

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2005-2

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

Introduction

1. On July 28 and 29, 2005, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Michel Gentot and Agustín Gordillo, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. “W”, a staff member of the Fund.

2. Ms. “W” contests the decision of the former Director of Administration approving the conclusions of a review team constituted under the Discrimination Review Exercise (DRE), a special, one-time inquiry into cases of alleged discrimination that was initiated by the Fund in the late 1990s. Applicant contended in the DRE that her salary and grade level were adversely affected by gender discrimination and sought as remedies both a pay increase and a promotion. The DRE review team, following its investigation, concluded that Applicant had not been discriminated against in her career with the Fund. At the same time, however, it found that circumstances of Ms. “W”’s initial departmental assignment may have hampered her career progression and that, at various points in her career, “skill deficits” may have been “magnified.” Ratifying the DRE team’s conclusion that there had been no discrimination in Applicant’s case but that, nonetheless, some remedial action was in order, the Director of Administration approved a within-grade salary increase and career development assistance to strengthen Applicant’s ability to compete for positions at the next grade level, but denied Applicant’s request for promotion.

3. In her Application before the Administrative Tribunal, Applicant contends that the DRE investigation of her case was procedurally defective and that the Director of Administration’s conclusion that Ms. “W”’s career had not been affected by gender discrimination was not supported by the evidence. Specifically, Applicant alleges that the Fund did not demonstrate that factors other than discrimination led to Applicant’s allegedly slower career progression as compared with male colleagues. Additionally, Applicant maintains that the Fund has not implemented prospective career development measures approved as part of the remedial action in her case, improperly used the DRE report to influence the denial of a promotion, and has continued to discriminate against her on the basis of gender.

4. Respondent, for its part, maintains that the DRE process applied in Applicant’s case was an appropriate exercise of the Fund’s discretion, that Ms. “W”’s claim was reviewed impartially and in accordance with the established DRE procedures, and that the conclusions

drawn by the review team and ratified by the Director of Administration were reasonably supported by the evidence. As to claims that the Fund has failed to implement fully the remedial action granted in Applicant's case, improperly used the DRE report to deny Ms. "W" a promotion, and continues to discriminate against her, Respondent asserts that Applicant has not exhausted administrative review procedures as to these contentions and therefore they are not properly before the Tribunal but that in any event they are without merit. Accordingly, Respondent urges the Tribunal to deny Ms. "W"'s Application.

The Procedure

5. On November 19, 2003, Ms. "W" filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicant that her Application did not fulfill the requirements of para. 3 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.¹

6. The Application was transmitted to Respondent on December 10, 2003. On January 6, 2004, pursuant to Rule XIV, para. 4,² the Registrar issued a summary of the

¹ Rule VII provides in pertinent part:

"Applications

...

3. The Applicant shall attach as annexes all documents cited in the application in an original or in an unaltered copy and in a complete text unless part of it is obviously irrelevant. Such documents shall include a copy of any report and recommendation of the Grievance Committee in the matter. If a document is not in English, the Applicant shall attach an English translation thereof.

...

6. If the application does not fulfill the requirements established in Paragraphs 1 through 4 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time, not less than fifteen days, in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date...."

² Rule XIV, para. 4 provides:

"In order to inform the Fund community of proceedings pending before the Tribunal, the Registrar, upon the notification of an application to the Fund, shall, unless the President decides otherwise, issue a summary of the application, without disclosing the name of the Applicant, for circulation within the Fund."

Application within the Fund. Respondent filed its Answer to Ms. “W”’s Application on January 26, 2004. On March 1, 2004, Applicant submitted her Reply. The Fund’s Rejoinder was filed on April 1, 2004.

7. The Tribunal decided that oral proceedings, which neither party had requested, would not be held as they were not necessary for the disposition of the case.³ The Tribunal had the benefit of a transcript of oral hearings conducted by the Fund’s Grievance Committee, at which Ms. “W”, the members of the DRE review team, a former Assistant Director of the Administration Department (ADM), the Fund’s Diversity Advisor, and other persons having knowledge of Applicant’s career and the DRE process testified. The Tribunal has held that it is “...authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it.” Mr. M. D’Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 17.

Requests for Production of Documents

8. In her Application, Ms. “W” made the following requests for production of documents:

1. An unredacted copy of Notes made by the Fund staff member who served together with an external consultant to form the DRE review team;
2. Any additional documents resulting from the DRE review of Applicant’s case that were not earlier supplied to Applicant;
3. Comparator data for male senior economists; and
4. Data on the outcome of the DRE.

9. In accordance with Rule XVII⁴ of the Tribunal’s Rules of Procedure, Respondent had the opportunity to present its observations, as both parties exchanged views in their

³ Article XII of the Tribunal’s Statute provides that the Tribunal shall “... decide in each case whether oral proceedings are warranted. Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held “... if the Tribunal decides that such proceedings are necessary for the disposition of the case.”

⁴

“RULE XVII

Production of Documents

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.

(continued)

subsequent pleadings as to whether the document requests should be granted. Following consideration of the views of the parties, including the briefs and oral arguments in the Grievance Committee that had been made part of the record before the Tribunal, the Administrative Tribunal, meeting in session, decided on July 28, 2005 to deny each of these requests on the following grounds.

Request 1 - An unredacted copy of “Notes on [Ms. “W”].”

10. This request refers to the notes created by the Fund staff member who served together with an external consultant to form the review team who investigated Applicant’s complaint pursuant to the Discrimination Review Exercise (DRE). The redacted copy, which was provided to Applicant during the Grievance proceedings, omits the names of the interviewees.

11. In response to a discovery request during the Grievance Committee proceedings, the Fund’s Legal Department disclosed to Applicant the names of nine staff members interviewed for the DRE review of Applicant’s case, and a number of these persons were called as witnesses during the Grievance Committee hearings. Applicant concedes that “...most of the persons interviewed for [the Notes] have been identified and have testified on the statements made.” Accordingly, Applicant argues that there is no valid reason for the Fund to withhold the unredacted version of the Notes, that the claim of confidentiality is “spurious,” and that “[a]s a matter of principle, Applicant should not have had to work with redacted documents....”

12. Respondent, for its part, maintains that the unredacted version of the Notes should not be disclosed because disclosure “...would not only contravene those assurances of confidentiality [given to persons interviewed as part of the DRE process], but would also unnecessarily increase the risk of unfettered availability of this highly sensitive document.”

13. In the view of the Tribunal, Respondent has taken an inconsistent approach to the disclosure of the identities of persons interviewed for the DRE review of Applicant’s case,

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.

4. When the Tribunal is not in session, the President shall exercise the powers set forth in this Rule.”

and therefore its objection to the document request is not sustainable on the basis that disclosure would infringe the privacy of individuals. Nonetheless, the Tribunal denies the document request on the ground that disclosure of an unredacted version of the “Notes on [Ms. “W”]” would not be of probative value to the Applicant, given the entire record that has been available to her both during the administrative review process (including the Grievance Committee proceedings) and before the Administrative Tribunal. *See Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 15 (denying production of a disputed document in part because “...as similar information was found elsewhere in the record before the Tribunal, its disclosure would not have been of probative value to Applicant”).

Request 2 – Any additional documents resulting from the DRE review of Applicant’s case that were not earlier supplied to Applicant.

14. The Fund has responded that all documents pertaining to the DRE review of Applicant’s case were turned over to her counsel in response to the discovery requests in the underlying administrative review process. Applicant has not proffered any evidence suggesting that the Fund has in its possession additional responsive documents. Accordingly, this request is denied on the basis that Applicant has not shown that she has been denied access to documents by the Fund. (Rule XVII, para. 1.) *See Mr. “F”*, para. 9 (denying two document requests on the ground that “...Applicant had not shown that he had been denied access to the documents by the Fund, as the Fund had responded that it had provided all documents responsive to these requests as part of the Grievance Committee’s proceedings [footnote omitted], Applicant did not dispute this response and the record before the Tribunal appeared to corroborate it”).

Request 3 – Comparator data for male senior economists.

15. Applicant has stated this request variously as “...comparative data for male senior economists needed to allow Applicant to show that male economists with experience, academic credentials, years of service, age, and satisfactory performance equivalent to Applicant’s have progressed to levels A15 and higher,” and “comparator data for all Fund staff...or, at a minimum, all male economists in the same cohort as Applicant (i.e. entered the Fund between 1980-1984) regardless of current age or grade.” Applicant maintains that the comparator data used by the Fund to determine a salary increase for Applicant in pursuance of the DRE’s recommendations unfairly denied her a promotion from Grade A14 to A15. That data encompassed only those senior economist staff at Grade A14 and in the age group 50-52.

16. In Applicant’s view, comparator data should not be limited to economists at Grade A14 because she should be permitted to use statistics to establish that she was entitled to a promotion of one grade level as a result of the DRE. The comparator group selected by the Fund in fashioning a remedy in her DRE case, contends Applicant, unfairly limited that remedy.

17. The Fund maintains that the DRE team reasonably determined on the basis of qualitative (rather than statistical) evidence that Applicant was at the appropriate grade level and that her career had not been adversely affected by gender discrimination. Therefore, statistical information was used by the Fund only to determine the amount of a salary adjustment. The DRE review team held that the adjustment was justified by its finding that Applicant's initial departmental assignment may have hampered her career progression and that "skill deficits" may have been "magnified."

18. Applicant's request for additional comparator data goes to a central contention of the Application before the Administrative Tribunal, i.e. that Fund studies pre-dating the DRE showed a one-grade differential between male and female economist staff and that Applicant should have been remedied accordingly through the DRE. Therefore, Applicant seeks, as an alternative to the requested data, a stipulation that "...the conclusions of the Report on the Status of Women in the Fund apply to Applicant's case, i.e. that there is a one grade anomaly for women economists in the Fund as a result of discriminatory practices and that Applicant belongs to the class discriminated against and held back unfairly."

19. Respondent, for its part, asserts that it was a reasonable exercise of the Fund's discretion to craft a mechanism for the review and remedy of cases of past discrimination that would rely on qualitative as well as quantitative information. Therefore, this document request for comprehensive comparative statistical data requires the Tribunal to decide an important question for consideration in this case, i.e. whether the methods employed in the DRE review of Applicant's complaint, in particular, the way in which statistics were used, represented an abuse of discretion on the part of the Fund.⁵

20. In evaluating the document request, it is important to recall that in Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-2 (March 5, 2002), the Administrative Tribunal upheld the general contours of the DRE process as a proper exercise of the Fund's discretionary authority, observing that "[s]uch alternative procedures are, by definition and design, intended to offer a mechanism for resolution of claims distinct from those afforded by legal proceedings" (para. 49), that the "hallmark of these procedures was their flexibility," and that "...the procedures contemplated a considerable degree of latitude for the review teams in undertaking their investigation" (para. 55).⁶ It is also important to note that the Administrative Tribunal is not presented here with the question of whether statistical analysis may prove discrimination but rather whether in fashioning an alternative dispute resolution mechanism to remedy on an ad hoc basis cases of past discrimination, the Fund could reasonably conclude that qualitative as well as quantitative considerations should be taken into account.

⁵ See *infra* Consideration of the Issues of the Case; Procedural Allegations; The methodology applied by the DRE team in Applicant's case.

⁶ See *infra* Legal Framework for the Administrative Tribunal's Review of DRE Cases.

21. Respondent has presented evidence that, in developing the DRE, it deliberated upon the appropriate role of statistical evidence and concluded, after seeking the assessment of expert reviewers,⁷ that the aggregate analysis prepared on behalf of the Working Group on the Status of Women in the Fund could not demonstrate conclusively whether discrimination had occurred in the individual case. The Chair of the Working Group endorsed the view that such analysis cannot be applied in a “mechanical way” to remedy salary and grade disparities. Accordingly, the Administrative Tribunal concludes that Respondent’s decision to base the DRE review of individual cases, including that of Ms. “W”, upon qualitative as well as statistical factors was not arbitrary, capricious or discriminatory.⁸

22. Finally, the Tribunal observes that the World Bank Administrative Tribunal (WBAT) when presented directly with the question of whether statistics alone could demonstrate discrimination, has twice concluded in the negative. *See Sebastian (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 57 (1988), para. 34 (“Discrimination against the Applicant cannot be proven by the mere presentation of general statistics purporting to show that as a class the women employees of the Bank are not treated as well as male employees”) and *Nunberg v. International Bank for Reconstruction and Development*, WBAT Decision No. 245 (2001).

23. In *Nunberg*, the WBAT rejected the complaint of a staff member who sought to use individual regression analysis to show that she should have received a larger salary increase than that granted pursuant to a salary review initiated as the result of a Bank-wide study of gender differentials in salary and promotion. In the proceedings before the WBAT, the applicant requested that the Bank produce data necessary to perform an individual regression analysis. The WBAT convened oral hearings in the case to consider the extent to which an individual regression analysis of the Applicant’s salary progression, as compared to other methodologies, would provide evidence of gender discrimination. (Para. 24.)

24. Following the consideration of competing expert opinions, the WBAT in *Nunberg* concluded that “...it appears to the Tribunal that the regression analysis sought by the Applicant could be no more than a step in a complex process...the outcome of that exercise could not determine finally what salary was fair and equitable for her personally.” (Para. 54.) Accordingly, the WBAT held that it was “...unable to find that the Bank’s refusal to provide the material for a regression analysis was inconsistent with the principles of fairness and equity,” (para. 56) and dismissed the application on the grounds that “... the Tribunal has

⁷ See *Mr. “R”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 63 (upholding exercise of managerial discretion that was “deliberate” and made after “extended consideration”).

⁸ The questions of whether Respondent reasonably applied such qualitative considerations in shaping the remedies granted Applicant in the DRE review of her case by (1) concluding that promotion to the next grade level was not warranted, and (2) determining the extent of the salary adjustment awarded are considered *infra* at Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant’s case; The remedy granted Applicant through the DRE process.

been unable to make a specific finding of discrimination affecting the Applicant individually, after the 5% adjustment decided by the Bank, as neither the evidence specific to her situation nor the studies carried out by the Bank supports such a finding and there is no compelling case for applying the methodology proposed by her.” (Para. 58.)

25. In its October 2, 2002 Order in Ms. “W”’s case, the Fund’s Grievance Committee concluded: “...the statistical regression analysis sought by Grievant is not relevant to establish discrimination in Grievant’s individual case,” and that the Committee “...agrees with the Fund that ‘the DRE was based on the reasonable conclusion that statistical analysis did not provide a sufficient or appropriate basis for making findings and fashioning remedies in individual cases.’”

26. On the basis of the Administrative Tribunal’s conclusion (*supra*, para. 21) that Respondent’s decision to base the DRE review of individual cases, including that of Ms. “W”, upon qualitative as well as statistical factors was not arbitrary, capricious or discriminatory, Applicant’s request for comparator data is denied, as the requested information is not relevant to the questions at issue in the case.

Request 4 – Data on the outcome of the DRE.

27. Applicant’s final document request is for “...the correctly tabulated outcome of the DRE exercise for all 67 cases examined....to demonstrate that there was disparate treatment of women in the DRE compared to men who were promoted at a rate of 95 percent....” Applicant has created her own tabulation of outcomes, which differs from those compiled in the Report of the Consultants on the Discrimination Review.⁹

28. For the reasons set forth under Request 3, such data on DRE outcomes would neither prove conclusively that the DRE process in general was discriminatory nor that the process as applied in Applicant’s case was discriminatory. The Grievance Committee drew the same conclusion in its Order of October 2, 2002.

29. This document request is accordingly denied on the ground that the requested information is not relevant to the questions at issue in the case.

The Factual Background of the Case

30. The relevant factual background, some of which is disputed between the parties, may be summarized as follows.

⁹ See *infra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

Ms. “W”’s Career with the Fund

31. Applicant began her career with the Fund on February 1, 1982 as an Economist at grade G (equivalent to A12) in “Department 1,”¹⁰ one of the Fund’s Functional (as distinct from Area) departments. Ms. “W” was employed in mid-career with a master’s degree in economics and expertise in an area relevant to the work of that department. In 1986, she was promoted to Grade A13. In 1989, Ms. “W” transferred to one of the Fund’s Area departments “Department 2,” where she remained until 1992 when she moved to another Functional department “Department 3.” During her tenure in “Department 3,” Ms. “W” was promoted in 1995 to the position of Senior Economist at Grade A14. In 2000, Ms. “W” transferred to a second Area department “Department 4,” and in 2004 she took up the post of a Fund Resident Representative, while continuing as a Senior Economist at Grade A14.

32. During her career with the Fund, Applicant has been active in a variety of staff advocacy roles. Applicant served as a member of the Working Group on the Status of Women (*see infra*), for which she received praise from its Chair, particularly for her work in supervising the statistical analysis performed by outside consultants.

The Discrimination Review Exercise (DRE)

33. The Discrimination Review Exercise (DRE) was an exceptional, one-time inquiry into cases of alleged discrimination, whenever originating, as long as they were brought to the attention of the Director of Administration during a specific, but narrow time frame, between August 28 and September 30, 1996. The DRE was initiated by the Fund to investigate and remedy, through an alternative dispute resolution mechanism, instances of past discrimination that had adversely affected the careers of Fund staff.

34. The DRE sprung from a series of studies undertaken by the Fund, following the 1992 Survey of Staff Views, to examine on both a statistical and a qualitative basis the question of possible discrimination within the Fund.¹¹ In May 1994, the Working Group on the Status of Women in the Fund released its Report Equity and Excellence, addressing issues of gender

¹⁰ In accordance with the Administrative Tribunal’s policy on protection of privacy, adopted in 1997, the departments of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal’s Judgment.

¹¹ Employment discrimination in the Fund is prohibited by Rule N-2 of the Rules and Regulations of the International Monetary Fund:

“N-2. Subject to Rule N-1 above, the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, creed, or nationality.
Adopted as N-1 September 25, 1946, amended June 22, 1979,”

For more recent steps taken by the Fund to address discrimination, *see Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81-84.

equality. In July 1995, this work was complemented by Pelerei, Discrimination in the Fund: A Study of the Nature, Extent, and Cause of Discrimination on the Basis of Race, Nationality, Religion and Age, a study commissioned by the Fund's Advisory Group on Discrimination.

35. Shortly thereafter, the Managing Director issued to the staff the report Discrimination in the Fund (December 1995), prepared by the Chairman of the Fund's Advisory Group on Discrimination, Mr. A. Mohammed. That report cited the benefits of instituting an alternative dispute resolution procedure to address cases of alleged discrimination:

“It could be argued that there are appeal channels already in place, such as the Grievance Committee and the Administrative Tribunal. These tend to involve rather elaborate legal procedures; what is being suggested here is a much simpler *ad hoc* forum for settling discrimination complaints that rankle staff who are reluctant to invoke the existing procedures for fear of inviting reprisals if they fail at what tends to be regarded as adversarial proceedings against their current, or recent, supervisors.”

Discrimination in the Fund (December 1995), p. 34, note 1.

36. In a Memorandum to Staff in early 1996, the Managing Director noted:

“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.”

(Memorandum from the Managing Director to Members of the Staff, February 9, 1996, “The Report of the Consultant on Discrimination.”) In July of that year, the Managing Director again addressed the issue of the effect of possible past discrimination on the careers of current 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.”

(Memorandum from the Managing Director to Members of the Staff, July 26, 1996, "Measures to Promote Staff Diversity and Address Discrimination.")

37. The framework for an ad hoc review of individual cases of alleged discrimination was announced on August 28, 1996 in a Memorandum to Staff from the Director of Administration, "Review of Individual Discrimination Cases," setting forth several avenues for the identification of cases for review, including a provision for self-identification by those individuals who believed their careers had been adversely affected by discrimination. As to how the review process would actually work, the Memorandum advised:

"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."

38. Additional information regarding the DRE process was communicated to staff on January 13, 1997 in a further Memorandum from the Director of Administration to Members of the Staff, titled "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 Fund staff. The role and qualifications of the consultants were described as follows:

"The review of individual discrimination cases will be carried out by external consultants [footnote omitted] assisted by a small number of Fund staff from both within and outside the Administration Department. The consultants selected for this project have a mixture of backgrounds with expertise covering discrimination, diversity, arbitration, and mediation. The consultants also have extensive experience in working with both public and private sector organizations."

39. As to the role of the Diversity Advisor with respect to the DRE, the Memorandum stated:

"Although the Special Advisor on Diversity was involved in counseling individual staff members regarding their initial submissions for a review, she will not be involved in the actual reviews of individual cases. She will be focusing on the

departmental diversity plans and other systemic efforts contained in the Managing Director's action plan."

40. The procedures and aims of the review were set forth in the January 13, 1997 Memorandum to Staff 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. ...

... 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."

41. Following the conclusion of the DRE process, the Fund issued the Report of the Consultants on the Discrimination Review ("Consultants' Report"), in which the consultants summarized the methodology and outcomes of the review. Some 70 cases had been reviewed, approximately 70 percent of which alleged discrimination primarily on grounds of race or nationality, 20 percent on grounds of gender, and the remaining 10 percent on grounds of age or religion. *Id.*, p. 5.

42. The Consultants' Report describes the role and methods of the consultants and Fund officials in carrying out investigations and arriving at remedial action:

“II. METHODOLOGY

Review of the individual discrimination cases was conducted by five review teams, each including one outside consultant and one Fund staff member. [footnote omitted] Each of the cases submitted under the discrimination review exercise was assigned to one of the five teams. The five teams, the Fund’s Special Advisor on Diversity, and the Director of ADM formed a committee which met on a regular basis to discuss the policies and procedures of the discrimination review process. To ensure consistency in the exercise, review teams presented selected individual cases to the full committee for evaluation.

Individual reviews consisted of (1) an initial interview with the applicant; (2) interviews with others having knowledge of the applicant’s Fund career (‘contacts’ limited to those authorized by applicants) including, supervisors, subordinates, peers, and others; (3) statistical analysis, where required; and (4) a feedback interview with the applicant. During the course of the review, the teams conducted approximately 600 contact interviews.

All initial interviews were conducted by both team members (i.e., outside consultant and Fund staff representative) except where applicants requested private meetings with the outside consultant. Many contact interviews were conducted by one team member, rather than both. Fund team members interviewed some contacts privately. However, all such interviews were with ‘secondary contacts’ (i.e., contacts having important but not pivotal information regarding cases). Where Fund staff’s findings were potentially determinative, the outside consultants conducted follow-up interviews with contacts. The teams advised contacts to respect the confidential nature of the process and informed them that feedback would be given to applicants in aggregate form to preserve anonymity in the process. Following the interviews with applicants and contacts, and a review of all relevant documentation, the teams reported their findings and conclusions to each applicant. Once again, final interviews were conducted by both team members except in cases where applicants requested a private meeting with the outside consultant.

Although the teams attempted to reach consensus on a case-by-case basis, the outside consultants made final determinations regarding the merit of claims presented. The outside consultants also suggested remedial action on a case-by-case basis. However, remedies were limited by the decision taken at the outset of the

exercise to provide remedies that were both prospective and, to the extent possible, within the framework of the Fund's existing personnel policies. Some of these limiting factors included: (1) promotion opportunities; (2) applicants' current competitiveness for job openings; (3) budgetary constraints; (4) time-in-grade requirements; and (5) the promotion procedures of the review committees.”

Id., pp. 4-5.

43. As for the outcome of the review, the consultants reported that the DRE review teams had made recommendations for 67 of the 70 cases filed. Indications of “unfair or uneven treatment” had been identified in approximately half of these. The table appended to the Report divides the outcomes between those in which “Indications of Unfair or Uneven Treatment” were found and those in which no such indications were found; there is no category titled “discrimination.” The Report explains that only in a “small number of cases” was there “clear evidence of discrimination:”

“The discrimination review exercise was not designed to prove the presence or absence of discrimination to a high legal standard. The indications of unfair or uneven treatment varied a good deal as regards the amount and clarity of evidence available. In a small number of cases—mainly involving starting salaries or salaries on transfer to a different career stream—there was clear evidence of discrimination. In the majority of cases, however, the judgments made by the review teams were far more subjective based, at times, on sketchy evidence sometimes going back as much as 20-25 years. **In arriving at their judgments, the review teams were influenced by a desire, where possible, to give the staff member the benefit of the doubt.**”

Id., p. 6. (Emphasis in original.) As to the distribution of outcomes among different groups of staff, the Report concluded:

“The indicators of unfair or uneven treatment were related to primary factors roughly proportional to the overall distribution of candidates, with 77 percent of the candidates for whom unfair treatment was found linked primarily to race/nationality, 20 percent to gender, and 3 percent to age. While these were the primary factors, in many cases age was also an important secondary factor that limited advancement in the later stages of a career that may have been hampered at an early stage by nationality, race, and/or gender considerations.”

Id., p. 6.

44. With respect to the use of promotion as a remedy, the consultants reported:

“In 17 of these 35 candidates for whom there was an indication of unfair or uneven treatment, the primary remedial outcome of the review was a promotion. In some of these 17 cases, the staff member was already in the process of obtaining a sought after promotion during the course of the discrimination review exercise and there was no support or intervention from management or ADM to help bring about the promotion. In other cases, such promotions took place largely as a result of internal market forces but with some support provided by management or the ADM. In yet other of these 17 cases, the promotion came about as a direct result of a specific decision taken by management and/or ADM outside the framework of the normal internal market.”

Id., pp. 6-7. As for the remedy of within-grade salary adjustment, the Report noted:

“In another 15 of the 35 cases in which some indications of uneven or unfair treatment were identified, a within-grade-salary adjustment averaging 6.2 percent was the primary remedial action. In many of these 32 cases in which a promotion and/or within-grade-salary adjustment was a primary outcome of the exercise, the staff members also received (and in a number of cases are continuing to receive) support in the form of training, reassignments, coaching, and mentoring. In three cases in which unfair or uneven treatment was identified, the remedial action did not involve a promotion or a within-grade-salary adjustment, but did include this type of career development support.”

Id., p. 7. The consultants further reported that in 10 of the 32 cases in which no indication of unfair or uneven treatment was found, some form of supportive action such as training or reassignment nonetheless was being provided as an outcome of the review. *Id.*, p. 7.

45. Finally, the Consultants’ Report provided data on DRE outcomes analyzed by gender:

“The discrimination cases of 37 men and 30 women were reviewed, and the proportion of candidates for whom indications of unfair or uneven treatment was identified was roughly equal for both (53 percent of the women and 49 percent of the men). The proportion of men and women for whom a promotion was an outcome of this exercise was also comparable, although a larger proportion of women (27 percent) received within grade salary adjustments than men (19 percent), and the average size of the adjustment was larger for women (6.6 percent) than men (5.7 percent). This reflected the fact that a relatively low starting

salary for women accounted for a number of the cases of unfair treatment identified.”

Id., p. 7. The table accompanying the Report indicates that promotion was the primary remedy for 23 percent of women and for 27 percent of men.

The Application of the DRE to the Case of Ms. “W”

46. In response to the Director of Administration’s August 28, 1996 Memorandum to Staff, Applicant on September 24, 1996, requested review under the DRE on the ground that, based upon statistical evidence, her Fund career had been adversely affected by gender discrimination:

“I base my request on the statistical results of the report of the Working Group on the Status of Women.....After accounting for differences in qualifications, the regression measures a statistically significant adverse treatment of women economists compared to men, equal to 3.4 percent of women’s salaries on average....

....Substituting my data into the regression...indicates that I should have earned \$91,992 in 1993 had I been treated the same as the average performing male economist in the Fund. In terms of quality and breadth of assignments undertaken, my performance reports (of which you have copies) indicate a work effort at least as good as the average performing male. On the same basis, separate ordered probit regressions indicate that I should have been graded at A15 that year.

....

...it should be noted that my individual pay and grade anomalies relate principally to treatment in the two departments where I was initially assigned in the Fund....Following a move to the ... Department (my third assignment), some of my anomaly has subsequently been corrected....Nevertheless, anomalies of 1 grade and \$11,000 still remain....

In summary, women economists in the Fund show a statistically significant adverse pay and grade treatment as compared to male economists in the Fund. I am a member of this disadvantaged group. In addition, computations in my individual case after adjusting for a recent promotion indicate that I am paid \$11,000, and one grade, less than the average performing male economist. Therefore I am requesting a review of discrimination and correction in my case.”

47. Pursuant to the DRE procedures, the review of Applicant's case was conducted by a review team appointed by the Fund, consisting of an outside consultant ("external team member") and an official of the Administration Department ("internal or Fund team member"). The team held its initial meeting with Ms. "W" on May 14, 1997, at which Applicant emphasized that her claim was grounded on an alleged statistical disparity between her own salary and grade level and those of male economists. Ms. "W" testified during the Grievance Committee proceedings:

"I submitted my DRE case not just for my own individual self, I was still very much acting as an advocate for women's issues in the Fund....

So when I had my initial interview, I told [the external team member] – and [the Diversity Advisor] was a witness and [the Fund team member] was a witness—that my own individual case is pretty much substantiated by the written request. I had a written request and I made a case for measuring discrimination in my individual case by substituting myself into a regression. And I thought that the written request to be considered was self-explanatory."

The Fund review team member recalled that the most significant thing about the initial meeting with Ms. "W" was Applicant's request that a regression analysis be run "in order to resolve her case." The Fund team member, according to her Grievance Committee testimony, explained to Ms. "W" that it was

"... not consistent with the way we had handled all of the other cases and we wanted, again, to be consistent. The review was mostly qualitative in which we asked a lot of questions, talked to people and collected data. So we explained that we weren't going to use that mechanism to address her case."

48. The Fund team member compiled Notes of the team's review of Applicant's DRE claim. These Notes reflect a review of both the "paper record," i.e. Applicant's Annual Performance Reports (APRs) and her 1988 Long-Term Performance Assessment (LTPA), as well as interviews with supervisors and other Fund staff familiar with Applicant's career.

49. Following its investigation of Applicant's case, the DRE review team summarized its methods, findings, and recommendations in its confidential case report. The review team explained that in view of the nature of Ms. "W"'s complaint, the methodology it applied in her case was to assume that the Fund's pre-DRE statistical studies had established a "rebuttable presumption" of discrimination:

"Ms. ["W"] argued to the Team that it should base its review in her case largely on the basis of regression analyses. In reviewing Ms. ["W"]'s career, the Team made the beginning assumption that

the Pelerei Study and the work of the Working Group established a rebuttable presumption of discrimination. To review Ms. [“W”]’s claim of discrimination, the Team had to determine if there were reasons other than discrimination for her career trajectory at the Fund.”

The team found that “...while both the paper record and discussions with contacts indicated some problems with Ms. [“W”]’s performance, there also are indications that she was treated differently from her male colleagues.” In particular, the team noted that in the first Division to which she was assigned, Ms. “W” was “not given prime assignments.” Moreover, “Department 1” was, in the estimation of the review team, “... known at the time as not having a good record for promoting women....” *Id.*

50. Despite identifying a difference in treatment between Applicant and male colleagues, the review team nonetheless concluded that Applicant had not experienced “discrimination” in her Fund career. This determination was based primarily on the team’s identification of a “skill deficit” that it held rebutted the statistical presumption of discrimination:

“It is in Ms. [“W”]’s early [“Department 1”] APRs [Annual Performance Reports], and discussions with contacts regarding this early period of Ms. [“W”]’s career that the Team encountered what has been described as the ‘forest for the trees’ problem. Two of Ms. [“W”]’s strengths are her strong quantitative bent and expertise with computers. Combined, those strengths were also noted by contacts and in her APRs as leading to generating mountains of data rather than on sharp analysis. Her excellent computer skills and hard working nature often have resulted in her providing answers to questions with a mountain of data without a corresponding focus on the ‘big picture.’”

Id., p. 3. Notably, the review team emphasized that this particular “skill deficit” had been encountered in the “early period” of Ms. “W”’s career and had ameliorated over time:

“Fortunately, Ms. [“W”]’s tendency to attack problems by throwing all available data [at them] appears to have attenuated since her transfer to [“Department 3”]. There is no mention of this issue in any of the APRs since Ms. [“W”]’s transfer to [“Department 3”], nor was it mentioned in interviews with contacts who are keen observers of Ms. [“W”]’s recent career.”

Id.

51. In other comments in its report, the review team noted that during her assignment in “Department 2,” Applicant was “...viewed as possessing limited analytical skills” and “...not view[ed]...as competitive with her peers with respect of the breadth of skill required for Area Department work.” By contrast, in “Department 3,” her most recent assignment as of the

time of the DRE, Ms. “W” was regarded as demonstrating strong analysis in her comments on papers: “Her work has been as good as 90% of the other Senior Economists in the Fund. She appears to have overcome at least some of the analytical shortcomings some saw in her work in the first years of her Fund career.” The review team also noted that Applicant was seen as “...an extremely hard worker and an excellent team player.” *Id.*

52. Finally, the DRE review team summed up its conclusions as to Applicant’s case:

“The Team did not conclude that Ms. [“W”] had been discriminated against in her career. Until her most recent assignment, however, she appears not to have received the benefit of any doubts, and her skills deficits appear to have been magnified rather than minimized. Her time in [“Department 1”] hampered the early years of her Fund career. On the other hand, Ms. [“W”] does appear to have some skill deficits, and they are sufficient to overcome the presumption that she had been discriminated against. The Team noted that Ms. [“W”] appears to have overcome the major impediments to her continued progression at the Fund – a failure to distinguish important data from the less important, and a weakness in analytic ability. The Team also noted that in her current assignment she has been given some supervisory responsibilities – an important skill if she’s to progress further in the Fund.”

Id., pp. 3-4. On the basis of its findings, the review team recommended: 1) a one-time salary increase of 6.5 percent, representing “...the difference in salary between Ms. [“W”]’s current salary and the average salary of economists in the 50-52 year old range;” and 2) “...that she be provided with supervisory responsibilities to assess her management skills, and other assignments to develop and assess her writing skills.” The team noted that Ms. “W”’s career “...appears to be on track for further progress,” and that “[i]f she did well, Ms. [“W”] was encouraged to apply for A15 vacancies in [“Department 3”] and elsewhere with support from ADM [Administration] for her applications.” *Id.*, p. 4.

53. On April 21, 1998, the review team held a final meeting with Ms. “W” to report its findings and recommendations. The discussion in that meeting is a matter of dispute between the parties. According to Applicant, among the recommendations was the alleged statement of the external team member that Applicant should be promoted to Grade A15 within one year’s time.¹²

54. By memorandum to Applicant of May 21, 1998, the Director of Administration affirmed the review team’s conclusions and recommendations:

¹² See *infra* Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant’s case; The remedy granted Applicant through the DRE process.

“The remedial action approved in your case will include a 6.5 percent salary adjustment within your current Grade A14...effective May 1, 1998.

As indicated in my earlier note to the staff-at-large, in cases where it appears there may have been unfair or uneven treatment, the review will not be an end in itself, but just the beginning of a process for identifying opportunities. In your case, efforts will be made to identify assignments for you that further develop and assess your analytical, writing, and supervisory skills. The objective will be to help strengthen your ability to compete for positions at the Grade 15 level.

....Although no evidence of discrimination was found in your case, the team responsible for carrying out the review concluded that your initial assignment in the...Division may have slowed your career and that, at different points in your career, skill deficits may have been magnified.”

It is the May 21, 1998 decision of the Director of Administration that is contested in the Administrative Tribunal.

The Channels of Administrative Review

55. Ms. “W” initially filed a Grievance with the Fund’s Grievance Committee on May 15, 1998. She was thereafter advised by the Director of Administration that administrative review procedures had not been exhausted, and on May 21, 1998, the ADM Director issued to Ms. “W” her memorandum approving the review team’s recommendations.

56. According to a chronology prepared by Applicant, she again filed a Grievance on July 20, 1998 and was subsequently advised by the Grievance Committee Chair that she would need to invoke additional administrative review procedures under GAO No. 31. Following further exchanges with the Fund’s administration, a final Grievance was filed December 30, 1998.¹³

¹³ The course of events that unfolded in the case of Ms. “W” reflects the uncertainty that existed as to the relationship between the DRE process and the administrative review procedures of GAO No. 31. On December 18, 1998, the Administrative Tribunal in Ms. “Y”, Applicant v. International Monetary Fund Respondent, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 40, ruled that the Director of Administration’s decision ratifying the recommendations of a DRE review team was a decision “taken directly” within the meaning of GAO No. 31, Rev. 3 (Grievance Committee), Section 6.06; such decisions may be contested in the Grievance Committee without additional review.

(continued)

57. After an unsuccessful period of voluntary mediation pursuant to a plan designed to expedite resolution of the DRE cases, Applicant's Grievance was considered by the Grievance Committee in the usual manner, on the basis of oral hearings and briefs of the parties. The Grievance Committee issued its Recommendation and Report on July 2, 2003. The Committee found that the DRE review team's investigation appeared to have been "...thorough and in keeping with the procedures set forth [for the DRE process]," and that the team members had testified "...credibly and in detail that Grievant's pace of advancement at the Fund was not based on discrimination on account of gender, but on her own shortcomings." Accordingly, the Grievance Committee concluded "...with respect to the review team's major finding in this case, that Grievant was not discriminated against on the basis of her gender, and it cannot be said that the review team was arbitrary, capricious or discriminatory in making this finding." Additionally, the Committee concluded that the method of arriving at the remedy of a 6.5 percent salary adjustment also appeared to have been "reasonably based."

58. The Committee's recommendation, which included an *ex gratia* payment for legal fees, was accepted by Fund management on July 15, 2003. The Grievance Committee, however, later increased the amount it recommended for the *ex gratia* payment. Management's acceptance of this further recommendation was received by Applicant on August 20, 2003. The Fund agreed to accept this latter notification, which constituted management's final determination as to the relief Applicant would be provided at the conclusion of the Grievance process, as the decision triggering the three month statute of limitations for purposes of Article VI¹⁴ of the Statute of the Administrative Tribunal.

59. On November 19, 2003, Ms. "W" filed her Application with the Administrative Tribunal.

In Ms. "Y", the Tribunal summarily dismissed the Application on the ground that, because Ms. "Y" had not taken her complaint contesting the results of the DRE to the Fund's Grievance Committee, she had not exhausted the channels of administrative review prerequisite to the Tribunal's consideration of her case, as required by Article V of the Tribunal's Statute. Recognizing the procedural uncertainties presented, the Tribunal concluded "...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 possibility." Following the Grievance Committee's review, the case of Ms. "Y" returned to the Administrative Tribunal for adjudication. See Ms. "Y" (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-2 (March 5, 2002), considered *infra* at Legal Framework for the Administrative Tribunal's Review of DRE Cases.

¹⁴ Article VI, Section 1 provides:

"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."

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. The DRE lacked due process protections and, as applied in the case of Ms. "W", procedural defects had a material effect on the outcome of the review. The review team members were not qualified for their responsibilities. Members of the Fund staff who were involved in the review of Applicant's claim were affected by conflicts of interest, and the role of the outside consultant was unduly constrained by these officials.
2. The DRE review of Applicant's case must be held to the standard adopted by the review team, i.e. that earlier Fund studies such as that of the Working Group on the Status of Women established a "rebuttable presumption" of discrimination as to Applicant.
3. Using accepted statistical methods, Applicant has shown that she has been paid and graded at a lower level than the average male economist in the Fund, despite better-than-average performance. The DRE review of Applicant's case failed to establish that factors other than discrimination resulted in Applicant's slower career progression.
4. Additionally, the DRE review team expressly found that there had been disparate treatment between Ms. "W" and her male colleagues.
5. The claim of a skills deficit was without merit and was contradicted by the written record. Applicant has been praised for her hard work, initiative, in-depth analysis and policy work, and exceptional quantitative skills.
6. There was a clear bias in the review team's approach, which did not focus on the elements of discrimination but rather on factors to rebut the apparent discrimination. The review team improperly relied upon oral assessments that contradicted the written record of Applicant's performance. The review team thereby wrongly characterized Applicant as having a "forest-for-the-trees" problem, distorting the review of her case and leading to the unsupported conclusion that performance factors explained the disparity in Applicant's grade and salary vis-à-vis male economists.
7. The Director of Administration took a decision to ratify the review team's findings on the basis of incorrect information and analysis. The conclusions of the DRE team were not "reasonably supported by evidence."

8. Applicant's career was adversely affected by discrimination and the Tribunal has jurisdiction to make such a finding.
9. Respondent used a biased statistical analysis, based on an inappropriate group of comparators, to determine the remedy for Applicant as a result of the DRE process. At the same time, Respondent refused to provide statistical information requested by Applicant. The proper use of statistics would have allowed Applicant to establish that she should have received a promotion as well as a salary adjustment as a remedy.
10. An offer of possible promotion to Grade A15 within one year was made orally to Applicant by the outside consultant but apparently was reversed by the Administration Department.
11. The remedy implemented in Applicant's case was consistent with a pattern in which the outcome of the DRE process benefited male complainants to a greater extent than female complainants.
12. Apart from implementing the pay adjustment resulting from the DRE exercise, Respondent has taken no action on the prospective career measures awarded as part of the remedy in Ms. "W"'s case and continues to discriminate against her on the basis of her gender.
13. Respondent improperly used the report of the DRE review team to influence the denial of a promotion for which Applicant applied in her Department.
14. Applicant seeks as relief:
 - a. findings by the Tribunal that (i) the DRE team failed to reach correct conclusions on the evidence and the Fund's decision rejecting a finding of discrimination was not properly founded, (ii) the DRE investigation violated Applicant's right to due process, and (iii) Applicant's career prospects were damaged by the improper use of the DRE team's report;
 - b. promotion to Grade A15, retroactive to 1998;
 - c. compensation, retroactive to 1993, for pay disparity vis-à-vis comparably situated economists, and a "step-up" pay increase as of May 1, 2003;
 - d. damages of one year's net salary for unfair procedures;
 - e. assistance to improve Applicant's "career trajectory"; and
 - f. legal costs.

Respondent's principal contentions

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

1. The procedures followed in the DRE review of Applicant's claim were consistent with the procedures established for the DRE and upheld by the Tribunal in Ms "Y" (No. 2).
2. The Fund properly exercised its discretion in appointing the members of the DRE review team, who were qualified to conduct the review. Fund officials involved in the DRE process were not affected by any conflict of interest with regard to Applicant's case. Neither was the Administration Department's role in the DRE process improper, but rather contributed to making the DRE a fair and reasonable exercise.
3. There was no evidence of any bias in the review team's approach to investigating Applicant's claim or of any institutional bias against Applicant.
4. The DRE review team's conclusions were reasonably based on its review of Applicant's claim.
5. The review team's finding of skills deficits rebutted the presumption of discrimination. The "forest-for-the-trees" problem, i.e. strong quantitative and computer skills but a comparative need to develop analytical skills, was consistently noted by the review team in both the written record of Applicant's performance and in the team's interviews.
6. The review team's finding that the early years of Applicant's Fund career had been hampered because she had not been given the benefit of any doubts and her skills deficits appeared to have been magnified rather than minimized, also was substantiated.
7. Applicant did not present any probative evidence that her early career at the Fund had been adversely affected by gender discrimination. The review team appropriately concluded that her career had been hampered instead by poor management.
8. Applicant did not raise with the DRE review team any act of alleged discrimination that could have been investigated, and she did not establish that any actions or decisions of the Fund were discriminatory.
9. The Fund's approach to the use of statistics in the DRE review of Applicant's claim was not arbitrary, capricious or discriminatory. The DRE was based on the reasonable conclusion that statistical analysis did not provide a sufficient or appropriate basis for making findings and fashioning remedies in individual

cases of alleged discrimination. The review team did give some weight to statistics in concluding that the report of the Working Group on the Status of Women created a “rebuttable presumption” of discrimination. However, the team correctly determined that Applicant’s individual claim needed to be reviewed in light of the actual facts of her career history.

10. In light of the lack of evidence of gender discrimination in Applicant’s case and the view that she needed to develop further the skills essential for higher grades, the DRE review team reasonably concluded that Applicant was at the appropriate grade level.
11. The remedy of a 6.5 percent salary adjustment was reasonably based on the review team’s investigation of Applicant’s case. Applicant’s salary was properly compared with that of other senior economists of her grade and age range. Also consistent with the team’s review and DRE procedures was the recommendation that Applicant be given assignments to develop and assess her skills to strengthen her ability to compete for higher level positions.
12. Applicant’s argument that the remedy recommended in her case reflected a pattern whereby the DRE itself was discriminatory against women is not credible and is not supported by any evidence.
13. Applicant has not shown that any recommendation was ever made as part of the DRE process that she be promoted to Grade A15 within one year. In any event, such a recommendation would have been inconsistent with Fund policies and therefore at odds with the DRE guidelines.
14. Applicant has not exhausted administrative review procedures as to her claims that the Fund has failed to follow through on the DRE recommendations and continues to discriminate against her on the basis of gender; therefore, these claims are not properly before the Tribunal. In any event, the claims are unfounded, as Applicant has been given assignments to enhance her competitiveness for higher grade positions and the DRE report was not improperly used to influence decisions against promotion within her Department.

Legal Framework for the Administrative Tribunal’s Review of DRE Cases

62. The case of Ms. “W” and another to be decided subsequently of Ms. “Z” are the last cases arising from the Discrimination Review Exercise (DRE) to be presented for review by the Administrative Tribunal. In an earlier Judgment, Ms. “Y” (No. 2), Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-2 (March 5, 2002), the Tribunal established the framework for its review of such cases.

63. In Ms. “Y” (No. 2), the applicant sought *de novo* review by the Tribunal of the merits of her underlying claims of discrimination, which she contended were not fully and fairly

examined under the DRE process. Respondent maintained that review of the underlying claims by the Administrative Tribunal was not appropriate because Ms. “Y” had failed to raise these claims on a timely basis under the administrative review procedures of GAO No. 31. Respondent accordingly contended that review in the Administrative Tribunal was to be limited to challenges to the fairness of the conduct of the DRE process itself.

64. The Tribunal concluded that a limited measure of review was to be undertaken by the Tribunal, explaining its reasoning as follows. At the time the DRE was implemented, the Fund had announced to the staff that the alternative dispute resolution mechanism did not confer any new rights, nor replicate or replace the Fund’s grievance procedure. Ms. “Y” had taken no steps to contest the abolition of her position, or any other decision of the Fund that she alleged was discriminatory, through the formal channels of review provided under GAO No. 31 for staff to challenge adverse personnel decisions. The Tribunal therefore rejected the view that because Ms. “Y”’s allegations of discrimination had been subject to the DRE, they could be reviewed by the Tribunal in the same manner as if they had been pursued on a timely basis through the formal administrative review procedures. Citing the value of timely, formal administrative review to the reliability of later adjudication by the Administrative Tribunal, the Tribunal emphasized that the DRE procedures were, “...by definition and design, intended to offer a mechanism for resolution of allegations of discrimination distinct from those afforded by legal proceedings” (para. 49) and that the depth of the Tribunal’s review was limited in part by the nature of the record of the DRE proceedings before it (para. 65).¹⁵

65. In addition, in holding that review of Ms. “Y”’s underlying discrimination claims had been foreclosed because the mandatory time periods for invoking prior steps prescribed by GAO No. 31 had expired, the Administrative Tribunal made clear that the only decision that could be subject to review by the Grievance Committee, and thereafter by the Administrative Tribunal, was the decision of the Director of Administration affirming the DRE review team’s conclusions. Accordingly, the Administrative Tribunal rejected the view that because the applicant’s allegations of discrimination had been subject to the DRE, they could be reviewed by the Tribunal *as if* they had been pursued on a timely basis through GAO No. 31. (Para. 39.)

66. At the same time, however, the Tribunal concluded that, as Ms. “Y” had challenged the Director of Administration’s decision upholding the DRE team’s conclusion that her career was not adversely affected by discrimination, “...examination of that conclusion necessarily entails some consideration of whether the Applicant’s career did suffer discrimination.” (Para. 41.) The Tribunal continued: “That consideration may be distinguished, however, from the *de novo* examination by the Tribunal of the underlying

¹⁵ See also Ms. “J”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 110, observing that in Ms. “Y” (No. 2) the Administrative Tribunal had “...underscored the limited measure of its review of the informal discrimination review process” in light of the nature of the decision-making process under review.

claims that Applicant seeks.” (Para. 41.) The same standard shall be applied in the present case.¹⁶

67. In addition to challenging the “individual decision” in her case, aspects of Ms. “Y”’s Application appeared to impugn the DRE process more generally by asserting that the DRE lacked many of the attributes of a formal legal proceeding such as a written record. In response to these contentions, the Tribunal in Ms. “Y” (No. 2) upheld as a lawful exercise of the Fund’s discretionary authority the decision to implement as part of its human resources functions a means to remedy, during a narrow time frame, instances of past discrimination that reached beyond statutory time bars and had not previously been raised through the formal administrative review procedures. The Tribunal concluded that the DRE

“... was a good faith effort on the part of the Fund, perhaps unprecedented among international organizations, to resolve lingering allegations of past discrimination and to remedy the adverse effects of discrimination on the careers of aggrieved staff members.... The DRE was undertaken as a result of reasoned consideration by the Fund’s administration, based on recommendations made in an extensive study Discrimination in the Fund (December 1995), suggesting that a procedure alternative to formal adjudication would facilitate the resolution of longstanding complaints.”

(Para. 48.) The Administrative Tribunal in Ms. “Y” (No. 2) furthermore concluded that the procedures adopted for the DRE, for example, confidentiality and lack of a written record, appeared to have been rationally related to its purposes and that, accordingly, the implementation of the DRE was a proper exercise of the Fund’s managerial discretion. (Paras. 49, 52.)

68. Finally, the Tribunal in Ms. “Y” (No. 2) subjected to review for abuse of discretion the conduct of the DRE process as applied in Ms. “Y”’s case, citing the standard set forth in the Commentary on the Tribunal’s Statute:

“...with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.”

¹⁶ The standard of review invoked by the Administrative Tribunal in reviewing the limited number of cases arising under the unique circumstances of the DRE procedure therefore differs from that applied when a contention of discrimination is brought to the Tribunal through the usual channels of administrative review pursuant to GAO No. 31. See Mr. “F”, note 13.

(Report of the Executive Board, p. 19.) The Tribunal considered: a) whether the procedures applied by the DRE review team in Ms. “Y”’s case were consistent with the procedures established for the DRE and with those applied by the DRE teams in other cases; b) whether the conclusions of the DRE team in Ms. “Y”’s case, and their ratification by the Director of Administration, were reasonably supported by evidence; and c) whether the investigation of Ms. “Y”’s claims were tainted by any bias. After examining the evidence, the Tribunal held “...first, that the proceedings of the DRE in respect of Ms. “Y”’s claims were regular, appropriate and unexceptionable and, second, that there is no ground for questioning the conclusion of the DRE that the Applicant’s career disposition was unaffected by discrimination.” (Para. 80.) The Application of Ms. “Y” was accordingly denied.

Consideration of the Issues of the Case

69. Applying the framework developed in Ms. “Y” (No. 2), the Tribunal now considers the contentions presented by Ms. “W”. These contentions may be outlined as follows: 1) procedural allegations; 2) sustainability of the DRE’s findings and conclusions as to discrimination and remedy; and 3) implementation of remedial action pursuant to the DRE, alleged improper use of the DRE report, and contentions of continuing discrimination.

Procedural Allegations

70. Applicant contends that the DRE review of her case was affected by a series of deficiencies inconsistent with the procedures established for the DRE and with the fair resolution of her complaint. In particular, Applicant challenges: a) the composition of the review team and the respective roles performed by its internal and external members; b) the influence of the Administration Department and its Assistant Director; c) the role exercised by the Fund’s Diversity Advisor; d) alleged institutional bias against Applicant; and e) the methodology applied by the DRE review team in Applicant’s case, specifically the means of applying a “rebuttable presumption” of discrimination and reliance on qualitative as well as statistical evidence. These contentions are reviewed below.

Composition of review team and roles of its internal and external members

71. Applicant contends that the DRE review team members were not qualified for their responsibilities, that some Fund officials who were involved in the review of Applicant’s claim were affected by bias (*see infra*), and that the role of the external team member was improperly constrained by these officials. Respondent denies these charges.

72. Ms. “W” challenges the role and qualifications of the respective team members. In particular, she maintains that the external team member was not expert in problems of discrimination and that he did not play the lead role contemplated in the memoranda on the DRE. The Tribunal however finds that the external team member’s qualifications---as a person seasoned in mediation and alternative dispute resolution, including experience in the mediation of employment discrimination cases---met those prescribed for the consultants as

announced in the Memorandum to Staff of January 13, 1997.¹⁷ That Memorandum stated that the outside consultants were to have "...a mixture of backgrounds with expertise covering discrimination, diversity, arbitration and mediation." Additionally, the qualifications of the internal team member, who had significant human resources experience within the Fund, likewise were consistent with those contemplated by the DRE.

73. Evidence that the external team member did not play the role provided for in the DRE memoranda is similarly lacking. The applicable Memorandum provided: "The review of individual cases will be carried out by external consultants [footnote omitted] assisted by a small number of Fund staff from both within and outside the Administration Department." Both team members testified that they worked together, dividing the list of interviewees and coming together to discuss the case as a whole. The external team member conceded that while at first he had been skeptical of the partnership arrangement between the consultants and Fund staff he came to believe that it was "a very smart decision" to pair the external member with "someone who understood how the Fund works." As to the particular working relationship between them, the external member testified, "[w]e tried to do everything by consensus;" the two "worked as a team," "talked things through" and together drafted their report.

74. The practices described by the review team members in Ms. "W"'s case are consistent with those summarized in the Consultants' Report prepared at the conclusion of the entire Discrimination Review Exercise.¹⁸ That Report stated that all initial and final interviews with complainants were conducted by both members of the review team, while many contact interviews were conducted by a single team member. The Report additionally noted that "[a]lthough the teams attempted to reach consensus on a case-by-case basis, the outside consultants made final determinations regarding the merit of claims presented." This statement must be understood in the overall context of the DRE, in which the ultimate decisions were taken by the Director of Administration on the basis of the review teams' recommendations.¹⁹ In any event, the Fund team member in Applicant's case acknowledged in her testimony before the Grievance Committee the authority of the external team member in this regard; both team members, however, emphasized that in the case of Ms. "W" they formed a consensus as to the merits of the complaint.

¹⁷ In Ms. "Y" (No. 2), para. 55, the Tribunal observed that in reviewing a decision for abuse of discretion, "[i]nternational administrative tribunals have emphasized the importance of observance by an organization of its procedural rules..." citing Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 23, and considered whether the procedures applied to the DRE review of Ms. "Y"'s claim were consistent with the procedures set forth for the DRE. As described *supra*, the procedures under which the DRE would operate were set forth in Memoranda to Staff of August 28, 1996 and January 13, 1997.

¹⁸ See *supra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

¹⁹ See *infra* Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant's case; The remedy granted Applicant through the DRE process.

75. Accordingly, in the view of the Tribunal, there was no evidence that the role performed by the external team member was improperly constrained by Fund officials. Moreover, the working relationship between the two team members, as well their interactions with the Administration Department, which oversaw the exercise, *see infra*, were fully consistent with the procedures set out for the DRE.

Influence of the Administration Department and its Assistant Director

76. Applicant contends that the Administration Department and its Assistant Director exercised an inappropriate role in the review of her DRE complaint.

77. In Ms. “Y” (No. 2), the Administrative Tribunal established that a measure of the procedural fairness accorded in an individual DRE case is consistency with the procedures applied by the DRE teams in other cases. (Paras. 54-55.) Considerable testimony emerged in the case of Ms. “W” as to efforts to ensure consistency of the DRE process across the 70 cases reviewed. The former Assistant Director of Administration in particular testified as to his dual role of serving as a member of one the five review teams (not the team assigned to Ms. “W”’s case) and of assisting the Director of Administration in coordinating the overall review:

“In that capacity, I also I think assisted the Director of Administration in trying to ensure some quality control and consistency in the exercise, that is to try to the extent possible to ensure that each of the five review teams were approaching the exercise and in particular, approaching possible remedies that were coming out of the exercise in a way that was consistent across the 70 or so individual cases.”

According to the ADM Assistant Director, the five review teams, the Director of Administration and the Diversity Advisor met as a group before beginning the review of individual cases to consider procedures and methodology. Additionally, they met to discuss a sample (15 – 20) of the 70 cases “...so that the review team could benefit from the broader views of the full team and so that other teams could benefit through...cross fertilization.” This practice is also described in the Consultants’ Report.²⁰

78. Both of the team members assigned to review Ms. “W”’s complaint indicated in their testimony that the process of cross-checking was employed in Applicant’s case. In the words of the external member:

“We wanted as much consistency as we could have just on the way we were doing things and how we were drawing conclusions. And the only way to do that...is to meet periodically and talk....

²⁰ See *supra* The Factual Background of the Case; The Discrimination Review Exercise (DRE).

....

...we'd talk about a case at the point that the team had come to its conclusion about a recommendation, we'd talk it through and try to answer questions from other team members about how we drew that conclusion and what that might lead to.

....

The kind of consistency that we were trying to achieve was sort of a general consistency in how we were approaching things and how we were reaching conclusions.”

79. Ms. “W” questions the procedures followed by the DRE team and alleges that the former Assistant Director of Administration exerted undue influence over it. The Tribunal finds that the procedures followed were consistent with those of other teams, that those procedures were reasonable, and that the measure of involvement of the Administration Department was appropriate. Indeed, the record supports the view that ADM and its Assistant Director helped to assure that the procedures applied to Ms. “W”'s case were consistent with those set forth for the DRE and applied by the review teams in other cases.

Role of the Fund's Diversity Advisor

80. Ms. “W” further observes that the Diversity Advisor took a role in the review of her case even though the Diversity Advisor was not in a position to evaluate Applicant's work performance. In her testimony before the Grievance Committee, the Diversity Advisor conceded that she had not observed Ms. “W”'s interactions with co-workers in Applicant's departmental work environment but had gained impressions of Ms. “W” in exchanges relating to the Report of the Working Group on the Status of Women in the Fund and the implementation of the DRE.

81. It is not clear to the Tribunal on whose invitation the Diversity Advisor was treated as a “contact.” Ms. “W” alleges that the Diversity Advisor asked to sit in on her sessions as an “observer” to learn more about the DRE process in general and that Ms. “W” was not aware that she would also be an interviewee in Applicant's case. When interviewed, and when she testified in the Grievance Committee, the Diversity Advisor characterized Ms. “W”'s insistence on the probative force of statistics as “aggressive.” Additionally, her views supported the perception that Ms. “W”'s analytical abilities did not match her statistical strengths. Applicant, for her part, attributed the Diversity Advisor's perceptions to a difference in their respective roles with respect to the DRE.

82. The Tribunal recalls that the January 1997 Memorandum to Staff on the DRE procedures stated that the Diversity Advisor “...will not be involved in the actual reviews of individual cases.” Accordingly, there is ground for questioning whether the Diversity Advisor should have been interviewed as a contact. But her role does not appear to have had

a decisive influence on the disposition of Ms. “W”’s case, as her critical characterizations were consistent with those of some other contacts.

Alleged institutional bias against Applicant

83. Ms. “W” also alleges that her history of having taken an outspoken staff advocacy role had a prejudicial effect on the evaluation of her complaint in the DRE process. Applicant testified in particular to having developed, in her view, an adversarial relationship vis-à-vis the Assistant Director of Administration through her role in representing staff members on a separate matter. The ADM Assistant Director, by contrast, testified that he had a high regard for Applicant’s work on behalf of the staff and that his prior experience with her did not create “any bias one way or another.”

84. In the Tribunal’s view, no evidence in support of Applicant’s speculation of bias in the DRE process emerged. Indeed, it was firmly denied by witnesses of the Respondent. The Fund team member knew Ms. “W” to be “active and outspoken” but “personally admired her for it” and did not recall anyone referring to Ms. “W” as an “activist.” The Tribunal concludes that Applicant did not establish that her staff advocacy activities resulted in any institutional bias that adversely affected the review of her DRE complaint.

The methodology applied by the DRE review team in Applicant’s case

85. Ms. “W” advances two complaints in respect of the methodology adopted by the review team in her case. First, while she agrees that there was a “rebuttable presumption” of discrimination, she challenges the propriety of the effort to find elements of rebuttal, i.e. deficiencies in her performance that might explain her rate of promotion, contending that the manner in which this method was employed prejudiced the outcome of the review. Second, she maintains that statistical evidence suffices to establish that her Fund career was adversely affected by discrimination.

86. Applicant alleges bias in the approach taken by the review team, which she contends led it to focus not on elements of discrimination but on factors to rebut apparent discrimination, thereby distorting the review of her case. Applicant maintains that the DRE inquiry was prejudiced by the review team’s effort to ferret out possible skill deficits to seek to explain any career disparity between Ms. “W” and male economists. In Applicant’s view, evidence of unfair procedure is found in discrepancies between her written performance record and the reports of some of the interviews carried out by the team. Accordingly, Ms. “W” contends that the DRE process in her case led the review team wrongfully to characterize her as having a “forest-for-the-trees” problem in an effort to rebut the apparent disparity in her grade and salary vis-à-vis male economists.

87. The sustainability of the DRE’s findings in Applicant’s case is taken up in the following section. Whether the review team’s application of a “rebuttable presumption” of discrimination amounts to a failure of fair procedure will now be considered. It is essential to recall, as the Tribunal observed in Ms. “Y” (No. 2), that “[t]he hallmark of [the DRE] procedures was their flexibility....[h]ence, the procedures contemplated a considerable degree

of latitude for the review teams in undertaking their investigation” (Para. 55). As stated in the Memorandum to Staff from the Director of Administration, “Review of Individual Discrimination Cases,” August 28, 1996, “[t]he 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.”

88. Accordingly, the Tribunal takes note of the fact that Ms. “W” proffered to the DRE team no specific instances or acts of discrimination from which her Fund career had suffered. It was therefore understandable that the DRE team sought to find out whether there were other impedimenta to her career. The Tribunal concludes that the decision to proceed in this manner was within the leeway provided review teams under the procedures governing the review process, and there is no evidence that this particular methodology prejudiced the outcome of the review of Applicant’s case.

89. Finally, as for Ms. “W”’s complaint that statistics alone established her case of discrimination, for reasons earlier stated, the Tribunal cannot sustain the position of Ms. “W” that the review team subjected her complaint to unfair procedures by looking beyond statistical evidence in assessing her career advancement. The Tribunal has concluded *supra*, para. 21,²¹ that Respondent’s decision to base the DRE review of individual cases, including that of Ms. “W”, upon qualitative as well as statistical factors was not arbitrary, capricious or discriminatory. (*See also Ms. “Y” (No. 2)*, paras. 42-52, upholding the implementation of the DRE and its essential procedures as a valid “regulatory decision.”)

90. In sum, as to Applicant’s procedural allegations, the Tribunal concludes that the procedures applied by the Fund in the DRE review of Ms. “W”’s case were reasonable, appropriate and consistent with the DRE procedures and with the fair resolution of Applicant’s claim.

Sustainability of the findings and conclusions of the DRE review of Applicant’s case

91. Having concluded that the procedures applied to the DRE review of Applicant’s discrimination claim were fair and regular, the Tribunal turns to the sustainability of the review team’s findings and conclusions, as ratified by the Director of Administration in her decision of May 21, 1998.

92. In *Ms. “Y” (No. 2)*, para. 63, this Tribunal recognized, in the context of review of DRE cases, that an important element of the lawful exercise of discretionary authority with respect to individual administrative acts is that conclusions must not be arbitrary or capricious, but rather must be reasonably supported by evidence. Accordingly, the Tribunal concluded that it “... must satisfy itself that the contested decision is reasonably supported by evidence gathered by the DRE team.” *Ms. “Y” (No. 2)*, para. 66.²² In this case, Applicant

²¹ *See supra* Requests for Production of Documents.

²² As the Tribunal observed in *Ms. “Y” (No. 2)*, para. 64, a decision may be set aside if it

(continued)

challenges the sustainability of the two principal outcomes of the DRE review of her claim, i.e. the finding that her Fund career was not adversely affected by discrimination and the determination of a remedy for unfair or uneven treatment.

The finding of non-discrimination

93. Applicant maintains that the DRE review of her case failed to establish that factors other than discrimination resulted in Applicant's allegedly slower career progression, and, in addition, that the DRE review team expressly found that there had been disparate treatment between Ms. "W" and her male colleagues. Therefore, alleges Ms. "W", the conclusion of the DRE review team as ratified by the Director of Administration that Applicant's Fund career was not adversely affected by discrimination cannot be sustained.

94. As both parties accepted the proposition that, on the basis of earlier statistical studies of Fund employment, it was appropriate for the review team in Ms. "W"'s case to proceed from a "rebuttable presumption" of discrimination, the dispute as to the sustainability of the DRE's findings and conclusions concerns itself in part with whether the Fund indeed rebutted that presumption.

95. In testimony before the Grievance Committee, the Fund team member summarized the review team's findings:

"...the consistent themes in terms of Ms. ["W"]'s strengths were that she had exceptionally good quantitative skills, computer programming skills and data management skills and she had a tendency to rely too much on an enormous amount of data. But her area of weakness was her inability to analyze the data effectively in a systematic manner and to focus on the salient points and the critical points and finally, to basically connect those with the big picture.

“... rested on an error of fact or of law, or if some essential fact was overlooked ... or if clearly mistaken conclusions were drawn from the evidence.’ (*In re Durand-Smet (No. 4)*, ILOAT Judgment No. 2040 (2000), para. 5.) Review is also limited by the admonition that ‘... tribunals ... will not substitute their judgment for that of the competent organs. ...’ (Report of the Executive Board, p. 17.) As the World Bank Administrative Tribunal has recognized, ‘...in matters involving the exercise of discretion by the Bank, the Tribunal is not charged with the task of re-examining the substance of the Bank’s decision with a view to substituting the Tribunal’s decision for the Bank’s.’ (*Pierre de Raet v. IBRD*, WBAT Decision No. 85 (1989), para. 56.)”

So in essence, in my very first interview, what I discovered was the forest-for-the-trees problem and this was consistent in I think all but one of my interviews.”

The external team member’s testimony was that “things were mixed,” with some deficits and some strengths, but that the “notion that there were some deficits” led to the team to conclude that the presumption of discrimination had been overcome.

96. The Tribunal observes that the review team’s report presented the “forest-for-the-trees” problem as limited and one that had been largely overcome. The report emphasized that the “skill deficit” had been encountered in the “early period” of Ms. “W”’s career with the Fund and had “attenuated” since her transfer to “Department 3” (her most recent assignment as of the time of the DRE), noting that she had overcome at least some of the analytical shortcomings and that the issue was “...not mentioned in interviews with contacts who are keen observers of Ms. [“W”]’s recent career.” In addition, the review team noted that Ms. “W” “... appears not to have received the benefit of any doubts, and her skills deficits appear to have been magnified rather than minimized.”

97. Respondent maintains that the “forest-for-the-trees” problem was consistently noted by the review team in both the written record of the Applicant’s performance and in the team’s interviews. Applicant vigorously disputes this contention. In the view of the Tribunal, the conclusion reached by the DRE review team and ratified by the Director of Administration that factors other than discrimination affected Ms. “W”’s career progression is sustainable. Evidence of whether, in fact, Ms. “W”, especially earlier in her career, manifested inadequate analytical skill – in contrast to her undoubted quantitative strength – is mixed. It is not generally sustained by her annual performance reports. It finds some, but not consistent, support in the interviews conducted by the DRE team.

98. What may be more significant in Applicant’s failure to achieve promotion from Grade A14 to Grade A15 is the fact that a large proportion of the economists in Grade A14 are not promoted to Grade A15. Competition for Grade A15 positions is considerable. For an economist not to succeed in a few applications for promotion to Grade A15 is hardly evidence of discrimination; it is rather evidence of competition. *Cf. Nunberg*, para. 44 (“The argument that she was a strong performer, but had salary increases mainly in the satisfactory range, is inconclusive to show discrimination without other data relevant to salary determination, such as peer comparisons and budgetary constraints.”) According to Respondent’s pleadings in this case, more than half of Fund economists hold Ph.D. degrees, a credential which Applicant does not possess. In addition, a “bottleneck” affects professional staff at the A14 level because the number of A15 positions in each economic department normally cannot exceed the number of divisions plus one. The Diversity Advisor emphasized in her testimony before the Grievance Committee that the number of A15 positions is extremely limited and only a few staff are promoted to that grade. Accordingly, the fact of non-advancement is not proof of discrimination.

99. Applicant further maintains that the DRE finding of non-discrimination is not sustainable because the review team made an express finding of disparate treatment. She notes that the review team reported differences in treatment of Ms. “W” based on gender, in particular, as stated in its report, that there were “...indications that she was treated differently from her male colleagues,” and that in her first assignment she was “not given prime assignments” in a Department that in the team’s view was “...known at the time as not having a good record for promoting women....”

100. Respondent in its pleadings before the Tribunal contends that Applicant has not presented any probative evidence that her early career at the Fund had been adversely affected by gender discrimination and that the review team appropriately concluded that her career had been hampered instead by poor management. The Tribunal observes, however, that the Fund team member in her Grievance Committee testimony acknowledged the review team’s concern that the Department to which Applicant initially was assigned had a record of not promoting women.

101. Finally, in assessing the sustainability of the DRE’s finding of non-discrimination in Ms. “W”’s case, it is appropriate to consider how Applicant fared in the DRE process as compared with other complainants, as well as to understand the particular terminology employed in the DRE. As reported in the Consultants’ Report compiled at the conclusion of the Discrimination Review Exercise, “indications of unfair or uneven treatment” were found in approximately half of the cases reviewed. Ms. “W”’s was apparently one of these cases. Hence, while the DRE did not conclude that Applicant’s career had been affected by “discrimination,” it appears to have found that she experienced “unfair or uneven treatment” warranting remedial action within the parameters of the Discrimination Review Exercise. It is well in this regard to recall that the table reporting DRE outcomes did not include a category titled “discrimination” and noted that only in a “small number of cases” was there “clear evidence of discrimination.” The reluctance to ascribe “discrimination” to very many of the cases is, in turn, explained in the Consultants’ Report on the ground that “the discrimination review exercise was not designed to prove the presence or absence of discrimination to a high legal standard” in recognition of the evidentiary limitations of the exercise. What is significant, therefore, is that Applicant was awarded a remedy through the DRE process, although in her case, as in most others in which some remedial action was granted, no specific finding of “discrimination” was made.

102. Accordingly, the Tribunal is able to sustain the conclusion of non-discrimination in the case of Ms. “W” on the following basis. First, relief was awarded to Applicant for “unfair or uneven treatment.” In granting Applicant a remedy through the DRE process, it may be said that the Director of Administration gave weight to the finding of the review team that there were indications that in her early Fund career Ms. “W” was treated differently from male colleagues and skill deficits were unfairly magnified. Second, the DRE by its nature and terms was not designed to determine “discrimination” to a legal standard. Finally, the

Tribunal is mindful of the limited depth of its review of cases arising through the DRE²³ and holds that it was not arbitrary or capricious for the Fund to conclude as a result of the DRE review of Ms. “W”’s complaint that her career was not adversely affected by discrimination.

The remedy granted Applicant through the DRE process

103. Applicant disputes the adequacy of the remedy awarded her as a result of the DRE process, i.e. a 6.5 percent salary adjustment and career development assistance. Applicant maintains that this remedy was inadequate primarily because it did not include the promotion to which she claimed she was entitled on the basis of the statistical analysis included in her request for DRE review.

104. Applicant contends that the external team member in the feedback meeting with her had indicated that a promotion of one grade level within one year would be part of the remedial action in her case. It is a matter of factual dispute as to whether the team member so indicated. Ms. “W” has testified that he did and puts forward as support her handwritten notes of the meeting. The team member, by contrast, testified that he did not recall whether or not he had made such a recommendation. What is essential to consider, however, is, irrespective of whether such recommendation was proposed by the external team member, was there any abuse of discretion on the part of the Fund, i.e. in the decision of the Director of Administration, in selecting the remedy that was selected.

105. The Consultants’ Report prepared at the conclusion of the Discrimination Review Exercise indicated that the outside consultants “suggested” remedial action on a case-by-case basis, but that remedies were limited by a number of factors (*see infra*). The external consultant in Ms. “W”’s case noted that determination of a remedy was subject to the cross-checking process among the larger group of review members, as earlier described.²⁴ Moreover, as emphasized by the ADM Assistant Director, “...in the end, the director of Administration was the person taking decisions, the consultants were advisory, so...[the Director of Administration] would have been able to have overruled a recommendation.”

²³ As the Tribunal held in Ms. “Y” (No. 2), para. 41:

“At the same time, since the Applicant challenges the...decision of the Director of Administration upholding the conclusion of the DRE that the Applicant’s career was not adversely affected by discrimination, examination of that conclusion necessarily entails some consideration of whether the Applicant’s career did suffer discrimination. That consideration may be distinguished, however, from the *de novo* examination by the Tribunal of the underlying claims...”

²⁴ *See supra* Consideration of the Issues of the Case; Procedural Allegations; Influence of the Administration Department and its Assistant Director.

106. A significant constraint on the award of remedies pursuant to the DRE was that they were to fall within the confines of the Fund's human resources policies. The Memorandum of January 13, 1997 announcing the parameters of the DRE to the staff stated: "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." (*See also* Consultants' Report, pp. 4-5.) The ADM Assistant Director likewise confirmed that the most important guidance given to the review teams with respect to remedies was that they "...fall within the framework of the human resources policy that existed in the Fund...." In his view, these policies "...precluded making a recommendation that someone be...promoted outright from A14 to A15" because the new position would involve different job content. Such promotions, he testified, were to be distinguished from "career progression" promotions, which could be taken as a result of the DRE. According to the ADM Assistant Director, "[w]hen promotions involved changes in job content...titled positions, supervisory positions, the director of Administration did not make any such decision to effect a promotion as a result of a recommendation made by the review team under the DRE."²⁵

107. The Consultants' Report also identified additional factors that might affect the recommendation of remedies in particular cases, including, "... (1) promotion opportunities; (2) applicants' current competitiveness for job openings; (3) budgetary constraints; (4) time-in-grade requirements; and (5) the promotion procedures of the review committees." (p. 5.) The limited opportunities for promotion to A15 have earlier been considered.²⁶ Moreover, in Applicant's case, the review team seems to have drawn the conclusion that Ms. "W" was not, at the time of the review, competitive for an A15 position because further skill development and assessment were required. Accordingly, the review team determined not to recommend an outright promotion and the Director of Administration concurred with that recommendation. The team recommended rather that Applicant "...be provided with supervisory responsibilities to assess her management skills, and other assignments to develop and assess her writing skills. If she did well, Ms. ["W"] was encouraged to apply for A15 vacancies in ["Department 3"] and elsewhere with support from ADM for her applications."²⁷

²⁵ Cf. Ms. "Y" (No. 2), para 69 (noting as to Ms. "Y"'s complaint of discrimination in the grading of her position that the review team found a "clear demarcation" between A11 and A12 in the editorial stream, supporting the view that the grading of Ms. "Y"'s position had not been adversely affected by discrimination).

²⁶ *See supra* Consideration of the Issues of the Case; Sustainability of the findings and conclusions of the DRE review of Applicant's case; The finding of non-discrimination.

²⁷ Ms. "W" does not challenge the appropriateness of the remedy of career development assistance; however, she does contend that Respondent has failed to implement such remedial action. *See infra* Consideration of the Issues of the Case; Implementation of remedial action pursuant to the DRE, alleged improper use of the DRE report, and contentions of continuing discrimination.

108. It may also be recalled that, in summarizing the outcomes of the DRE exercise, the Consultants' Report highlighted that in relatively few cases was outright promotion prescribed as a remedial action:

“In 17 of these 35 candidates for whom there was an indication of unfair or uneven treatment, the primary remedial outcome of the review was a promotion. In some of these 17 cases, the staff member was already in the process of obtaining a sought after promotion during the course of the discrimination review exercise and there was no support or intervention from management or ADM to help bring about the promotion. In other cases, such promotions took place largely as a result of internal market forces but with some support provided by management or the ADM. In yet other of these 17 cases, the promotion came about as a direct result of a specific decision taken by management and/or ADM outside the framework of the normal internal market.”

Id., pp. 6-7.

109. The Tribunal concludes that the evidence does not show that Ms. “W” was ever promised promotion as a remedy in the DRE process. Even if, as she alleges, promotion within one year was suggested by the external team member, it was well within the discretion of the Administration Department to decline to accept that recommendation. Nor would it have been arbitrary or capricious to do so in light of prevailing personnel policies and the relative scarcity of Grade A15 economist positions within the Fund.

110. As to the extent of the salary adjustment, the Tribunal concludes that this too was rationally based. As explained in its report, the review team recommended a one-time salary increase of 6.5 percent, representing “...the difference in salary between Ms. [“W”]’s current salary and the average salary of economists in the 50-52 year old range,” and this recommendation was adopted by the Director of Administration. Applicant, who had sought a greater salary increase in her request for DRE review, has challenged the Fund’s selection of comparators, alleging that the appropriate use of statistics would establish that she was entitled to promotion as well as salary adjustment. The Tribunal has ruled against Ms. “W”’s argument insofar as it relates to promotion. (*See supra*, para. 21). As to the extent of salary adjustment, the DRE team members, having determined on the basis of qualitative evidence that Applicant was not entitled to a promotion, reasonably drew comparators for the purpose of reviewing salary levels from within Ms. “W”’s grade of A14.

111. Additionally, the Tribunal observes that by taking age as a proxy for experience, an approach which testimony suggested had been used in other DRE cases, Respondent afforded Ms. “W” the benefit of the doubt with respect to the salary adjustment. As stated in the transmittal note from the Assistant Director of Administration:

“Among the non-discriminatory reasons why [Ms. “W”]’s salary is below the norm of her age group are that [Ms. “W”] was 29 when she started to study economics and had fewer years of relevant work experience than most who join at 35. In terms of total years of relevant work experience, [Ms. “W”] compares more closely with those in a 46-47 year old age group where her salary is much closer to the norm.”

Furthermore, the data reveal that for the majority of the 50-52 year-old A14 senior economists, a Ph.D. is recorded as the highest degree attained whereas Applicant’s highest degree is a master’s degree. It is also notable that the A14 senior economists span a considerable range of ages, from 33 to 64. In view of all of the foregoing factors, the Tribunal concludes that the determination of the salary adjustment was not arbitrary or capricious.

112. Finally, Applicant also has asserted that the remedy in her case was consistent with a pattern of gender discrimination in the outcome of the DRE exercise generally, contending that remedies disproportionately benefited male complainants. No support emerged for this contention, which was vigorously disputed by the review team members. Moreover, the Tribunal, for reasons earlier stated (*supra*, para. 28), has held that DRE outcomes would not be probative of discrimination in the DRE process in general or as applied in Applicant’s case.

113. The remedy of a salary adjustment and career development assistance, but not promotion, has been challenged by Ms. “W” as not supported by the evidence and as inadequate. The Tribunal concludes that the Fund, having reasonably found, pursuant to the procedures afforded by the DRE, that Applicant’s career was not adversely affected by discrimination but that her initial assignment may have hampered her career progression and that skill deficits may have been magnified, made a sustainable decision in the reasonable exercise of its managerial discretion to grant Applicant a remedy of a 6.5 percent salary adjustment and career assistance to strengthen her ability to compete for positions at the next grade level but to deny Applicant’s request for promotion.

Implementation of remedial action pursuant to the DRE, alleged improper use of the DRE report, and contentions of continuing discrimination

114. In addition to challenging the procedures undertaken in the review of her DRE complaint and the sustainability of the review team’s conclusions, Applicant further alleges that the Fund has failed to implement the career development measures that were part of the remedial action prescribed in her case, improperly used the DRE report to deny her a promotion, and continues to discriminate against Applicant on the basis of her gender. Respondent contests the admissibility of these claims before the Administrative Tribunal and asserts that these contentions, in any event, are without merit.

Admissibility

115. The Fund maintains that because each of these latter complaints arose following Ms. “W”’s initiation of administrative review of the May 21, 1998 decision of the Director of Administration they are not ripe for consideration by the Administrative Tribunal. Applicant counters that these allegations are “intimately related” to her challenge to the DRE decision and are therefore cognizable by the Tribunal in this case.

116. The IMFAT on a number of occasions has emphasized the importance of the requirement of Article V²⁸ of the Statute that an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review. As explained in the Commentary on the Statute, “...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.” (Report of the Executive Board, p. 23.) *See Ms. “J”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 82. As the Tribunal observed in *Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66, “[t]he requirement for exhaustion of remedies serves the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.” *See also Ms. “Y”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42 (“...it is the view of the Tribunal that exhaustion of the remedies provided by the Grievance Committee, where they exist, is statutorily required... 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.”)

117. Likewise, the Administrative Tribunal has looked to what decision or decisions have been the subject of prior administrative review in determining the administrative act(s) to be subjected to the Tribunal’s consideration. *See Ms. “Y” (No. 2)*, para. 36; *Ms. “J”*, para. 84. In *Ms. “J”*, the Tribunal rejected the argument that an applicant could raise before the Administrative Tribunal contentions relating to her medical separation from the Fund where the only exhaustion of administrative review undertaken by the applicant was of a decision under the Staff Retirement Plan to deny her request for disability retirement. While the applicant in that case claimed that the two matters were closely allied, the Fund pointed out that the two involved separate decision makers and separate channels of administrative review; the applicant had taken none of the steps required for review of the medical separation claim pursuant to GAO No. 31. While the Tribunal in *Ms. “J”* expressed “some

²⁸ Article V, Section 1 provides:

“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.”

sympathy” for the applicant’s argument given the “intersecting nature” of her various claims, it observed that “[t]he fact remains that Ms. “J” did not attempt to exhaust her remedies in the Grievance Committee.” “Moreover, and in any event,” the Tribunal concluded, “it is difficult to see what material interest Ms. “J” has in challenging at this stage the separation procedures and their issue, in view of the fact that separation has been effected and that she unreservedly accepted its financial benefits.” Accordingly, the Tribunal confined its consideration in Ms. “J” to the challenge to the Staff Retirement Plan’s decision on disability retirement. (Para. 89.)

118. The case of Ms. “W” requires the Tribunal to consider whether Applicant has met the requirements of Article V in challenging before the Administrative Tribunal matters related to the implementation of the May 21, 1998 decision of the Director of Administration that arose following her initiation of administrative review of that decision. The Tribunal considers the following factors to be determinative. Applicant’s additional contentions, i.e. that the Fund failed to implement fully the remedial action granted under the DRE process and improperly used the review team’s report to influence the denial of a promotion, arose in the unique circumstance of the pendency of a complex review procedure, including voluntary mediation, designed to achieve a final resolution of the DRE complaints. This procedure ensued after Applicant lodged her Grievance with the Fund’s Grievance Committee.²⁹ Moreover, the Grievance Committee, during its subsequent hearings in Ms. “W”’s case, admitted testimony as to the allegations that she now seeks to raise before the Tribunal, allegations that were closely related to but nonetheless postdated the Grievance. The Tribunal accordingly has the benefit of this evidentiary record and the parties have had the opportunity to settle their claims, thereby fulfilling policies underlying the requirement for exhaustion of administrative review.

119. For the foregoing reasons, the Tribunal finds no difficulty in now passing upon Applicant’s further allegations as to the implementation of the remedy and the use of the DRE report insofar as they are a) closely linked with the challenge to the DRE decision itself and b) have been given some measure of review in the context of a procedure intended to give finality to longstanding claims.

120. As for Applicant’s more generalized allegation of “continuing” discrimination, however, the Tribunal concludes that it is not admissible, and, in any event, that Applicant has put forward no evidence to support it. The Tribunal observes that in Mr. “F”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), it reviewed allegations that an applicant had been subjected to incidents of religious hostility over the course of his career and, citing the Fund’s Discrimination Policy, posed the legal question as “...whether Applicant has shown that he has been subjected to 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

²⁹ See *supra* The Channels of Administrative Review.

of fair and impartial treatment.’ (Discrimination Policy, July 3, 2003, p. 4).” (Para 90.) The Tribunal in Mr. “F” accordingly took cognizance of a pattern of conduct where separate administrative review had not been undertaken as to each individual act. The case of Mr. “F” may be distinguished, however, from the present case because the discriminatory conduct alleged by Mr. “F” had taken place prior to, rather than following, the initiation of administrative review procedures under GAO No. 31.

121. Moreover, in view of the conclusion in Ms. “Y” (No. 2), para. 39, that the scope of the Tribunal’s review of DRE cases is limited and that the Tribunal may not examine underlying contentions of discrimination raised in the DRE *as if* they had been pursued through the steps required under GAO No. 31 (*see supra*, para. 65), there can be no ground for the Tribunal to find jurisdiction to review, as part of a challenge to a DRE decision, discrimination claims arising after the conclusion of the DRE process, based upon any theory of “continuing” discrimination. As the Tribunal observed in Ms. “Y” (No. 2), “...while the Fund as part of its human resource functions may have created an alternative dispute resolution mechanism to remedy instances of past discrimination stretching beyond statutory bars and not previously raised through administrative review, the Administrative Tribunal, as a judicial body, remains controlled by its Statute.” (Ms. “Y” (No. 2), para. 40.) Accordingly, the Administrative Tribunal will not consider the generalized of allegation of Ms. “W” that she continues to be subjected to gender discrimination.

Implementation of remedial action and alleged improper use of DRE report

122. As earlier noted, remedial action in Applicant’s case encompassed two components, a salary adjustment and career development assistance. It is not disputed that the 6.5 salary increase was implemented. Applicant does dispute, however, that career development assistance, as set out in the Director of Administration’s decision letter of May 21, 1998, has been effected. That decision provided in part:

“As indicated in my earlier note to the staff-at-large, in cases where it appears there may have been unfair or uneven treatment, the review will not be an end in itself but just the beginning of a process for identifying opportunities. In your case, efforts will be made to identify assignments for you that further develop and assess your analytical, writing, and supervisory skills. The objective will be to help strengthen your ability to compete for positions at the Grade A15 level.”

In Applicant’s view:

“I have never had – since the final interview, I have never had one call or one conversation whatsoever on follow-up on the results of the DRE. My personal feeling is that [the] Administration Department has done the opposite; that is, by giving things like the

DRE summary to my SPM, they have had the opposite effect of really hurting my career.”

123. In his testimony before the Grievance Committee, the Assistant Director of Administration characterized the nature of career development assistance resulting from the DRE as driven primarily by market forces:

“...I think we were hoping in the Human Resources Department that in cases like Ms. [“W”]’s, where the review team had made the recommendation that it did, that the Human Resources Department and the staff member’s department would help support...those market forces.

I mean to give you an example of that, I recall making some phone calls to departments, encouraging them to interview staff who had applied for vacancies at the A15 level, maybe at the A9 level for a support staff member with a similar recommendation....So there was some effort to try to influence the market, but the market forces were still the predominant ones.”

124. As to the particular case of Ms. “W”, the Assistant Director of ADM testified to a discussion with the front office in “Department 3” that was “...focused on the issue of implementing one of the recommendations of the review team, which was to give Ms. [“W”]...an opportunity to compete for positions at the A15 level in [“Department 3”] and giving her assignments that might support that process of her being assessed and reviewed and putting her perhaps in a more favorable position to compete for senior level positions in [“Department 3”].” He reported that the front office was “...very positive about wanting to give Ms. [“W”] ...every opportunity to compete.” He did not recall any specific vacancy for which Ms. “W” may have applied.

125. The Senior Personnel Manager (SPM) of “Department 3” testified to having been told that Ms. “W” should be given an opportunity to demonstrate her abilities. The SPM recalled Ms. “W”’s having applied for two A15 positions, one in 1999 and one in 2000. For the first position, the SPM testified, Applicant “was judged not to have proven sufficient analytical skills for the A15 level.” The second position was filled by another woman in the Department. The SPM further testified that Applicant was given “stretch” assignments, such as policy work and mission opportunities to broaden her experience, and that Ms. “W”’s move to “Department 4” “...was seen as giving her the opportunity to further demonstrate her skills....”

126. As to Ms. “W”’s allegation that the Fund has failed to implement fully the remedial action accorded her, the record indicates that Ms. “W” has been given assignments, such as mission assignments as well as her current Resident Representative post, in which she can demonstrate her analytical capacities and managerial aptitude. The Tribunal therefore

declines to accept the contention that Applicant has not received the career development assistance contemplated by the DRE remedy.

127. Finally, Applicant contends that the Fund improperly used the report of the DRE review team to influence the denial of a promotion for which she applied in her then Department. It is not disputed that in September 1999 a copy of the review team's report was transmitted by an Administration Department official to the Senior Personnel Manager. Applicant maintains that the report is inherently prejudicial in emphasizing the "skill deficits" that the DRE review team concluded had rebutted the statistical presumption of discrimination and that its contents influenced the judgment of the SPM.

128. As the Tribunal earlier has observed, *supra* para. 96, the review team's report presented the "forest-for-the-trees" problem as limited and one that had been largely overcome. Moreover, the SPM testified that the report was not shared with others and denied that it carried any weight in the SPM's own assessment of Applicant's competencies. Instead the SPM cited concerns independent of those reflected in the DRE report as to whether Applicant at the time demonstrated readiness for advancement to Grade A15. For example, the SPM testified to a mission assessment that suggested that Applicant's skills would benefit from more exposure to analytical policy work.

129. The Tribunal accordingly finds that Applicant has not established that the DRE report was used to deny her a promotion. It is not proven that disclosure of the report to the Senior Personnel Manager of Applicant's department was the factor or even a factor in Applicant's failure to be granted a promotion. The competition governing promotion to Grade A15 has been set out above, *see supra* para. 98. As the Tribunal has observed, for an economist not to succeed in a few applications for promotion to Grade A15 is hardly evidence of discrimination. Nor is it evidence of failure on the part of the Fund to carry out career development assistance granted as a result of the Discrimination Review Exercise, assistance which is subject to "market forces." Additionally, it is of more than incidental interest that in the case of one of the applications Ms. "W" made to an A15 post, the successful candidate was a woman. In any event, Ms. "W" appears currently to enjoy the confidence of the Fund's administration to discharge increased responsibilities, as indicated by her appointment as a Resident Representative.

130. For the foregoing reasons, the Tribunal concludes that Applicant has not succeeded on her claims that the Fund has failed to implement the career development assistance granted as a remedy in the DRE or that it has used the DRE report to influence negatively Ms. "W"'s prospects of advancement in her Fund career.

Decision

FOR THESE REASONS

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

The Application of Ms. “W” is denied.

Stephen M. Schwebel, President

Michel Gentot, Associate Judge

Agustín Gordillo, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
November 17, 2005