyne, however, already had made the decision to separate from the Fund without any inducements beyond the separation entitlements already incorporated into the Fund's internal law through GAO No. 16, Section 12, save for a six-month delay in the separation arrangements to allow her to reach age 50. She effectively seeks the retroactive benefit of the MBP amendment.

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[18] *Cf. Mr. "R"*, para. 64 (allocation of differing benefits to different categories of staff was reasonably related to the purposes of the benefits, "in particular, the incentive to recruitment" of Resident Representatives).

130. Respondent asserts that ". . . while the separation benefits available to volunteers under the Fund-wide downsizing largely replicated those normally available to staff under Section 12 of GAO No. 16, the Executive Board also approved a number of enhanced benefits and incentives available only to those separating under the Fund-wide exercise, in order to encourage participation." As described in communications to the staff, in addition to the MBP amendment: "Enhancements include[d] payment of education allowances to eligible staff for the full academic year in which they separate or begin *separation leave*, a range of additional in-house and external placement services; and waiver by the Fund of some staff obligations to repay the Fund for unmet minimum service requirements." "Exploring Your Options," pp. 6-7. (Emphasis in original.)

131. The Tribunal has carefully studied the Executive Board minutes and other documentation produced by Respondent documenting the history of the process of taking the decisions of early 2008, first, to amend the Staff Retirement Plan with a new, and permanent, option for a reduced early retirement pension beginning at age 50 (the "Rule of Age 50"), and, second, to amend the Medical Benefits Plan, on a temporary basis, to facilitate utilization of the new pension option by staff whose ages fell just short of age 50 by providing access to subsidized retiree medical coverage (without taking SBF leave) for "staff separating in the context of the current downsizing in FY2009-FY2011 only."

132. These documents confirm that the revision of the SRP was part of a larger human resources strategy to facilitate mid-career mobility. Consideration of pension reforms grew out of the earlier Employment, Compensation and Benefits Review (ECBR), spurred nonetheless by the particular needs of the downsizing ("restructuring exercise"). "Staff Paper on Reform of the Staff Retirement Plan," RP/CP/08/5, January 22, 2008. As for the MBP amendment, the relevant Board paper explains: "During the Executive Board discussion of the Staff Retirement Plan changes on January 28, 2008, [footnote omitted] several members of the Board indicated concern about medical coverage for separating staff, particularly those with long service who would not be eligible for retiree medical coverage due to separation before reaching age 50." Accordingly, "Management was asked to consider potential gaps in coverage and more liberal retiree medical eligibility." "Proposed Changes in Personnel and Other Policies in the Context of the Fund's Strategic Directions," EBAP08/21 (March 21, 2008), p. 2.

133. It is notable that in recommending permanent amendment of the Staff Retirement Plan, the staff paper rejected an approach that would have limited the "Rule of Age 50" pension option to staff separating under the downsizing exercise: "This avoids introducing a window approach, under which better benefits would be provided to those who leave during the restructuring, as this could undermine staff morale":

> "**As proposed, the introduction of the Rule of Age 50 without a temporary ('window') option would help to address longer-term institutional needs.** The proposed changes will be applicable to eligible staff who will stay in the Fund after the restructuring as well as to those who leave the Fund in the context of the downsizing. This avoids introducing a window approach, under which better benefits would be provided to those who leave during the restructuring, as this could undermine staff morale. It is also

> [in] line with the preferences voiced in consultations with the Staff Association Committee, where it was noted that the staff favored offering the same options for all participants, rather than creating a specific 'window' option."

"Staff Paper on Reform of the Staff Retirement Plan," RP/CP/08/5, January 22, 2008. (Emphasis in original.)

134. In contrast, there is no evidence in the record that in recommending the enactment of the Medical Benefits Plan amendment any consideration was given to making it a permanent part of the Plan or the potential effect on staff morale of not doing so. *See* "Medical Benefits Plan—Expanding Retiree Medical Eligibility Rules," Memorandum from Human Resources Director to Deputy Managing Director, February 20, 2008. It appears that the impetus for the MBP amendment arose solely within the context of the downsizing, without consideration as to whether it might be made a permanent option.

135. The Memorandum from the HRD Director to the Deputy Managing Director of February 20, 2008 was prepared in response to a request from an Executive Director to consider expanding the MBP's eligibility rules for continuation of coverage after separation: "Of particular concern . . . is providing access to retiree medical coverage to those staff under age 50 who leave during the restructuring period . . . ." *Id.*, p. 1. The proposal was to address "potential concerns from staff who want to take another job but under the current rules would be compelled not to take other employment if they needed separation payments to bridge to retiree medical eligibility. It balances extension of retiree medical coverage with avoiding plan provisions that would be out of line with competitive practices and that add unnecessarily to the MBP's financial liabilities" *Id*., p. 5.[19] The Tribunal observes that this statement must be considered in the context in which it is presented. The Memorandum compares the recommended amendment with an alternative that would have provided retiree medical coverage to a "broader, younger group," noting that the Board ". . . already lowered the MBP's retiree medical eligibility threshold in 2002 with some apprehension about taking on liabilities of future employers." *Id.*

136. The Fund in its pleadings comments:

> "The memorandum explains the background of the proposed MBP amendment, and it sets out three alternative approaches for consideration. The memorandum also includes HRD's recommendation that the third alternative—which is the one ultimately adopted by the Board—be considered 'for separations as a result of the restructuring,' since it 'balances extension of retiree medical coverage with avoiding plan provisions that would be out

[19] The Board paper on the MBP amendment likewise concluded: "Given the substantial per capita cost to provide retiree medical coverage and the competitiveness of the current eligibility provisions, these options provide a balanced approach designed to address the Board's concerns . . . ." "Proposed Changes in Personnel and Other Policies in the Context of the Fund's Strategic Directions," EBAP08/21 (March 21, 2008), p. 8.

> of line with competitive practices and that add unnecessarily to the MBP's financial liabilities.'"

What is clear from the Memorandum dated February 20, 2008 is that it is aimed at identifying the most appropriate mechanism to provide access to medical coverage to those staff under age 50 who were to separate under the Fund-wide downsizing program. Accordingly, the Memorandum did not consider the position of Ms. Pyne and other staff who might have volunteered in other initiatives such as a departmental reduction in force. Given that the purpose of the adoption of the Medical Benefits Plan amendment was to encourage staff members to opt for voluntary separation under the downsizing program, it is not surprising that the Memorandum did not address the situation of staff members who were not to be affected by the downsizing program. The Fund's demonstrated need to persuade staff members to participate in the downsizing program means that differentiation between those who would participate and those who chose to separate voluntarily under other circumstances was not unjustifiable. *See de Merode*, para. 47. Given that the purpose pursued was legitimate, and that the mechanism selected to achieve that purpose was closely tailored to meet that purpose, the failure to consider the position of staff members not affected by the downsizing program did not constitute an error of law.

137. In sum, the legislative history of the SRP amendment indicates that it emerged from the earlier Employment, Compensation and Benefits Review (ECBR), a large-scale review of the compensation and benefits practices of the Fund. *See generally Daseking-Frank et al.,* para. 16 (denying challenge to revision of staff compensation system). The history supports the conclusion that the enactment of the SRP amendment providing for a "Rule of Age 50" reduced early retirement pension option had two objectives: (a) a longer-term goal of reforming human resources policies to provide for more mobility of mid-career staff, and (b) a short-term goal of facilitating separations under the Fund-wide downsizing. It was apparently this short-term goal that drove the timing of the enactment in early 2008. It appears that the SRP amendment may have been hastened by the downsizing but not motivated solely by it.

138. In contrast, the amendment of the Medical Benefits Plan does not appear to have been part of a longer-term human resources strategy. Rather, the record indicates that it was driven solely by concerns relating to the potential success of the Fund-wide downsizing effort.

139. The Executive Board could have chosen to make the enhanced benefits of MBP Section 2.36 (E) available to any staff member whose separation date fell within a specified period rather than limiting its availability to "staff separating in the context of the current downsizing in FY2009-FY2011 only." That it did not do so is supported by evidence and a weighing of policy considerations. *See Mr."R"*, para. 47. In the view of the Tribunal, the temporary MBP amendment was a reasonable exercise of the Executive Board's policy-making discretion which this Tribunal finds no basis to overturn.

Did the Fund's Management abuse its discretion in declining to accept the recommendation of the Grievance Committee to award Applicant partial attorney's fees and costs for her representation before that Committee, pursuant to GAO No. 31, Rev. 4, Section 7.04?

140. It is recalled that the Grievance Committee, having recommended that Ms. Pyne's Grievance be sustained in part and denied in part, additionally recommended that 50 percent of her attorney's fees and costs be reimbursed by the Fund, pursuant to GAO No. 31, Rev. 4, Section 7.04, which provides:

> "7.04 *Assistance of Counsel or Other*s. A staff member may seek the assistance of other staff members or individuals who are not Fund staff members in presenting the grievance to the Committee. [footnote omitted] At the conclusion of the case, if the Committee concludes that a grievance is well-founded in whole or in part, it may recommend that the Fund reimburse the grievant for some or all of the reasonable costs, including legal fees, actually incurred by the grievant in pursuing the grievance. In deciding whether to recommend reimbursement, the Committee shall take into account the nature and complexity of the case, the nature and quality of the work performed, and the reasonableness of the fees charged in relation to prevailing rates."

141. The Fund's Management responded to the Recommendations of the Grievance Committee as follows. As to the Recommendation on the merits of Applicant's complaint, Management "note[d] the Committee's findings and recommendation that your grievance be denied in part, and sustained in part, on the merits, but that your claims for financial relief be denied." As to the Recommendation for partial reimbursement of attorney's fees and costs, it stated:

> "We are not in agreement with the contention of the Grievance Committee that you have been partially successful in your claims for relief, in light of the fact that no compensable harm was found, and no financial relief awarded. Therefore, we have decided that there is no basis to accept the Committee's recommendation that you be reimbursed the amount of $22,141.50 in legal fees and costs."

(Letter from Special Advisor to Managing Director to Applicant, February 2, 2011, and cover email of February 3, 2011.)

142. Applicant contends that Management abused its discretion in deciding to reject the recommendation of partial attorney's fees in her case because it offered a "clearly fallacious rationale" for its refusal to accept the recommendation. In the view of Applicant, (a) "[t]he Grievance Committee failed to assess properly the loss of the opportunity to elect the Rule of 50 for pension purposes," and (b) "[w]here the challenge causes the Fund to recognize a duty and

revise its rules, regulations or policies, there is a clear benefit to the Fund and it should bear part of Applicant's costs."

143. Respondent, for its part, maintains that Applicant's claim that Fund Management abused its discretion in deciding not to accept the Grievance Committee's recommendation on reimbursement of legal fees in Applicant's case is without merit, as Management has no obligation to accept recommendations of the Grievance Committee and it clearly explained its refusal to do so in this instance. The Committee's recommendations are not binding on Fund Management, and Management acted within its authority in declining to accept the Committee's recommendation on reimbursement of legal fees. In any event, asserts Respondent, Applicant's claim is unnecessary, as the Tribunal will review the merits of Applicant's request for attorney's fees.

144. As this Tribunal has recognized, the Grievance Committee is advisory to Fund Management, which takes the final decision. *See* GAO No. 31, Sections 1 and 8. In *Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 64, the Tribunal observed:

> "64. As the Grievance Committee is advisory to management, the Fund's management is free to reject its recommendations, although it has made a practice of accepting them. [footnote omitted] This fact of consistent 'acceptance' of the recommendations of the Grievance Committee serves to underscore that the Committee's work is a component part of a process for the settlement of disputes rather than that of an adjudicatory body. Indeed, as this Tribunal has recognized, the Grievance Committee's constitutive instrument GAO No 31, by its terms provides that its purpose '. . . in accordance with Rule N-15, is (1) to establish a Grievance Committee to hear cases within its jurisdiction and *to make recommendations to the Managing Director in order to facilitate the fair and expeditious resolution of disputes*. . . .' GAO No. 31, Rev. 3 (November 1, 1995), Section 1 (Emphasis supplied.) *See Ms. "J"*, note 23 and para. 97 ('. . . the Grievance Committee is empowered only to make recommendations to the Managing Director, who is charged with taking the final administrative decision. . . . Accordingly, there is no "standard of review" that applies as between the Tribunal and Grievance Committee.')"

145. Management may reject or deviate from the Grievance Committee's recommendation, giving reasons for its decision. *See* GAO No. 31, Section 8.03. Management gave reasons in this case, which cannot be said to be arbitrary or improperly motivated. Accordingly, the Tribunal is unable to sustain Applicant's complaint that Management abused its discretion in denying her partial reimbursement of legal fees as recommended by the Grievance Committee.

146. The Tribunal also notes its jurisprudence holding that if an applicant succeeds in his or her Application before the Tribunal, the Tribunal may award costs for the applicant's legal representation in the underlying Grievance proceedings. In *Ms. "C", Applicant v. International*

Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1), IMFAT Order No. 1997-1 (December 22, 1997), the IMFAT held:

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

See also Mr. "F", para 124 ("costs deriving from representation in proceedings antecedent to the Tribunal's review [have] been found to be within the scope of the Tribunal's remedial authority"). The Tribunal has explained the rationale for this authority as follows:

> "The rationale for the Tribunal's Interpretation was that the preparation of a claim that ultimately succeeds in the Tribunal necessarily involves the presentation of that claim to, and its rejection by, the Grievance Committee. The Tribunal reasoned that unless awards under Article XIV, Section 4 of the Statute could encompass costs incurred in pressing such claims in the Grievance Committee, the statutory purpose of giving all staff members access to the Tribunal would not be well served. The Tribunal considered as well that had the claim succeeded initially in the Grievance Committee (as success in the Tribunal suggests it should have), the grievant could have had the benefit of the Grievance Committee's own fee-shifting authority."

Mr. "V", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 136.

147. It will always be a matter for the Tribunal to decide whether costs should be awarded in any particular case, consistent with its authority under Article XIV, Section 4, of its Statute, which provides:

> "4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates."

In this case, the Tribunal concludes that it is not appropriate to award any costs to Applicant because she has not had significant success on the legal submissions she has made to this Tribunal.

Decision

FOR THESE REASONS

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

The Application of Ms. Pyne is denied.

Catherine M. O'Regan, President

Michel Gentot, Judge

Andrés Rigo Sureda, Judge

_____
Catherine M. O'Regan, President

_____
Celia Goldman, Registrar

Washington, D.C.
November 14, 2011