

Judgment No. 1998-1

Ms. “Y”, Applicant v. International Monetary Fund, Respondent

December 18, 1998

Introduction

1 On December 17 and 18, 1998, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. “Y”, a former staff member of the Fund.

The Procedure

2. On August 7, 1998 an Application was filed by Ms. “Y”, who had been employed with the Fund since 1971; in 1995 the position of which she was the incumbent was abolished. Subsequently, efforts were made to locate alternative employment for her in the Fund, which were of no avail. In 1996 she requested a review of her grade as well as of the abolition of her position under an ad hoc review procedure that had been introduced to redress past, and preclude future, discrimination in the Fund. Her allegations were that her grade and the abolition of her position had been influenced by gender, age and career stream discrimination. The review, which was carried out by an ad hoc review team consisting of an outside consultant and a senior member of the Administration Department, concluded that there was no evidence of discrimination in the grading and abolition of the position. The Director of Administration informed the Applicant that she concurred with that conclusion. It is that decision of the Director of Administration that the Applicant challenges before the Tribunal.

3. In response to the Application, the Fund filed a Motion for Summary Dismissal under Rule XII of the Tribunal’s Rules of Procedure on the ground that Applicant had failed to comply with the statutory requirement that an Application may be filed with the Tribunal only after Applicant has exhausted all available channels of administrative review. Pursuant to para. 2 of Rule XII¹, a Motion for Summary Dismissal suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. Hence, the present consideration of the claim is confined to the jurisdictional issues of the case.

¹“The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.”

4. Rule XII, para. 5² of the Tribunal's Rules of Procedure allows the Applicant to file an Objection within thirty days from the date on which a Motion for Summary Dismissal is transmitted to him. However, the President, in the exercise of his authority under paragraph 2 of Rule XXI,³ decided to grant the Applicant an additional 15 days to file her Objection, in order to enable her to revise the list of documents and other evidence which she had requested the Tribunal to order the Fund to produce⁴. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule." so as to adapt it to the purposes of the Objection. The Fund presented its views on Applicant's amended request for documents on October 23, 1998.

5. Paragraph 4 of Rule XVII provides that "When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule." On the basis of this authority, the amended request was rejected on the ground that the documents and other evidence that Applicant requested were clearly irrelevant to the case before it, which is limited to its jurisdictional aspects.

6. The Tribunal also denied Applicant's request for oral proceedings, as the condition laid down in Rule XIII, paragraph 1⁵ that they be "necessary for the disposition of the case" which is confined to the jurisdictional issues, was not met.

²"The Applicant may file with the Registrar a written objection to the motion within thirty days from the date on which the motion is transmitted to him."

³"The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal may in exceptional cases modify the application of these Rules, including any time limits thereunder."

⁴Rule XVII (Production of Documents) provides:

" 1. The Applicant may, before the closure of the pleadings, request the Tribunal to order the production of documents or other evidence which he has requested and to which he has been denied access by the Fund, accompanied by any relevant documentation bearing upon the request and the denial or lack of access. The Fund shall be given an opportunity to present its views on the matter to the Tribunal.

2. The Tribunal may reject the request to the extent that it finds that the documents or other evidence requested are clearly irrelevant to the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of assessing the issue of privacy, the Tribunal may examine *in camera* the documents requested.

3. The Tribunal may, subject to Article X, Section 1 of the Statute, order the production of documents or other evidence in the possession of the Fund, and may request information which it deems useful to its judgment."

⁵"1. Oral proceedings shall be held if the Tribunal decides that such proceedings are necessary for the disposition of the case. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel, and may examine them."

The facts

7. The relevant facts may be summarized as follows. Applicant was employed as a staff member of the Fund on July 1, 1971, and was promoted to a professional position in 1983. In 1987, after she appealed her job grade, she was promoted to grade A11, which grade she still held in 1995, when the position was abolished. From July 1985 to October 31, 1995 she worked in Department No. I. Following a merger of two Departments, the position of which she was the incumbent was abolished effective May 1, 1995. Applicant was advised of the options available to her under the Fund's policy governing abolition of posts. In accordance with that policy, efforts were made over a six month period to find her an alternative position. In addition, on an exceptional basis, arrangements were made for her to be assigned to a Temporary Assignment Position (TAP) in Department No. II for an initial period of 10 months from January 2, 1996 through October 31, 1996. This TAP was later extended for an additional four-month period through the end of February 1997. Applicant's selection for the TAP effectively suspended the 120 day notice period and separation leave provided under the separation policy, and served as a bridge to the time when Applicant would be eligible for an early retirement pension and provide her continuous access to the Fund's health insurance.

8. On August 28, 1996, the Director of Administration issued a memorandum to the staff announcing guidelines for the review of individual cases under an ad hoc discrimination review procedure, inviting persons who felt that their careers may have been affected by discrimination to request a review of their individual case. In response to that memorandum, Applicant on September 30, 1996, requested a review on the grounds that her Fund career had been adversely affected by discrimination based on profession, gender and age, which she contended had affected the grading of her position and culminated in the abolition of her post.

9. On December 23, 1996, the Fund informed Applicant that she was not eligible to participate in the review process, as she would shortly be separating from the Fund on early retirement and any remedial action would be of a forward-looking nature.

10. On June 23, 1997, Applicant filed a formal grievance with the Grievance Committee in which she contested the decision that she was not eligible to participate in the ad hoc discrimination review process.

11. Shortly thereafter, on June 27, 1997, the Director of Administration advised Applicant that upon review of the matter she had concluded that the Fund should carry out a review of Applicant's discrimination claim. Thus, the decision which Applicant was challenging before the Grievance Committee was reversed, rendering her grievance moot.

12. The review was conducted by an ad hoc review team appointed by the Fund, consisting of an outside consultant and a senior official of the Administration Department. The team met with Applicant on several occasions. The conclusion reached by the team was that there was no evidence to support the allegation that the grading of Applicant's position or the abolition of her post was influenced by factors of discrimination. The team therefore

determined that it had no basis on which to recommend a regrading of Applicant's position, which was the remedy she sought.

13. Applicant was informed of that conclusion in a meeting with the team on December 19, 1997; she asserts that on that occasion the official of the Administration Department informed her that if she was not satisfied with the decision that age or gender had not affected her grade she should request the Director of Administration to hold an administrative review of the decision. Thereupon, Applicant, through counsel, by letter dated January 27, 1998, requested the Director of Administration to conduct such a review.

14. The Director of Administration replied February 10, 1998 by explaining the basis for the conclusion that no relief was warranted and offering Applicant an opportunity to meet again with the review team so that it could further explain the process, and so that Applicant could raise any new facts or arguments that she might wish to make regarding her allegations. Applicant did not take up this offer, but on March 24, 1998, her counsel wrote again to the Director of Administration, challenging the nature of the process and repeating her request for an administrative review.

15. On May 8, 1998, the Director of Administration wrote to Applicant's counsel advising that she had carefully reviewed the investigation carried out by the review team, and that she fully concurred with its recommendation. On August 7, 1998, Applicant filed a complaint with the Tribunal.

The Ad Hoc Review of Discrimination

16. The Ad Hoc Discrimination Review Process was one of the results of the issuance in early 1996 of the report of the Consultant on Discrimination. In a memorandum to staff announcing completion of that report, the Managing Director stated:

“8. The report contains proposals for addressing the concerns of those staff who feel that they have been discriminated against, typically on grounds of race, either in terms of promotion or salary. It suggests that we might appoint an independent panel, perhaps with expert assistance from outside the Fund, to examine these cases on a confidential basis and reach conclusions as to whether the perceptions of discrimination, in career progression or in salary levels, are warranted by the facts. This is a very sensitive area, and I have asked Mr. Mohammed to consult with the Director of Administration on the nature and extent of the problems and report directly to Management on what action might be needed.” (Memorandum from the Managing Director to Members of the Staff, February 9, 1996, “The Report of the Consultant on Discrimination”.)

17. In July of that year the Managing Director issued a further memorandum regarding issues of diversity and discrimination within the Fund. In it he addressed the issue of the effect of possible past discrimination on the careers of Fund staff:

“A difficult question remains: cases where discrimination may have adversely affected the careers of Fund staff in the past. One message that has come through quite clearly from Mr. Mohammed’s work is that there are some staff who consider that they have been discriminated against to the detriment of their careers. Questions of past discrimination must be addressed, and even where these staff could have availed themselves of the Fund’s grievance procedures I believe the onus is on us. We are already looking into some identified cases and, as noted above, I have asked the Administration Department and the two Review Committees to look more broadly at individual staff member’s career progress and opportunities. I also expect departments to help ensure that any cases where corrective action may be required are brought to Management’s attention. We are determined to address this issue and believe that we can do so most quickly and effectively by acting decisively within the existing framework of our procedures.” (Memorandum from the Managing Director to Members of the Staff, July 26, 1996, “Measures to Promote Staff Diversity and Address Discrimination”)

18. Procedures for a one-time, ad hoc review of individual cases of alleged discrimination were announced in August 1996 (Memorandum from the Director of Administration to Members of the Staff, August 28, 1996, “Review of Individual Discrimination Cases”). That memorandum set forth several avenues for the identification of cases for review including cases of staff members who had come forward as part of the study by the Consultant on Discrimination, and cases identified as a result of a systematic review of career patterns undertaken by the Senior Review Committee, the Review Committee, and the Administrative Assistant Review Committee. In addition, Department Heads, Senior Personnel Managers, Administrative Officers, and the Diversity Advisor were invited to submit names of potential cases of discrimination and background information to the Director of Administration by September 30, 1996. The August 28, 1996 memorandum also included a provision for self-identification by those members of the staff who believed their careers had been adversely affected by discrimination. Such individuals were asked either to contact one of the persons noted above to request submission of their names, or alternatively to submit their names directly to the Director of Administration within the same deadline. Applicant chose this latter route, sending an e-mail that stated:

“I believe that my Fund career was adversely affected by profession-, gender-, and age-based discrimination. A background note about my case, which culminated in the abolishment of my position, is attached.”

19. The ad hoc review was a one-time review of cases of alleged discrimination which were identified to the Director of Administration during a narrow time frame, concluding September 30, 1996. As to how the review process would actually work, the August 28, 1996 Memorandum stated that:

“The way in which individual cases will be considered will depend very much on the nature of the circumstances that have given rise to the claim of discrimination. In coordinating these reviews, the Administration Department will draw on the input of subordinates, peers, and supervisors. The career record will be reviewed and those undertaking the reviews may meet with the individual employees under consideration, at the initiative of the reviewer or the employee. Where warranted, the aim will generally be to suggest remedial actions that are prospective and constructive, including assignments, mobility, training, promotions, and salary adjustments.”

20. The Memorandum also addressed the subject of the interrelationship between the ad hoc discrimination review process and grievance procedures available in the Fund:

“The consideration being given to individual cases of possible discrimination is a one-time action and is not intended to replace or replicate the Fund’s grievance procedures.”

21. Further information regarding the ad hoc discrimination review process was communicated to staff in January 1997 (Memorandum from the Director of Administration to Members of the Staff, January 13, 1997, “Procedures for Review of Individual Discrimination Cases”). The staff was informed that the review of individual discrimination cases would be carried out by external consultants assisted by a small number of Fund staff from both within and outside the Administration Department. The procedure and aim of the review were stated to be as follows:

“The team of consultants and staff, working in pairs, will review the background of each individual discrimination case, meet with the individuals concerned as well as others familiar with their circumstances, and make recommendations. In cases where remedial action is warranted, the aim will generally be to suggest actions that are prospective and fall within the Fund’s existing personnel policies, including reassignments, training and other development initiatives, promotions, and salary adjustments. An initial meeting will be held with each employee requesting a review to obtain background information, to discuss current and former staff members (subordinates, peers, and/or supervisor) who might be contacted by members of the review group to obtain additional information, and to identify the types of forward-looking remedies that may be considered appropriate if it is concluded that past discrimination has adversely affected the employee’s career. ...

This exercise will be initiated in the second half of January. Every effort will be made to carry out this review in as discrete and sensitive a manner as possible. While feedback sessions will be undertaken with each concerned employee to inform him or her of the outcome of this review, in those cases where discrimination has been identified, this review will not be an end in

itself, but just a beginning of a process for identifying opportunities. At the end of the review process, every effort will be made to utilize the lessons learned from past discrimination cases to help further strengthen the Fund's policies and practices to prevent discrimination in the future."

22. In the case of the Applicant, the review was carried out by a team consisting of the Assistant Director of Administration and an outside consultant. The team concluded that it found no evidence of discrimination either in the Applicant's grade or in the abolition of the position which she held.

Summary of principal arguments concerning the admissibility of the claim

The Fund's arguments set forth in the Motion to Dismiss

23. In its Motion to Dismiss the Fund raises the threshold question of whether the case is admissible. It requests the Tribunal to rule the case irreceivable "because Applicant failed to exhaust administrative remedies as required by the Statute". "To do otherwise", argues the Fund, "... would undermine the fundamental function of the Tribunal as described in the Executive Board Report as a forum of last resort." The request is supported with the following propositions:

- By failing to pursue her challenge to an administrative decision before the Grievance Committee in accordance with the established procedures, Applicant has not met the requirements of Article V, Section 1 of the Statute that an Applicant first exhaust all available channels of review.

- The May 8, 1998 letter from the Director of Administration cannot be considered a final individual decision for purposes of exhaustion of administrative review, because

"... Under the Statute, where, as here, the available channels of review include a formal procedure for consideration of complaints and grievances of individual staff members in respect of personnel matters and conditions of service --that is the Grievance Committee-- the requirement is deemed to be satisfied by one of three events: (a) if a recommendation is made to the Managing Director and the applicant has received no decision granting him the relief requested within three months; (b) if the applicant receives notice of a decision denying the request; or (c) if the applicant received a notice of a decision granting the relief requested, but the relief has not been received within two months."

- A Grievance Committee has been established for the purpose of considering individual complaints by staff members regarding the application of personnel regulations and their conditions of service. That Committee has jurisdiction to hear challenges to both discretionary and non-discretionary decisions which fall under this rubric. Applicant has not appealed the review of the decision of the discrimination

review team to the Grievance Committee. Therefore, that Committee has not had a chance to consider her complaint and issue a recommendation for final decision by the Managing Director as provided under General Administrative Order (GAO) No. 31, Rev. 3, Sections 7.08 and 7.09. Hence, Applicant has not exhausted all available channels of administrative review.

- Having appealed to the Director of Administration to obtain reversal of the decision of the ad hoc discrimination review team, Applicant satisfied the requirement of exhaustion of the administrative review for purposes of submitting a complaint to the Grievance Committee under GAO No. 31, Rev. 3, Sec. 6.05, but not for purposes of admissibility before the Tribunal under Article V of the Statute. Applicant appears to have confused the distinct requirements governing exhaustion of administrative review for purposes of the Grievance Committee with those governing Tribunal cases.

- The decision that Applicant challenged before the Grievance Committee in June 1997 is distinct from the decision that Applicant seeks to challenge now. In her 1997 grievance, Applicant specifically requested that the decision not to include her case in the ad hoc discrimination review be overturned. The Director of Administration reversed that decision. The ad hoc discrimination review found no discrimination. The Applicant now seeks to challenge the finding of no discrimination. The grievance submitted in 1997 by the Applicant to the Grievance Committee was treated as moot because Applicant's request for a review--the purpose of her grievance--had been granted. Because that grievance addressed an issue different from what Applicant is complaining of in her Application to the Tribunal, it does not satisfy the requirements of exhaustion of administrative review under Article V of the Statute.

- Applicant's failure to interpret properly and apply the applicable rules cannot be attributed to any fault on the part of the Fund. Indeed, in announcing the discrimination review procedures, the Fund specifically noted that: "[T]he consideration being given to individual cases of possible discrimination is a one-time action and is not intended to replace or replicate the Fund's grievance procedures." (Memorandum from the Director of Administration to Members of the Staff, August 28, 1996, "Review of Individual Discrimination Cases".) In her February 10, 1998 letter, the Director of Administration reiterated that point: "[t]he special one-time discrimination review exercise did not, in any way, alter the existing rules or entitlements that govern the Fund's existing grievance procedures."

- The Fund contends that:

"It is a well-established rule of law, and one that is consistently followed by the major international organization administrative tribunals, that staff members are responsible for following the rules and procedures established for bringing complaints and

appeals, and that such rules and procedures must be strictly complied with.”

- Based on her review and assessment, the Director of Administration decided that the findings and conclusions of the review team were valid and should stand. The procedure of this decision is in accordance with GAO No. 31, Rev. 3, Section 6.04, which provides for appeal to the Director of Administration for review of decisions concerning a Staff Member’s career.

- Applicant was aware of the administrative remedies available to her under GAO No. 31, Rev. 3, and pursued the first of those remedies, that is, an appeal to the Director of Administration but did not proceed to seek review by the Grievance Committee. Therefore, she did not exhaust available channels of administrative review, as is required under the Statute in order to have recourse to the Tribunal. Instead, Applicant bypassed the important and mandatory step of pursuing her claim with the Grievance Committee--the formal channel established for that purpose--and has made an Application directly to the Tribunal.

Applicant’s contentions set forth in her Application and Objection

24. Applicant contends that the May 8, 1998 letter from the Director of Administration comes at the end of a series of meetings and exchanges of correspondence between Applicant and the Fund and should, at this point, be considered as a final decision appealable to the Tribunal. She maintains that the correspondence culminating in that letter “should be considered a final individual decision, and the effective end of the administrative process that Applicant has been pursuing for a period far in excess of one year and which has neither provided Applicant with any of the relief she has requested nor provided verifiable evidence that the procedure was carried out”. Applicant supports this view by referring to a passage in the July 26, 1996 Memorandum from the Managing Director to Members of the Staff, “Measures to Promote Staff Diversity and Address Discrimination” in which, Applicant argues, the Managing Director has “made the grievance process superfluous and secondary to honest review and full relief to aggrieved participants”. The passage in question is as follows:

“Questions of past discrimination must be addressed, and even where these staff could have availed themselves of the Fund’s grievance procedures I believe the onus is on us. We are already looking into some identified cases and, as noted above, I have asked the Administration Department and the two Review Committees to look more broadly at individual staff member’s career progress and opportunities. I also expect departments to help ensure that any cases where corrective action may be required are brought to Management’s attention. We are determined to address this issue and believe that we can do so most quickly and effectively by acting decisively within the existing framework of our procedures.”

Admissibility of claims under the Tribunal's Statute - General

25. The admissibility of claims is governed by Articles V and VI of the Statute which prescribe as a pre-condition of admissibility the completion of the applicable administrative review.

“ARTICLE V

1. When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.
2. For purposes of this Statute, where the available channels of administrative review include a procedure established by the Fund for the consideration of complaints and grievances of individual staff members on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service, administrative review shall be deemed to have been exhausted when:
 - a. three months have elapsed since a recommendation on the matter has been made to the Managing Director and the applicant has not received a decision stating that the relief he requested would be granted;
 - b. a decision denying the relief requested has been notified to the applicant; or
 - c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.
3. For purposes of this Statute, where the available channels of review do not include the procedure described in Section 2, a channel of administrative review shall be deemed to have been exhausted when:
 - a. three months have elapsed since the request for review was made and no decision stating that the relief requested would be granted has been notified to the applicant;

b. a decision denying the relief requested has been notified to the applicant; or

c. two months have elapsed since a decision stating that the relief requested would be granted has been notified to the applicant, and the necessary measures have not actually been taken.

...

ARTICLE VI

1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.”

26. In the published Commentary on the Statute, the reasons for the exhaustion of remedies requirement are explained as follows:

“Article V prescribes an exhaustion of remedies requirement with respect to the admissibility of applications before the tribunal. Cases otherwise falling within the tribunal's competence would be admissible only if applicable administrative remedies have been exhausted. The exhaustion requirement is imposed by the statutes of all major administrative tribunals, presumably for the reason that the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate.

Under this Article, in situations where administrative review includes recourse to formal procedures established by the Fund for this purpose, a channel of administrative review would be exhausted by any of the following events, as applicable to the circumstances. First, the requirement would be satisfied if a recommendation on the matter had been made to the Managing Director and the applicant received no decision granting him the relief requested within three months. Second, the requirement would be satisfied if the applicant received a decision denying his request; a decision which granted his request only in part would be treated as a denial for this purpose. Third, if the applicant received a decision granting him the relief requested but the relief was not forthcoming after two months had elapsed, administrative review would be considered exhausted. Finally, if the Fund and the applicant agree to bypass administrative review and submit the dispute directly to the

tribunal, all channels of administrative review would be considered exhausted for purposes of this Article.

In situations where recourse to the Grievance Committee or other formal procedure is not applicable, administrative review of a request would be considered as exhausted by any of the outcomes described in Section 3.”
(p. 23)

27. For the purpose of determining whether an Application satisfies the applicable exhaustion requirements, a distinction must be made between two categories of cases: those falling within the competence of the Grievance Committee; and those subject to another review process.

28. The Grievance Committee’s jurisdiction is based on its constitutive instrument, GAO No. 31, Rev. 3, the pertinent provisions of which provide that:

“Section 4. Jurisdiction of the Grievance Committee

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

4.02 *Exhaustion of Administrative Review.* The Committee shall have jurisdiction to hear a case only after the grievant has exhausted the applicable channels of administrative review set forth in Section 6 of this Order, unless the Managing Director, or the Managing Director’s designee, agrees that the grievance may be submitted directly to the Committee.

...

4.04 *The Grievance Committee’s Examination of its Jurisdiction.* The Committee, for the purpose of proceeding with a grievance, shall decide whether it has jurisdiction over the matter.”

29. In order to be receivable by the Grievance Committee, a grievant must first satisfy a review requirement, namely, he must have sought the applicable administrative review of his complaint. That requirement is spelled out in GAO No. 31 as follows:

“Section 6. Administrative Review

6.01.1 *Administrative Review.* The applicable channels of administrative review and the procedures to be followed are set forth below. ...

...

6.02 *Grievances Concerning a Staff Member's Work or Career.* With respect to decisions that pertain to a staff member's work or career in the Fund, the staff member shall first submit a request for review in writing to his or her Department Head or other official designated by the Department Head for this purpose, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. Except as provided in Section 6.02.1, the request must be submitted within six months after the challenged decision was made or communicated to the staff member, whichever is later. The Department Head, or his or her designee, shall have 15 days in which to respond in writing to the request for review.

...

6.02.2 With respect to a decision concerning a staff member's work or career that was taken directly by his or her Department Head, the staff member may appeal the decision to the Director of Administration within six months after the challenged decision was made or communicated to the staff member, whichever is later, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31.

6.03 *Grievances Regarding Staff Benefits.* For decisions regarding the application of a staff benefit, the staff member shall first submit a request for review in writing to the division chief in the Administration Department whose division is responsible for the administration of the benefit in question, clearly indicating that he or she is pursuing the administrative remedies under General Administrative Order No. 31. The request must be submitted within three months after the staff member was informed of the intended application of the benefit. The division chief shall have 15 days to respond in writing.

6.04 *Appeal to the Director of Administration.* If dissatisfied with the response to a request under either Section 6.02 or 6.03, or if no response is received within 15 days after submission of such a request, then the staff member may request in writing a review by the Director of Administration. The written request must be submitted within 30 days after the response from the division chief or Department Head, as applicable, has been received or the deadline for a response has passed, whichever is earlier.

6.05 *Exhaustion of Administrative Review.* The channels of administrative review shall be considered exhausted, for purposes of filing a grievance with the Committee, when the staff member has received a response to his or her written request or no response has been received within 15 days of its submission to the Director of Administration.

6.06 *Decisions Taken by Managing Director or Director of Administration.* With respect to any decision that was taken directly by the Director of Administration or by the Managing Director, or by the Managing Director's designee, the staff member may file a grievance with the Committee within six months after the challenged decision was made or communicated to the staff member, whichever is later.

6.07 *Time Limits.* A staff member shall be required to exhaust the applicable channels of administrative review within the required time limits before submitting a grievance to the Grievance Committee. ...”

30. Where the Grievance Committee has jurisdiction, the review requirement in Article V is met (a) by a decision by the Managing Director not granting the requested relief; (b) by the notification of a decision granting the relief, which, however, remains uncomplished after two months; or, (c) in the absence of a decision granting the relief, three months after a recommendation was made to the Managing Director. When a channel of review different from that provided for in paragraph 2 of Article V is in question, the exhaustion requirements are met when the provisions of Article V, paragraph 3, subparts a or b or c have been met.

31. The issue in the phase of this case that is now before the Administrative Tribunal is whether the ad hoc discrimination review constitutes an alternative channel of review and hence one not involving the Grievance Committee.

32. Administrative Tribunals of international organizations have emphasized the importance of exhaustion of administrative remedies before recourse to them. The *raison d'être* for the requirement of exhaustion of administrative remedies was emphasized by the World Bank Administrative Tribunal in Rae (No.2):

“42. More to the point the Bank has made available to all staff members who sought to challenge the soundness of their job grading a procedure for administrative review that would have brought their case to the Job Grading Appeals Board. The Applicant failed to invoke such administrative review in a timely manner after October 1987, and she is therefore barred by Article II, para. 2, of the Statute of the Administrative Tribunal from presenting this issue to the Tribunal many years later. The wisdom of requiring exhaustion of such internal administrative remedies is evidenced in this very case, where the Applicant seeks to have the Tribunal assess ab initio the fairness of the level 17 grade of the Applicant's position as Staff Planning Assistant, without the benefit of the kind of full evidentiary record, and prior informed review, that would have been assured had the case been presented in good time to the Job Grading Appeals Board. (Donneve S. Rae (No. 2), Applicant v. International Bank for Reconstruction and Development, Respondent, World Bank Administrative Tribunal, 1993, No. 132.)

Admissibility of Applicant's complaint

33. The admissibility of Applicant's claim depends on whether it fulfills requirements set forth in Article V. For the purpose of this problem, three of Article V's four sections are relevant. Section 1 deals with the situation in which the Fund has established channels of administrative review. What such channels might be is explained in Sections 2 and 3. Established channels covered by Section 2 involve the Managing Director in the decision-making process. Section 3 deals with situations in which the established review channels do not include the procedure described in Section 2.

34. Whether in any particular case the available channels have been exhausted is to be determined in accordance with Section 2 or 3. The Commentary explains:

“In situations where recourse to the Grievance Committee or other formal procedure is not applicable, administrative review of a request would be considered as exhausted by any of the outcomes described in Section 3.” (p. 23.)

The question thus is: under which of these categories does the present case fall? A further question is: has the review procedure pertaining to the category in question been exhausted?

35. Applicant argues that the ad hoc review was not a formal channel of review. The gist of the argumentation presented in the Applicant's Objection to the Fund's Motion for Summary Dismissal is that the discrimination review procedure was an informal exercise, rather than an established review channel, which was intended to be alternative, rather than prerequisite, to the review of claims by the Grievance Committee. The one-time ad hoc discrimination review was designed primarily to provide relief to staff members whose cases fell outside the jurisdiction of the Grievance Committee, e.g., as time-barred. There is no contemporaneous indication in the memoranda circulated by the Administration that by bringing a complaint to the ad hoc review a staff member would be entitled to pursue a dispute before the Grievance Committee that otherwise would be barred from its review. Applicant maintains that under Article V, Section 3(b), the channel of administrative review is deemed to have been exhausted by the decision of the Director of Administration denying the relief sought. Accordingly, Applicant contends, she has completed the required administrative review under Article V, Section 3, which applies “where the available channels of review do not include the procedure described in Section 2”, and has properly filed her complaint with the Tribunal.

36. The Fund's Motion does not discuss the point whether Section 3 might apply, with the result that the claim would be admissible; it advocates dismissal of the claim on the ground that the Grievance Committee would have had jurisdiction to hear the case because the ad hoc review did not replicate or replace the grievance procedure.

“The Fund has established a Grievance Committee for the purpose of considering individual complaints by staff members regarding the application of regulations and their conditions of service. That Committee has jurisdiction to hear challenges to both discretionary and non-discretionary decisions which fall under this rubric. Applicant has not appealed the review of the decision from the discriminatory [sic] review team to the Grievance Committee. That Committee has not had a chance to consider her complaint and issue a recommendation for final decision by the Managing Director as provided under GAO No. 31, Rev. 3, Sections 7.08 and 7.09, and therefore Applicant has not exhausted all available channels of administrative review.”

37. As noted above, the admissibility of Applicant’s claim depends, first, on the category in Article V in which it falls, and, second, on whether the exhaustion requirements applicable to that category have been met. Article V, Section 2 would apply if the Grievance Committee would have had jurisdiction over the claim. The Committee’s jurisdiction, in the particular case, would be conditional upon its prior review requirements having been met.

38. The Fund could, presumably, have instituted a review procedure for past discrimination expressly stated to replace the jurisdiction of the Grievance Committee for those matters. That it did not do; to the contrary, the Fund on several occasions emphasized that the ad hoc review did not confer new rights, and did not replicate or replace the grievance procedure. The Fund also, in internal and external communications, contrasted the formal character of established review procedures with the informal character of the ad hoc procedure, presumably indicating thereby that the ad hoc review was not intended to be a replacement of any formal grievance procedure.

39. In order to assess the validity of the Fund’s argument that after the decision of the Director of Administration sustaining the holding of no discrimination Applicant could have come to the Grievance Committee, it is useful to refer to the provisions of GAO No. 31, Rev. 3 which spell out the prior review requirements for a grievance. The hierarchy of officials a grievant must have approached and the time periods of each approach, in order to have exhausted the prior review requirements and have his or her claim admitted to the Grievance Committee, are listed.

40. The ad hoc review of Applicant’s complaint did not go through the steps outlined in Section 6.02, 6.03, 6.04 and 6.05 of the GAO, and could not have done so, because the mandatory time periods for each of these steps had expired when the review was undertaken. The review procedure also did not involve any of the supervisory officials mentioned in the provisions referred to above. Instead, it involved an outside consultant and an official of the Administrative Department, both outside the hierarchy that constitutes the channel of review within the meaning of the GAO, up to, but not including, the Director of Administration. However, since her decision was not a follow-up of the mandatory preceding steps, it should be considered as taken “directly” by the Director of Administration within the meaning of Section 6.06.

41. Article V of the Statute governs the exhaustion of remedies. Paragraph 1 of Article V generally prescribes that an Application may be filed with the Tribunal only after an Applicant has exhausted “all available channels of administrative review”. Paragraph 2 treats established channels of administrative review including the Grievance Committee. Paragraph 3 treats channels of review that do not embrace such established channels. The ad hoc discrimination review procedure could be seen as an illustration of this latter possibility, but it is not clearly so indicated.

42. In the view of the Tribunal, the memoranda establishing the ad hoc discrimination review procedure and explaining that it was not meant to be in lieu of, and not meant to obviate recourse to, the Grievance Committee, could have been more explicit. The lack of clarity on the point--and this is the distinguishing factor in this case--understandably may have led Applicant to conclude that exhaustion of Grievance Committee channels was not required in her case. However, it is the view of the Tribunal that exhaustion of the remedies provided by the Grievance Committee, where they exist, is statutorily required and that the memoranda in question do not exclude that requirement. Moreover, recourse to the Grievance Committee would have the advantage of producing a detailed factual and legal record which is of great assistance to consideration of a case by the Administrative Tribunal.

43. The Tribunal accordingly holds that Applicant has not exhausted the channels of administrative review as required by Article V of the Statute, and, therefore, that the Fund’s Motion for Summary Dismissal is granted. Given the singular circumstances of this case, in the event that the Grievance Committee, if seized, should decide that it does not have jurisdiction over Applicant’s claim, the Administrative Tribunal will reconsider the admissibility of that claim on the basis of the Application now before it.

Decision

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides:

First, the Fund's Motion for Summary Dismissal is granted;

Second, the Administrative Tribunal will reconsider the Applicant's claim on the basis of the Application now before it, in the event that the Grievance Committee, if seized, decides that it does not have jurisdiction over that claim.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Philine R. Lachman, Registrar

Washington, D.C.
December 18, 1998