ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2013-2

Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent

Table of Contents

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2013-2

Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent

Introduction

1. On March 12 and 13, 2013, the Administrative Tribunal of the International Monetary Fund, composed for this case[1] of Judge Catherine M. O'Regan, President, and Judges Edith Brown Weiss and Francisco Orrego Vicuña, met to adjudge the Application brought against the International Monetary Fund by Mr. Brian Tosko Bello, a former staff member of the Fund. Applicant was represented by Ms. Veronika Nippe-Johnson, Schott Johnson, LLP. Respondent was represented by Ms. Jennifer Lester, Assistant General Counsel, and Ms. Melissa Su Thomas, Counsel, IMF Legal Department.

2. Applicant challenges the policy of the Fund not to re-hire (on a contractual or any other basis) former staff members such as himself who separated voluntarily under the terms of the 2008 Fund-wide downsizing program. Applicant asserts a challenge to the policy as a "regulatory decision" as well as to the application of the policy in his individual case. Applicant asserts that the re-hiring ban directly contravenes information that was provided to, and relied upon by, staff members such as himself in deciding to opt for voluntary separation under the downsizing program. Applicant also contends that the policy is not supported by a proper business rationale and that it impermissibly discriminates against persons who volunteered for separation under the 2008 downsizing vis-à-vis other former Fund staff members in respect of eligibility for re-employment. Additionally, Applicant asserts that the Fund failed to announce the policy, rendering it invalid *per se*.

3. Applicant seeks as relief rescission of the January 12, 2012 decision of the Director of the Fund's Human Resources Department (HRD) that Applicant was not eligible to compete for a contractual position in his former department, rescission of the policy against re-hiring (on a contractual or any other basis) former staff members who separated under the 2008 Fund-wide downsizing program, and monetary compensation in the amount of one year's salary. Applicant also seeks legal fees and costs, which 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.

4. Respondent, for its part, maintains that the Fund's decision to amend the policy relating to the re-hiring of former staff members, so as to exclude from eligibility for re-employment those persons who had separated pursuant to the 2008 Fund-wide downsizing program, was a

---

[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.

legitimate exercise of managerial discretion supported by a reasonable business purpose and that the distinction it makes among categories of former staff is permissible because the differentiation is rationally related to the business purpose. The Fund further contends that it made no commitment—either in its communications to the staff as a whole or individually to Applicant—that it would refrain from modifying its hiring policies in the future. The Fund maintains that Applicant suffered no harm as a result of the method by which it communicated the re-hiring ban and that the policy was properly applied in his case.

The Procedure

5. Mr. Tosko Bello filed an Application with the Administrative Tribunal on April 12, 2012. The Application was transmitted to Respondent on April 13, 2012. On April 18, 2012, pursuant to Rule IV, para. (f),[2] the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

6. On May 14, 2012, pursuant to Rule XII[3] of the Tribunal's Rules of Procedure,

---

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

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

[3] Rule XII provides:

> *Summary Dismissal*
>
> 1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.
>
> 2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.
>
> 3. The complete text of any document referred to in the motion shall be attached in accordance with the rules established for the answer in Rule VIII. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the motion. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the motion.
>
> 4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Applicant.
>
> 5. The Applicant may file with the Registrar an objection to the motion within thirty days from the date on which the motion is received by him.

(continued)

Respondent filed a Motion for Summary Dismissal of the Application, to which Applicant filed an Objection on June 15, 2012. On September 11, 2012, the Tribunal rendered its Judgment in *Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2012-3 (September 11, 2012) ("*Tosko Bello I*"), in which it denied the Fund's Motion for Summary Dismissal of the Application.

7. In *Tosko Bello I*, the Tribunal rejected the Fund's contention that the Tribunal lacked jurisdiction *ratione personæ* over Applicant's complaint. The Tribunal held that there are two grounds for its exercise of jurisdiction in this case. First, the essence of the policy that Applicant contests is to differentiate former staff members who separated voluntarily under the beneficial terms of the 2008 downsizing exercise from other applicants for Fund employment; accordingly, Applicant's status is not, as Respondent had contended, the same as that of any other disappointed job seeker. Second, Applicant asserts a violation of a material term of the agreement by which he separated from the Fund, an agreement that expressly permits claims for its enforcement. As the issues of the case arise directly from Applicant's former Fund employment, the Tribunal concluded that it has jurisdiction *ratione personæ* over the Application. *Id.*, paras. 23-32.

8. Following the Tribunal's Judgment denying the Fund's Motion for Summary Dismissal, the pleadings on the merits resumed. Respondent filed its Answer to the Application on October 31, 2012. On December 3, 2012, Applicant submitted his Reply. The Fund's Rejoinder was filed on January 3, 2013.

9. On February 15, 2013, Applicant submitted an additional document, which was accepted for filing by the President of the Tribunal pursuant to Rule XI[4] and transmitted to the Fund for its

---

> 6. The complete text of any document referred to in the objection shall be attached in accordance with the rules established for the reply in Rule IX. The requirements of Rule VII, Paragraph 4, shall apply to the objection to the motion.
>
> 7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Fund.
>
> 8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests.

[4] Rule XI provides:

> *Additional Pleadings*
>
> 1. In exceptional cases, the President may, on his own initiative, or at the request of a party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be furnished in the original or in an unaltered copy and accompanied by any necessary certified translations.

(continued)

comment. The Fund's response was filed on February 28, 2013 and transmitted to Applicant for his information.

Applicant's requests for production of documents

10. Pursuant to Rule XVII[5] of the Tribunal's Rules of Procedure, in his Application, Applicant made the following requests for production of documents:

> 1. Any and all documentation of [the Fund's] policy not to re-hire any staff who volunteered for separation during the 2008 downsizing exercise, either . . . as regular staff (fixed-term or limited-term) or as contractuals, including any and all documentation evidencing when the policy was implemented, and any and all documentation evidencing all related internal

---

> 2. The requirements of Rule VII, Paragraph 4, or Rule VIII, Paragraphs 2 and 3, as the case may be, shall apply to any written statements and additional documents.
>
> 3. Written statements and additional documents shall be transmitted by the Registrar, on receipt, to the other party or parties.

[5] Rule XVII provides:

Production of Documents

> 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.
>
> 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.
>
> 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.

> deliberations by and among Fund decision makers, including but not limited to deliberations about the intended business rationale and the decision not to publicly announce the policy.
>
> 2. Any and all documentation evidencing whether or not any exceptions have been granted since the date of implementation of the new policy.
>
> 3. Any and all documentation evidencing the Fund's similar policies for rehiring of former staff, either as regular staff (fixed-term or limited-term) or as contractuals:
>
> a) for staff who separated mandatorily during the 2008 downsizing exercise
>
> b) for staff who separated voluntarily or mandatorily outside (i.e., before or after) the 2008 downsizing exercise.

11. Respondent attached to its Answer documentation that it states is responsive to Applicant's requests. In his Reply, Applicant accepted the Fund's response. Accordingly, no requests for production of documents remain pending before the Tribunal.

Oral proceedings

12. 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 oral proceedings shall be held ". . . if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views pursuant to Rules VII-X, the Tribunal deems such proceedings useful."

13. In his Application, Applicant requested oral proceedings. Respondent opposed that request on the ground that such proceedings were not necessary to the disposition of the case, as there were no material facts in dispute. In his Reply, Applicant withdrew his request for oral proceedings, noting that, in the light of the Fund's response to his request for production of documents, the written record was now complete and he ". . . agree[d] with Respondent that this case can be decided by the Tribunal on the basis of the written record before it."

14. In view of the withdrawal of Applicant's request and because the Tribunal considers that the written record and the briefs of the parties provide adequate basis for its disposition of the issues of the case, the Tribunal decided that oral proceedings would not be held.

The Factual Background of the Case

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

16. Applicant began his employment with the Fund on March 1, 2001. In early 2008, the Fund announced a downsizing initiative, unprecedented in the Fund, to trim and reshape its workforce with the purpose of reducing expenditures and refocusing the mission of the organization.[6] Under the initial phase of the downsizing, the Fund sought to attract volunteers through enhanced separation benefits (also made available to those separating later under the mandatory phase of the process). Staff were given a narrow window from March 1-April 21, 2008 in which to volunteer. Volunteers were to indicate a preferred last day of active duty to fall within the one-year period between May 14, 2008 and May 13, 2009. *See* Staff Bulletin No. 08/03 (Refocusing and Modernizing the Fund: The Framework for the Downsizing Exercise) (February 29, 2008), p. 2. Some 492 volunteers separated under the beneficial terms of the 2008 downsizing exercise. Applicant is one of those volunteers.

17. During the period in which members of the staff considered the decision to volunteer pursuant to the terms of the downsizing program, the Fund established on its intranet a website titled Exploring Your Options (EYO), which Respondent has described in its pleadings as a "source of practical information for potential volunteers." *See Tosko Bello I*, para. 10. Staff Bulletin No. 08/03, p. 2, which established the framework for the downsizing, referred staff members to that website, advising: "All staff will be able to volunteer to leave the Fund with a separation package described in the *Exploring Your Options* website . . . ."

18. The EYO website was, in the Fund's words, ". . . intended to provide information, as available and accurate at the time, 'on the separation process, your package options and benefits, and resources to help you in making decisions during the downsizing.'" The EYO website included an extensive Q&A section, addressing some 200 questions submitted by Fund staff. On February 29, 2008, the day before the period opened for volunteering, the following entry was posted:

> Q. If I volunteer and take a package, is there a specific rule that will prevent me from being hired by the Fund sometime in the future?
>
> A. No. The Fund has no prohibition from being reemployed in the future because you have taken a separation package. You may not

[6] The 2008 Fund-wide downsizing exercise has given rise to a series of Judgments by this Tribunal. *See Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-2 (February 9, 2010) (sustaining differential treatment of Grade A9-A15 staff members in respect of Fund's exercise of right of refusal of volunteers); *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010) (same); *Ms. D. Pyne, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-2 (November 14, 2011) (sustaining Executive Board's decision to limit benefit of an amendment of the Medical Benefits Plan to staff separating pursuant to the terms of the 2008 Fund-wide downsizing exercise); *Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012) (concluding that Fund failed to consider the applicant's application for voluntary separation fully in accordance with the rules governing the Fund's exercise of its right of refusal of volunteers).

> be reemployed at the Fund during the separation leave or the period that it would cover if you take the separation leave as a lump sum. There also are some restrictions on reemployment while you are also receiving a pension.

The documentation of the case shows that the quoted posting remained accessible on the EYO website until at least May 22, 2008, i.e., after Applicant had signed his separation agreement. (*See* below.)

19. In its pleadings, the Fund has explained this posting as follows: "As a general matter, staff members who receive SBF [Separation Benefits Fund] benefits become eligible for re-employment by the Fund after the end of the period of time corresponding to those benefits. [footnote omitted] This long-standing policy, among other policies of possible relevance to staff members considering separation from the Fund, was explained to staff in the form of a 'Q&A' that was part of an intranet website called 'Exploring Your Options,' . . ." *See Tosko Bello I*, para. 11.

20. Each page of the Q&A section also included the following statement:

> These FAQs provide[ ] answers to specific questions raised by staff in anticipation of the downsizing. These answers do not address all possible situations, and the specific circumstances of individual staff may differ. While we have attempted to be accurate and complete in providing these responses, in the event of an inconsistency between an answer provided below and the applicable rule or regulation, the provisions of the rule or regulation will govern.

21. Staff Bulletin No. 02/14 (Contractual Appointment of Fund Retirees) (August 16, 2002) generally governs the re-employment of former staff members; it is to this policy that the Fund asserts that the cited Q&A referred. By its terms, the purpose of the policy set out in Staff Bulletin No. 02/14 is to ". . . allow the Fund to employ experienced former staff when this is in the interest of the institution, but to do so in a manner that avoids tax, visa, and HR management problems." Staff Bulletin No. 02/14 *inter alia*: (i) bars the re-employment of former staff members as long as they are receiving benefits from the Separation Benefits Fund (SBF) (or for an equivalent period of time in the event of a lump-sum payment); (ii) prevents former staff members from occupying substantially the same positions they held before retirement; (iii) requires that any contractual re-employment be consistent with the Fund's policy on Categories of Employment (Staff Bulletin No. 00/10), which restricts contractual appointments to specific functions and for particular time periods; and (iv) in the case of G-4 visa holders, requires re-settlement outside of the U.S. duty station prior to re-employment, along with other restrictions. Staff Bulletin No. 02/14 remains in effect and continues to govern the issue of contractual appointment of Fund retirees *other than those persons who voluntarily separated pursuant to the 2008 Fund-wide downsizing program*. Re-employment of those former staff members is barred by the policy that is the subject of Applicant's challenge.

22. On April 21, 2008, Applicant submitted his request for voluntary separation under the terms of the Fund-wide downsizing program. On May 2, 2008, he was informed that his request had been accepted. Shortly thereafter, by letter of May 19, 2008, the Fund ". . . confirmed the administrative arrangements under which [Applicant] . . . agreed to voluntarily separate from the Fund, in the context of the downsizing exercise." (Letter from HRD Director to Applicant, May 19, 2008.) That letter included the following paragraphs:

> In agreeing to these arrangements, you also voluntarily agree that the terms of this memorandum represent a full and final resolution of any and all demands and claims by you, your heirs and legal representatives of every nature, known or unknown, including consequential, indirect and punitive damages, arising out of or in connection with your Fund employment to date, other than the enforcement of this agreement. You further agree to release the Fund from any and all claims, demands, actions, judgments and executions by you, your heirs and legal representatives, arising out of or in connection with your Fund employment to date, other than the enforcement of this agreement.
>
> . . . .
>
> By signing and returning a copy of this letter, you confirm that the above arrangements fully reflect the terms and conditions under which you have agreed to voluntarily separate from the Fund.

The letter stated that Applicant would receive, as of the effective date of his separation, a separation benefit in the form of a lump-sum payment equivalent to 7.5 months of his net annual salary. By the terms of the letter, Applicant's separation from the Fund became effective approximately one year later, on May 13, 2009.

23. According to the Fund, in the course of the year in which most of the downsizing volunteers separated, it reconsidered the applicability of the general rule relating to re-employment of former staff members and, based upon concerns about possible "reputational risks" to the Fund associated with the re-hiring of former staff members who had received separation benefits under that program, adopted the policy that is the subject of Applicant's complaint.

24. According to Respondent, this new policy was adopted by Fund Management in consultation with HRD and was communicated in person to the Senior Personnel Managers (SPMs) of the Fund's departments in late March 2009. (*See* Affidavit of former Deputy Director of HRD, December 21, 2012, p. 2.) On April 2, 2009, HRD confirmed the policy to the SPMs via a "Strictly Confidential" email message as follows:

> Just to reconfirm policy on this issue, for yo[u]r information: Management has decided that we do not at this stage envisage the re-hiring of volunteers, either as regular staff (fixed-term or

> limited-term) or as contractuals.
>
> We mentioned this at our recent SPM meeting, but it may not have been fully clear as we are still getting some proposals.
>
> We'll be grateful for your cooperation in implementing this policy.

(Email from HRD to SPMs, April 2, 2009.)

25. More than a year later, on September 23, 2010, following "management's re-evaluation of the policy," HRD sent a further email communication to SPMs, confirming that the policy remained unchanged:

> We have received several inquiries about the policy on re-engagement of volunteers. For your information, the policy remains unchanged, that is staff who separated from the Fund under the downsizing exercise ("volunteers") cannot be re-engaged, neither as staff nor as contractuals. As you are aware, this was a decision made by management during the downsizing, and communicated to SPMs in April 2009.
>
> Contractual engagement of other retirees (that is of former staff who separated outside the downsizing exercise, with or without benefits from the Separation Benefits Fund) continues to be governed by the policy set out in Staff Bulletin 02/14 (August 2002).

(Email from HRD to SPMs, September 23, 2010.) A later message, of November 10, 2010, advised the SPMs and Assistants to SPMs (ASPMs) that the policy applied as well to the Fund's overseas offices. (Email from HRD to SPMs and ASPMs, November 10, 2010.)

26. According to Respondent, the issue of permitting the re-engagement of staff who separated pursuant to the downsizing has been reconsidered periodically by Management in consultation with heads of Departments and HRD. On each occasion, the Fund has decided that both the "external reputational risk," i.e., possible adverse reaction in the media and by member country authorities, and the "internal reputational risk," i.e., possible adverse effect on staff morale, outweighed potential benefits of making available to the Fund the services of these former staff members. (Affidavit of former Deputy Director of HRD, December 21, 2012.)

27. On July 14, 2009, in parallel with (and in recognition of) the Fund's policy, the IMF Executive Board adopted a similar bar on the hiring by Offices of Executive Directors (OEDs) of former staff members of the Fund, the Independent Evaluation Office and OEDs who had separated under the 2008 downsizing program. ("Proposed Policy for OED Employment of Individuals Separated in the Restructuring Exercise and Certain Other Former Fund Employees," EBAM/09/44, July 10, 2009.)

28. In January 2012, Applicant asserts, he was contacted by an official of his former department who extended to him a verbal offer for a contractual appointment with the Fund. By Respondent's account, the department official ". . . indicated that there was a contractual position available for which [Applicant] might be suited" and Applicant was ". . . encouraged to contact . . . [the] Director of HRD to enquire about the status of this restriction [on the re-engagement of volunteers]." On January 11, 2012, Applicant inquired by email to the HRD Director about his eligibility to apply for the position:

> I would like to interview for a contractual position in [my former department] . . . but am not sure if I am eligible. I was part of the SBF 2009 separation. I emailed . . . in HRD last week and she said she forwarded my request on but I still have not received a response.
>
> Tomorrow is the final day for interviews in [my former department] but no one seems to know if former SBF staff are allowed back in the Fund.
>
> Any direction you could give would be greatly appreciated. . . .

(Email from Applicant to HRD Director, January 11, 2012.)

29. On January 12, 2012, the HRD Director notified Applicant: "My staff did a quick check this morning. Because you left under the downsizing initiative, you are not eligible to compete for any contracts at the Fund." (Email from HRD Director to Applicant, January 12, 2012.) It is this response, and the underlying policy upon which it rests, that Applicant challenges before the Tribunal.

The Channels of Administrative Review

30. In its Judgment in *Tosko Bello I*, the Tribunal considered the question of whether Applicant had met the requirement of Article V, Section 1, of the Tribunal's Statute, which provides that "[w]hen the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review." That Judgment left open the question of whether Applicant has challenged directly, within the meaning of Article VI, Section 2, a "regulatory decision" of the Fund.[7]

31. Article VI[8] provides that an application challenging the legality of an "individual

[7] *See infra* Consideration of the Issues of the Case: Has Applicant challenged a "regulatory decision" of the Fund within the meaning of Article II of the Tribunal's Statute?

[8] Article VI provides in full:

ARTICLE VI

(continued)

decision" must be filed within three months of the exhaustion of administrative review. The illegality of a "regulatory decision" may be asserted in support of a timely application challenging the legality of an "individual decision" taken pursuant to it. An applicant may also bring a direct challenge to the legality of a "regulatory decision" adversely affecting him within three months of the announcement or effective date of that decision, whichever is later.

32. In his Application, Applicant states that he seeks to bring a "direct challenge" to the contested policy as a "regulatory decision" of the Fund, pursuant to Article VI, Section 2, of the Tribunal's Statute. There are no channels of administrative review to exhaust when a "regulatory decision" is challenged directly,[9] which must be done within three months of its announcement or effective date. Applicant maintains that in the case of the policy that he challenges there is no discernible announcement or effective date, as the policy appears to have been communicated in writing only by the "Strictly Confidential" email to SPMs. Applicant asserts that he was first informed of the policy barring the re-employment of staff members who separated voluntarily under the downsizing when the HRD Director notified him of his lack of eligibility for a contractual appointment on January 12, 2012. Applicant filed his Application with the Administrative Tribunal within three months of that date.

33. Prior to submitting his Application to the Tribunal, Applicant filed a Grievance with the Fund's Grievance Committee, in which he challenged both the policy and its application to him.

> 1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.
>
> 2. An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.
>
> 3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.
>
> 4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.
>
> 5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

[9] *See Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2007-1 (January 24, 2007), para. 39; *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications),* IMFAT Judgment No. 2005-3 (December 6, 2005) (*"Baker I"*), para. 13.

Applicant indicated in his Application to the Tribunal that he had filed the Grievance to preserve his rights to proceed in either forum and that he was willing to withdraw the Grievance should Respondent agree to proceed solely in the Tribunal. Likewise, in his Objection to the Fund's Motion for Summary Dismissal, Applicant stated that he would withdraw his Grievance if the Tribunal concluded that his Application was admissible.

34. In *Tosko Bello I*, paras. 19-20, the Tribunal concluded that to the extent that Applicant challenged an "individual decision," as well as a purported "regulatory decision," it was clear that Applicant had taken steps to exhaust channels of administrative review through the Fund's Grievance Committee.[10] Although that Committee determines its own jurisdiction for purposes of proceeding with a grievance, this Tribunal decides whether an applicant has met the exhaustion of remedies requirement of the Tribunal's Statute. *See Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 85. The Tribunal observed that in the instant case "Applicant's complaint against the 'individual decision' rests entirely on his challenge to the underlying policy. Applicant makes no allegations that are specific to the application of that policy in the circumstances of his case." *Tosko Bello I*, para. 20. The purposes of administrative review are to provide opportunities for resolution of the dispute and to produce a detailed record in the event of subsequent litigation. *See Estate of Mr. "D"*, para. 66. In the view of the Tribunal, these purposes would not have been served by any further proceedings in the Grievance Committee.[11] The Tribunal thus concluded that Applicant had satisfied the exhaustion requirement of Article V, Section 1, of the Statute.

35. As to the requirement of Article VI that an Application be timely filed with the Tribunal, the Tribunal in *Tosko Bello I*, para. 21, determined that it need not decide at that stage of the proceedings (i.e., in the context of deciding the Motion for Summary Dismissal) whether the contested policy met the statutory definition of a "regulatory decision"[12] such that, in the absence of a challenge to an "individual decision," Applicant would be required to file his Application within three months of the policy's announcement or effective date. The fact that Applicant had identified an "individual decision" giving effect to the policy obviated any

---

[10] The Grievance Committee's jurisdiction, unlike that of the Administrative Tribunal, is limited to complaints in which a ". . . staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service." It expressly excludes challenges to "staff regulations as approved by the Managing Director" and "decision[s] of the Executive Board." GAO No. 31, Rev. 4 (October 1, 2008), Section 4.

[11] *See generally Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18. 2002), paras. 19-20; *Billmeier*, para. 49. *Cf. Ms. C. O'Connor, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2010-1 (February 8, 2010), paras. 40-41.

[12] Article II, Section 2.b., defines "regulatory decision" as "any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund."

concern under Article VI as to whether he had met the statute of limitations to challenge the policy itself, a policy that Applicant asserts has no discernible announcement or effective date. Article VI, Section 2, provides that the ". . . illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision."

36. On September 17, 2012, following the Tribunal's Judgment on the admissibility of the Application, and consistent with his earlier representations to the Tribunal, Applicant requested the Grievance Committee Chair that his Grievance be withdrawn without prejudice. On the basis of the agreement of the parties, the Grievance accordingly was withdrawn.

Summary of Parties' Principal Contentions

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

Applicant's principal contentions

1. The policy barring the re-employment of former staff members who separated voluntarily under the terms of the 2008 Fund-wide downsizing exercise directly contravenes written information provided by the Fund, which was reasonably relied upon by staff members including Applicant, in deciding to opt for separation under that program. These representations formed part of the *quid pro quo* by which Applicant and other volunteers separated from the Fund.

2. The Fund's policy against re-employment of staff members who separated voluntarily under the 2008 downsizing exercise is not supported by a proper business rationale.

3. The contested policy discriminates impermissibly against staff members who separated voluntarily under the 2008 downsizing program vis-à-vis other former Fund staff members in respect of eligibility for re-employment.

4. The Fund's failure to announce the rule renders it invalid *per se*.

5. Applicant seeks as relief:

   a. rescission of the HRD Director's January 12, 2012 decision, which Applicant describes as a decision "not to select/not to consider Applicant eligible" for a contractual vacancy in his former department;

   b. rescission of the Fund's policy against re-hiring (either as regular staff or contractual) former staff members who separated voluntarily under the 2008 downsizing exercise;

   c. compensation in the amount of one-year's salary as "compensatory and moral damages"; and

d. legal fees and costs incurred in pursuing his case before the Grievance Committee and the Administrative Tribunal.

Respondent's principal contentions

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

1. Eligibility of volunteers in the 2008 downsizing to be re-hired by the Fund was not a fundamental or essential term of employment and therefore was subject to unilateral amendment by the Fund.

2. The contested policy barring the re-employment of persons who separated voluntarily from the Fund pursuant to the terms of the 2008 Fund-wide downsizing program was a legitimate exercise of the Fund's discretionary authority. The policy is rationally related to the legitimate business purpose of mitigating reputational risks to the institution.

3. The Fund did not impermissibly discriminate among categories of former staff in barring the re-hiring of those who separated voluntarily pursuant to the 2008 downsizing program. There is a "rational nexus" between the purposes of the re-hiring ban and the differentiation among former staff members.

4. The Fund made no formal commitment that it would maintain its policy unchanged; nor did it restrict its discretion to change the policy. Eligibility for re-employment was not a *quid pro quo* for voluntary separation under the downsizing.

5. The contested policy was properly applied to Applicant. His separation agreement included no individualized commitment by the Fund to refrain from modifying its hiring policies.

6. The manner by which the Fund communicated the re-hiring ban was appropriate, and Applicant suffered no harm as a result.

Consideration of the Issues of the Case

39. The Application of Mr. Tosko Bello raises the following issues for the consideration of the Administrative Tribunal. First, does the policy prohibiting the re-hiring of the 2008 Fund-wide downsizing volunteers constitute a "regulatory decision" within the meaning of Article II of the Tribunal's Statute? Second, if it does, has Applicant brought a "direct" challenge to that "regulatory decision" within three months of its announcement or effective date? Third, is Applicant's challenge to the "regulatory decision" well-founded, that is, did the Fund's representation on the EYO website that there was no rule barring the future re-employment of staff members who separated voluntarily pursuant to the 2008 Fund-wide downsizing program constrain its discretionary authority to adopt a rule prohibiting the re-hiring of those volunteers?

Fourth, is Applicant's challenge to the "individual decision," determining that he was ineligible to compete for a contractual vacancy based upon the contested "regulatory decision," well-founded?

Has Applicant challenged a "regulatory decision" of the Fund within the meaning of Article II of the Tribunal's Statute?

40. The Tribunal addresses at the outset whether Applicant, in addition to challenging an "individual decision" of the Fund,[13] has challenged a "regulatory decision" within the meaning of Article II of the Tribunal's Statute. In his Application, Applicant asserts that he seeks to bring a "direct challenge" to the decision barring the re-engagement of the 2008 downsizing volunteers as a "regulatory decision" of the Fund. Respondent, although referring in its pleadings to the re-hiring ban as a "policy," has not disputed that the rule against re-engagement of the downsizing volunteers constitutes a "regulatory decision" or that Applicant has challenged it directly within three months of its announcement or effective date. The Fund did not respond in its subsequent pleadings to the question that the Tribunal expressly left open in *Tosko Bello I*, para. 21, i.e., that it had not been necessary, in concluding that the Application was admissible, to decide "whether the contested policy meets the statutory definition . . . of a 'regulatory decision' [footnote omitted] such that, in the absence of a challenge to an 'individual decision,' Applicant would be required to file his Application within three months of the policy's announcement or effective date."[14]

41. Article II, Section 2, of the Statute defines "administrative act" as "any individual or regulatory decision taken in the administration of the staff of the Fund." It further defines "regulatory decision" to mean "any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund." Does the policy barring the re-hiring of the downsizing volunteers meet that statutory definition?

42. This Tribunal has considered what will constitute a "regulatory decision" within the meaning of Article II. In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 35, the Tribunal considered the question of whether the applicant had challenged a "regulatory decision" when he contested a human resources practice governing the setting of initial salaries of non-economist staff, as well as its application in his individual case. The Tribunal concluded that the challenged practice was not a "regulatory decision" within the meaning of the Statute because it was an "unpublished practice known to and employed by a small number of officials of the Administration Department of the Fund." The Tribunal in *D'Aoust* held that although it could not review the

---

[13] *See Tosko Bello I*, paras. 20-21.

[14] It is notable also that Respondent maintains that Applicant's filing of a Grievance was a "wholly unnecessary step given the nature of the claims being presented, and the jurisdictional competence of the Grievance Committee"; a principal distinction between the jurisdiction of this Tribunal and that of the Fund's Grievance Committee is the exclusive authority of the Tribunal to review challenges to "regulatory decisions."

practice as a "regulatory decision," it had jurisdiction to consider the legality of the "individual decision" flowing from that practice. *Id. See also Mr. "R" (No. 2), Applicant v. International Monetary Fund*, *Respondent,* IMFAT Judgment No. 2004-1 (December 10, 2004), paras. 50-51 (whether challenged policy was "regulatory decision" was "open to question"); *Mr. M. D'Aoust (No. 3), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2008-1 (January 7, 2008), para. 40.

43. There is a marked difference between the policy considered in *D'Aoust* and that at issue in the instant case. In this case, it was Fund Management that adopted the decision prohibiting the re-hiring of the downsizing volunteers. It did so in consultation with HRD, which communicated the decision to SPMs in the Fund's departments in late March 2009. That decision was confirmed in a subsequent "Strictly Confidential" email to SPMs, stating that "Management has decided that we do not at this stage envisage the re-hiring of volunteers, either as regular staff (fixed-term or limited-term) or as contractuals." (Email from HRD to SPMs, April 2, 2009.)

44. In considering whether Applicant challenges a "regulatory decision" of the Fund, the Tribunal takes note of its jurisprudence indicating that the limited circulation of a decision may, in some circumstances, be relevant to the question of whether that decision is a "regulatory decision" within the meaning of the Statute. In the instant case, the contested policy was not circulated either to the volunteers or to the staff at large. Rather, it was communicated to SPMs in each department and individually upon inquiry by former staff members. (*See* below.) The Tribunal has commented on the importance of notice of "regulatory decisions," both as a requirement of due process and of the structure of the Tribunal's Statute. *See D'Aoust*, para. 37; *Ms. "B", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), paras. 56-60. In the instant case, in which the contested decision was, in the Fund's words, "taken at the highest levels of Fund management," its limited circulation is not, in the view of the Tribunal, dispositive of the question of whether it will constitute a "regulatory decision." A consideration underlying the notice requirement is that a "regulatory decision" be fully vetted before it is subject to challenge before the Administrative Tribunal, just as an "individual decision" must first be tested through available channels of administrative review. That concern has been satisfied when the decision has been taken by the Management of the Fund. Accordingly, given that the bar against re-hiring the 2008 downsizing volunteers was taken at the highest levels of Fund Management, that it was communicated to SPMs within the Fund's departments,[15] and that it reversed a policy that itself had been widely communicated to staff via the EYO website, the Tribunal concludes that the contested policy constitutes a "regulatory decision" within the meaning of Article II of the Statute.

[15] *See also Ms. "B"*, para. 60 (Memorandum constituting "regulatory decision" was ". . . published, and circulated to all SPMs, all Administrative Officers and to the Staff Association. Moreover, the Memorandum was one of the periodic adjustments that the 89/28 Staff Bulletin, which formalized the minimum time-in-grade requirements, foresaw might be warranted.")

Has Applicant brought a "direct" challenge to the "regulatory decision" within three months of its announcement or effective date?

45. Having concluded that in contesting the policy against re-engagement of the 2008 downsizing volunteers Applicant challenges a "regulatory decision" of the Fund, a further question arises. Has Applicant brought a "direct" challenge to that "regulatory decision" within three months of the "announcement or effective date of the decision, whichever is later," as provided by Article VI, Section 2, of the Statute? The consequence of the phrase "whichever is later" is that the statute of limitations contained in Article VI, Section 2, will not operate until three months after a "regulatory decision" has been announced and become effective. Article VI, Section 2, thus ensures that staff members retain the right to challenge "regulatory decisions" even when there may be a significant time lapse between the decision being announced and becoming effective, or becoming effective and being announced. As elaborated below, whether Applicant has brought a "direct" challenge to the "regulatory decision" within the time stipulated in Article VI, Section 2, has a direct bearing on the nature of the relief that may follow.

46. It is not disputed that the decision to prohibit the re-engagement of the 2008 downsizing volunteers has never been formally "announced" to the volunteers as a group or to the staff of the Fund at large. The Tribunal has concluded, for the reasons set out above, that the lack of formal announcement of the re-hiring ban does not preclude its challenge as a "regulatory decision." The Tribunal now considers the question of how, in the singular circumstances of the case, that lack of general announcement affects the interpretation of the statutory provision that a "regulatory decision" may be challenged directly within three months of the later of its "announcement or effective date."

47. Applicant contends that because the decision was not generally circulated by the Fund, its "announcement or effective date" for purposes of bringing a "direct" challenge before the Tribunal is to be reckoned from the date when the HRD Director notified him of his lack of eligibility for a contractual vacancy, i.e., January 12, 2012. Given the Fund's failure to inform the downsizing volunteers of the re-hiring ban or to make a general announcement of it, is that "regulatory decision" subject to challenge "directly"—as Applicant asserts it is—within three months of its notification to him individually?

48. According to the Fund, the disputed policy initially was communicated to the SPMs "in a meeting," that is, apparently orally. The email communications from HRD to the SPMs in the Fund's departments, dated April 2, 2009 and marked "Strictly Confidential" (confirming policy that had been "mentioned . . . at our recent SPM meeting"), dated September 23, 2010 (confirming that policy "remains unchanged"), and dated November 10, 2010 (advising that policy applies as well to overseas offices)—along with the HRD Director's January 12, 2012 individual communication to Applicant in response to his inquiry—constitute the only written documentation that Respondent has provided in response to Applicant's request pursuant to Rule XVII for "[a]ny and all documentation" of the policy challenged in this case.[16]

[16] *See supra* The Procedure: Applicant's requests for production of documents.

49. The evidence accordingly shows that although the "regulatory decision" became effective in late March 2009, it was never generally announced to the volunteers or to the staff. Respondent states that it chose an "appropriate and efficient approach" by communicating the policy to the SPMs who, together with HRD, are tasked with recruitment responsibilities. In the view of the Fund, "[i]t was incumbent on these hiring managers to implement the policy, and in so doing communicate this policy to those former volunteers who applied for positions."

50. The evidence additionally shows that the decision remained a source of uncertainty even among the hiring managers, and it required repeated clarification. When Applicant was advised by an official of his former department of a contractual vacancy for which he might be suited, the question of whether he was eligible to apply for it was not clear to those involved in the hiring process. As recounted at paras. 28-29 above, Applicant found it necessary to inquire up to the level of the HRD Director to seek a determination as to his eligibility to compete for the vacancy. In the absence of the decision's general circulation, a substantial period elapsed between the date the decision became effective and when it was notified to Applicant.

51. The Tribunal is mindful that the policy underlying its jurisdiction to review a challenge to a "regulatory decision" directly within three months of its announcement or effective date looks to the resolution of the question of the legality of such decision ". . . before there ha[s] been considerable reliance on, or implementation of, the contested decision*." See* Commentary[17] on the Statute, p. 25 ("Regulatory decisions could be challenged by adversely affected staff within three months of their announcement or effective date. It is considered useful to permit the direct review of regulatory decisions within this limited time period. As a result, the question of legality, and any related issues (such as interpretation or application) could hopefully be firmly resolved before there had been considerable reliance on, or implementation of, the contested decision"), quoted in *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005), para. 22.

52. The Tribunal nonetheless concludes that the Fund's decision to communicate the re-hiring ban in the restricted manner that it did may not be permitted to shield that "regulatory decision" from "direct" challenge before this Tribunal within three months of its notification to Applicant. To conclude otherwise would be to create an incentive for the Fund to withhold the prompt circulation of "regulatory decisions," a practice that is consistent neither with sound human resources practices nor with the responsibility of this Tribunal to "determine whether a decision transgressed the applicable law of the Fund." *See* Commentary on the Statute, p. 13. Accordingly, in the view of the Tribunal, the terms of Article VI, Section 2, that "*[a]n application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later*; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision

[17] The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009).

taken pursuant to such regulatory decision" (emphasis added), provide a potential applicant the benefit of bringing a "direct" challenge to a "regulatory decision" in circumstances such as those encountered by Applicant here.

53. The Tribunal additionally observes that the right to bring a direct challenge to a "regulatory decision" within three months of its announcement or effective date appears to be closely related to the scope of the Tribunal's remedial authority as provided by Article XIV of the Statute. The Commentary accompanying that provision of the Statute[18] indicates that the relief available when a "regulatory decision" is successfully challenged solely in the context of its individual application—i.e., the only means by which a "regulatory decision" may be challenged if more than three months have elapsed since the later of its announcement or effective date—is only to render that "regulatory decision" unenforceable in the case of its application to the applicant, although the practical effect would be to limit any "future" applications of the impugned "regulatory decision."[19] By contrast, when an application challenging a "regulatory decision" is submitted to the Tribunal within three months of the decision's announcement or effective date, the "regulatory decision" may be challenged "directly," that is, in the absence of an "individual decision" taken pursuant to it.[20] In the case of such a "direct" challenge, it is clear that the relief available extends to annulment of the "regulatory decision," along with annulment of any "individual decision" adversely affecting a staff member taken pursuant to that "regulatory decision" either "before or after" its annulment. In the latter case, other adversely affected staff members, in addition to the applicant in the case, would benefit directly from a conclusion by the Tribunal that the challenge to the "regulatory decision" was well-founded.

54. In the view of the Tribunal, the Fund's failure in this case to give general circulation to a policy adopted by Management may not be permitted to shield it from "direct" review and from the remedies that may flow from such challenge. A purpose of an "announcement," in terms of the logic of the Tribunal's Statute, is surely to inform affected staff members (or former staff members) of the "regulatory decision" so that its legality may be tested before this Tribunal. Accordingly, it is the manner in which the Fund chose to communicate the policy, first adopted

---

[18] *See infra* Remedies, quoting pertinent provisions of Statute and Commentary.

[19] *But see Ms. "G",* para. 32 and note 11. In that Judgment, the Tribunal, in deciding an application for intervention (pursuant to Rule XIV of the Tribunal's Rules of Procedure) in a case involving a challenge to a "regulatory decision" brought in the context of a challenge to an "individual decision" denying the applicant's request for exception to the challenged rule, did not advert to the distinction drawn by the Commentary in respect of the remedies available. Instead, it cited the text of Article XIV, Section 3, which provides: "If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void." The Tribunal decided to grant the application for intervention on the ground that "Mr. "H" would be in the class of persons who would benefit from a favorable outcome in Ms. "G"'s case even without the intervention" and that, accordingly, he should be permitted to intervene and thereby afforded the opportunity to attempt to persuade the Tribunal of his views on the issues of the case.

[20] *See, e.g., Daseking-Frank et al.*; *Baker I*.

in late March 2009, that permits Applicant to challenge that "regulatory decision" directly within three months of the date on which it was notified to him on January 12, 2012 when he inquired of the HRD Director whether he was eligible to apply for a contractual vacancy in his former department. In the unusual circumstances of the case, the "individual decision" of the HRD Director was functionally equivalent to the "announcement" (within the meaning of Article VI, Section 2) to Applicant of the "regulatory decision" upon which that "individual decision" was based. There is nothing in the Statute that prohibits a "direct" challenge to a "regulatory decision" from being maintained concurrently with a timely challenge to an "individual decision" taken pursuant to it.

55. Accordingly, the Tribunal concludes that Applicant has brought a challenge to a "regulatory decision" not only in the context of contesting an "individual decision" but also "directly" within three months of the "announcement or effective date of the decision, whichever is later," in accordance with Article VI, Section 2, of the Statute.

Is Applicant's challenge to the "regulatory decision" well-founded?

56. Having concluded that Applicant has challenged a "regulatory decision" of the Fund, as well as an "individual decision" taken pursuant to it, and has done so "directly" within three months of its announcement or effective date, the Tribunal now turns to the merits of the dispute.

Did the Fund's publication on the EYO website that there was no rule barring the future re-employment of staff members who separated voluntarily pursuant to the 2008 Fund-wide downsizing program constrain the Fund's discretionary authority to adopt a rule prohibiting the re-hiring of those volunteers?

57. In *Tosko Bello I*, para. 29, the Tribunal recognized that the "essence of Applicant's complaint is that the Fund unilaterally and retroactively amended the understanding by which he separated in respect of his eligibility for future Fund employment." The question presented by this case is a narrow one: Did the Fund, by posting the following content on the EYO intranet site, constrain its authority to amend its re-hiring policy in relation to persons who separated pursuant to the 2008 downsizing? That posting read:

> Q. If I volunteer and take a package, is there a specific rule that will prevent me from being hired by the Fund sometime in the future?
>
> A. No. The Fund has no prohibition from being reemployed in the future because you have taken a separation package. You may not be reemployed at the Fund during the separation leave or the period that it would cover if you take the separation leave as a lump sum. There also are some restrictions on reemployment while you are also receiving a pension.

58. The question accordingly is not whether, as a general matter, the Fund may, from time to time, amend its policies relating to the re-employment of former staff members. Nor is the

question whether the Fund could lawfully have conditioned acceptance of volunteers under the 2008 Fund-wide downsizing program on relinquishment of eligibility for future employment with the organization. That it clearly did not do. Rather, the question raised by the Application is whether, having publicized to staff members considering the option of voluntary separation under the 2008 downsizing that there was no rule barring their future re-employment with the organization, the Fund could later unilaterally impose such a bar solely upon that particular group of former staff members.

59. Applicant's principal contention is that the policy barring the re-employment of former staff members who separated voluntarily under the terms of the 2008 Fund-wide downsizing exercise directly contravened information that was provided to, and reasonably relied upon by, staff members such as himself in deciding to opt for voluntary separation under that program. In Applicant's view, these representations formed part of the *quid pro quo* by which he and the other volunteers separated from the Fund.

60. The Fund responds that the EYO posting provided an accurate representation of the rule that governed at the time, a rule that was, however, subject to future revision. Respondent asserts that "[a]t no time did the Fund represent to staff that by making available a summary of rules on the website it was making a commitment to them that these policies were immutable or not subject to the governing principle—of which all staff are aware—that the rules and regulations governing staff may be changed from time to time to meet the needs of the organization." Respondent accordingly maintains that the Q&A posting did not form part of the *quid pro quo* by which Applicant and the other volunteers separated under the downsizing.

61. Applicant asserts that the possibility of returning to work at the Fund in some capacity was an "important factor in his decision making" and that he and the other volunteers ". . . reasonably relied on the written information and expectation that upon the end of their separation leave period they could be eligible for re-employment at the Fund. *Without the assurances, Applicant and other similarly situated staff might not have agreed to the voluntary separation.*" (Emphasis in original.)

62. In Respondent's view, because such reliance "would imply that an institution is bound irrevocably by any published rule or policy, notwithstanding its inherent power to unilaterally amend non-fundamental or non-essential conditions," it was "unreasonable for Applicant to rely on the Fund's statement of its rules on the re-employment of volunteers, with the expectation that this policy would not be unilaterally amended by the Fund in the future." Although Respondent concedes that "Applicant may have unilaterally ascribed some weight to the information provided in the 'Q&A' section and purportedly altered his legal position in reliance thereof . . . ," it maintains that the "Fund did not intend for this information to serve as anything other than a summary of its rules and policies in force at the time, and this was clearly signified to the staff." In Respondent's view, the "summary of the Fund's rules and policies on this issue did not therefore give rise to a promise from which the Fund is estopped from deviating."

63. This Tribunal has recognized that the 2008 Fund-wide downsizing program was an "unprecedented effort to 'encourage the voluntary separation of staff members'," resulting in nearly 500 separations. *Ms. D. Pyne, Applicant v. International Monetary Fund, Respondent*,

IMFAT Judgment No. 2011-2 (November 14, 2011), para. 129. Moreover, "[i]n 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." *Id.* The decision whether or not to volunteer for the downsizing was a complex one for individual staff members who were required to weigh the costs and benefits of leaving the Fund under the terms of that program, along with the possibility that if an insufficient number of staff volunteered then mandatory separations would ensue. It was in this environment that Applicant and other staff members "explored their options."

64. It is not disputed that the EYO website was expressly designed to "help [staff members] in making decisions during the downsizing" and that the Q&As "provide[d] answers to specific questions raised by staff in anticipation of the downsizing." In Applicant's view, any ambiguity must be construed against the Fund, which drafted the information in its own interest in attracting volunteers.

65. The World Bank Administrative Tribunal (WBAT), in its seminal case *de Merode*, WBAT Decision No. 1 (1981), para. 18, explained that a staff member's individual letter of appointment represents but one element of the conditions governing the employment relationship between the Bank and the staff member:

> [T]he fact that the Bank's employees enter its service on the basis of an exchange of letters does not mean that these contractual instruments contain an exhaustive statement of all relevant rights and duties. . . . The contract may be the *sine qua non* of the relationships, but it remains no more than one of a number of elements which collectively establish the *ensemble* of conditions of employment operative between the Bank and its staff members.

The WBAT identified the "ensemble" of conditions of employment as comprising the Bank's written law, and, with certain limitations, the practice of the organization and general principles of law. *Id.*, paras. 16-29. The WBAT emphasized:

> [T]he legal basis for the application to each employee of rules outside his own "contract" *stricto sensu* does not rest on those terms of the letter of appointment and the letter of acceptance which provide that the appointment is "subject to the conditions of employment of the Bank" and which mention specifically the Bank's policy in respect to dependency allowance, benefits, retirement, insurance, etc. True, one might say that, in accepting the appointment "offered" by the Bank, the staff member at the same time "accepted" as a whole the relevant rules and policies. *The applicability of these to the employee is, however, the consequence of their objective existence as part of the legal system to which the staff member becomes subject by entering into a contract with the organization.*

Id., para. 29. (Emphasis added.)

66. Similarly here, in entering into his separation agreement as part of the 2008 Fund-wide downsizing program, Applicant's expectations and the Fund's obligations were not, as Respondent would have it, limited to the "four corners" of the separation letter. In the view of the Tribunal, the information provided on the EYO website formed part of the "ensemble" of Applicant's conditions of separation from the Fund. This is so because, as a substitute for individual bargaining, the Fund made representations to potential volunteers as a group via that intranet website. Those who chose to volunteer accepted those representations and the Fund was obliged to adhere to them.

67. Respondent asserts that "[i]n providing this information in the Q&A section of the webpage, the Fund made clear that the information provided therein did not represent a full and binding statement of the Fund's policies on the Restructuring Exercise." Respondent refers to the statement placed on each page of the Q&A posting, which read:

> These FAQs provide[ ] answers to specific questions raised by staff in anticipation of the downsizing. These answers do not address all possible situations, and the specific circumstances of individual staff may differ. While we have attempted to be accurate and complete in providing these responses, in the event of an inconsistency between an answer provided below and the applicable rule or regulation, the provisions of the rule or regulation will govern.

As Applicant rightly points out, however, the wording of that caveat referred only to the possibility that summary information communicated in the Q&A might deviate from an extant rule. Accordingly, it is inapposite to the issue presented by the instant case. The statement, in fact, highlights that the purpose of the Q&As was to provide answers to specific questions raised by staff "in anticipation of the downsizing."

68. Respondent maintains that because Applicant did not secure an individualized commitment from the Fund that he would not be barred from future re-employment there was no "meeting of the minds" on this point. "If such a matter was crucial to his decision to separate," asserts the Fund, "he would have specifically requested an undertaking on the part of the Fund that it would maintain his eligibility to be re-employed." Respondent contends that the ". . . parties were expected to express all the terms in the four corners of the separation agreement."

69. It is true, as Respondent points out, that Applicant's separation letter states: "By signing and returning a copy of this letter, you confirm that the above arrangements fully reflect the terms and conditions under which you have agreed to voluntarily separate from the Fund." That letter, however, does not treat the question of possible future re-employment. In the circumstances, it was entirely reasonable for Applicant (and the others who volunteered for separation as part of the downsizing) to rely on the information supplied on the EYO website. In the view of the Tribunal, the assurances given on that website were analogous to those given to the applicant in *Brebion v. International Bank for Reconstruction and Development*, WBAT

Decision No. 159 (1997), whose oral understanding with the World Bank was held by the WBAT to have supplemented her separation agreement and to have immunized her from a future amendment of the Bank's rules that placed a cap on the number of days per year that former staff members could serve.

70. Staff members must be able to rely upon the information communicated to them through the Fund's internal communications channels. This is especially so when they confront decisions that are poised to alter significantly their lives and careers, as was the case with the 2008 Fund-wide downsizing. *See Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012), para. 151 (awarding compensation for intangible injury resulting from Fund's failure to uphold the applicant's legitimate expectation of having his request for voluntary separation considered in accordance with the rules governing the 2008 Fund-wide downsizing exercise).

71. This Tribunal has recognized the significance of what it has characterized as the "living law" of the Fund as may be communicated to the staff by publication of information on the Fund's internal website. *See Mr. "R"*, *Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2002-1 (March 5, 2002), note 14 ("The Tribunal has taken note of announcements of benefits and allowances pertinent to this case that appear on the Fund's Intranet rather than, as far as it has been possible to ascertain, in Staff Bulletins and GAO texts. Since the Tribunal feels bound to take account of the 'living law' of the Fund found in the 'public' domain, which is accessible to staff of the Fund, it has decided to include such Intranet data in this Judgment.") Moreover, content found on the EYO website (including the Q&As) has been submitted by the Fund and relied upon by this Tribunal in earlier cases arising from the 2008 downsizing exercise. *See Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-2 (February 9, 2010), para. 30; *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010), para. 29; *Pyne*, paras. 108, 122, and 130.

72. That the information provided on the EYO website was reliable and material to the conduct of downsizing volunteers is additionally highlighted by a reference to that website in the separation letter of another staff member, which is part of the record before the Tribunal in this case. That staff member had elected to receive SBF payments over a period of separation leave, rather than by way of a lump-sum payment as had Applicant. Accordingly, the separation letter included a paragraph, absent from Applicant's separation letter, relating to the staff member's conduct during the SBF leave period: "As an employee of the Fund, you will continue to be subject to the N-Rules and specifically to the rules regarding conflicts of interest. Before the end of your separation leave, you may not engage in gainful employment elsewhere without the express written approval of the Fund. *Detailed information on outside employment as well as other relevant information is available in the Exploring Your Options website.*" (Letter from HRD Director to [staff member], May 22, 2008.) (Emphasis added.)

73. In *Mr. "V", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1999-2 (August 13, 1999), this Tribunal stated, in the context of alleged breach of a settlement and release agreement, that international administrative tribunals have looked for evidence of "individualized bargaining and the exchange of consideration as indications that the

agreement was entered into freely and reflected a real balancing and resolution of interests between the parties." *Id.*, para. 79. In *Mr. "V"*, the Tribunal concluded that, "[w]here, as with the Retirement Agreement between Mr. "V" and the Fund, there is evidence of vigorous, individualized negotiation of terms, it is difficult to conclude that anything other than their plain meaning should be accorded those terms." *Id.*, para. 82. In the instant case, by contrast, this Tribunal is tasked with interpreting a separation agreement of a wholly different kind.

74. The separation agreement at issue in this case is more similar to that considered by the WBAT in *Harrison v. International Bank for Reconstruction and Development*, WBAT Decision No. 53 (1987). There, the WBAT distinguished cases arising from separation agreements "characterized by a personalized negotiation between the staff member and representatives of the Bank" and those determined unilaterally by general rules apparently not subject to individual adjustment. In the former circumstance, a "freer environment existed in which to place a fair value upon the staff member's relinquishment of his right[s] . . . . In the present case, however, the value equivalent to the staff member's release was determined not by individualized negotiations but rather by an inflexible and general rule covering potentially all staff members employed by the Bank . . . ." *Id.*, paras. 26-29 (invaliding staff rule imposing release of claims on staff members accepting certain separation packages as part of comprehensive Bank reorganization; permitting applicant to challenge abolition of her position and termination of employment). In *Harrison*, the WBAT further observed that "[t]he absence of freedom to negotiate about terms was starkly reinforced by the very widespread concern and dislocation among the staff that would necessarily follow from any top-to-bottom reorganization, no matter how fairly and painstakingly implemented." *Id.*, para. 27.

75. Respondent asserts that Applicant was not ". . . compelled to accept the terms of the separation as set forth in the draft agreement initially proposed by the Fund. The Applicant was also entitled to retain legal counsel to advise him of the consequences of the terms of the separation agreement." This suggestion, offered in the Fund's pleadings, contrasts markedly, however, with the reality of the downsizing exercise, in which volunteers typically requested separation via an automated mailbox provided for that purpose, were soon thereafter notified of their acceptance or refusal for the program, and, it appears, provided with standard form agreements soon following. *See* Staff Bulletin No. 08/03, p. 2 ("staff will be able to submit an application to volunteer on-line though the *ESS Kiosk* or by using a form that will be available in the *Exploring Your Options* website"); *see also Faulkner-MacDonagh*, para. 41; *Billmeier*, para. 40. Such an approach was hardly an invitation to individualized negotiation. Nor is there any suggestion in the rules governing the downsizing that the Fund, in fact, would have been amenable to bargaining over individual terms as part of an exercise predicated on the fair treatment of Fund staff members in accordance with prescribed rules. Applicant left under standard terms and benefits, the precise calculation of which varied, according to specified rules, depending upon such factors as the staff member's length of service and particular elections he had made.

76. Applicant did not strike an individualized bargain with the Fund. Nor, in the circumstance of the departure of nearly 500 staff members, could he have been expected to have done so. In this respect, the circumstances in which Applicant voluntarily separated contrast sharply with those considered in *Mr. "V"*. Respondent emphasizes that "Applicant neither

sought nor received such an assurance [that he would not be barred from future re-employment]. There was simply no meeting of [the] minds between the Fund and the Applicant that this should constitute a term of the separation agreement." In the view of the Tribunal, however, the burden was not upon Applicant but rather on the Fund to propose any term that might have varied from the information disseminated on the EYO website. In an environment of Fund-wide downsizing in which individualized bargaining was not the rule, the Fund may not properly shift to the staff member the burden of securing an individualized commitment that his eligibility for future re-employment would not be foreclosed.

77. In the view of the Tribunal, when the Fund advised staff considering separation under the downsizing that there was no rule barring their re-employment following the usual SBF period, it constrained its discretionary authority to amend the re-hiring policy in the manner that it did. That advice was part of the ensemble of conditions by which the downsizing volunteers separated from the Fund.

78. The Tribunal accordingly concludes that Applicant and the other volunteers rightfully relied upon the information communicated to all persons eligible to volunteer under the terms of the 2008 Fund-wide downsizing that no rule precluded their future re-employment. This was a material term upon which Applicant and almost 500 other staff members separated from the Fund. The Fund did not live up to its end of the bargain. The Fund placed information on the website titled Exploring Your Options, which was expressly designed to "help [staff] in making decisions during the downsizing." On that website, the Fund stated without relevant qualification that staff who opted for voluntary separation would not be prohibited from being re-employed in the future by the Fund. The Fund made this assurance part of the bargain it struck with the volunteers who separated under the 2008 Fund-wide downsizing exercise. When, a little more than a year later and before many of the volunteers—including Applicant—had actually left employment, the Fund revised its policy, it breached those expectations.

79. What compels the Tribunal's conclusion in this case is that the Fund posted the Q&As with the purpose of assisting staff in making decisions about whether or not to opt for separation under the terms of the downsizing program. Read literally, the text of the response may be said to refer only to the rule existing at the time that the Q&A was posted. Read in the context in which the Q&As were presented, however, the purport of the question was surely to seek assurance—and the Fund's answer provided that assurance—that future Fund employment would not be foreclosed by acceptance of the separation terms offered by the downsizing. In later promulgating a policy that did precisely that, the Fund breached the legitimate expectations of the volunteers. This conclusion is reinforced by the fact that the Fund did not revise, in general, its policies relating to re-employment of former staff members, but rather issued a policy that applied specifically to those persons whom it had informed via the Q&A of a contrary rule.

Applicant's contention that the Fund failed to give reasonable notice of the re-hiring ban

80. Applicant asserts as a separate basis for challenging the legality of the policy prohibiting the re-hiring of the downsizing volunteers that it was implemented in the absence of fair procedures and that the Fund's failure to announce the rule rendered it invalid *per se*. Applicant

asserts that the decision to adopt the re-hiring ban was "made behind closed doors while most affected staff members actually were still at the Fund and had just signed their separation agreements . . . and the—now false—information in the Q&As remained uncorrected." Applicant maintains that a "minimum requirement of fair and proper process in the Fund's implementation of any new policy affecting its current and former staff would have been proper notification and information of the amended policy to all affected staff—whether in the form of a Staff Bulletin, a formal amendment to its staff rules or GAO's or any other public forum."

81. Respondent, for its part, maintains that the manner in which it communicated changes to its re-hiring policy individually to Applicant when he inquired about a possible contractual appointment was appropriate and that Applicant suffered no harm as a result. In the view of the Fund, it was not necessary to announce the policy to staff because it had "no impact on serving staff" and there can be "no sound reason for requiring the Fund to announce changes in its recruitment criteria to a group of former staff members who have no entitlement to be re-hired by the Fund." In Respondent's view, it chose an "appropriate and efficient approach" by communicating the policy change to the SPMs who, together with HRD, are tasked with recruitment responsibilities. In the view of the Fund, "[i]t was incumbent on these hiring managers to implement the policy, and in so doing communicate this policy to those former volunteers who applied for positions."

82. In a variety of circumstances, this Tribunal has commented on the importance of clarity in the Fund's rules and regulations governing the employment relationship. *See generally Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 178 and cases cited therein. Furthermore, the Tribunal has held that "[w]hen new staff rules are adopted, especially those denominated 'Guidelines,' 'Policies,' and the like, it is incumbent that the Fund give indication on the face of such pronouncements just how they are to fit into the existing regulatory framework. When such documents modify the meaning or application of the General Administrative Orders, the Fund should, as a matter of course, update the relevant GAOs." *Id.*, para. 180. *See also D'Aoust*, para. 36 ("[N]either the members of the staff of the Fund nor this Tribunal can adequately react to a practice which is at once real in its effects but so elusive in its origins, adoption, recording, articulation and transparency.")

83. The Tribunal has concluded above that the "regulatory decision" challenged in this case cannot stand because it was inconsistent with an undertaking expressly made to those staff members who volunteered for separation under the 2008 Fund-wide downsizing program. In the light of that conclusion, the Tribunal need not address the question of whether the rule is invalid on any other ground. *See Harrsion*, para. 28 ("In view of this finding [of the invalidity of the rule] the question whether paragraph 12.01 of Staff Rule 5.09 has been adopted with or without proper consultation with the Staff Association becomes irrelevant); *Ms. "J", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2003-1 (September 30, 2003), para. 171 ("The Tribunal has decided Ms. "J"'s Application in her favor on substantive grounds. In this case, the Tribunal finds no need to pass upon her procedural complaints"; rescinding decision denying disability pension and ordering that disability pension be granted); *Ms. "K", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2003-2 (September 30, 2003), para. 108 (same).

Is Applicant's challenge to the "individual decision," determining that he was ineligible to compete for a contractual vacancy on the basis of the contested "regulatory decision," well-founded?

84. The "individual decision" challenged in this case is the January 12, 2012 decision of the HRD Director that "[b]ecause [Applicant] left under the downsizing initiative, [he was] not eligible to compete for any contracts at the Fund." It is not disputed that the "individual decision" flowed directly from the contested "regulatory decision." The Tribunal observed in *Tosko Bello I*, para. 20: "Applicant's complaint against the 'individual decision' rests entirely on his challenge to the underlying policy. Applicant makes no allegations that are specific to the application of that policy in the circumstances of his case."

85. Accordingly, having concluded that Applicant's challenge to the "regulatory decision" is well-founded, the Tribunal also concludes that his challenge to the "individual decision" is well-founded.

Remedies

86. In his Application, Applicant seeks as relief:

a. rescission of the HRD Director's January 12, 2012 decision, which Applicant describes as a decision "not to select/not to consider Applicant eligible" for a contractual vacancy in his former department;

b. rescission of the Fund's policy against re-hiring (either as regular staff or contractual) former staff members who separated voluntarily under the 2008 downsizing exercise;

c. compensation in the amount of one-year's salary as "compensatory and moral damages"; and

d. legal fees and costs incurred in pursuing his case before the Grievance Committee and the Administrative Tribunal.

Applicant additionally states: "To the extent the challenged matter is disposed of on the basis of general principles of law rather than particular facts relating to Applicant's Application, Respondent should agree to treat all staff members similarly situated in accordance with the Tribunal's decision, whether or not an individual has made application or intervened in the proceedings before the Tribunal."

87. The pertinent remedial provisions of the Statute and their accompanying Commentary are reproduced below:

ARTICLE XIV

1. If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall

prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

. . . .

Under Section 1, if the tribunal finds that an individual decision is illegal, it shall order the rescission of the decision and all other appropriate corrective measures. These measures may include the payment of a sum of money, or the specific performance of prescribed obligations, such as the reinstatement of a staff member.

In cases where the tribunal concludes that an individual decision is illegal by virtue of the illegality of the regulatory decision pursuant to which it was taken, the judgment would not invalidate or rescind the underlying regulatory decision, nor would it invalidate or rescind other individual decisions already taken pursuant to that regulatory decision.[23] If a regulatory decision had been in effect by the organization for over three months, an application directly challenging its legality would not be admissible. A finding by the tribunal, in the context of reviewing an individual decision, that the regulatory decision was illegal would not nullify the decision as such. Thus, previous decisions taken in reliance on, or on the basis of, the regulatory decision would not be invalidated; the organization could decide as a policy matter whether, and to what extent, to reopen those decisions and take further action in light of the tribunal's judgment. The judgment would, however, render the regulatory decision unenforceable against the applicant in the immediate case. The regulatory decision would also, for all practical purposes, become ineffective vis-à-vis other staff members, since future applications in other individual decisions would themselves be subject to challenge, within the applicable time limits for such claims.

[23] Other staff members to whom the regulatory decision had already been applied could seek relief in light of the tribunal's holding only if their applications were made within the specified time limits for challenging individual decisions.

. . . .

3. If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and

void.

Section 3 sets forth the consequences of a ruling in favor of an application challenging the legality of a regulatory decision. In that case, the statute provides that the tribunal shall annul the decision. As a result, the decision could not thereafter be implemented or applied by the organization in individual cases.

Annulment would have certain consequences with respect to individual decisions taken pursuant to the annulled regulatory decision, whether taken before or after the date of annulment. Such individual decisions would be null and void. Accordingly, it would be incumbent on the Fund to take corrective measures with respect to each adversely affected staff member. The failure to take proper corrective measures in an individual case would itself be subject to challenge as an administrative act adversely affecting the staff member. For example, if the tribunal annulled a regulatory decision retroactively reducing a benefit, all staff members to whom that decision had been applied would be entitled to the restoration of that benefit for that period. The failure to restore the benefit in an individual case could then be challenged before the tribunal.

(Statute, and Commentary on the Statute, pp. 35-37.)

88. Article XIV, Section 3, of the Statute provides that "[i]f the Tribunal concludes than an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision." The Tribunal has concluded above that Applicant's challenge to the "regulatory decision" barring the re-employment of former staff members who separated voluntarily pursuant to the terms of the 2008 Fund-wide downsizing program is well-founded because that decision violated the legitimate expectations of the volunteers. Accordingly, pursuant to Article XIV, Section 3, the "regulatory decision" is annulled.

89. Article XIV, Section 3, further provides that "[a]ny individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void." Applicant has challenged an "individual decision" made on the basis of the "regulatory decision" that is null and void. No other "individual decision" based on the invalid "regulatory decision" has been brought to the attention of the Tribunal in these proceedings. The pertinent "individual decision" in relation to Applicant is the January 12, 2012 decision of the HRD Director. The record shows that Applicant sought to apply for a particular contractual vacancy that arose in his former department and that he elicited a written determination directly from the HRD Director that he was not eligible to compete for any contracts at the Fund because he had separated pursuant to the 2008 Fund-wide downsizing

program. As considered above,[21] it is not disputed that the "individual decision" flowed directly from the "regulatory decision"; the Tribunal has concluded that Applicant's challenge to the "individual decision" is well-founded. Accordingly, on the basis of Article XIV, Sections 1 and 3, of the Statute, the HRD Director's January 12, 2012 decision that Applicant was "not eligible to compete for any contracts at the Fund" because he had separated under the 2008 Fund-wide downsizing program is null and void.

90. Article XIV, Section 1, provides in respect of challenges to "individual decisions" that "[i]f the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision *and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.*" (Emphasis added.) It is notable that the portions of the Commentary on the Statute associated with both Sections 1 and 3 of Article XIV refer to the taking of "corrective measures." *See* Commentary on the Statute, pp. 35, 37. The question arises of what remedy the Tribunal shall prescribe to "correct the effects" of the nullified "individual decision" in respect of Applicant. In his request for relief, Applicant seeks compensation in the amount of one-year's salary as "compensatory and moral damages."

91. The Tribunal observes that although Applicant describes the January 12, 2012 decision of the HRD Director as a decision "not to select/not to consider Applicant eligible for the contractual appointment in [his former department]," it is clear from the record that the content of that decision, that "[b]ecause you left under the downsizing initiative, you are not eligible to compete for any contracts at the Fund" (Email from HRD Director to Applicant, January 12, 2012), was not a non-selection decision but rather a non-eligibility decision. Applicant has not asserted, nor can he show on this record, that but for the nullified "regulatory decision" he would have been re-employed by the Fund. Accordingly, Applicant has not established that he suffered actual loss of wages because of the application of the "regulatory decision" in the circumstances of his case. Instead, the loss that Applicant suffered is an intangible injury. Accordingly, to "correct the effects" of the nullified "individual decision," Applicant shall be awarded monetary compensation for that injury.

92. The jurisprudence of this and other international administrative tribunals has long recognized the principle that ". . . relief may be awarded for intangible injury." *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 121-122 and Decision (awarding compensation for Fund's failures to take effective measures in response to religious intolerance and workplace harassment of which Mr. "F" was an object, and to give him reasonable notice of the abolition of his post).[22] In cases in

---

[21] *See supra* Consideration of the Issues of the Case: Is Applicant's challenge to the "individual decision," determining that he was ineligible to compete for a contractual vacancy on the basis of the contested "regulatory decision," well-founded?

[22] *See also Negrete*, para. 151 (awarding compensation for intangible injury resulting from Fund's failure to uphold the applicant's legitimate expectation of having his request for voluntary separation considered in accordance with the rules governing the 2008 downsizing exercise); *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), paras. 255-256 and Decision (awarding compensation for failures of fair process in respect of selection process for position to which the applicant sought to be promoted

(continued)

which an applicant has been wrongfully excluded from competition for a post, it is not necessary to show that he or she would have succeeded in the quest for the position in order for monetary compensation to be granted. *See, e.g., Jakub v. International Bank for Reconstruction and Development*, WBAT Decision No. 321 (2004), paras. 69-70, 76 and Decision (awarding compensation "because the Respondent failed to give the Applicant an opportunity to compete for a position in his department for which he was entitled to be considered," even though it was "possible that if the Applicant had been allowed to compete for the post, he would not have been selected"); *Mr. I. K. M.*, ILOAT Judgment No. 2959 (2010), Considerations 3-9 (awarding moral damages for "violation of [applicant's] right to compete for a post" where "no evidence that the complainant's candidature . . . would have had any real prospect of success"; also setting aside impugned appointment).

93. Accordingly, to correct the effects of the nullified "individual decision" in respect of Applicant, the Fund shall pay him compensation in the sum of $20,000 for the intangible injury he incurred in being wrongfully denied the opportunity to compete for a vacancy in his former department for which he made efforts to apply. In setting this sum, the Tribunal takes into account that Applicant has succeeded in respect of the two main forms of relief he sought: the annulment of both the "regulatory decision" and the "individual decision" taken in his case. The effect of the annulment of the "regulatory decision" is that Applicant and the other 2008 downsizing volunteers are now eligible to apply to be considered for re-employment at the Fund as suitable vacancies arise, as was their legitimate expectation in the light of the terms upon which they volunteered for separation from the Fund. In the view of the Tribunal, this was the primary material benefit Applicant sought in this case.

94. In addition to the relief set out above, the Fund shall adopt the necessary corrective measures to ensure that former staff members who voluntarily left the institution pursuant to the terms of the 2008 downsizing program are considered henceforth as eligible for re-employment if qualified to this end. Those corrective measures include that the Fund shall notify individually each volunteer that the ban on re-hiring of former staff members who voluntarily separated under the 2008 Fund-wide downsizing exercise has been nullified by decision of the Tribunal. The Fund shall also notify all staff members (whether in HRD or the Fund's other departments) who have responsibility for the recruitment and hiring of personnel that the ban on re-hiring of the downsizing volunteers has been lifted, and it shall provide a general announcement of this to all staff.

---

and for breach of the Fund's rules in failing to provide her with proactive assistance in seeking another suitable position to which she might be re-assigned following abolition of her position); *Ms. "EE",* paras. 265-266 (awarding compensation for breach of due process for Fund's failure to seek any account from the applicant of her version of the facts relevant to the accusations against her before taking decision to place her on paid administrative leave pending investigation of misconduct); *Ms. "C", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44 and Decision (awarding compensation for lapse of due process in non-conversion of fixed-term appointment).

Legal fees and costs

95. Article XIV, Section 4, of the Statute 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.

96. In accordance with the Tribunal's Rules of Procedure, Applicant has included with his Reply a statement of his legal fees and costs totaling $16,281.00. Respondent has had the opportunity to comment on this statement in its Rejoinder.

97. The Fund responds that, in applying the statutory criteria, the Tribunal should consider that the case is "not complex from either a factual or legal standpoint" and does not involve extensive testimony or documentary evidence. The Fund also requests that the Tribunal apply a principle of proportionality to limit any fee award to a percentage of the total that fairly reflects the extent to which Applicant has prevailed on his claims.

98. Additionally, Respondent objects to that portion of Applicant's request for legal fees and costs that reflects his representation before the Grievance Committee. In the view of the Fund, the filing of Applicant's Grievance was a "wholly unnecessary step given the nature of the claims being presented, and the jurisdictional competence of the Grievance Committee."

99. It is settled jurisprudence that this Tribunal may award attorney's fees and costs for representation in proceedings antecedent to the Tribunal's review.[23] In *Tosko Bello I*, para. 17, the Tribunal noted that Applicant had filed a Grievance with the Fund's Grievance Committee to preserve his rights to review in either forum. The Tribunal has elsewhere commented on the problem of exhaustion of administrative review in cases in which an applicant challenges an "individual decision" on the basis that an underlying "regulatory decision" is invalid. *See generally Faulkner-MacDonagh*, paras. 50-65 and cases cited therein. Whether Applicant's challenge in the instant case was to an "individual decision" or a direct challenge to a "regulatory decision" (or both, as the Tribunal has now concluded), was a question that remained unclear even to the Tribunal. *See Tosko Bello I*, para. 21.

100. In the light of the Tribunal's jurisprudence favoring recourse to the Grievance Committee where that channel is available, *see, e.g., Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42, it was reasonable for

---

[23] *See Sachdev,* para. 258; *Mr. "F",* para. 124; *Ms. "C", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1),* IMFAT Order No. 1997-1 (December 22, 1997), para. Fourth; *see also Mr. "V",* para. 136.

Applicant to protect his interests by submitting a Grievance. Were the Tribunal to refuse to grant that portion of Applicant's fee request associated with the Grievance filing, it might lead future applicants to risk being debarred from seeking review in this Tribunal on the ground that they failed to comply with the exhaustion requirement of Article V, Section 1, of the Tribunal's Statute. In the circumstances, the Tribunal concludes that there is no ground to exclude that portion of the fee request that arises from Applicant's pursuit of his complaint before the Grievance Committee.

101. Finally, the Tribunal notes that in *Tosko Bello I*, para. 35, it reserved until this Judgment on the merits the consideration of Applicant's request for legal fees and costs incurred in successfully defending against the Fund's Motion for Summary Dismissal of the Application in the Tribunal.[24] Those fees and costs are included in the statement submitted with Applicant's Reply. Respondent does not oppose this element of the fee request.

102. Having considered the representations of the parties, and the criteria set out in Article XIV, Section 4, of the Statute, the Tribunal concludes as follows. Applicant has prevailed on his principal claim, resulting in a Judgment that affects not only himself but a wide group of other former staff members. The Tribunal accordingly finds no ground upon which to award anything less than the full amount of fees and costs submitted, i.e., $16,281.00.

[24] "The Tribunal finds no ground to grant Applicant's request for legal fees and costs at the present stage of proceedings. It leaves open the possibility of revisiting the question of an award of attorney's fees for successfully defending against the Motion for Summary Dismissal at the time of its decision on the merits of the Application." *Tosko Bello I*, para. 35.

Decision

FOR THESE REASONS

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

1. The "regulatory decision" barring the re-employment of former staff members who separated voluntarily pursuant to the terms of the 2008 Fund-wide downsizing program is annulled.

2. The "individual decision" of January 12, 2012, determining that Mr. Tosko Bello was ineligible, on the basis of the above "regulatory decision," to compete for a contractual vacancy in his former department is null and void.

3. To correct the effects of the nullified "individual decision" in respect of Mr. Tosko Bello, the Fund shall pay him compensation in the sum of $20,000 for the intangible injury he incurred in being wrongfully denied the opportunity to compete for the contractual vacancy in his former department for which he made efforts to apply.

4. The Fund shall notify individually each former staff member who separated voluntarily pursuant to the terms of the 2008 Fund-wide downsizing program that the ban on re-hiring of those volunteers has been nullified by decision of this Tribunal.

5. The Fund shall also notify all staff members (whether in the Human Resources Department or the Fund's other departments) who have responsibility for the recruitment and hiring of personnel that the ban on re-hiring of volunteers who separated pursuant to the terms of the 2008 Fund-wide downsizing program has been nullified by decision of this Tribunal, and it shall provide a general announcement of this to all staff.

6. The Fund shall pay Mr. Tosko Bello the reasonable costs of his legal representation incurred in pursuing his claims before the Grievance Committee and the Administrative Tribunal, in the sum of $16,281.00.

Catherine M. O'Regan, President

Edith Brown Weiss, Judge

Francisco Orrego Vicuña, Judge

/s/
Catherine M. O'Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
March 13, 2013