ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2022-1

"TT", Applicant v. International Monetary Fund, Respondent

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INTRODUCTION

1. On February 25 and 28, March 2, 4 and 7, and April 6 and 26 and June 21, 2022, the Administrative Tribunal of the International Monetary Fund ("Tribunal"), composed for this case, pursuant to Article VII, Section 4 of the Tribunal's Statute, of Judge Edith Brown Weiss, acting as President for the case,[1] and Judges Deborah Thomas-Felix and Andrew K.C. Nyirenda, met to adjudge the Application brought against the International Monetary Fund ("Respondent" or "Fund") by "TT"[2], a former staff member of the Fund. Applicant was represented by Mr. Peter C. Hansen and Mr. J. Michael King, Law Offices of Peter C. Hansen, LLC. Respondent was represented on the written pleadings by Ms. Juliet Johnson and Mr. Andrew Giddings, both Senior Counsels in the Administrative Law Unit of the IMF Legal Department. Mr. Brian Patterson, IMF Assistant General Counsel, along with Ms. Johnson, appeared on behalf of Respondent in the oral proceedings.

2. In light of the COVID-19 pandemic, consequent restrictions on travel, and the Fund's work-from-home directive, the Tribunal decided to hold its session by electronic means, in accordance with Article XI of the Statute, amended in 2020, which provides:

> The Tribunal shall ordinarily hold its sessions at the Fund's headquarters. The Tribunal may decide to hold a session at another location or by electronic means, taking into account the need for fairness and efficiency in the conduct of proceedings. The Tribunal shall fix the dates of its sessions in accordance with its Rules of Procedure.

The session, including the oral arguments of the parties (see below), was held by videoconference coordinated by the Tribunal's Registry.

3. Applicant contests the decision to place him on administrative leave with pay and to deny him access to his work unit and systems. The 2.5-month administrative-leave-with-pay period, combined with an equal period of annual leave, comprised the 5 months culminating in Applicant's retirement from the Fund upon reaching mandatory retirement age. Applicant

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[1] Statute, Article VII, Section 4, provides in relevant part: "If the President recuses himself or is otherwise unable to hear a case, the most senior of the members shall act as President for that case. . . ."

[2] Applicant's request for anonymity was granted on January 24, 2022. *See infra* Applicant's and Respondent's requests for anonymity.

contends that the challenged administrative-leave-with-pay decision was improperly motivated by retaliation, harassment and discrimination. Applicant further submits that, although the decision was said to respond to concerns about workplace safety allegedly posed by Applicant's presence, it was taken without the procedural protections that would have been associated with administrative leave with pay pending an investigation of misconduct.

4. The Grievance Committee concluded that the decision to place Applicant on administrative leave with pay was ". . . defective because it was the product of retaliatory motives" and recommended rescission of that decision and removal of any record thereof. At the same time, the Grievance Committee recommended denial of Applicant's request for monetary relief. Fund Management accepted the Grievance Committee's recommendations to rescind the impugned decision and to reimburse partial attorneys' fees.

5. In his Application to the Tribunal, Applicant reasserts his challenge to the administrative-leave-with-pay decision. Applicant additionally contends that the Grievance Committee proceedings constitute a separate injury to Applicant. Applicant alleges that those proceedings diverged from due process and were affected by bias, and that the Grievance Committee acted inconsistently with Tribunal precedents in its approach to compensation for intangible injury.

6. Applicant seeks as relief: (a) rescission of a non-promotion decision preceding these events, and related relief; (b) rescission of the administrative-leave-with-pay decision and removal from Applicant's file of documentation of the administrative leave and of any allegations made against Applicant; (c) compensation for accrued leave that Applicant was required to use prior to the administrative leave; (d) three years' salary to compensate for "severe career, moral and intangible damage done to [Applicant] by the Fund's wrongful actions, including . . . retaliatory harassment"; (e) an additional one year of salary as moral damages for the separate intangible injury by the "defective Grievance Committee process and the Fund's acceptance of, and active participation in, those defects"; (f) other relief in connection with the Grievance Committee proceedings, including full attorneys' fees; and (g) 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.

7. Respondent, for its part, maintains that the contested administrative-leave-with-pay decision was reasonably considered, properly motivated, and well within the discretion afforded by the applicable provision of the Fund's internal law. The Fund submits that the Director of the Human Resources Department ("HRD") had sufficient evidence to place Applicant on administrative leave with pay on the ground that his "continuing presence . . . at work may not be in the interest of the Fund" (Staff Handbook, Chapter 5.01, Section 5.6) and that Applicant was given ample notice and opportunity to be heard. As to Applicant's challenges to aspects of the Grievance Committee's proceedings in his case, the Fund maintains that these fall outside the jurisdiction of the Tribunal to decide. Respondent has also asked the Tribunal to address alleged lack of civility on the part of Applicant's counsel in his presentation of the case.

PROCEDURE

8. On August 5, 2020, Applicant filed an Application with the Tribunal. The Application was transmitted to Respondent on August 10, 2020. On August 21, 2020, pursuant to Rule IV,

para. (f), of the Tribunal's Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

9. On October 26, 2020, Respondent filed its Answer to the Application.[3] On November 30, 2020, Applicant submitted his Reply, which was supplemented on December 4, 2020, by request of the Registrar. The Fund's Rejoinder was filed on January 6, 2021. Following the filing of the Rejoinder, Applicant's counsel submitted a communication to the Tribunal on February 11, 2021, which was transmitted to the Fund for its information.

10. Following the oral proceedings in the case, Applicant submitted his Supplementary Request for Costs on March 10, 2022. The Fund filed its Response on March 18, 2022.

A. Applicant's request for production of documents

11. Pursuant to Rule XVII of the Tribunal's Rules of Procedure, Applicant made the following request for production of documents: "all Grievance Committee materials pertaining to [Applicant]'s case, including all drafts of any decisions, all deliberative materials (including emails), and any communications with either party."

12. Applicant asserted that "(i) such materials are probative as to the allegations and claims laid out herein, (ii) the Grievance Committee is not a court, but merely a Fund office not immune to Tribunal review; (iii) GAO [General Administrative Order] 11, Chapter 11.03, Section 5.4 ('Independence of the Grievance Committee') does not prevent the Tribunal from reviewing the Committee's work when the Committee's independence has reasonably been put in question; and (iv) GAO 11, Chapter 11.03, Section 5.19 ('Duty of Confidentiality') does not shield the Grievance Committee from Tribunal scrutiny, which is itself strictly confidential and cannot be deemed a 'reprisal' under Section 5.4 of that Chapter."

13. The Fund opposed Applicant's document request on two grounds. First, the Fund contended that the Grievance Committee's deliberations and drafts are "irrelevant to the issues of the case" in terms of Rule XVII(2) because the Tribunal's Statute and jurisprudence establish that the Tribunal does not have jurisdiction to review the Grievance Committee's Recommendation or to "engage in a searching review of its processes." Second, the Fund maintained that producing the requested documents would interfere with the Grievance Committee's deliberative process and would "completely undermine [the Committee's] ability to perform their critically important function in the Fund's dispute resolution system."

14. The Tribunal observes that Applicant's request for production of documents relates to a secondary claim in his Application, that is, that the Grievance Committee proceedings constitute a separate injury to Applicant.[4] For purposes of deciding Applicant's request for production of

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[3] On August 13, 2020, pursuant to the authority provided by Rule VIII(1), the President of the Tribunal granted Respondent's request for extension of time, following an opportunity for Applicant to comment on that request, to which he did not object.

[4] *See infra* Did the Fund abuse its discretion in the treatment of Applicant's case by the Grievance Committee?

documents, the Tribunal concluded that it did not need to decide on the justiciability of Applicant's claim concerning the Grievance Committee's treatment of his case. What was significant in deciding the request for production of documents was that Applicant had not explained how the documents he was seeking would substantiate the allegations he advances. These allegations focus on the Grievance Committee's findings and conclusions, the law upon which it relies, citation of particular cases and not others, the Committee's reasoning, and the relief it recommended in the case. The Tribunal has the record of the Grievance Committee proceedings in Applicant's case, beginning with the Statement of Grievance, through the pre-hearing and hearing transcripts, multiple post-hearing submissions, and the Committee's Reports and Recommendations.

15. The Tribunal accordingly concluded, in the light of the record as a whole, that the documents Applicant requested would not be probative of the issues of the case. On January 24, 2022, the Tribunal notified the parties that Applicant's request for production of documents had been denied.

B. Role of OII report in Tribunal proceedings

16. The Fund maintains that it has properly included in the record before the Tribunal a decision by the Office of Internal Investigations ("OII"), closing a Preliminary Inquiry into a retaliation complaint brought by Applicant concerning circumstances to be considered by the Tribunal in this case. The Fund maintains that the OII decision provides "persuasive evidence that no retaliation occurred" in Applicant's case.

17. Applicant objects that the Tribunal should not give any deference to OII's decision to close the Preliminary Inquiry. Applicant submits that the Fund has improperly included that decision in the record of the case, contrary to the Tribunal's past rulings concerning the separation between the Fund's disciplinary process, on the one hand, and the process for resolution by the Tribunal of challenges to "administrative acts," on the other. Applicant additionally contends the decision demonstrates that OII proceeded to dismiss a complaint against a decision (the administrative-leave-with-pay decision in Applicant's case) that OII had earlier "pre-approved" for HRD.

18. The Tribunal has recognized that disposition of a misconduct complaint by those organs of the Fund charged with its resolution is distinct from the Tribunal's review of a challenge to an "administrative act" (Article II) adversely affecting an Applicant: "Accordingly, *in the absence of a compelling reason*, the Tribunal will not ordinarily have a basis for taking account of the findings of Ethics investigations." *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 68. (Emphasis added.) The Tribunal has explained its rationale as follows:

> 68. In the view of the Tribunal, the weight that it may give to Ethics Office findings is limited by the following factors: (i) the Tribunal's duty to assess independently the claims raised in an application so as to fulfill its obligation ". . . as a judicial body, to determine whether a decision transgressed the applicable law of the Fund," Commentary on the Statute, p. 13; (ii) the confidential nature of the investigatory process, by which the

> reports of investigation are withheld from the complaining party; and (iii) the requirement that, as a judicial body, the Tribunal is to draw its conclusions based on evidence tested through an adversary process. Accordingly, in the absence of a compelling reason, the Tribunal will not ordinarily have a basis for taking account of the findings of Ethics investigations.
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> 69. Staff members must feel free to pursue all channels of recourse when presented with circumstances that they perceive as raising issues both of misconduct by other staff members and of the illegality of an administrative act by which they have been adversely affected. Given the distinct *purposes* of these channels, and the differences among their fact-finding methods and standards of proof, the Tribunal concludes that it would not be appropriate to give weight to the findings made by the Ethics Office in response to Applicant's complaints.

Ms. "GG" (No. 2), paras. 68-69.

19. In this case, the Tribunal finds no "compelling reason" to take account of OII's decision to close the Preliminary Inquiry into Applicant's retaliation claim. Accordingly, the Tribunal rejects the Fund's request to consider the OII determination as probative of whether the administrative-leave-with-pay decision was improperly motivated by retaliation. The Tribunal takes note of the existence of the report but does not give evidentiary weight to its content.

C. Applicant's and Respondent's requests for anonymity

20. Pursuant to Rule XXII(1) of the Tribunal's Rules of Procedure, Applicant requested anonymity for himself "on the ground that good cause for such exists[,] given that this case involves: (i) allegations of misconduct against the Applicant; (ii) alleged retaliation against the Applicant; (iii) whistleblowing by the Applicant."

21. Respondent, citing Rule XXII(2), requested anonymity for two Fund officials who are key figures in the case, a request that the Fund acknowledged "necessarily requires anonymity for Applicant as well." Respondent also requested that the name of Applicant's work unit not be identified in the Judgment.

22. Rule XXII(4) provides that the Tribunal may grant a request for anonymity where "good cause" has been shown for protecting the privacy of an individual. The Tribunal has interpreted the "good cause" standard in the light of the principle that granting anonymity to an applicant is an exception to the ordinary rule that the names of parties to a judicial proceeding should be made public. *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13.

23. In this case, Applicant alleges that the contested administrative-leave-with-pay decision was improperly motivated by harassment, retaliation and discrimination. These are serious accusations that the Tribunal has recognized warrant anonymity for persons involved. The Tribunal has recently reaffirmed that "[s]hielding the identities of persons involved in disputes

concerning 'alleged misconduct . . .' is a core ground for granting anonymity to applicants pursuant to Rule XXII." *Ms. "PP", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-1 (May 20, 2021), para. 19, citing *Ms. "AA",* para. 14. *See also Mr. "KK", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2016-2 (September 21, 2016), para. 16 (Tribunal's jurisprudence supports anonymity in cases "involving allegations of staff misconduct, including harassment and retaliation").[5]

24. In the light of the Tribunal's jurisprudence and the issues and evidence of the case, the Tribunal granted Applicant's request for anonymity. As to Respondent's request for anonymity of other persons, the Tribunal observes that its usual practice is not to identify by name other individuals in the Judgment, and it accordingly acceded to Respondent's request as well. *See Ms. "GG" (No. 2)*, para. 76. Likewise, the Tribunal has long observed the practice of not identifying departments and divisions of the Fund, except where the identification of a work unit is necessary to the comprehensibility of the Judgment. *See Mr. M. D'Aoust (No. 3), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2008-1 (January 7, 2008), note 1.

25. On January 24, 2022, the Tribunal notified the parties that Applicant's and Respondent's requests for anonymity had been granted.

D. Applicant's request for oral proceedings

26. Applicant requested oral proceedings "to permit further argument by counsel, and to address any other issues or evidentiary gaps that the Tribunal or the parties may identify in the course of this case." The Fund responded that it ". . . sees no reason whatsoever for an oral hearing." It referred to the request for oral proceedings as "perfunctory" and contended that Applicant made "no serious argument why a hearing would be beneficial in this case."

27. Article XII of the Tribunal's Statute provides that the Tribunal shall ". . . decide in each case whether oral proceedings are warranted." Rule XIII(1) of the Rules of Procedure provides in part: "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."

28. The Tribunal has recently recalled that when it revised its Rules of Procedure in 2004, changing the standard for holding oral proceedings from "necessary" to "useful" and adding a provision permitting the Tribunal to limit oral proceedings to the oral arguments of parties' counsel, it did so with a view towards making the possibility of holding oral proceedings more likely, while underscoring the value of conducting such proceedings for purposes of addressing questions of law. *Elkjaer et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-4 (December 28, 2021), para. 26. The Tribunal has recognized the benefit of

[5] This is so even where an applicant does not seek anonymity. *See Mr. "SS", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-3 (December 27, 2021), para. 22 ("[E]ven if Applicant may decline to protect [his own] privacy . . . , the Fund retains valid interests in protecting the privacy of staff whom Applicant has accused of discrimination, retaliation, and other misconduct.").

holding such proceedings ". . . for the purposes of clarifying legal issues and providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record." *Ms. "PP"*, para. 25 (collecting cases).

29. In the instant case, Applicant's request for oral proceedings was unclear as to whether it sought proceedings limited to the oral arguments of counsel; it suggested that oral proceedings might also "address any . . . evidentiary gaps that the Tribunal or the parties may identify in the course of this case." Applicant, however, did not identify any "evidentiary gaps," nor propose particular witnesses. In the circumstances, the Tribunal found no cause to consider holding witness hearings and limited its consideration of Applicant's request to a request for oral arguments of counsel.

30. On January 24, 2022, the Tribunal notified the parties that Applicant's request for oral proceedings, limited to the oral arguments of parties' counsel, had been granted. The Tribunal also decided that the proceedings, which were to be held "by electronic means," in accordance with Article XI of the Tribunal's Statute, would be "held in private," per Article XII of the Statute and Rule XIII(1), as the Tribunal had granted Applicant's request for anonymity.

31. Oral proceedings in the case were held by videoconference on March 2, 2022.

FACTUAL BACKGROUND

32. In finding the facts of the case, the Tribunal draws upon the totality of the evidence before it. This includes the documentary record before the Tribunal, as well as testimonial evidence elicited in the Grievance Committee proceedings.[6] *See Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17 (Tribunal is ". . . authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it."). At the same time, the Tribunal has '"emphasized . . . that the [Grievance] Committee only makes recommendations and the Tribunal examines all issues *de novo*."' *Mr. "SS", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-3 (December 27, 2021), para. 94; *Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 129 ("Tribunal makes its own independent findings of fact and holdings of law [and] is not bound by the reasoning or recommendation of the Grievance Committee.").

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

34. Applicant and another staff member were colleagues at the same grade level, working in the same unit (the "Office") of the Fund. Later, when a vacancy arose for Head of Office, both competed; the other staff member was selected and appointed to the position at the next higher grade.

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[6] *See infra* CHANNELS OF ADMINISTRATIVE REVIEW.

35. Following these events, in December 2017, a staff survey revealed that a significant proportion of respondents had observed "bullying" within the Office. In December 2017, Applicant sought out a meeting with the HRD Director to discuss several topics: Applicant's desired promotion to the next grade, which he believed was stalled by the Head of Office's own lack of grade progression; the results of the December 2017 staff survey as it related to the Office; and a policy issue concerning division of responsibilities among entities of the Fund. That meeting was held on January 2, 2018. On the latter point, Applicant followed up with an email to the HRD Director, expressing his "opinion . . . that it made sense to combine the expertise of . . . two units and in the long term interest of the institution."

36. Applicant asserts that he and the HRD Director had agreed that the content of their January 2, 2018, conversation would be kept confidential but that the HRD Deputy Director later betrayed that confidence and disclosed elements of the exchange to the Head of Office. This disclosure, Applicant submits, set off a chain of events with adverse repercussions for him.

37. Following his meeting with the HRD Director, Applicant continued to pursue his concerns relating to the outcome of the staff survey as follows. On January 5, 2018, Applicant sent a communication to the Senior Personnel Manager ("SPM") for the Office, commenting on the survey results and proposing a meeting. Following a further exchange with the SPM, on January 8, 2018, Applicant complained to the HRD Director: "I am quite disappointed with [the SPM] – . . . I expected him to gather independent analysis of the issues in [the Office]. If HR is interested in understanding the real issues, you may want to assign someone else who will be more objective. Otherwise these issues will continue. . . . I hope it gets the attention it deserves."

38. In the Grievance Committee proceedings, the SPM described his follow-up of the survey results. The survey, he said, disclosed issues with the "management style of the management team." The SPM testified that it was Applicant who was reportedly the perpetrator of "bullying." However, it was the Head of Office whom the SPM later approached regarding how to address "issues of communication/management style." The SPM commented: "I would say most things [in the survey] were regarding [the Head of Office] about his communication style and the management style. So it was about communicating, that he was only one-way communications." The SPM "put together two sessions of team building" to help address these issues.

39. The facts related to the January 2018 cancellation by the Head of Office of upcoming business travel on the part of Applicant are among those disputed by the parties. Applicant contends that the Head of Office cancelled the travel in retaliation for Applicant's disputing the SPM's proposal to hold an individual meeting with the Head of Office in relation to the staff survey results, rather than an Office-wide meeting. The Head of Office, for his part, identified Applicant's conduct in relation to the travel cancellation in the first of a series of messages he would send to HRD officials in relation to Applicant's alleged improper workplace behavior.

40. Accordingly, on January 9, 2018, the Head of Office emailed the SPM to report "behavior unbecoming of a professional" on the part of Applicant, asserting that he represented a "risk to the proper functioning of the Office":

> Out of abundance of caution, I asked [Applicant] (via email) to cancel his planned trip to New York. As soon as he walked into my office early

> Monday morning, he started to complain loudly. From that point on, things went downhill very quickly. [Applicant] began raising his voice, and soon thereafter, he started yelling and pointing his finger at me to say 'this is not fair; I am not going to be pushed around like this; your decision lacks a good reason; there is no rationale for this; etc.' . . . .
>
> In any professional setting, this kind of hostile and threatening behavior (exhibited by [Applicant]) is unacceptable and potentially dangerous. I believe this is what others have referred to as bullying concerning his behavior. I will not tolerate this kind of behavior towards me or anyone else in the Office. . . . A request to cancel a business trip should not cause someone to become emotionally unhinged. I would firmly state that [Applicant] represents a risk to the proper functioning of the Office.

Applicant later apologized to the Head of Office for his behavior.

41. Two weeks later, on January 23, 2018, the SPM and the HRD Deputy Director met with Applicant to discuss the January 9, 2018, communication from the Head of Office, as well as two other incidents (which had occurred in late 2017) that reportedly had been brought to their attention by the Fund's Deputy Managing Director/Chief Administrative Officer ("DMD/CAO"). Those other incidents concerned Applicant's conduct in the cafeteria and the library of the Fund, in which, in the course of disputing practices that were being applied in those venues, Applicant was reported to have conducted himself in a manner that was perceived as hostile and aggressive to those who witnessed the events. As to the January 23, 2018, meeting, the HRD Deputy Director testified: "[T]he message that I was giving to [Applicant] at that time was you don't have long to go in your career at this point and there are too many things that are associated with you, so keep the lid on for the remainder of your period."

42. Several months thereafter, on May 9, 2018, the Head of Office again wrote to the SPM, copying the HRD Deputy Director, to report an incident involving Applicant and a junior staff member of the Office. According to the Head of Office, that staff member had reported that Applicant "started to raise his voice and became agitated in an intimidating way" when he learned that the junior staff member had failed to deliver an expected project. The junior staff member reported that Applicant had called that staff member a "liar" and had said the staff member must be suffering from "amnesia." The Head of Office reported that the incident was witnessed and corroborated by another staff member. According to the Head of Office, the junior staff member had asked the Head of Office to inform HRD that Applicant had behaved in an "unprofessional and intimidating way." Applicant testified that "this behavior I agreed was not good behavior for the office" and that he had apologized for it.

43. The May 9, 2018, communication from the Head of Office triggered a follow-up meeting with Applicant by the SPM and HRD Deputy Director. According to the testimony of the SPM, at that meeting Applicant was told "all these instances were piling up and the other incidents would not be really, you know, [be] more accepted."

44. In June, the FY2018 APR exercise provided another flashpoint between Applicant and the Head of Office. In that APR, Applicant was rated "Effective" and was said to have "performed a key senior role with respect to managing the analytical and technical work" of the Office, "shared his well-versed technical knowledge and expertise," and "shown that he could be personable, as he coached and mentored the younger [Office] staff." At the same time, the APR write-up included the admonition that Applicant was ". . . encouraged to set higher professional conduct standards with respect to controlling his temper and managing his interpersonal conduct to foster mutual respect and professionalism."

45. In the APR discussion of June 21, 2018, the Head of Office advised Applicant that he had decided not to nominate him for promotion to the next grade level. Applicant maintains that in this meeting the Head of Office revealed his animosity toward Applicant for "going behind his back" to meet with the HRD Director in January, which Applicant says the Head of Office deemed "insubordination." A month later, on July 27, 2018, following the administrative-leave-with-pay decision, Applicant completed his comments on the APR form, summing up his perceptions of the APR discussion and recent events:

> The above comments [of the Head of Office on the APR form] do not reflect the discussion that took place during the APR. . . . Promotion discussion - not eligible due to "insubordination" and "harassment" charges. Also a conversation related to NY trip cancellation Insubordination grounds for dismissal - even when an apology was tendered and a plan devised that meet his requirement. Mention of the harassment in the cafeteria incident which is hearsay. There was conversation related to visit to [HRD Director] "Going beyond [behind] his back to [HRD Director]" During this discussion I realized at that time that confidential conversation relayed to him by HR staff in HR[D]: . . . . My explanation to get understanding of rule related to B2 reporting to B2. His conclusion related to HR issues in the Office and the survey[.]

Applicant continued:

> As a result I have proceeded to file formal complaints and a[n] administrative review related to my promotion to B2 to seek justice within the IMF system. On July 27 I was placed on administrative leave by HRD pending my official retirement on request from [the Head of Office] as he is "uncomfortable" with me being in the office and some assorted false charges. As advised by HRD during the discussion, I plan to file formal administrative review/complaint as these point to abuse of authority and retaliation for my visit to HR Director.

46. In the week following the APR discussion, Applicant sought recourse for the non-promotion decision (which he attributed to retaliation on the part of the Head of Office), through the following channels: the HRD Director, via informal communications (June 28-29); OII, by filing a formal complaint of retaliation (June 28); and through the Fund's dispute resolution

system by filing a formal request for administrative review (July 1) of the non-promotion decision. These developments are elaborated below.

47. In his June 28, 2018, communication to the HRD Director, Applicant alleged there had been a "serious breach of confidentiality" by HRD staff who had revealed to the Head of Office the meeting of January 2, 2018, between Applicant and the HRD Director. In Applicant's view, the "APR discussion points to retaliation"; Applicant advised the HRD Director that he would be making a formal filing for administrative review. In a further exchange with the HRD Director of June 29, 2018, Applicant complained that the results of the staff survey were "never discussed in the office as a whole" and that "the survey was a cry for help from the office about the poor leadership." Applicant continued: "My impression is [the SPM] did not understand these issues at a deeper level. They clearly point to 'leadership' gaps – ethics, fairness, trust and supervision. I hope a professional external review of this will help the office and the institution."

48. On June 28, 2018, Applicant also filed a formal complaint with OII, alleging retaliation by the Head of Office and the HRD Deputy Director. OII opened a Preliminary Inquiry. As noted above,[7] that complaint was later resolved by OII with a finding that the Preliminary Inquiry had found no credible basis to suggest that Fund staff had engaged in misconduct in the form of retaliatory practices towards Applicant.

49. On July 1, 2018, Applicant filed a formal request for administrative review of the decision by the Head of Office not to nominate him for promotion to the next grade.[8]

50. On July 17, 2018, following a two-week vacation, Applicant engaged in an internal Office discussion in which he raised concerns about practices of the Head of Office in relation to carrying out its functions, practices that Applicant considered to contravene rules governing the Office's activities. Applicant followed up on the next day with an email to the Head of Office and several other staff members within the Office, on the same subject.

51. A few days later, on July 20, 2018, the Head of Office emailed the HRD Deputy Director, "Concerning [Applicant] and his behavior," requesting a meeting and reporting the following:

> Over the last week, [Applicant] has been acting uncharacteristically and eerily distant. Every time I see him now he turns his head, does not acknowledge me, and he has an angry look towards me. I also have some staff coming to tell me to be careful with him. Recently, there have been additional incidents of [Applicant] making false accusations, defamatory comments concerning the Office and its staff members, and arguing with and shouting at the staff.
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> I do not feel secure when I am in the Office with only him around . . . because he has lashed out at me once before (as you know). . . . [H]e

[7] *See supra* PROCEDURE: Role of OII report in Tribunal proceedings.

[8] *See infra* CHANNELS OF ADMINISTRATIVE REVIEW.

> continues to undermine the work of [the Office] and goes out of his way to defame my character and reputation. I am very concerned that he is now blatantly undermining the work of [the Office]. . . . [H]is hostile/bullying behavior continues to go unchecked . . . .
>
> **He now poses a serious operational and security threat to [the Office] and its staff**. Not to mention, he currently has access to everything we do.

(Emphasis in original.) In the same communication, the Head of Office stated that he also planned to bring his concerns to the Fund's Ethics Advisor and the DMD/CAO.

52. The SPM and the HRD Deputy Director discussed the July 20 communication with the Head of Office. The HRD Deputy Director testified: "The words here I think he felt threatened." He further testified: "I was also required to forward this [i.e., the July 20 email from the Head of Office] to [the Internal Investigator] also to be investigated in terms of [the Head of Office]'s complaint. So that's what I . . . did." (The Fund, in its pleadings, states that Management did not open a formal investigation into any alleged misconduct on the part of Applicant.)

53. The HRD Director had delegated to the HRD Deputy Director the question of how to handle the circumstances unfolding in the Office. The HRD Deputy Director testified that before taking a decision to place Applicant on administrative leave with pay, he checked with OII that the decision would not be regarded as retaliation, given Applicant's request for review of the non-promotion decision.

54. The HRD Deputy Director communicated the administrative-leave-with-pay decision to Applicant in a meeting of July 26, 2018. In Grievance Committee testimony, he explained his decision-making process as follows: "I did tell [Applicant] pointblank that I was really not into trying to prove what had actually happened and there is a process for that to be conducted. But in the entry [interim?], I wanted to create an environment for which he is safe and also the [Office] staff are also safe, and I was considering putting him on leave with pay." In response to the Grievance Committee Chair's questioning as to what informed HRD's decision to place Applicant on administrative leave with pay, the SPM stated: "you have to act in the way that [is] best to ensure safety."

55. The HRD Deputy Director additionally testified that he was aware that Applicant would reach mandatory retirement age in December and that ". . . he also had some leave that he needed to use, because that's normal for when people are leaving towards the end. And I thought it was reasonable in light of that – in consideration of leave with pay, which I felt that he will not lose anything, but he will actually have maybe more time, but be relieved also from whatever stress or tension was also going on in the office. But also it would create an environment in the office that at least I will not be concerned about the safety of – the safety of the staff there."

56. Applicant testified that when he returned to his Office following the meeting of July 26, he was asked to hand over his badge. He removed his personal possessions on the next day.

57. The next day, July 27, 2018, Applicant emailed the HRD Deputy Director to follow up on their discussion, copying the SPM: "I understood from our discussion that HRD has placed me

on administrative leave in response to representation by [the Head of Office] that he is 'uncomfortable' about my presence in the office due to a variety of reasons like not being responsive, making disparaging comments about the office, yelling at people, etc." Applicant continued: "I wish to respond for the record that since the APR discussion in June I have conducted myself with professionalism in spite of a hostile environment" and had resumed responsibilities following two weeks' leave, listing various tasks. Applicant concluded: "As you suggested[,] I plan to follow the procedures to seek justice within the IMF system."

58. On July 31, 2018, Applicant filed a formal request for administrative review of the administrative-leave-with-pay decision.[9]

59. The following day, August 1, 2018, five days after the discussion in which Applicant was informed of the administrative-leave-with-pay decision, the HRD Deputy Director again met with Applicant and provided him with a letter ". . . to follow up on Thursday, July 26 discussions about your transition to mandatory retirement effective December 31, 2018." Its operative terms read as follows:

> We informed you that:
>
> i. You will be authorized to use annual leave, including advance annual leave, between July 30 and October 15, 2018. Upon your retirement, you will be eligible to receive payment for the unused accrued 60 days of annual leave.
>
> ii. On October 16, 2018, you will be placed on Administrative Leave With Pay until December 31, 2018, the day you reach your mandatory retirement age. Taking into account recent aspects of the work environment, your manager has explained to HRD his view that this would be mutually advantageous and we hope it will facilitate your transition towards retirement.
>
> iii. Access to the [Office's] systems and [to the Office] have been removed effective July 27. Otherwise your Fund network and buildings . . . access remains active in the normal way.
>
> iv. All Fund equipment (i.e. laptop, IPad, mobile phone) must be returned to the Fund no later than the day before the beginning of the administrative leave period, as per Fund policy.
>
> v. You understand that during the period of annual leave and administrative leave you remain employed by the Fund and are subject to the Fund's rules and policies including the Code of Conduct for Staff and policies on publications, public statements,

[9] *See infra* CHANNELS OF ADMINISTRATIVE REVIEW.

and external activities. In such periods your benefits will accrue in the normal way.

vi. You will need to resign earlier if you wish to accept alternative employment before December 31, 2018. Fund salary and benefits will end on the effective date of your resignation.

This is the principal decision contested in the case.

60. Applicant continued in the Fund's employment until his separation on December 31, 2018, upon reaching mandatory retirement age. During the period July 30 – October 15, 2018, Applicant was in annual leave status. This was followed from October 16 – December 31, 2018, by the period of administrative leave with pay.

61. Just before separating from the Fund, Applicant sent an email to the Managing Director, in which he raised "issues . . . that have emerged over the last few years due to structural changes in the . . . governance model." Applicant stated that he had "tried to bring up these issues in other forums without success" and that it was his "duty to highlight concerns that IMF management needs to address." The subject addressed in this communication was the same that he had earlier raised in his January communication with the HRD Director.

CHANNELS OF ADMINISTRATIVE REVIEW

A. Administrative Review

62. As noted above, on July 1, 2018, Applicant filed a request for administrative review, challenging the decision by the Head of Office not to recommend Applicant's promotion to the next grade. On July 31, 2018, Applicant filed a second request for administrative review, challenging HRD's decision to place him on administrative leave with pay. On September 7, 2018, the HRD Director issued a consolidated response to both requests for administrative review, denying Applicant's complaints. These decisions are described more fully below.

(1) Non-promotion decision

63. The HRD Director identified the "principal factor" in the non-promotion decision to have been "[Applicant's] conduct towards [the Head of Office] on January 8, 2018," following the Head of Office's cancellation of Applicant's conference travel. The HRD Director concluded: "The evidence available to me indicates that you shouted at him and pointed your finger in an offensive and intimidating manner, and that this was witnessed by his administrative assistant. Concerns about this conduct were raised with HRD." The HRD Director noted that the HRD Deputy Director and the SPM subsequently met with Applicant "to warn that such conduct was not consistent with required standards of workplace conduct and that any recurrence would be investigated as potential misconduct warranting a disciplinary measure. You acknowledged to them that your conduct had fallen below required standards and subsequently apologized to [the Head of Office]."

64. The non-promotion decision, said the HRD Director, was buttressed by concerns raised in May 2018 that Applicant had "shouted at and used offensive language . . . towards a junior staff member" of the Office and that others were reluctant to raise issues with Applicant due to his '"temper."' Additionally, the HRD Director referred to the incidents that allegedly had taken place in the Fund's library and cafeteria and found that "[o]n both occasions, other employees perceived [Applicant's] manner as offensive and intimidating and complained about this to their supervisors."

65. In denying Applicant's challenge to the non-promotion decision, the HRD Director concluded: "It is vital that senior staff uphold and model our standards of conduct in the workplace. If we promote staff in cases where these standards have not been consistently observed, this signals to others that we accept and even endorse this conduct." The HRD Director's review concluded that it was "reasonable for [the Head of Office] to decide not to nominate [Applicant] for promotion due to [his] conduct towards him in January 2018 and for his decision to be reinforced by the several other behavioral concerns that were raised with him."

66. The HRD Director additionally found that the evidence did not support Applicant's contentions that the non-promotion decision was based either on Applicant's having raised concerns within the Office on July17-18, 2018, relating to practices of the Head of Office that Applicant considered to contravene governing rules, or on the Head of Office's learning that Applicant had raised questions about promotion prospects with the HRD Director in the meeting of January 2, 2018.

(2) Administrative-leave-with-pay decision

67. In responding to Applicant's challenge to the administrative-leave-with-pay decision, the HRD Director cited the July 20, 2018, email from the Head of Office to the HRD Deputy Director, in which he had reported that Applicant had "uncharacteristically refused to acknowledge him and appeared angry such that he did not feel secure when he was in the office and you were the only other person present," and also referred to incidents of Applicant's alleged shouting at staff. The HRD Director noted that the HRD Deputy Director had taken responsibility for addressing the situation and "considered that the use of administrative leave with pay prior to [Applicant's] retirement might be an appropriate way to safeguard the work environment. Difficult situations are sometimes addressed using administrative leave towards the end of a staff member's appointment because it does not lead to financial or career damage and is understood by others simply to be the use of annual leave."

68. The HRD Director also noted that the HRD Deputy Director had consulted with "DRS [Dispute Resolution System] Officers" about the possibility that the decision could be perceived as retaliation and that they "agreed that the concerns expressed by [the Head of Office] were a reasonable basis for the proposed decision." The administrative-leave-with-pay decision had been explained to Applicant by the HRD Deputy Director in the July 26 meeting, at which the SPM was also present. According to the HRD Director's decision on administrative review, the HRD Deputy Director had made clear that this was "not a punitive action and did not represent a finding that [the Head of Office's] concerns were well-founded but that it was a practical way of protecting the Fund's interest in a positive working environment." The HRD Director accordingly concluded that the administrative-leave-with-pay decision was a "reasonable

response to the concerns expressed by [the Head of Office] about the office environment, against the background of the several concerns raised about [Applicant's] workplace conduct during 2018."

69. The HRD Director also took note of Applicant's arguments that the decision represented a denial of due process and was related to "whistleblowing complaints" he had filed, as well as confidential feedback he had provided about his manager for a due diligence review: "You told me that the use of administrative leave with pay reflects '"a culture where disagreement is not tolerated'" and was not done to safeguard the office environment but to retaliate against Applicant. As to Applicant's allegations of retaliation, the HRD Director concluded: "Evidence gathered during my review indicates that no information about the feedback exercise had been provided to [the Head of Office] prior to the July 26 decision. Nor did I find evidence to support the possibility that he was influenced by a discussion about [a practice of the Office challenged by Applicant] or that the decision was taken to retaliate against you for any reports you had made or by any other improper motive."

70. In sum, the HRD Director concluded that both decisions challenged by Applicant through the administrative review process represented reasonable exercises of managerial discretion.

B. Grievance Committee proceedings

71. Following the denial of his requests for administrative review, on November 16, 2018, Applicant filed his Statement of Grievance, challenging the administrative-leave-with-pay decision. Applicant alleged that the decision was taken in violation of due process, based on unverified false representations against him, and that it amounted to retaliation for discussions he had undertaken with the HRD Director for which he had requested confidentiality. Applicant further submitted that the administrative-leave-with-pay decision amounted to a dismissal without due process, rather than a transition to retirement, and that the decision was neither in his interest or that of the Fund. Applicant further alleged that the breach of confidentiality resulted in a hostile workplace environment and that HRD's decision amounted to retaliation by Applicant's supervisor.

72. The Grievance Committee considered the case in the usual manner, on the basis of an evidentiary hearing and the briefs of the parties. Applicant represented himself at the Grievance Committee hearing, retaining counsel to prepare his post-hearing submissions. Applicant's statements before the Committee were considered as sworn testimony. The Fund called two witnesses: the HRD Deputy Director, and the SPM.

73. On November 19, 2019, the Grievance Committee issued its Report and Recommendation. The Grievance Committee concluded that the Fund's decision to invoke Staff Handbook, Ch. 5.01, Section 5.6, to place Applicant on administrative leave with pay was not, of itself, an abuse of discretion. Nor, in the Committee's view, did the administrative-leave-with-pay decision constitute impermissible harassment or age discrimination.

74. On the question of retaliation, however, the Grievance Committee found in favor of Applicant. The Grievance Committee identified "protected activities" for purposes of Applicant's claim of retaliation as including his July 1, 2018, request for administrative review

of the non-promotion decision, and Applicant's having raised concerns within the Office on July 17-18. 2018, relating to practices of the Head of Office in relation to carrying out its functions, practices that Applicant considered to contravene rules governing the Office's activities. The Grievance Committee observed that the July 20, 2018, email from the Head of Office, and the July 26, 2018, administrative-leave-with-pay decision by HRD, came close on the heels of that discussion: "This sequence of events presents a basis for inferring improper motivation" by the Head of Office. In the view of the Grievance Committee, these facts presented a *prima facie* case of retaliation that the Fund did not counter with evidence showing that it had acted upon legitimate motives. The Committee also noted that neither the SPM or the HRD Deputy Director had closely questioned the Head of Office to obtain detailed explanations for his July 20 accusations. Additionally, said the Grievance Committee, there was no evidence that the Fund had looked into the concerns Applicant had raised about the Office's practices.

75. The Grievance Committee additionally found improper motive for the administrative-leave-with-pay decision on the basis of personal animosity: "The Fund has not provided probative evidence that there were legitimate, business-related reasons for [the Head of Office's] July 20 complaint . . . . As a result, a fair inference can be drawn from the record that [the Head of Office's] complaint was based on non-business considerations (i.e., personal animosity) and that [the HRD Deputy Director] acted upon that improper motivation."

76. As a remedy in the case, the Grievance Committee recommended rescission of the administrative-leave-with-pay decision and deletion of any record thereof. At the same time, it rejected Applicant's request for monetary relief, concluding that he had not proven that any injury, either tangible or intangible, had resulted to him from the administrative-leave-with-pay decision.

77. Following additional submissions of the parties, on February 28, 2020, the Grievance Committee issued a Supplemental Report and Recommendation, in which it recommended that Applicant be reimbursed a portion of his attorneys' fees. The Grievance Committee additionally denied Applicant's request for reconsideration of the recommended remedy.

78. On May 5, 2020, Fund Management notified Applicant that it had accepted the Grievance Committee's recommendations as set out in both its Recommendation and Supplemental Recommendation.

79. On August 5, 2020, Applicant filed his Application with the Tribunal.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

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

1. The Fund's rule providing for administrative leave with pay "pending investigation of misconduct" (Staff Handbook, Ch. 5.01, Section 5.3) exclusively governed in the circumstances of Applicant's case, in which the

Head of Office perceived Applicant as a threat. The decision was taken as a disciplinary and security measure. Applicant should have been afforded the procedural protections contemplated by Section 5.3, including the opportunity to clear his name.

2. The Fund has not substantiated a basis for placing Applicant on administrative leave with pay for "special and unusual situations," in which the "continuing presence of a staff member at work may not be in the interest of the Fund" (Section 5.6).

3. The decision to place Applicant on administrative leave with pay was improperly motivated by retaliation and harassment. Applicant engaged in a series of protected activities, including "whistleblowing," which triggered the administrative-leave-with-pay decision.

4. The decision to place Applicant on administrative leave with pay was a *de facto* termination of employment and was improperly motivated by age discrimination.

5. Applicant was removed from the Office in a humiliating manner, following the administrative-leave-with-pay decision.

6. The Tribunal should not give any deference to OII's decision to close its Preliminary Inquiry into a complaint of retaliation brought by Applicant. The Fund has improperly included that decision in the record of the case, contrary to the Tribunal's past rulings concerning the division between the disciplinary process and challenges to administrative acts before the Tribunal. The decision also demonstrates that OII proceeded to dismiss a complaint against a decision (the administrative-leave-with-pay decision in Applicant's case) that OII had earlier "pre-approved" for HRD.

7. The Grievance Committee proceedings constituted a separate injury to Applicant. Those proceedings diverged from due process and were affected by bias. The Grievance Committee acted inconsistently with Tribunal precedents in its approach to compensation for intangible injury.

8. Applicant's counsel opposes Respondent's request for the Tribunal to deny Applicant's request for attorneys' fees or to take other action in response to the counsel's alleged lack of civility in his advocacy before the Tribunal.

9. Applicant seeks as relief:

    a. rescission of a non-promotion decision preceding these events, and related relief;
    b. rescission of the administrative-leave-with-pay decision and removal from Applicant's file of documentation of the administrative leave and of any allegations made against Applicant;

c. compensation for accrued leave that Applicant was required to use prior to the administrative leave;
d. three years' salary to compensate for "severe career, moral and intangible damage done to [Applicant] by the Fund's wrongful actions, including . . . retaliatory harassment";
e. an additional one year of salary as moral damages for the separate intangible injury by the "defective Grievance Committee process and the Fund's acceptance of, and active participation in, those defects";
f. other relief in connection with the Grievance Committee proceedings, including full attorneys' fees; and
g. 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.

B. Respondent's principal contentions

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

1. The Fund's decision to place Applicant on administrative leave with pay for "special and unusual situations" (Staff Handbook, Ch. 5.01, Section 5.6), in which the "continuing presence of a staff member at work may not be in the interest of the Fund," was a reasonable exercise of managerial discretion, which provided a pragmatic response to an untenable situation in the leadership of the work unit. The Fund had a sufficient quantum of evidence to support its decision.

2. The Fund provided Applicant ample notice and opportunity to be heard before taking the decision to place him on administrative leave with pay for special and unusual situations.

3. The Fund was not required to place Applicant on administrative leave with pay "pending investigation of misconduct" (Section 5.3) in the circumstances of the case. Fund Management has discretion to decide not to investigate allegations of misconduct.

4. Applicant has not shown that the administrative-leave-with-pay decision was based on retaliation or any other improper motive. Applicant's allegations of retaliation fail either because he has not shown protected activity in terms of the law governing retaliation or has not shown a causal link between a protected activity and the adverse action of which he complains.

5. Applicant was not "terminated" by the Fund, and he has made no showing that the decision to place him on administrative leave with pay was motivated by discriminatory animus based on his age.

6. Applicant suffered no compensable injury as a result of the administrative-leave-with-pay decision, including in relation to the implementation of the decision to deny him access to his work unit and systems.

7. The Fund has properly included in the record of the case the OII decision closing the Preliminary Inquiry into a complaint of retaliation brought by Applicant. That decision provides "persuasive evidence that no retaliation occurred."

8. Neither the recommendations of the Grievance Committee or its internal processes are subject to the Tribunal's review, as these do not constitute "administrative acts" falling within the Tribunal's jurisdiction under its Statute.

9. Applicant should not be awarded attorneys' fees regardless of the outcome of the case. The lack of civility of Applicant's counsel in presenting his case must be addressed by the Tribunal.

RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW

82. For ease of reference, the principal provisions of the Fund's internal law relevant to the consideration of the issues of the case are set out below.[10]

A. Administrative Leave with Pay

83. Relevant provisions of the Fund's internal law governing administrative leave with pay are set out below.

(1) Staff Handbook, Ch. 5.01 (Leave and Official Holidays), Section 5 (Administrative Leave with Pay) (July 2018 version)

84. Staff Handbook, Ch. 5.01, Section 5, provides in pertinent part for administrative leave with pay as follows:

> Section 5: Administrative Leave with Pay
>
> 5.1 *Entitlements and Benefits*. The Fund may place a staff member [footnote omitted] on administrative leave with pay in the circumstances set out in this Section. During any period of administrative leave with pay, staff members shall be entitled to all benefits to which they are otherwise entitled.
>
> 5.2 *Authority to Place Staff on Administrative Leave*. The Managing Director may authorize administrative leave with pay for as

[10] The Tribunal's practice is to reproduce the relevant provisions of the Fund's internal law that governed the issues of the case. The Fund's internal law changes over time and the provisions reproduced herein are not necessarily those in force as of the time of this Judgment.

many staff members as necessary if a Business Continuity Plan is implemented under subparagraph 5.6.2 or for a staff member who is subject to N-Rules and is under investigation for misconduct, as provided under paragraph 5.3. All other decisions to place staff members on administrative leave with pay will be taken by the Director of HRD and, in the case of staff who are under investigation for misconduct under paragraph 5.3, after consultation with the staff member's Department Head.

5.3 *Administrative Leave with Pay Pending Investigation of Misconduct*. When a staff member is alleged to have engaged in conduct for which any of the disciplinary measures referred to in "Chapter 11.02: Misconduct and Disciplinary Procedures" might be imposed, he or she may be placed on administrative leave with pay while the matter is under investigation, in accordance with the provisions of "Interim Measures". Any such period shall not extend beyond the date on which the staff member is notified of the decision in the matter.

5.3.1 *Finding of No Misconduct*. If the Managing Director or the Director of HRD as applicable, determines that there are no grounds for a finding of misconduct, a staff member on administrative leave with pay pending investigation of misconduct will be returned to active status.

5.4 *Administrative Leave with Pay Pending Determination on Medical Separation*

. . . .

5.5 *Administrative Leave with Pay for Special Family Emergency*

. . . .

5.6 *Administrative Leave with Pay for Special and Unusual Situations*. Administrative leave with pay may be granted in special and unusual situations that include, but are not limited to, the evacuation of resident representatives or where, in the view of the Director of HRD, the continuing presence of a staff member at work may not be in the interest of the Fund. A resident representative who has been evacuated will not be eligible for administrative leave if he or she is assigned to duty in another location.

5.6.1 *Business Continuity Plan*. The Managing Director may grant administrative leave with pay to as many staff as necessary in a situation where a Business Continuity Plan is implemented and non-essential staff are not required to report for duty.

5.6.2 *Time Limit.* The period of administrative leave with pay for special and unusual circumstances may not exceed six months per triggering event.

5.7 *Administrative Leave with Pay in Connection with External Assignments, External Swaps and Reimbursed Secondments*

. . . .

B. Disciplinary Procedures

85. Pertinent provisions of the Staff Handbook governing disciplinary procedures are reproduced below.

(1) Staff Handbook, Ch. 11.02 (Disciplinary Procedures), Section 3 (Authority and Procedure for Initiating Investigations into Alleged Misconduct) (July 2018 version)

86. Section 3 (Authority and Procedure for Initiating Investigations into Alleged Misconduct) provides in pertinent part as follows:

3.1 *Authority of the Managing Director and Director of HRD*. The Managing Director (for staff members at Grades B1-B5) or the Director of HRD (for all other staff members) may initiate investigations into allegations of misconduct.

. . . .

3.4 *Procedure for Initiating Investigations*. Investigations shall be initiated through referral of the matter in writing to the Fund's Internal Investigator, to OIA, to another Fund official or to an outside party as investigating officer. The referral shall set out the nature of the allegations and the scope of the investigation to be conducted. Investigations initiated by a Department Head in accordance with paragraph 3.2 above may only be referred to and conducted by another official in the same department. A material change in the scope of the investigation must be authorized by the official who initiated the investigation.

3.5 *Basis for Investigation*. Before an investigation is initiated, a preliminary inquiry will normally be conducted to establish whether there is sufficient credible information to warrant an investigation of the alleged misconduct.

(2) Staff Handbook, Ch. 11.02 (Disciplinary Procedures), Section 7 (Decisions on Disciplinary Action) (July 2018 version)

87. Section 7 (Decisions on Disciplinary Action) provides as follows (including "Interim Measures" (Sections 7.5 and 7.6) as referenced at Staff Handbook, Ch. 5.01, Section 5.3:

> Section 7: Decisions on Disciplinary Action
>
> 7.1 *Responsible Official*. For purposes of this Section, the term "responsible official" means the Managing Director, Director of HRD, Department Head or other Fund official to whom authority has been delegated pursuant to this Chapter.
>
> 7.2 *Transmission of the Report of Investigation and Response of the Staff Member*. At the conclusion of an investigation into alleged misconduct, and before making a decision on any disciplinary action, the responsible official shall give the respondent a copy of the Report of Investigation for review and comments. Respondents shall be given reasonable opportunity to present any comments they may have on the Report of Investigation and the allegations made against them. In any personal appearance, respondents may be accompanied by an advisor of their choice, including an attorney, from either inside or outside the Fund. [footnote omitted]
>
> 7.3 *Further Inquiry*. If the staff member's [footnote omitted] response raises issues that, in the responsible official's opinion, were not fully addressed or resolved in the Report of Investigation, the responsible official may request that further inquiry into the matter be conducted before deciding whether or not the staff member has committed misconduct and deciding on an appropriate disciplinary action.
>
> 7.4 *Decision*. On the basis of the Report of Investigation, the staff member's response, and any additional information obtained as the result of any further inquiry as referred to in paragraph 5.3 above, the responsible official shall determine whether the allegations are well founded and whether the staff member's conduct constitutes misconduct.
>
> 7.4.1 *Finding of Misconduct*. If the responsible official finds that misconduct occurred, he or she shall notify the staff member in writing of his or her conclusions and the reasons therefor, and of the disciplinary measure(s) to be imposed. Where applicable, the Director of HRD or Managing Director shall determine the amount and/or duration of disciplinary measures and the conditions, if any, to be met for their discontinuance.

7.4.2 *No Finding of Misconduct*. If the responsible official concludes that no misconduct has occurred, he or she shall inform the staff member who was the subject of the investigation that the staff member's actions did not constitute misconduct and that the matter is closed.

7.5 *Interim Measures*. Pending the completion of an investigation and a decision on the matter, and where the responsible official finds reasonable cause for such action:

(i) the staff member may be relieved of specific duties or temporarily reassigned by the Department Head or Director of HRD; or
(ii) the staff member may be placed on administrative leave with pay by the Director of HRD in accordance with "Administrative Leave with Pay", provided that, in respect of staff members in Grades B1-B5 who are subject to Rule N-12, such measures shall be imposed by the Managing Director.
(iii) the payment of benefits or allowances may be suspended or postponed.

7.6 *Opportunity to be Heard on Interim Measures*. Before imposing any of the above interim measures, the responsible official shall give the staff member a reasonable opportunity to be heard on the facts at issue and allegations against him or her, unless exceptional circumstances require otherwise.

7.7 *Disciplinary Measures During Period of Review*. In cases where a staff member requests review of a decision to impose disciplinary measures as provided in "Chapter 11.03: Dispute Resolution", the disciplinary measures shall remain in force and shall not be suspended during the period in which the review is conducted, unless the Director of HRD or Managing Director, as appropriate, decides that a suspension of the measures pending review is warranted by exceptional circumstances in a specific case.

C. Retaliation

88. Provisions of the Fund's internal law prohibiting retaliation are set out below.

(1) Staff Handbook, Ch. 11.03 (Dispute Resolution), Section 8 (Protection Against Reprisal (July 2018 version)

89. Staff Handbook, Ch. 11.03, Section 8, provides as follows:

Section 8: Protection Against Reprisal

8.1 *Protection of Staff Members*. No individual shall be subject to adverse action of any kind because of pursuing the channels of dispute resolution set out in this Chapter or for assisting another staff member [footnote omitted] in pursuing those channels.

8.2 *Consequences of Retaliation*. Any adverse action taken against an individual in retaliation for his or her pursuit of, or participation in, a dispute resolution procedure established by the Fund may be grounds for a finding of misconduct and the imposition of disciplinary measures under "Chapter 11.02: Misconduct and Disciplinary Procedures".

(2) Staff Handbook, Ch. 11.01 (Standards of Conduct), Section 11 (Retaliation and Participation in Fund Processes) (July 2018 version)

90. Staff Handbook, Ch. 11.01, Section 11, provides as follows:

Section 11: Retaliation and Participation in Fund Processes

11.1 *Prohibition of Retaliation*. As set out in the Annex 11.01.6: Retaliation Policy, any retaliation against a staff member [footnote omitted] for either raising an ethics complaint in good faith or filing a grievance, or for participating in either type of proceeding as a witness, shall constitute misconduct, and any adverse decision motivated by retaliation shall be invalid.

11.2 *Duty of Cooperation.* Staff are expected to cooperate with the Fund's processes for resolving allegations of misconduct or unethical behavior, and they are also expected to participate, when requested, as witnesses in dispute resolution matters.

11.3 *Reporting Misconduct*. Staff are strongly encouraged to make reports in good faith of suspected misconduct or unethical behavior, including through the Integrity Hotline (Annex 11.01.7: Integrity Hotline Program). However, failure to report suspected misconduct is not itself a separate act of misconduct.

11.4 *Duty of Managers*. Managers have a duty to act upon, resolve, and/or report ethical concerns that come to their attention.

11.5 *Allegations in Bad Faith*. Malicious and unsubstantiated allegations of misconduct may constitute separate acts of misconduct.

(3) Staff Handbook, Ch. 11.01 (Standards of Conduct), Annex 11.01.6 (Retaliation Policy) (July 2018 version)

91. Staff Handbook, Ch. 11.01, Annex 11.01.6, provides as follows:

GAO 11 – Annex 11.01.6: Retaliation Policy

The Fund encourages employees to use the channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution. Staff and managers should be aware that the Fund does not tolerate any form of retaliation against anyone for using any of these channels, or for participating as a witness in an ethics investigation or grievance. Thus, if there were retaliation against a staff member for either raising an ethics complaint or a grievance, or for participating in either type of proceeding as a witness, the retaliation itself would be a form of misconduct which could result in disciplinary action, and any adverse decision motivated by retaliation would be invalid.

Guidance Points:
Managers are expected to create an atmosphere where staff will feel free to use existing channels for workplace conflict resolution without fear of reprisal. These channels include managers, ASPMs, SPMs, Department Heads, HRD, the Ombudsperson, the Ethics Advisor, the Integrity Hotline and the formal dispute resolution system (Grievance Committee and Administrative Tribunal).

Staff are expected to cooperate with the Fund's processes for resolving allegations of misconduct or unethical behavior, and they are also expected to participate, when requested, as witnesses in dispute resolution matters.

Staff are strongly encouraged to make reports in good faith of suspected misconduct or unethical behavior, including through the Integrity Hotline (Annex 11.01.7). However, failure to report suspected misconduct is not itself a separate act of misconduct.

Managers have a duty to act upon, resolve, and/or report ethical concerns that come to their attention.

Malicious and unsubstantiated allegations of misconduct are viewed as separate acts of misconduct.

D. Harassment and Discrimination

92. Relevant provisions of the Fund's internal law prohibiting harassment and discrimination are set out below.

(1) Staff Handbook, Ch. 11.01 (Standards of Conduct), Section 4 (Harassment) (July 2018 version)

93. Staff Handbook, Ch. 1101, Section 4, prohibits harassment as follows:

> Section 4: Harassment
>
> 4.1 *Behavior towards Colleagues*. Staff members are expected to treat one another, whether supervisors, peers, or subordinates, with courtesy and respect, without harassment or physical or verbal abuse. They should at all times avoid behavior at the workplace that may create an atmosphere of hostility or intimidation. Moreover, in view of the international character of the Fund and the value that the Fund attaches to diversity, employees are expected to act with tolerance, sensitivity, respect, and impartiality toward other persons' cultures and backgrounds.
>
> 4.2 *Prohibition of Harassment*. Employees of the Fund should not be subjected to harassment in carrying out their work at Headquarters, on mission [footnote omitted] or in any Fund duty station. To ensure a harassment-free workplace for all Fund employees, staff members must comply with all applicable policies concerning harassment, including sexual harassment (Annex 11.01.2: Harassment Policy) and the Mission Code of Conduct.

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(2) Staff Handbook, Ch. 11.01 (Standards of Conduct), Section 5 (Discrimination and Reasonable Accommodation) (July 2018 version)

94. Staff Handbook, Ch. 11.01, Section 5, prohibits discrimination as follows:

> Section 5: Discrimination and Reasonable Accommodation
>
> 5.1 *Prohibition of Discrimination*. Subject to the Fund's institutional needs, including the paramount importance of securing the highest standards of efficiency and technical competence, the employment, classification, promotion and assignment of staff members shall be made without discriminating against any person because of age, creed, disability, ethnicity, gender, nationality, race or sexual orientation.
>
> 5.2 *Staff Members' Responsibility*. Staff members share responsibility for contributing to a working environment that promotes equal treatment and is free from discrimination. To this end, they must comply with all applicable policies concerning discrimination (Annex 11.01.3: Discrimination Policy), including the supplementary policy statement (2000) on discrimination against persons with HIV/AIDS.
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> . . . .

CONSIDERATION OF THE ISSUES

95. The principal issues for consideration by the Tribunal are: A. Did the Fund abuse its discretion in placing Applicant on administrative leave with pay? B. Did the Fund abuse its discretion in the treatment of Applicant's case by the Grievance Committee? C. How shall the Tribunal address Respondent's allegations of lack of civility on the part of Applicant's counsel in his presentation of the case?

A. Did the Fund abuse its discretion in placing Applicant on administrative leave with pay?

96. The Tribunal notes at the outset that the impugned decision, as communicated to Applicant by the written notice of August 1, 2018, was a composite decision, comprised of three essential elements: Applicant was to take an initial 2.5-month period of accrued annual leave; he would thereafter be placed on a 2.5-month period of administrative leave with pay until reaching his mandatory retirement date; and, during the entire period (July 30 - December 31, 2018), Applicant would be denied access to his work unit and systems. These decisions, taken together, effectively ended Applicant's active status with the Fund as of July 30, 2018, although he continued to receive full pay and benefits and remained subject to the rules and regulations governing staff until December 31, 2018.

97. In contesting the administrative-leave-with-pay decision, Applicant challenges an individual decision taken in the exercise of managerial discretion. Accordingly, Applicant's challenge will succeed only if he establishes that the Fund abused its discretion because the decision was "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures." Commentary on the Statute,[11] p. 19. In light of the parties' contentions, the Tribunal will address the following questions: (1) What was the legal basis, that is, the authority in the Fund's internal law, for the administrative-leave-with-pay decision, and was Applicant notified of that authority? (2) Did the Fund err in invoking Staff Handbook, Ch. 5.01, Section 5.6 (Administrative Leave with Pay for Special and Unusual Situations), as the authority for placing Applicant on administrative leave with pay? (3) Was the decision to place Applicant on administrative leave with pay taken and implemented in accordance with fair and reasonable procedures? (4) Was the decision to place Applicant on administrative leave with pay improperly motivated?

[11] 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 Reports of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009 and 2020).

(1) What was the legal basis, that is, the authority in the Fund's internal law, for the administrative-leave-with-pay decision, and was Applicant notified of that authority?

98. The first question that arises is what was the legal basis for the contested decision. The record shows that Applicant was initially informed orally on July 26, 2018, that he would be placed on administrative leave with pay. That notification was followed in writing on August 1, 2018. The only explanation for the decision, as provided in that letter, stated: "Taking into account recent aspects of the work environment, your manager has explained to HRD his view that this would be mutually advantageous and we hope it will facilitate your transition towards retirement." There is no evidence in the record that Applicant was notified of the legal basis, that is, the authority in the Fund's internal law, for the decision.

99. Nor is there reason to conclude that it was clear to the decision maker, the HRD Deputy Director (whom the HRD Director had tasked with handling the matter), under which provision of the Fund's internal law the decision was to be taken and, hence, what standards he was to apply. Notably, the HRD Deputy Director's Grievance Committee testimony left open the possibility that he may have understood the decision at the time as a decision to place Applicant on administrative leave with pay pending investigation of misconduct. The HRD Deputy Director testified: "I did tell [Applicant] pointblank that I was really not into trying to prove what had actually happened *and there is a process for that to be conducted*. But in the entry [interim?], I wanted to create an environment for which he is safe and also the [Office] staff are also safe, and I was considering putting him on leave with pay." (Emphasis added.) He additionally testified: "I was also required to forward this [i.e., the July 20 email from the Head of Office] to [the Internal Investigator] also to be investigated in terms of [the Head of Office]'s complaint. So that's what I . . . did." That the HRD Deputy Director may have seen it as his function not to take sides in the dispute between Applicant and the Head of Office is consistent with the possibility that he anticipated that such determination was yet to be made through an investigatory process. The Fund states that Management did not open a formal investigation into any alleged misconduct on the part of Applicant.

100. It is fundamental that an institution governed by the rule of law provides both the factual basis for a decision that affects a staff member's employment status and the legal basis (the provision of the internal law) to support that decision. "[T]he obligation of a decision maker to give a reasoned written explanation for a decision, particularly where the decision has a profound and fundamental impact on the employment status of a person, is a general principle of international administrative law." *Mr. "RR", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-2 (December 24, 2021), para. 125. The Tribunal has observed that the formulation of a reasoned written decision encourages coherent and consistent decision making and facilitates the review process should such decision later be challenged. *Id.*, para. 128. In the instant case, the Fund's failure to identify the authority for the contested decision in terms of the Fund's written internal law meant that the decision maker was without guidance as to what standards to apply in taking the decision, and the affected staff member may have been hindered in developing his challenge to it.

101. It is also notable that once Applicant challenged the administrative-leave-with-pay decision through the administrative review process, the legal basis for the decision remained

unstated. The HRD Director's denial of Applicant's request for review failed to cite any provision of the Fund's internal law in upholding the decision.[12] The Tribunal observes that the "twin goals" of Article V's requirement for exhaustion of channels of administrative review are to provide opportunities for the resolution of the dispute and to assemble a record in the event of subsequent litigation. *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66. Both of these goals are frustrated in the absence of informing the aggrieved staff member of the basis in law and fact for the decision he challenges. A staff member of the Fund should not have to wait to litigate his case to learn the legal authority for the decision taken against him.

(2) Did the Fund err in invoking Staff Handbook, Ch. 5.01, Section 5.6 (Administrative Leave with Pay for Special and Unusual Situations), as the authority for placing Applicant on administrative leave with pay?

102. As noted, neither the decision placing Applicant on administrative leave with pay, nor the HRD Director's administrative review of that decision, cited a governing provision of the Fund's internal law. The first reference in the record to "Staff Handbook Rule 5.6" is found in Applicant's Statement of Grievance of November 16, 2018. (The record does not reveal how Applicant came to include this reference in his Grievance.) Thereafter, in formulating its proposed "statement of the issue" for purposes of the Grievance proceedings, the Fund cited Staff Handbook, Ch. 5.01, Section 5.6 (Administrative Leave with Pay for Special and Unusual Situations), as the basis for the decision, and the Grievance Committee adopted that formulation in stating the question presented by the Grievance. In its pleadings to the Tribunal, Respondent continues to rely on Section 5.6 as the authority for the decision it seeks to defend.

103. Applicant, for his part, challenges the applicability of Section 5.6, contending that it was Section 5.3 (Administrative Leave with Pay Pending Investigation of Misconduct) that exclusively governed in the circumstances of the case. In Applicant's estimation, the impugned decision was taken as a disciplinary and security measure because the Head of Office perceived Applicant as a "threat." As such, says Applicant, he should have been afforded the procedural prerequisites associated with Section 5.3.

104. The Fund counters that Management has discretion to decide not to investigate allegations of misconduct, and that no misconduct investigation was pursued against Applicant. Therefore, the Fund asserts, it was not required to invoke Section 5.3 (Administrative Leave with Pay Pending Investigation of Misconduct) and its attendant procedural steps, in the circumstances of the case.

105. The Tribunal observes that Staff Handbook, Ch. 5.01, Section 5, authorizes the Fund to place a staff member on administrative leave with pay in a range of circumstances.[13] These include: pending investigation of misconduct (Section 5.3); pending determination on medical separation (Section 5.4); for special family emergency (Section 5.5); for special and unusual

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[12] *See supra* CHANNELS OF ADMINISTRATIVE REVIEW.

[13] *See supra* RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW.

situations (Section 5.6); and in connection with external assignments, external swaps and reimbursed secondments (Section 5.7).

106. Staff Handbook, Ch. 5.01, Section 5.3 (Administrative Leave with Pay Pending Investigation of Misconduct), provides:

> 5.3 *Administrative Leave with Pay Pending Investigation of Misconduct*. When a staff member is alleged to have engaged in conduct for which any of the disciplinary measures referred to in "Chapter 11.02: Misconduct and Disciplinary Procedures" might be imposed, he or she may be placed on administrative leave with pay while the matter is under investigation, in accordance with the provisions of "Interim Measures". Any such period shall not extend beyond the date on which the staff member is notified of the decision in the matter.

107. Staff Handbook, Ch. 5.01, Section 5.6 (Administrative Leave with Pay for Special and Unusual Situations), provides:

> 5.6 *Administrative Leave with Pay for Special and Unusual Situations*. Administrative leave with pay may be granted in special and unusual situations that include, but are not limited to, the evacuation of resident representatives *or where, in the view of the Director of HRD, the continuing presence of a staff member at work may not be in the interest of the Fund*. A resident representative who has been evacuated will not be eligible for administrative leave if he or she is assigned to duty in another location.

(Emphasis added.)

108. Applicant submits that the Fund has presented no proper basis for relying on Section 5.6 and that the rule of *lex specialis* requires that a catchall rule (such as Section 5.6) shall not be invoked in place of a more tailored rule (such as Section 5.3).

109. The Tribunal observes that Staff Handbook, Ch. 5.01 (Administrative Leave with Pay), Section 5.3 (Administrative Leave with Pay Pending Investigation of Misconduct) must be read together with Staff Handbook, Ch. 11.02 (Disciplinary Procedures), Section 7 (Decisions on Disciplinary Action). The latter provision sets out the formal framework for misconduct proceedings within the Fund.[14] As part of that framework, Ch. 11.02, Section 7.5, authorizes "interim measures," which may be implemented "[p]ending the completion of an investigation and a decision on the matter, and where the responsible official finds reasonable cause for such action." Among those "interim measures" is that the "staff member may be placed on

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[14] *See supra* RELEVANT PROVISIONS OF THE FUND'S INTERNAL LAW. *See generally Ms. "PP", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-1 (May 20, 2021).

administrative leave with pay." Notably, Section 5.3 (of Ch. 5.01) cross-references Ch. 11.02, Section 7.5 (Interim Measures). Section 5.3 is integrally tied to the misconduct process.

110. In the instant case, the Tribunal has not been called upon to decide whether Applicant should have been investigated for misconduct. The "administrative act" (Statute, Article II) that Applicant challenges before the Tribunal is the decision to place him on administrative leave with pay. The issue before the Tribunal is whether it was lawful of the Fund to invoke Section 5.6, and a related question whether the Fund properly exercised its discretion in the application and implementation of that provision.

111. In view of the foregoing discussion of the structure of the internal law, the Tribunal finds that it was within the Fund's authority to invoke Staff Handbook, Ch. 5.01, Section 5.6 (Administrative Leave with Pay for Special and Unusual Situations), as the authority for placing Applicant on administrative leave with pay.

112. The next question is, given its application of Section 5.6, did the Fund properly exercise the discretion afforded by that provision?

(3) Did the Fund act in accordance with fair and reasonable procedures when it decided that "in the view of the Director of HRD, the continuing presence of [Applicant] at work may not be in the interest of the Fund" (Staff Handbook, Ch. 5.01, Section 5.6)?

113. This is the first decision taken under Staff Handbook, Ch. 5.01, Section 5.6 (Administrative Leave with Pay for Special and Unusual Situations), to be challenged before the Tribunal. The parties dispute what requirements must be met when the Fund decides that "in the view of the Director of HRD, the continuing presence of a staff member at work may not be in the interest of the Fund" and whether those requirements were fulfilled in Applicant's case.

114. Respondent submits that Section 5.6 confers a "wide discretion" on the decision maker and asks the Tribunal to defer to the "Director of HRD's managerial expertise in determining whether a staff member's presence is in the best interests of the Fund." The Fund also emphasizes that "[t]here are no prerequisites, such as a formal investigation, prior to granting this form of Administrative Leave with Pay." As considered above, Applicant, for his part, contends that the administrative-leave-with-pay decision should not have been taken in the absence of the procedural steps afforded by Section 5.3.

115. To assess whether fair and reasonable procedures were afforded in Applicant's case, the Tribunal must first consider what factors underlay HRD's decision that the "continuing presence of [Applicant] at work may not be in the interest of the Fund." Then, it will determine what process was due in the circumstances and whether the Fund complied with that process.

(i) What factors underlay HRD's decision that the "continuing presence of [Applicant] at work may not be in the interest of the Fund"?

116. Just as the impugned decision failed to disclose its legal authority in terms of the Fund's written internal law, it also elided its factual basis, stating only that Applicant's ". . . manager has

explained to HRD his view that this would be mutually advantageous and we hope it will facilitate your transition towards retirement." The Tribunal accordingly is left to probe the evidence in the record to establish the basis for HRD's determination that the "continuing presence of [Applicant] at work may not be in the interest of the Fund."

117. The Tribunal discerns from the record three, interrelated factors that underlay the administrative-leave-with-pay decision: discord in the working relationship between Applicant and the Head of Office, which was said to make untenable their continuing to collaborate in the management of the Office; Applicant's allegedly ill-tempered conduct, which might constitute misconduct; and the opinion of the Head of Office that Applicant's continuing presence in the work unit "pose[d] a serious operational and security threat to [the Office] and its staff."

118. In its pleadings to the Tribunal, the Fund identifies the first factor as providing sufficient ground for the impugned decision. The Fund asserts that the administrative-leave-with-pay decision was a "pragmatic decision to ensure that the [Office] could function effectively." "[T]he reason for HRD's decision was that the relationship between Applicant and [the Head of Office] . . . had deteriorated to the point that they could no longer work together." The Fund emphasizes: "There was no need for an investigation to establish this undisputed fact."

119. The Fund also seeks to minimize security concerns as a cause for the administrative-leave-with-pay decision, stating: "[I]f HRD considered that Applicant did pose such a grave threat, Fund Security and Management would have been consulted immediately about the need for an investigation." At the same time, the Fund submits that it had a "sufficient quantum of evidence" to support the administrative-leave-with-pay decision based on Applicant's conduct.

120. The contemporaneous documentary record, as well as the HRD Director's administrative review decision (which sought to substantiate the contested decision retrospectively), support the conclusion that the administrative-leave-with-pay decision was taken, at least in part, on the ground that Applicant was alleged to have engaged in conduct that might constitute misconduct. On three occasions between January and July 2018, the Head of Office wrote to HRD, reporting Applicant's workplace behavior variously as: "unbecoming of a professional"; "hostile and threatening"; "potentially dangerous"; "bullying"; and that Applicant was "making false accusations, defamatory comments concerning the Office and its staff members, and arguing with and shouting at the staff." The HRD Director's decision on administrative review unmistakably anchored the administrative-leave-with-pay decision of late-July 2018 (along with the earlier non-promotion decision of late-June 2018) in Applicant's allegedly inappropriate conduct dating to January 2018 and before. The HRD Director endorsed the view that Applicant had engaged in ill-tempered behavior not only in the Office and in his relations with its Head, but also in incidents in the Fund's cafeteria and library in December 2017. She concluded that the administrative-leave-with-pay decision was a "reasonable response to the concerns expressed by [the Head of Office] about the office environment, against the background of the several concerns raised about [Applicant's] workplace conduct during 2018."

121. The record discloses that concern for workplace safety also factored in the impugned decision. In his communications to HRD, the Head of Office reported that he did "not feel secure when [he was] in the Office with only [Applicant] around." He further alleged that Applicant posed a "risk to the proper functioning of the Office" and, later, a "serious operational and

security threat to [the Office] and its staff." In their Grievance Committee testimony, the HRD Deputy Director and the SPM both emphasized safety concerns arising from these communications. The HRD Deputy Director testified that the administrative-leave-with-pay decision ". . . would create an environment in the office that at least I will not be concerned about the safety of – the safety of the staff there." The SPM echoed the view that "you have to act in the way that [is] best to ensure safety."

122. Hence, although the Fund maintains that the reason for the administrative-leave-with-pay decision was simply to put distance between two managerial-level staff members as a "practical way of protecting the Fund's interest in a positive working environment" (HRD Director's decision on administrative review), the record establishes that additional, and serious, considerations lay behind the decision. These were the allegations from the Head of Office that Applicant (i) had engaged in conduct that might constitute misconduct, and (ii) posed a threat of future harm to the Office and its employees.

123. Given these factors, what process was due before the Fund could properly place Applicant on administrative leave with pay for special and unusual situations (Section 5.6)?

(ii) What process was due in the circumstances of Applicant's case?

124. The Tribunal has decided above that the Fund did not err in invoking Section 5.6 (Administrative Leave with Pay for Special and Unusual Situations). Nonetheless, "a decision could constitute an abuse if an organization exercises its discretionary power for a purpose other than that for which the power was granted."[15] The Tribunal observes that the text of Section 5.6, which permits the HRD Director to remove a staff member from the workplace for a period of up to six months (Section 5.6.2) where the staff member's presence "may not be in the interest of the Fund," is broadly drafted. As such, it may be open to abuse. The Tribunal holds that Section 5.6 may not be deployed to evade the procedural requirements that protect both the staff member and the institution from erroneous decision making where an administrative-leave-with-pay decision is based, in whole or in part, on allegations of conduct that might constitute misconduct. Fair and reasonable procedures must govern, whether or not the formal disciplinary machinery has been activated or Section 5.3 (Administrative Leave with Pay Pending Investigation of Misconduct) has been invoked.

125. When the Fund takes a decision to place a staff member on administrative leave with pay under Section 5.6 on the basis that "in the view of the Director of HRD, the continuing presence of a staff member at work may not be in the interest of the Fund," and that decision is grounded, as the evidence shows it was here, in alleged conduct that might constitute misconduct and/or in the view that the staff member's presence poses a risk of future harm, then procedural

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[15] *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 74 (observing that "administrative tribunals have considered the abolition of positions improperly motivated if the aim of the decision was to terminate a particular person for misconduct or unsatisfactory performance.").

protections must be afforded akin to those required in cases of administrative leave with pay pending investigation of misconduct.

126. In cases of administrative leave with pay pending investigation of misconduct, the Tribunal has held: "[T]he doctrine of *audi alteram partem*, a fundamental principle of international administrative law, should be followed before a decision to place a staff member on administrative leave is taken unless exceptional circumstances require otherwise." *Ms. "EE", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 197. This requirement has subsequently been codified in the Fund's written internal law: "Before imposing any of the above interim measures, the responsible official shall give the staff member a reasonable opportunity to be heard on the facts at issue and allegations against him or her, unless exceptional circumstances require otherwise." Staff Handbook, Ch. 11.02 (Disciplinary Procedures), Section 7.6. This requirement applies expressly in cases of administrative leave with pay pending investigation of misconduct (Section 5.3). The Tribunal concludes that it also applies in the context of a decision under Section 5.6, when the decision is based, in whole or in part, on allegations of conduct that might constitute misconduct.

127. The Tribunal '"consistently has applied notice and hearing as essential principles of international administrative law."' *Ms. "EE"*, para. 188 (collecting cases). Those principles apply not only in the context of misconduct decisions but in non-disciplinary circumstances as well.[16] The opportunity for the staff member to be heard on the matters that are to form the basis for an adverse decision against him is particularly important where, as here, the person reporting the conduct is engaged in a disputatious relationship with the staff member. The Tribunal has observed: "Where interpersonal conflict exists, it will ordinarily be helpful for the Fund to give a person against whom a complaint has been lodged an opportunity to be heard prior to placing that person on administrative leave . . . . The value of granting a hearing in such circumstances is that at times an entirely different complexion may be placed on the issues under investigation." *Ms. "EE"*, para. 121. In such circumstances, the Fund shall take adequate steps to test the validity of the assertions against the staff member, so that animosity between the accuser and the accused is not conflated with misconduct on the part of the latter.

128. The Tribunal has recognized: "To 'hear both sides' is a core element of due process." *Ms. "EE"*, para. 190. That requirement is heightened in this case for two reasons. First, as noted, the allegations giving rise to the administrative-leave-with-pay decision involved purported interpersonal misconduct vis-à-vis the person reporting that conduct. Second, the administrative-leave-with-pay decision effectively ended Applicant's career with the Fund. Rather than preserving the status quo while accusations were investigated and resolved, as is the purpose of administrative leave with pay "pending investigation of misconduct," in this case of administrative leave with pay "for special and unusual situations," the administrative-leave-with-pay decision effectively ended Applicant's Fund career without resolving the accusations giving

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[16] *See, e.g., Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), paras. 41-43 (awarding compensation for procedural irregularity in non-conversion of fixed-term appointment where Fund failed to provide appointee with the opportunity to answer accusations made against her by co-workers as to her interpersonal skills).

rise to the decision. These accusations were serious ones, including "bullying," that deserved impartial assessment and resolution, both in fairness to Applicant and in the interest of the Fund and its staff in seeking to eradicate the type of conduct in which Applicant was said to have engaged.

129. The Tribunal concludes that when the Fund takes a decision to place a staff member on administrative leave with pay pursuant to Section 5.6 on the ground that "in the view of the Director of HRD, the continuing presence of a staff member at work may not be in the interest of the Fund," general principles of international administrative law require that the decision be taken on the basis of an impartial assessment, following notice of the proposed action and an opportunity for the staff member to be heard on the matters that are to form the basis for the decision. The staff member needs to be apprised of how his continuing presence at work is alleged to be antithetical to the "interest of the Fund."

(iii) Did the Fund take the administrative-leave-with-pay decision on the basis of an impartial assessment, following notice and an opportunity for Applicant to be heard?

130. Acknowledging the Tribunal's statement in *Ms. "EE"*, para 121, that "[w]here interpersonal conflict exits, it will ordinarily be helpful for the Fund to give a person against whom a complaint has been lodged an opportunity to be heard prior to placing that person on administrative leave," the Fund submits that it ". . . has met that standard here, as Applicant was afforded notice and opportunity to be heard prior to HRD taking the decision to place him on Administrative Leave with Pay for Special and Unusual Situations." At the same time, the Fund maintains that "due process does not entitle a person to an investigation before a non-disciplinary administrative action is taken." As noted, the Fund emphasizes that there was no need for investigation to establish the "undisputed fact" that the relationship between Applicant and the Head of Office had deteriorated to the point that they could no longer work together.

131. Respondent further maintains that "Applicant was duly warned on multiple occasions regarding his behavior towards his supervisor, others in [the Office], and others in the Fund at large." "[W]ith every instance of reported threatening or harassing behavior by Applicant," says the Fund, "the HRD team met with Applicant to hear his side of the story. HRD also warned Applicant that he needed to take corrective action and restrain himself." The Fund submits that Applicant was "on notice . . . that his behavior was inappropriate" and that the HRD Deputy Director "gave Applicant an opportunity to be heard regarding the proposed administrative leave."

132. Applicant, for his part, submits that "lack of an investigation per Section 5.3 deprived [Applicant] of his right to be cleared of false charges, and to avoid summary expulsion that indulged his manager's unlawful demands." "The Fund leveled grave charges," says Applicant, ". . . and those charges had grave consequences for him."

133. The record shows that Applicant was asked to meet with the SPM and the HRD Deputy Director on three occasions over the course of the seven months leading up to the decision to place him on administrative leave with pay. Each of these meetings was triggered by reports from the Head of Office to HRD, alleging inappropriate conduct on Applicant's part.

134. In the view of the Tribunal, these meetings were insufficient to fulfill the requirements of due process for the following reasons:

135. First, the Tribunal has found that the Fund failed to give Applicant notice of the legal authority for the administrative-leave-with-pay decision. The record supports the conclusion that the Fund itself was unsure, and did not make clear to Applicant, under what provision of its internal law it proposed to act. Accordingly, Applicant was not given adequate notice of the proposed action against him.

136. Second, the assertions of the Head of Office that Applicant had engaged in inappropriate conduct and posed a risk of future harm were not tested through an impartial weighing of the facts. Although in his meetings with HRD officials, Applicant may have had an opportunity to give his version of various events, in the absence of an articulated basis in law and fact for placing him on administrative leave with pay, it would not have been possible for Applicant to address fully the law and facts at issue and, in so doing, to exercise his right to be heard. The Tribunal emphasizes that '"adequate warning and notice are requirements of due process because they are a necessary prerequisite to defense and rebuttal."' *Ms. "EE"*, para. 189, quoting *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 37.

137. Third, the promise of an opportunity to be heard remains unfulfilled in the absence of a fair hearing by an impartial decision maker. The text of Section 5.6 provides that a staff member may be placed on administrative-leave-with-pay when "in the view of the Director of HRD" the continuing presence of the staff member at work may not be in the interest of the Fund. Implicit in that grant of discretionary authority is that the decision of the HRD Director will be taken impartially. In this case, the HRD Director abused the discretion afforded by Section 5.6 by failing to form a "view" that was impartial and informed by due process. Rather than undertaking an independent assessment of the matter, HRD adopted the view of Applicant's "manager [i.e., the Head of Office] [who] has explained to HRD his view that this would be mutually advantageous."

138. The Fund argues that in taking the administrative-leave-with-pay decision it relied on the "undisputed fact" of discord in the working relationship between Applicant and the Head of Office; it states that it did not "take sides" in that dispute. The Tribunal finds this argument does not relieve the Fund of its fundamental obligation to take decisions in the administration of the staff of the Fund in accordance with fair and reasonable procedures. *See* Commentary on the Statute, p. 19. The Tribunal has identified, in the context of administrative leave with pay pending investigation of misconduct, the inherently adverse nature of an administrative-leave-with-pay decision: "[P]lacing a staff member on administrative leave, coupled with suddenly barring him from regular access to the Fund's premises is not without adverse consequences to the staff member, in particular in regard to reputational issues, anxiety, career development, relations with colleagues, and opportunity for assignments." *Ms. "EE"*, para. 190. It was not fair of the Fund to accept the "undisputed fact" that two staff members could not get along as the basis for a decision to place one of them on administrative leave with pay for "special and unusual situations." This was especially so, given the serious accusations the Head of Office had leveled against Applicant. The ground for a decision that a staff member's presence at work is no longer "in the interest of the Fund" must be neutral vis-à-vis two staff members engaged in a

workplace dispute, unless, through fair process, the Fund has established a basis for distinguishing between them. That was not done here.

139. The Tribunal additionally finds to be without merit the Fund's defenses that the administrative-leave-with-pay decision was supported by: Applicant's alleged failure to object to the administrative leave with pay; Applicant's upcoming retirement; or HRD's consultation with OII. None of these defenses extinguishes the requirement that the decision be taken in accordance with the fair and reasonable procedures that the Tribunal has identified apply in the circumstances of the case.

140. The Fund maintains that the "Deputy Director of HRD consulted with Applicant on the option of the administrative leave decision, and he did not object." The Fund suggests, in essence, that Applicant waived his right to fair process. This argument is flawed as a matter of fact and law. The record shows that the HRD Deputy Director himself testified that, in the July 26, 2018, meeting in which Applicant was advised of the administrative-leave-with-pay decision, Applicant stated that he would "use the Fund avenues to prove my point on this." The next day, Applicant sent the HRD Deputy Director an email stating: "As you suggested[,] I plan to follow the procedures to seek justice within the IMF system."

141. The Fund additionally seeks to support the administrative-leave-with-pay decision on the ground that Applicant was scheduled to separate from the Fund in less than six months' time, as a consequence of reaching mandatory retirement age. Whatever role that factor may have played in HRD's decision-making process, this consideration did not relieve the Fund of its obligation to take the discretionary decision to place Applicant on administrative leave with pay for special and unusual situations in accordance with fair and reasonable procedures.

142. Finally, the Tribunal has decided above that it finds no compelling reason to take account of OII's decision to close the Preliminary Inquiry into Applicant's complaint of retaliation in the taking of the administrative-leave-with-pay decision.[17] Nonetheless, the Fund seeks to rely on the consultation between the HRD Deputy Director and OII as supporting the legitimacy of the impugned decision. That OII may have advised HRD of its view that the administrative-leave-with-pay decision should not give rise to a sustainable claim of retaliation did not deprive Applicant of the right to be heard and of an impartial assessment of the facts by HRD before taking the decision to place him on administrative leave with pay for special and unusual situations. This consultation did not immunize the Fund from its inherent duty to take decisions in accordance with fair and reasonable procedures or from the Tribunal's scrutiny of the contested decision.

143. The Fund's law anticipates that there may be "special and unusual situations" in which the "continuing presence of a staff member at work may not be in the interest of the Fund." When such situations arise from conduct that might constitute misconduct and/or the staff member's presence in the workplace is perceived to pose a threat of future harm, fair process must be afforded. It was not enough for the HRD Deputy Director simply to rely on the "view"

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[17] *See supra* PROCEDURE: Role of OII report in Tribunal proceedings.

of Applicant's supervisor, especially in circumstances in which it is not disputed that the discord between the staff member and the supervisor was cited as the reason why it would be in the interest of the Fund to place the staff member on administrative leave with pay. This was manifestly unfair.

144. For the foregoing reasons, the Tribunal concludes that the Fund failed to act in accordance with fair and reasonable procedures when it decided—in the absence of an impartial assessment, following notice of the proposed action, and in the absence of an opportunity for Applicant to be heard on the matters that were to form the basis for the decision—that "in the view of the Director of HRD, the continuing presence of [Applicant] at work may not be in the interest of the Fund."

(b) Did the Fund act in accordance with fair and reasonable procedures in implementing the administrative-leave-with-pay decision?

145. The contested administrative-leave-with-pay decision of August 1, 2018, stated at para. (iii): "Access to the [Office's] systems and [to the Office] have been removed effective July 27. Otherwise your Fund network and buildings . . . access remains active in the normal way." Applicant challenges the manner in which this element of the decision was implemented.

146. The Tribunal observes that Applicant was effectively placed on administrative leave with pay at the outset, rather than on annual leave, as provided by the written decision of August 1, 2018, given that the decision also provided that Applicant's "[a]ccess to the [Office's] systems and [to the Office] have been removed effective July 27." Furthermore, the decision that Applicant depart on administrative leave with pay was effectuated before the written decision had even been issued.

147. Applicant alleges that he was removed from the Office in a humiliating manner on July 26, 2018, just after being advised orally of the administrative-leave-with-pay decision. Applicant asserts that he was "brusquely ordered out of a [small work unit] without warning" and that the Head of Office "subverted [Applicant's] hasty effort to arrange a dignified exit by ordering that his badge be taken away by the confused Office Manager." The next day, says Applicant, he was required to clear out his office with the help of colleagues, underscoring that the "expulsion" from the Office was to be permanent and punitive. Applicant submits that these events amounted to a "public, ritualized degradation of a lead official entitled to respect from colleagues."

148. The Fund counters that the implementation of that part of the administrative-leave-with-pay decision denying Applicant access to his work unit and systems did not cause him any compensable harm.

149. The record before the Tribunal discloses the following. Applicant testified that after he left the meeting with the HRD Deputy Director on July 26, 2018, he returned to his Office where the assistant to the Head of Office demanded that he relinquish his badge. He reported this by email directly to the HRD Deputy Director on the same afternoon: "[The Head of Office]'s secretary came in [and] asked me to hand the access badge . . . , so he expects me not to come to work tomorrow. I thought our agreement was from Monday. Please clarify." The HRD Deputy

Director testified that he responded by calling the Office and saying that this was not what was agreed to. Applicant completed removing his personal possessions on the following day.

150. In *Ms. "EE"*, para. 231, the Tribunal responded to a staff member's allegation of humiliation in relation to her escort from the building by a Fund security officer upon being placed on administrative leave pending investigation of misconduct. The Tribunal concluded in that case that the "accusation of misconduct for which Applicant was placed under investigation, i.e., harassment of another staff member who expressed fear for her safety, was rationally related to the concerns that animate the 'standard procedure' of removing a staff member from the premises under the escort of a Fund security officer" and found that the practice did not violate fair and reasonable procedures in the circumstances of the case. The Tribunal further observed in connection with administrative leave pending investigation of misconduct:

> While the Tribunal does not question the application in this case of the standard procedure adopted by the Fund, *it considers that the Fund should seek ways to minimize the public embarrassment to a staff member who is being placed on administrative leave*. There exists a range of ways to achieve this. For example, the staff member could be escorted at the end of the workday when few staff members are present. Consideration could also be given to disabling a staff member's security pass and instructing him or her not to report the next day.

Id., para. 233. (Emphasis added.)

151. Accordingly, the Tribunal in *Ms. "EE"* did not find that the manner of removing the staff member from Fund premises was carried out in contravention of fair and reasonable procedures. However, it did observe: "[T]he Fund may wish in future cases to consider a less conspicuous fashion of barring from the Fund's premises a staff member who has been placed on administrative leave pending investigation of alleged misconduct." *Id.*, para. 233.

152. The question here is whether the circumstances in which Applicant was required to leave the premises of his Office and to relinquish access to the computer systems specific to that Office, both of which were effectuated before a written decision in the matter had even been notified to Applicant, represented a failure of the Fund to implement the administrative-leave-with-pay decision in accordance with fair and reasonable procedures.

153. When a staff member is placed on administrative leave with pay at the initiative of the Fund, the Fund must make all reasonable efforts to mitigate the inherent stigma and potential humiliation associated with such a decision, including being required summarily to leave the workplace. The evidence here shows that when the staff member returned from the meeting with the HRD Deputy Director, he was immediately ordered to relinquish his badge, denied access to his work unit and systems, and required to vacate his office the next day. These events took place before Applicant was formally notified by letter of the administrative-leave-with-pay decision.

154. Unlike in *Ms. "EE"*, there is no allegation or evidence that Applicant was escorted from the Office by security personnel. Nonetheless, the manner in which Applicant's departure was carried out on July 26, following his meeting with the HRD Deputy Director, contributed to the

wrongfulness of the decision. Its implementation violates the standard that all reasonable efforts should be taken to mitigate the inherent stigma and potential humiliation associated with such a decision. It adversely affected the dignity of the staff member.

155. The Tribunal accordingly concludes that the Fund did not act in accordance with fair and reasonable procedures in implementing the administrative-leave-with-pay decision.

(c) Tribunal's conclusions on fair and reasonable procedures

156. The Fund's decision to place Applicant on administrative leave with pay, and its implementation, were affected by fundamental failures of due process. These failures include: the Fund's omission in its communications with Applicant to cite any basis in its internal law for the impugned decision; the Fund's failure to take an impartial decision, following notice and an opportunity for Applicant to be heard, that the "continued presence of [Applicant] at work may not be in the interest of the Fund"; and the Fund's failure to meet the standard that all reasonable efforts must be taken to mitigate the inherent stigma and potential humiliation associated with implementing a decision to place a staff member on administrative leave with pay. The Tribunal accordingly concludes that the Fund exceeded the margin of its discretionary authority afforded by Staff Handbook, Ch. 5.01, Section 5.6. For these reasons, the contested administrative-leave-with-pay decision must be rescinded.

(4) Was the decision to place Applicant on administrative leave with pay improperly motivated?

157. The Tribunal has concluded above that HRD's decision to place Applicant on administrative leave with pay relied upon allegations from the Head of Office that Applicant had engaged in conduct that might constitute misconduct and posed a threat of future harm to the Office and its employees. The Tribunal has further concluded that the Fund adopted the view of the Head of Office in the absence of an impartial assessment of these serious accusations, without notice of the proposed action and an opportunity for Applicant to be heard on the matters that formed the basis for the decision. For these reasons, the Tribunal has decided that the Fund abused the discretion afforded by Staff Handbook, Ch. 5.01, Section 5.6, and that the administrative-leave-with-pay decision must be rescinded.

158. Applicant's pleadings to the Tribunal raise an additional question: Was the administrative-leave-with-pay decision further tainted by being improperly motivated by retaliation, harassment, or discrimination?

159. The Tribunal, and the Fund's written internal law, recognize a range of "improper motives" that may invalidate a decision, from personal animus to retaliation, harassment and discrimination. In its most general terms, "improper motive" means taking account of considerations not pertinent to the business reasons for a decision. The Tribunal has long recognized that the "general principle guiding international administrative tribunals regarding improper motive is that there must exist a causal link between the alleged irregular motive and the decision that is being attacked." *Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 73.

(a) Was the decision improperly motivated by retaliation or harassment?

160. The Tribunal notes at the outset that the Fund maintains that OII's decision to close its Preliminary Inquiry into a retaliation complaint brought by Applicant provides "persuasive evidence that no retaliation occurred" in Applicant's case. In considering the issue of retaliation, the Tribunal does not defer to the decision of OII. The Tribunal has recognized that disposition of a misconduct complaint by those organs of the Fund charged with its resolution is distinct from the Tribunal's review of a challenge to an "administrative act" (Statute, Article II) adversely affecting an Applicant: "Accordingly, in the absence of a compelling reason, the Tribunal will not ordinarily have a basis for taking account of the findings of Ethics investigations." *Ms. "GG" (No. 2)*, para. 68. As noted above, the Tribunal finds no compelling reason in this case to take account of such findings.[18]

161. Applicant alleges that the challenged administrative-leave-with-pay decision was part of a pattern of "retaliatory harassment" perpetrated by the Head of Office and then endorsed by HRD. This followed the January 2, 2018, meeting between Applicant and the HRD Director, in which Applicant raised the issues of his desired promotion to the next grade (which he believed was stalled by the Head of Office's own lack of grade progression), the results of the December 2017 staff survey as it related to the Office, and Fund governance issues.

162. According to Applicant, the pattern of retaliation that ensued included the following events: (i) the January 9, 2018, communication from the Head of Office to HRD reporting Applicant's "bullying" behavior and that he "represent[ed] a risk to the proper functioning of the Office," a communication that arose from a confrontation that Applicant says the Head of Office provoked by canceling Applicant's conference travel in retaliation for Applicant's pressing HRD to hold an Office-wide meeting on the staff survey results; (ii) the January 23, 2018, meeting with the HRD Deputy Director and SPM concerning the cafeteria and library incidents (both of which had taken place in late 2017), in which the HRD Deputy Director says he told Applicant "you don't have long to go in your career at this point and there are too many things that are associated with you, so keep the lid on for the remainder of your period"; (iii) the May 9, 2018, report from the Head of Office to HRD regarding Applicant's alleged conduct toward a junior staff member; (iv) the June 21, 2018, APR discussion in which the Head of Office advised that he would not recommend Applicant for promotion and, according to Applicant, accused him of "insubordination" and "going behind his back" to meet with the HRD Director on January 2, 2018; (v) the July 20, 2018, email from the Head of Office to HRD identifying Applicant as posing a "serious operational and security threat to [the Office] and its staff," a communication that Applicant alleges was in retaliation for Applicant's discussion on July 17, 2018 (and follow-up email of July 18, 2018) with the Head of Office and several others within the Office in relation to his actions on an important Fund policy relating to the work of the Office; and culminating in (vi) the July 26, 2018, administrative-leave-with-pay decision. In Applicant's view, ". . . all these events are connected starting with [his] visit to [the HRD Director]" of January 2, 2018.

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[18] *See supra* PROCEDURE: Role of OII report in Tribunal proceedings.

163. Respondent, for its part, maintains that there was no retaliation because Applicant was not engaged in "protected activity" in terms of the Fund's retaliation policy, and there was no "causal link" between the activity he cites and the "adverse action," that is, the decision to place him on administrative leave with pay.

164. The Tribunal observes that retaliation is a particular type of "improper motive" against which the Fund's written internal law affords specific protection. It does so in the interest of protecting the integrity of the Fund's systems for resolution of employment disputes and for raising ethical concerns. *See Mr. "DD", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 177 ("Protection from reprisal is essential to the fair and effective operation of the Fund's system for the resolution of staff complaints."). This larger institutional goal means that the Tribunal will scrutinize closely the reasons given for a decision that is alleged to be retaliatory.

165. A sustainable claim of retaliation must be clearly supported by three pillars. An applicant must show that he or she: (i) engaged in a "protected activity"; (ii) experienced an "adverse action"; and (iii) there was a "causal link" between the two. *Mr. "SS"*, para. 166.

166. The first question is, did Applicant engage in a "protected activity" in terms of the Fund's Retaliation Policy?

167. The Tribunal has observed that the "Retaliation Policy's wording makes clear that the Fund's prohibition against retaliation protects not only complainants and witnesses in formal ethics and grievance proceedings as referenced in [Staff Handbook, Ch. 11.01,] Section 11.1, but also 'anyone' who uses 'any of" the 'channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution."' *Mr. "SS"*, para. 170. Such channels include '"managers, ASPMs, SPMs, Department Heads, HRD, the Ombudsperson, the Ethics Advisor, the Integrity Hotline and the formal dispute resolution system (Grievance Committee and Administrative Tribunal)."' *Id*. The Tribunal emphasizes that the "Fund broadly protects all staff who 'speak up' or 'raise ethical concerns,' either formally or informally, with managers or through other workplace conflict resolution channels." *Mr. "SS"*, para. 170.

168. In going to the HRD Director on January 2, 2018, to seek to resolve a dispute regarding the prospects for his promotion, the staff survey results and governance concerns, Applicant engaged in "protected activity." Applicant's request of July 1, 2018, for administrative review of the decision not to promote him was also a "protected activity" in terms of the Fund's Retaliation Policy.

169. The next question is whether Applicant has established that a "causal link" exists between these protected activities and the contested decision to place him on administrative leave with pay. The Tribunal has emphasized: "The burden is thus on Applicant to show a 'causal link' between the retaliatory motive that he alleges . . . and the adverse decisions that he contests. Respondent, on its part, may counter with evidence of a 'reasonable and observable basis' for those decisions." *Mr. "SS"*, para. 174, citing *Ms. "GG" (No. 2)*, paras. 329-330. "[B]ecause an allegation of improper motive calls into question the impartiality of the decision-

making process, the evidence in the record of a reasonable and observable basis for that decision will be particularly significant." *Ms. "GG" (No. 2)*, para. 329.

170. Applicant contends that the actions enumerated in the Application constituted a pattern of retaliation, beginning after the January 2, 2018, meeting with the HRD Director and culminating in the decision to place Applicant on administrative leave with pay on July 26, 2018.

171. The Tribunal has recognized that a pattern of unfair treatment can constitute a hostile work environment. In *Ms. "GG" (No. 2)*, the Tribunal concluded that the applicant was subject to a hostile work environment to which the Fund failed effectively to respond. "That hostile work environment was marked by a pattern of unfair treatment in which Applicant's opportunities for career advancement were unreasonably impeded for reasons unrelated to her professional competence." *Ms. "GG" (No. 2)*, para. 434. The Tribunal stated:

> In examining the evidence to discern whether Applicant has established a "pattern of words, behaviors, action or inaction (such as the failure to take appropriate action in response to a complaint of discrimination), the cumulative effect of which is to deprive the individual of fair and impartial treatment" (Discrimination Policy, Section III), the Tribunal has necessarily taken a different approach than in deciding whether a single "administrative act" of the Fund represents an abuse of discretion. *The Tribunal has looked to individual incidents not in isolation but rather as markers delineating a "pattern" of unfair treatment, which has had an "adverse impact* on [Applicant's] employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment."

Ms. "GG" (No. 2), para. 281. (Emphasis added.)

172. In this case, the Tribunal recognizes that a pattern of incidents could give rise to a finding of retaliation under the Fund's Retaliation Policy. The incidents, however, must involve protected activities within the scope of that policy, and the ultimate adverse action must be clearly attributable to the pattern of protected activity.

173. Applicant contends that personal animus on the part of the Head of Office manifested itself in a pattern of retaliatory harassment. In assessing whether Applicant has substantiated a claim of retaliation, the Tribunal observes that it is hampered by the Fund's failure in this case to have probed the sources of the discord between Applicant and the Head of Office. That a staff member's own conduct may have fallen short of accepted norms is not dispositive of whether the staff member himself or herself has been subjected to harassment or retaliation. In *Mr. "F"*, paras. 100-101, the Tribunal found that a staff member had suffered compensable workplace harassment, even "though there [was] also evidence that he may have contributed to the malign atmosphere in the Section by his own behavior."

174. In the instant case, the Fund's failure to act in accordance with fair and reasonable procedures means that the evidentiary record remains opaque as to the respective responsibilities

of Applicant and the Head of Office for the discord that afflicted their working relationship. The Tribunal accordingly concludes that the evidence is insufficient to draw a conclusion as to whether that discord gives rise to an actionable claim of retaliation.

(i) Applicant's allegations of "whistleblowing"

175. As part of his retaliation claim, Applicant contends that the decision to place him on administrative leave with pay was immediately caused by his questioning of the Head of Office's implementation of Fund policy for which he also shared responsibility. Applicant characterizes this exchange as "whistleblowing." The events related to Applicant's objections and concerns occurred on July 17 and July 18, 2018. The decision to place Applicant on administrative leave with pay was taken on July 26, 2018.

176. Applicant testified that at this time the Head of Office wanted to take action that Applicant viewed as risky and needed the permission of a specific Committee and that he made this objection in his position in the Office as having responsibility for risk. According to Applicant, his "exposé" ("showing of willful violations of the . . . Committee's policy") was "the trigger" for the administrative-leave-with-pay decision and was "a later act in an ongoing whistleblowing action by [Applicant]." Applicant contends that the Head of Office "instantly recognized [the disclosure's] significance and moved with hyperbolic fervor: (i) to expel [Applicant]; to cut him off from [the Office's] computer system and databases; and (iii) to deny [Applicant] access to information that he could use for further whistleblowing research and disclosures."

177. Respondent, for its part, maintains that the policy issue was a discussion limited to staff within the Office, that Applicant "had not made an allegation of ethical violation or misconduct by [the Head of Office]," and that there is no basis for finding any "causal link" between Applicant's statements in the Office and the HRD decision. The Head of Office characterized Applicant remarks as "false accusations" and "defamatory comments" in his July 20, 2018, email to HRD.

178. The Tribunal observes that the written policy of the Fund governing retaliation does not reference "whistleblowing" *per se* or expressly provide protection of staff members who call into question colleagues' views as to how Fund policies shall be applied or, indeed, call into question the policies themselves. As interpreted by this Tribunal, the Fund's internal law "broadly protects all staff who 'speak up' or 'raise ethical concerns,' either formally or informally, with managers or through other workplace conflict resolution channels." *Mr. "SS"*, para. 170. A culture in which staff members are encouraged to "speak up" is essential to carrying out the mission of the Fund. The protection of staff members' ability to engage in rigorous discussion on the important issues under the Fund's jurisdiction and to bring matters to the attention of decision makers is critical and underlies international administrative law.

179. Applicant contends that he suffered retaliation for "whistleblowing." The Head of Office characterized the event as a discussion within staff and alleged that Applicant's conduct contained "false accusations" and "defamatory comments." What is clear is that Applicant called into question the Head of Office's professional judgment, and the latter reacted as if this were defamatory.

180. Both Applicant and Respondent agree that the working relationship between Applicant and the Head of Office had broken down. There is evidence to suggest that the decision contested in this case was driven by personal animosity between Applicant and the Head of Office. The Fund's failure to explore responsibility for that contentious relationship or to provide a solution to it other than the one that resulted in an adverse impact on Applicant was an error of law and a failure of fair procedure.

(b) Was the decision improperly motivated by age discrimination?

181. Applicant was five months short of reaching the Fund's mandatory retirement age when he was placed on administrative leave with pay. As noted, the administrative leave period spanned 2.5 months. Applicant had 2.5 months of accrued annual leave to exhaust prior to his retirement. Accordingly, following the administrative leave decision, which was notified to Applicant on August 1, 2018, Applicant never returned to active status at the Fund.

182. Applicant alleges that had he been a younger staff member, ". . . his expulsion [from the Fund] without an investigation or charges would have been unthinkable." Applicant accordingly contends that the administrative-leave-with-pay decision was improperly motivated by age discrimination.

183. The Fund submits that the administrative-leave-with-pay decision was not motivated by discriminatory animus based on Applicant's age but that it was "informed by Applicant's *impending separation date* from the Fund." (Emphasis in original.) In this regard, the Fund compares Applicant's circumstances to that of a term appointee who has not been converted to an open-ended appointment but has six months remaining in his employment with the Fund. In such case, submits the Fund, "if a special and unusual circumstance arises - such as an intractable interpersonal conflict that affects the work unit," the HRD Director could decide to place the staff member on administrative leave with pay rather than to pursue alternatives such as reassignment or a misconduct investigation: "Clearly, such a decision has nothing to do with the individual's age," maintains the Fund, "but is a direct consequence of the fact that the individual's remaining service at the Fund is time-limited and their departure is on a date certain."

184. The Fund's internal law prohibiting discrimination, Staff Handbook, Ch. 11.01 (Standards of Conduct), Section 5.1 (Prohibition of Discrimination) provides: "Subject to the Fund's institutional needs, including the paramount importance of securing the highest standards of efficiency and technical competence, the employment, classification, promotion and assignment of staff members shall be made without discriminating against any person because of age, creed, disability, ethnicity, gender, nationality, race or sexual orientation."

185. The Fund concedes that in taking the administrative-leave-with-pay decision, it took into consideration that Applicant was nearing separation from the Fund. That separation was occasioned by reaching mandatory retirement age under the Fund's rules. The question is whether the impugned decision was tantamount to age discrimination.

186. In *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), the applicant did not prevail in challenging a

vacancy selection process as being affected by age discrimination where the shortlisted candidates were also the youngest candidates. In that case, the applicant's age discrimination claim was "expressly linked to his contention that the selecting officials improperly 'discounted' what he considered to be the most relevant qualifications for the job." The Tribunal concluded it was within the Fund's discretion to fashion a selection process that gave greater weight to attributes such as "strategic vison" than to specialized knowledge or long-term experience in the particular field. "Accordingly," said the Tribunal, "the Fund's approach to assessing suitability for the position cannot be said to evidence age discrimination." *Id.*, para. 138.

187. Similarly here, Applicant has failed to substantiate his allegation that the administrative-leave-with-pay decision was improperly motivated by age discrimination. The Tribunal has concluded above that the fact that Applicant's career with the Fund was set to conclude as a consequence of reaching mandatory retirement age did not, however, relieve the Fund from its obligation to take the administrative-leave-with-pay decision in accordance with fair and reasonable procedures.[19]

(c) Tribunal's conclusions on improper motive

188. For the foregoing reasons, the Tribunal is not able to conclude, on the record of the case, that Applicant has established that the administrative-leave-with-pay decision was further tainted by being improperly motivated by retaliation, harassment, or age discrimination. That decision, the Tribunal has held above, must be rescinded because the Fund exceeded the margin of its discretionary authority by failing to take the decision in accordance with fair and reasonable procedures.

B. Did the Fund abuse its discretion in the treatment of Applicant's case by the Grievance Committee?

189. Applicant alleges that the treatment of his case by the Grievance Committee constituted a separate injury for which he is entitled to relief. Applicant contends that the Grievance proceedings diverged from due process and were affected by bias, and that the Grievance Committee acted inconsistently with Tribunal precedents in its approach to compensation for intangible injury.

190. Respondent, for its part, submits that neither the recommendations of the Grievance Committee or its internal processes are subject to the Tribunal's review, as these do not constitute "administrative acts" falling within the Tribunal's jurisdiction under its Statute. The Fund objects to Applicant's characterization of the Grievance process and to the inclusion in his present pleadings of discussion of the Grievance Committee's treatment of other cases.

191. On a number of occasions, the Tribunal has been presented with complaints alleging unfairness in the processes that staff members must exhaust before bringing an application to the Tribunal. The Tribunal has abstained from deciding such claims because it does not serve as an

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[19] *See supra* Did the Fund take the administrative-leave-with-pay decision on the basis of an impartial assessment, following notice and an opportunity for Applicant to be heard?

appellate body in relation to the Grievance Committee. "'This Tribunal has emphasized . . . that the [Grievance] Committee only makes recommendations and the Tribunal examines all issues *de novo*."' *Mr. "SS"*, para. 94, quoting *Mr. "DD"*, para. 168. *See also See Mr. "V"*, para. 129 ("As the Tribunal makes its own independent findings of fact and holdings of law, it is not bound by the reasoning or recommendation of the Grievance Committee.").

192. At the same time, the Tribunal has acknowledged that it relies, to a considerable extent, on the record assembled through the Grievance process in taking its own decisions. When presented with challenges to the integrity of that record, it will assess the weight to be given to it. *See, e.g., Ms. "GG" (No. 2)*, para. 427; *D'Aoust (No. 2)*, para. 176. Additionally, the Tribunal is mindful of the value of coherence between the legal principles applied by the Tribunal and those applied by other elements of the Fund's system for the resolution of staff employment disputes. *Ms. "NN", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2017-2 (December 11, 2017), para. 120.

193. In *Ms. "GG" (No. 2)*, the Tribunal emphasized the importance of fairness in the channels of review to the integrity of the dispute resolution system as a whole:

> 429. The integrity of the administrative review and Grievance Committee processes has a direct bearing on the work of the Administrative Tribunal. For most types of "individual decisions" that may be challenged before the Tribunal, exhaustion of the administrative review and Grievance Committee processes is a Statutory prerequisite.[footnote omitted] Although the Tribunal's ". . . review authority fully penetrates the layer of administrative review provided by the Grievance Committee, the Tribunal, in making its findings and conclusions, draws upon the record assembled through the review procedures." *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 96. Accordingly, the Tribunal has recognized the "utility of the administrative review process" to its own decision making, *id.*, noting that the Grievance Committee "produc[es] a detailed factual and legal record which is of great assistance to consideration of a case by the Administrative Tribunal." *Ms. "Y", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42.
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> 430. For these reasons, the Tribunal observes that it is essential to the robustness and integrity of the Fund's dispute resolution system that all steps in the administrative review and Grievance Committee processes are fair to staff members. Duties of confidentiality should be strictly observed. To the extent that questions have been raised about fairness in the administrative review and Grievance Committee processes, it is important for the

> Fund to take all appropriate steps to ensure the robustness and integrity of these dispute resolution processes.
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> 431. . . . . Insofar as Applicant's challenges raise systemic issues relating to the Fund's dispute resolution system, it is the province of the policy-making organs of the Fund to address such issues, in the light of the Tribunal's observations above.

The Tribunal has recently reaffirmed these principles in *Mr. "SS"*, paras. 245-246.

194. In this case, in which Applicant alleges he "endure[d] a long, costly and rigged process in which the Grievance Committee acted as a second set of advocates for the Fund," it is notable that Applicant prevailed in the Grievance Committee proceedings insofar as the Committee found that the administrative-leave-with-pay decision was "defective because it was the product of retaliatory motives." The Grievance Committee recommended that the decision be rescinded, a recommendation that Fund Management accepted. At the same time, the Grievance Committee rejected Applicant's request for monetary relief, concluding that he had not proven that any injury, either tangible or intangible, had resulted to him from the impugned decision. Additionally, the Grievance Committee recommended, and Fund Management accepted, that Applicant would be awarded only a portion of requested attorneys' fees.

195. Applicant takes issue with the Grievance Committee's approach to relief for intangible injury in this case, which he asserts is contrary to Tribunal precedents. A similar dispute arose in the case of *Ms. "NN"*. In that context, the Tribunal commented: "In the view of the Tribunal, in interpreting the Fund's internal law, it is important to bear in mind the desirability of coherence within the Fund's dispute resolution system. To the extent possible, the Tribunal considers it would be desirable were the Grievance Committee, in interpreting its own mandate, to strive to decide matters consistently with the jurisprudence of the Administrative Tribunal." *Ms. "NN"*, para. 120. The Tribunal reaffirms in the instant case the desirability of such coherence.

196. Applicant has expounded at length in his Application on what he perceives as failures of the Grievance Committee to afford a fair forum for the resolution of disputes prior to their consideration by the Tribunal. In the light of its statutory mandate and the jurisprudence cited above, the Tribunal will not pass judgment on these complaints. At the same time, the Tribunal is resolute in maintaining its own impartiality in resolving the disputes that come before it. If the Grievance Committee process is patently unfair so as to render its record unreliable, the Tribunal will call upon its own fact-finding processes: "[B]ecause the Administrative Tribunal makes findings of fact as well as holdings of law, . . . any lapse in the evidentiary record of the Grievance Committee may be rectified, for purposes of the Tribunal's consideration of the case, through the Tribunal's authority, pursuant to Article X of its Statute and Rules XVII and XIII of its Rules of Procedure, to order the production of documents, to request information and to hold oral proceedings." *Ms. "Z", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 120. The Tribunal has recognized that "the recourse procedures of the Fund are meant to be complementary and effective." *Estate of Mr. "D"*, para. 102. The Tribunal recognizes its inherent authority to ensure fairness in the channels

that lead to its resolution of a dispute, and it reminds the Fund to remain vigilant in ensuring the robustness and integrity of the dispute resolution system.

C. The issue of civility before the Tribunal

197. Respondent asserts that "Applicant's counsel's 'advocacy' violates basic standards of professionalism and civility." Applicant's counsel's submissions in this case, says the Fund, are "replete with *ad hominem* attacks, false statements and misrepresentations, and conveyed in a tone that is offensive to the professional decorum required of proceedings before this Tribunal." On that ground, the Fund submits that Applicant should not be awarded attorneys' fees regardless of the outcome of the case[20] and that the Tribunal must address the alleged lack of civility of Applicant's counsel in presenting his case.

198. Applicant's counsel, for his part, has responded to the Fund's assertions, defending the "professionalism, propriety and style" of his pleadings before the Tribunal.

199. The Tribunal has recognized that "[e]xercising the right to review of administrative acts through the channels established for the resolution of staff disputes, up to and including the review provided by this Tribunal, is a fundamental right of international civil servants." *Ms. "GG" (No. 2)*, para. 441. Applicants and their counsel or representatives in exercising that right, and counsel or representatives of the Fund in defending the institution's actions before the Tribunal, are expected to conduct themselves in a manner that facilitates a fair and reasoned adjudicatory process.

200. There are canons of conduct for counsel, widely accepted in diverse jurisdictions, that support the reasoned decision-making process essential to the adjudicatory function. For example, the United Nations Dispute Tribunal and United Nations Appeals Tribunal have adopted a "Code of conduct for legal representatives and litigants in person," which provides that such persons "shall maintain the highest standards of integrity and shall at all times act honestly, candidly, fairly, courteously, in good faith and without regard to external pressures or extraneous considerations."[21]

201. This Tribunal also considers that there are certain affirmative responsibilities that parties and counsel undertake in pursuing litigation in this forum. The Tribunal expects from the written and oral submissions of persons appearing before it, discourse that supports the reasoned decision-making process that is required of the Tribunal itself.

202. The Tribunal previously has had occasion to ". . . encourage[ ] every litigant to formulate pleadings in a manner that shows courtesy and respect both for adversaries and the adjudicatory process." *Ms. "GG" (No. 2)*, para. 440. Other international administrative tribunals have also

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[20] The question of attorneys' fees is considered below. *See infra* REMEDIES; Legal Fees and Costs.

[21] Article 4 (Basic Standards), para. 1, of "Code of conduct for legal representatives and litigants in person," Adopted as Appendix to General Assembly Resolution 71/266 (23 December 2016). https://www.un.org/en/internaljustice/pdfs/New_Single_Code_2016_Dec.pdf

commented on the relationship between the tone of pleadings and "an orderly and respectful Tribunal process." *Mr. F v. Asian Development Bank*, AsDBAT Decision No. 104 (2014), paras. 80-83.

203. Zealous advocacy must not give way to argumentation that misleads. Counsel, while necessarily partisan, are obliged to follow the canon of candor to the Tribunal, which applies in respect of both the facts and the law. Doing so is essential to supporting the Tribunal's fundamental function to discern dispassionately the facts of the case and to interpret the law in the light of applicable principles and precedents.

CONCLUSIONS OF THE TRIBUNAL

204. For the reasons elaborated above, the Tribunal has concluded that the Fund abused its discretion in deciding to place Applicant on administrative leave with pay and to deny him access to his work unit and systems. The Tribunal has not, however, sustained Applicant's secondary claim, challenging the treatment of his case by the Grievance Committee.

205. For the Fund's abuse of discretion in taking the decision to place Applicant on administrative leave with pay, Tribunal awards relief as follows.

REMEDIES

206. The Tribunal's remedial authority in respect of challenges to individual decisions is found in Article XIV, Section 1, of the Statute, which provides:

> 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.

207. The Tribunal's jurisprudence reflects that its remedial powers fall broadly into three categories: (i) rescission of the contested decision, together with measures to correct the effects of the rescinded decision through monetary compensation or specific performance: (ii) compensation for intangible injury resulting from procedural failure in the taking of a sustainable decision; and (iii) compensation to correct the effects of intangible injury consequent to the Fund's failure to act in accordance with its legal obligations in circumstances where there may be no decision to rescind. *Ms. "GG" (No. 2)*, para. 444; *Mr. "RR"*, para. 163.

208. In this case, the Tribunal has concluded that the Fund's decision to place Applicant on administrative leave with pay constituted an abuse of discretion. The Tribunal notes that the Fund has already rescinded the administrative-leave-with pay decision, following the recommendation of the Grievance Committee. The Tribunal turns now to consider the "measures . . . required to correct the effects of that [rescinded] decision" (Statute, Article XIV(1)), in particular, what compensation is required for the intangible injury consequent to the Fund's abuse of its discretionary authority.

A. Remedy for intangible injury

209. The Tribunal has recognized that intangible injury, by its nature, will be difficult to quantify. *Ms. "GG" (No. 2)*, para. 446. The Tribunal has not required applicants to offer proof of harm. Rather, the Tribunal's approach in such cases is to "identify the injury and assess its nature and severity, giving due weight to factors that may either aggravate or mitigate the degree of harm to the applicant." *Id.* This is because compensation for intangible injury responds not only to a staff member's legitimate expectation that the Fund will adhere to its legal obligations, "but also to the nature of the particular obligation that has been breached." *Id.*, para. 448. *Mr. "RR"*, para. 171.

210. In this case, the Tribunal has concluded that the Fund breached its obligation to take the administrative-leave-with-pay decision is accordance with fair and reasonable procedures because the Fund: (i) omitted in its communications with Applicant to cite any basis in its internal law for the impugned decision; (ii) failed to take an impartial decision, following notice and an opportunity for Applicant to be heard, that the "continued presence of [Applicant] at work may not be in the interest of the Fund"; and (iii) failed to meet the standard that all reasonable efforts must be taken to mitigate the inherent stigma and potential humiliation associated with implementing a decision to place a staff member on administrative leave with pay.

211. In *Ms. "EE"*, the Tribunal identified the adverse nature of an administrative-leave-with-pay decision: "[P]lacing a staff member on administrative leave, coupled with suddenly barring him from regular access to the Fund's premises is not without adverse consequences to the staff member, in particular in regard to reputational issues, anxiety, career development, relations with colleagues, and opportunity for assignments." *Ms. "EE"*, para. 190. In this case, the Tribunal has identified the following factors as aggravating the intangible injury associated with the administrative-leave-with-pay decision: the inherent stigma, particularly in the case of a long-serving staff member, of the determination that Applicant's "continuing presence . . . at work may not be in the interest of the Fund," including the affront to his perceived competence; the humiliation and loss of dignity resulting from Applicant's removal from the premises of the Office prior to the issuance of any written decision by the Fund; and the embarrassment to Applicant from his immediate departure from the Fund.

212. The Tribunal considers that since Applicant's career with the Fund was set to conclude as a consequence of reaching mandatory retirement age, this context serves as a mitigating factor.

213. For the intangible injury consequent to the Fund's abuse of discretion in taking the decision to place Applicant on administrative leave with pay, the Tribunal awards compensation in the sum of $30,000.

B. Legal fees and costs

214. As part of the Tribunal's remedial authority, Article XIV, Section 4, of the Statute provides for awards of legal fees and costs as follows:

> 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.

215. In accordance with Rule IX(5) of the Tribunal's Rules of Procedure, Applicant has submitted with the Reply documentation supporting his fee request. That request is considered together with Applicant's Supplementary Request for Costs, filed following the oral proceedings in the case. The Fund has set out its views in its Rejoinder and in its Response to Applicant's Supplementary Request for Costs.

216. In total, Applicant seeks legal fees and costs in the amount of $47,572.91. Of this sum, $20,096.82 represents fees incurred for representation in the Grievance Committee that remained unreimbursed after the Fund granted partial fees, consistent with the Grievance Committee's recommendation.[22]

217. The Tribunal considers at the outset Respondent's position that Applicant's fee request be denied in its entirety, on the ground that the pleadings presented by Applicant's counsel "violate[d] basic standards of professionalism and civility." The Tribunal has addressed above the responsibility of parties and counsel to formulate their pleadings in a manner that shows courtesy and respect for adversaries and the adjudicatory process.[23] Consistent with its "Statutory commitment to access to justice,"[24] the Tribunal declines to deny legal fees in this case in response to the Fund's assertion of incivility on the part of Applicant's counsel. *See Mr. "RR"*, para. 178 (rejecting similar request for diminution of fees).

218. In awarding fees and costs pursuant to Article XIV, Section 4, the Tribunal is guided by the criteria set out in that provision and by the following principles developed in its jurisprudence: "compensable fees and costs include those incurred for representation in the channels of administrative review that must be exhausted before the filing of an application with the Tribunal"; "a 'measure of proportionality' will apply, based on the degree to which an applicant is successful in the context of her total claims"; and "in determining compensable costs, there is 'no legal relationship between the amount of compensation awarded to Applicant and the costs of legal representation,"' *Ms. "NN"*, para. 154, citing *Ms. "C", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1)*, IMFAT Order No. 1997-1 (December 22, 1997).

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[22] *See supra* CHANNELS OF ADMINISTRATIVE REVIEW.

[23] *See supra* The issue of civility before the Tribunal.

[24] *Ms. "PP"*, para. 138 (rejecting Fund's Article XV request). *See Mr. "V", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 138 (observing that the "... purpose of Article XIV, Section 4 is to provide for cost-shifting in favor of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members.").

219. Where, as here, an applicant prevails only in part on an application, the Tribunal will apply a principle of proportionality. The Tribunal will weigh the "relative centrality and complexity" of the various claims and their ultimate disposition by the Tribunal. The Tribunal may also consider the role of the record assembled by counsel and relied on by the Tribunal in its decision-making process. *Ms. "NN"*, para. 156, citing *Mr. "F", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2005-1)*, IMFAT Order No. 2005-1 (April 18, 2005).

220. In the instant case, Applicant has prevailed on his principal claim, that the Fund abused its discretion in placing him on administrative leave with pay. The Tribunal has not sustained Applicant's secondary claim concerning the Grievance Committee's treatment of his case.

221. The representation of this case was unusual in several respects. Applicant represented himself through the hearing phase of the Grievance Committee process. Thereafter, Applicant engaged counsel to prepare the post-hearing briefs in the Grievance Committee. Furthermore, in his Application to the Tribunal, Applicant asked that the principal post-hearing brief in the Grievance Committee be "incorporated by reference" into the Application. The Tribunal has accordingly relied on that brief in considering the issues of the case; that brief, along with the Reply in the Tribunal, provides the substance of the argumentation on the claim on which Applicant has prevailed. In contrast, the text of the "Application" itself is devoted chiefly to Applicant's secondary argument, challenging the treatment of his case by the Grievance Committee, a challenge that the Tribunal does not sustain.

222. Applying the principle of proportionality, the Tribunal awards Applicant full legal fees and costs associated with both the Reply and the oral proceedings, which focused almost exclusively on Applicant's successful challenge to the administrative-leave-with-pay decision. For the reasons elaborated above, only 25 percent of the fees and costs associated with the preparation of the Application shall be reimbursed.

223. It is settled jurisprudence that this Tribunal may award attorneys' fees and costs for representation in proceedings antecedent to the Tribunal's review. *Mr. "RR"*, para. 179. Applicant accordingly will be awarded 100 percent of legal fees and costs incurred in the Grievance Committee, in which he raised the same claim on which he has prevailed in the Tribunal. That award shall be reduced by the fees that the Fund already has reimbursed following the Grievance Committee's Supplemental Report and Recommendation.

224. Having considered the representations of the parties and the criteria set out in Article XIV, Section 4, of the Statute, the Tribunal concludes that Applicant shall be awarded $38,421.97, which is approximately 80 percent of the total fees and costs requested.

DECISION

FOR THESE REASONS

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

1. "TT" has prevailed on his claim that the Fund abused its discretion in taking the decision to place him on administrative leave with pay. Accordingly, that decision is rescinded.

2. To correct the effects of the rescinded decision in the form of intangible injury, "TT" is awarded compensation in the amount of $30,000.

3. The additional complaint of "TT" that the Fund abused its discretion in the treatment of his case by the Grievance Committee is not sustained.

4. The Fund shall also pay "TT" $38,421.97, which is approximately 80 percent of the legal fees and costs incurred by "TT" in this case, including unreimbursed fees and costs incurred in the Grievance Committee proceedings.

Edith Brown Weiss, President[25]

Deborah Thomas-Felix, Judge

Andrew K.C. Nyirenda, Judge

/s/
Edith Brown Weiss, President

/s/
Celia Goldman, Registrar

Washington, D.C.
June 30, 2022

[25]Statute, Article VII, Section 4, provides in relevant part: "If the President recuses himself or is otherwise unable to hear a case, the most senior of the members shall act as President for that case . . . ."