

# ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

## JUDGMENT No. 2006-2

### Ms. "T", Applicant v. International Monetary Fund, Respondent

#### Introduction

1. On February 13, 14 and 15, 2006, the Administrative Tribunal of the International Monetary Fund, composed of Judge Stephen M. Schwebel, President, and Judges Nisuke Ando and Michel Gentot, Associate Judges, met to adjudge the case brought against the International Monetary Fund by Ms. "T", a former staff member of the Fund. It gave final consideration to its Judgment and adopted it on June 7, 2006.
2. Applicant contests the decision of the Fund not to convert her fixed-term appointment to a regular staff position. Applicant contends that the decision failed to take account of all of the relevant evidence and therefore was arbitrary, capricious and an abuse of discretion. Additionally, Applicant maintains that the non-conversion decision was marked by procedural irregularities, that the Fund had created an expectation of conversion and "mismanaged" her career, and that the decision not to convert her appointment represented discrimination on the basis of race and nationality.
3. Respondent, for its part, maintains that the decision not to convert Applicant's fixed-term appointment to a regular staff position was a reasonable exercise of managerial discretion, carried out consistently with the Fund's internal law and supported by the relevant evidence. In the Fund's view, Applicant, despite regular feedback and monitoring, failed to achieve the level of performance and potential for a Fund career required for conversion to regular staff. The Fund denies that the non-conversion decision was affected by either procedural irregularities or discrimination.

#### The Procedure

4. On April 13, 2004, Ms. "T" filed her Application with the Administrative Tribunal. In accordance with the Tribunal's Rules of Procedure, the Application was transmitted to Respondent on April 15, 2004, and on April 19, 2004, pursuant to Rule XIV, para. 4<sup>1</sup> of the

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<sup>1</sup> Rule XIV provides in part:

"4. 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

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Rules of Procedure, the Registrar issued a summary of the Application within the Fund. On June 1, 2004, Respondent filed its Answer to Ms. “T”’s Application. Applicant submitted her Reply on July 2, 2004. The Fund’s Rejoinder was filed on August 5, 2004. On January 25, 2006, Applicant submitted a statement of her legal costs, for which she had requested reimbursement in the Application. Pursuant to his authority under Rule XXI, para. 3,<sup>2</sup> the President directed that the statement be transmitted to the Fund for its observations, which were submitted on February 13, 2006.

5. 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.<sup>3</sup> The Tribunal had the benefit of a transcript of oral hearings before the Grievance Committee at which Applicant and other witnesses 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

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

1. Any and all documents relating to performance standards for Fund Staff Assistants from 1999 until the date of Applicant’s separation;
2. Any and all documents evidencing any actions by Respondent to share with Applicant any of the documents produced in response to point 1 above;
3. Any and all documents relating to managerial responsibilities for the professional development of subordinates including but not limited to training materials for managers or supervisors, guidelines and manuals, and documents relating to the monitoring of fixed-term appointed staff;

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application, without disclosing the name of the Applicant, for circulation within the Fund.”

<sup>2</sup> Rule XXI, para. 3 provides:

“The Tribunal or, when the Tribunal is not in session, the President may deal with any matter not expressly provided for in the present Rules.”

<sup>3</sup> 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. Any and all documents relating to or evidencing any action Respondent may have taken as it relates to developing Applicant's skills for a career with the Fund;
5. Any and all documents that describe the differences or similarities between the functions/responsibilities of a member of the Secretarial Support Group and the functions/responsibilities of a Staff Assistant;
6. Any and all documents relating to the diversity (e.g., race, nationality, gender) of ["Department 1"]<sup>4</sup> from 1999 until the date of Applicant's separation; and
7. Any and all communications regarding Applicant among ["Department 1"] personnel including but not limited to specified persons.

In accordance with Rule XVII<sup>5</sup> of the Tribunal's Rules of Procedure, Respondent was provided the opportunity to present its observations on the matter, as both parties exchanged views in their subsequent pleadings as to whether the document requests should be granted. Following consideration of the views of the parties, the Administrative Tribunal, meeting in session, decided on December 7, 2005 to deny each of these requests on the following grounds.

7. As to Requests 1, 2, 4, 5, 6, and 7, the Fund responded that all responsive documents were provided to Applicant during the Grievance proceedings. Applicant proffered no evidence

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<sup>4</sup> In accordance with the Administrative Tribunal's policy on protection of privacy, adopted in 1997, the departments and divisions of the Fund will be referred to herein by numerals, except where such reference would prejudice the comprehensibility of the Tribunal's Judgment.

<sup>5</sup> Rule XVII provides:

*"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.
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."

to suggest that the Fund had in its possession additional responsive documents. Accordingly, these requests were denied on the basis that Applicant had not shown that she had been denied access to documents by the Fund. (Rule XVII, para. 1.) *See Ms. "W", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 14.

8. As to Request 3, for "[a]ny and all documents relating to managerial responsibilities for the professional development of subordinates..." Respondent partially satisfied the Request while objecting to the Request insofar as it sought guidance materials for managers relating specifically to performance issues of regular staff members. The Fund contended that such documents are not relevant to assessing the legality of a decision concerning the conversion of a fixed-term staff member. The Tribunal sustains the Fund's objection that such documents are not relevant to the issues of the case of Ms. "T".

### The Factual Background of the Case

9. The relevant factual background may be summarized as follows. Additional factual elements will be included in the consideration of the issues of the case.

10. Applicant was first employed by the Fund beginning in July 1997 as a contractual employee<sup>6</sup> to serve as a Staff Assistant in the Secretarial Support Group (SSG). Following two years in that capacity, Applicant was appointed as a fixed-term staff member at the end of September 1999, in accordance with GAO No. 3, Rev. 6 (May 1, 1989) (Employment of Staff Members), which governed during the period of her employment.<sup>7</sup>

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<sup>6</sup> Contractual employees are distinguished, under the Fund's internal law, from staff members. *See generally Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999).

<sup>7</sup> GAO No. 3, Rev. 6 provided for two types of staff appointments, regular and fixed-term:

*"Section 3. Types of Appointments*

*3.01 Regular Appointments.* Regular appointments shall be appointments for an indefinite period. Persons holding such appointments shall be designated as regular staff members.

*3.02 Fixed-term Appointments.* Fixed-term appointments shall be appointments for a specified period of time. Persons holding fixed-term appointments shall be designated as fixed-term staff members."

GAO No. 3, Rev. 6 was superseded by GAO No. 3, Rev. 7 (May 1, 2003), which provides for fixed-term appointments as follows:

*"3.02 Types of Staff Appointments*

*3.02.1 Open-ended appointments*

....

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11. Applicant's letter of fixed-term appointment explained that the appointment was for a two-year period commencing on October 5, 1999 and would be probationary for the first six months. The letter advised Ms. "T" that, as a staff member on fixed-term appointment, she would be subject to the Guidelines for Fixed-Term Appointments (1995), which were enclosed with the correspondence.

12. Applicant was appointed to serve as a Staff Assistant in "Department 1" and was initially assigned to work in "Division i" of that Department, in which she functioned as one of two Assistants. Three months after Ms. "T"'s beginning that assignment, the Administrative Officer (AO) of the Department alerted the Division Chief that the Administrative Assistant had given Applicant a "not very good evaluation of the past three months. We need to meet and discuss this issue and then meet with [Ms. "T"] to keep her informed." The following month, in February 2000, Ms. "T" was transferred to "Division ii." At the conclusion of her assignment with "Division i," the Chief of that Division and the AO held a feedback session with Ms. "T", the substance of which was recorded in a memorandum of January 12, 2001 from the "Division i"

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3.02.1.2 Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment. Persons holding fixed-term appointments shall be designated as fixed-term staff members.

3.02.1.3 If fixed-term staff members meet the performance requirements, demonstrate potential for a career at the Fund, and meet the Fund's staffing requirement, their appointment may be converted from fixed-term to open-ended status at the expiration of the fixed-term appointment. Persons holding open-ended appointments shall be designated as regular staff members.

3.02.1.4 Staff recruited to fill senior level positions (Grades B3–B5) shall receive three- to five-year fixed-term staff appointments. After completion of the initial fixed-term appointment, these appointments may be renewed without limit for fixed-term periods up to five years up to mandatory retirement age, or converted to open-ended appointments.

3.02.1.5 Staff who rejoin the Fund may, at the discretion of the Fund, be offered an open-ended appointment without first having to complete successfully a fixed-term appointment, provided that they were regular staff at the time they separated from the Fund. This provision shall not apply to former staff members who are appointed to B3–B5 positions.

3.02.2 *Limited-term appointments*

...."

The present Application is governed by GAO No. 3, Rev. 6 and the Guidelines for Fixed-Term Appointments (August 1995), *see infra*.

Chief to the “Division ii” Chief in conjunction with the preparation of Applicant’s Anniversary Annual Performance Report (*see infra*). The “Division i” Chief reported that he had conveyed to Ms. “T” in February 2000 a number of points regarding shortcomings in her technological skills and work methods. He further reported that, in response, Applicant had noted that she found the Administrative Assistant to be “too busy and uncooperative” to provide the guidance Ms. “T” required as a newcomer to the Department and Division, and that she looked forward to the transfer to “Division ii,” which “seemed to be a less pressurized environment.”

13. At the conclusion of the standard six-month probationary period, the Administrative Officer queried the Division Chief of “Division ii” as to whether Ms. “T” should be confirmed. The Division Chief advised by email of April 4, 2000:

“[The Administrative Assistant of “Division ii”] confirmed that [Ms. “T”] was a slow worker, and a slow learner. However, her attitude is positive, she is trying, and she is making progress. [The Administrative Assistant of “Division ii”] is hopeful that she will pull through. Based on this, perhaps we should go ahead and confirm, and see how it works out. I find her helpful and good in the division.”

On June 23, 2000, the Administrative Officer reported to the Human Resources Department (HRD) that “Department 1” was “... pleased with Ms. [“T”]’s performance and would like her appointment to be confirmed.” On that same date, Applicant was informed by HRD that she had successfully completed the probationary period.

14. In August 2000, the Chief of “Division ii” took up a new assignment within the Fund, and the Division Chief under whom Ms. “T” formerly had served in “Division i” became the new Chief of “Division ii.” Applicant’s Anniversary Annual Performance Report (Anniversary APR), covering the period October 7, 1999 – October 7, 2000, was signed by and included comments from both Division Chiefs who had supervised Ms. “T” during the first year of her two-year fixed-term appointment. With respect to Applicant’s initial assignment in “Division i,” the Division Chief observed: “... despite her previous Fund experience, she appeared to lack the knowledge of standard Fund procedures and technical know-how usually expected of assistants.” As for her subsequent work in “Division ii,” the initial Chief of that Division noted: “... she did make an effort to improve her performance.... [n]evertheless, there remained scope for improving the speed and quality of her work.”

15. Applicant’s Performance Plan, as recorded in the Anniversary APR, was to “improve technical skills” through training and division work and to “show greater initiative” by taking full responsibility during the Administrative Assistant’s absence in January/February. In addition, the Performance Plan referenced an attached listing of eleven areas for development, which included both technological and work management objectives. These included, for example, the “[n]eed to improve technological skills – particularly more complex documents, boxes, Excel tables, and charts,” and to “[a]ttend to routine work without delay and without having to be reminded (e.g., filing, mail, BRS, mission leave schedule, weekly list).”

16. In summarizing the Anniversary APR discussion of January 19, 2001, in which both Division Chiefs and the Administrative Officer participated with Ms. "T", the initial "Division ii" Chief "... reiterated that the improvement in Ms. ["T"]'s performance over the last year indicated potential to reach the level necessary for satisfactory performance, but this needed to be clearly demonstrated in the coming months before a decision on conversion of her contract could be reached."

17. For her part, Ms. "T" recorded above her signature of March 9, 2001 on the Anniversary APR that she was "... shocked that my performance had been [rated] at a low level. It was the first time, since February 2000, that anyone told me that I was not performing at the level of an assistant of my grade." Memoranda of early 2001 reflect that Applicant conveyed a similar reaction to the Senior Personnel Manager (SPM) of the Department following the January Anniversary APR discussions. On January 31, 2001, the SPM reported to both Division Chiefs and the AO that Ms. "T" had visited her office, contending that she had received inadequate feedback from supervisors and alleging that such treatment was the result of discrimination. The SPM took exception to these allegations and offered to see how areas identified for improvement could be communicated more clearly to Applicant.

18. According to a Memorandum for Files of February 16, 2001 from the "Division ii" Administrative Assistant, a follow-up meeting was held in which the SPM reviewed with Ms. "T" the Performance Plan, including thirteen points for development, and noted as well that feedback was given "on an ongoing basis," for example, when Ms. "T" was told to follow through on assignments. The SPM communicated to Ms. "T" the possibility of extending the period of her fixed-term by six months, transferring her to another Division and providing as a mentor an officer of the Human Resources Department with whom Applicant had had a favorable working relationship during her earlier period of contractual service with the Fund. Each of these proposals was later implemented.

19. Applicant further conveyed her concerns regarding the appraisal of her performance to the Department Head, who recorded above his signature of March 2, 2000 to the Anniversary APR the Department's decision to extend Applicant's appointment by six months:

"Ms. ["T"] has expressed to me her concerns regarding her performance assessment. I have reassured her that [the Department] remains committed to giving her a fair chance through a fair process. Reflecting that commitment of the department, it has been agreed to extend her fixed-term appointment by six months, in order to provide her with an opportunity to demonstrate that she meets the requisite standards to become a regular staff member in the department. The outcome will, however, depend on her performance and her efforts to address the areas identified for improvement."

Accordingly, an Expiration of Fixed-Term Appointment form was signed on March 9, 2001, formalizing the extension of Applicant's appointment through April 3, 2002 and referencing the assessment of Ms. "T"'s performance as set out in the Anniversary APR:

**“In the case of an extension, please explain reasons and, when applicable, what aspects of performance will be monitored and how the staff member will be assisted in meeting the requirements.**

Please see attached first anniversary APR and memo enumerating areas for development.

The division chief, admin assistant and AO will meet with Ms. ["T"] every month to provide her feedback on areas requiring attention.

Ms. .... of SDD [Staff Development Division of HRD] will be her mentor during the next six months and will be kept informed of her progress.

A decision will be made at the end of September whether to convert Ms. ["T"] or let her term expire.”

20. In March 2001, Applicant transferred to “Division iii” of the Department, which according to the testimony of the SPM was to provide Applicant with a “supportive environment.” The Deputy Chief of “Division iii” had provided a favorable review of Applicant's performance on a mission he had headed while Applicant was still assigned to “Division ii” in November 2000. In a Memorandum of February 8, 2001 to the AO, he described Ms. “T”'s mission performance as follows:

“Ms. ["T"]'s overall performance on the mission was very good.... The mission was very busy.... She organized her work well, pushing others also to meet deadlines, and everything went smoothly.... Minutes, tables, matrices, and the concluding statement were all typed/revised/distributed well.

I found her original drafts of minutes to be reasonably accurate, and she was at pains to check with me, or other members of the team, when there was any problem.... ”

Upon Ms. “T”'s arrival in “Division iii,” the Administrative Assistant for the Division, by Memorandum of March 8, 2001, provided Applicant with a detailed listing of duties and responsibilities.

21. Meanwhile, a regular Annual Performance Report (APR), covering the remaining months of calendar year 2000, i.e. October – December, which had not been encompassed by the



Anniversary APR, was prepared. The APR referenced Applicant's positive performance on mission and attached the Deputy Division Chief's memorandum. The APR further noted: "Ms. ["T"] needs to carry over this positive performance to her work at headquarters, which was discussed at length in her anniversary APR and, subsequently with [the SPM]." The APR was signed on May 2, 2001 by the "Division ii" Chief and on June 4, 2001 by the "Division iii" Chief. Ms. "T"'s performance was rated "3" on a rating scale of 1 - 4, signed by the Department Head on May 7, 2001.

22. On April 24, 2001, the "Division iii" Chief met with Ms. "T" and the AO to consider Applicant's performance since her joining the Division in early March. In a Memorandum to Files, the Division Chief recorded areas of strength, as well as the following areas for further development:

- Improve familiarity with Fund procedures (e.g., how to handle Board documents).
- Greater attention to detail (e.g., when proofreading documents and inputting data into tables).
- Frequently touch base with colleagues to check that there is a clear understanding of what tasks are expected and when."

Less than a week later, the mentor assigned from the Staff Development Division recorded that she had met with Ms. "T", who reviewed with her elements of the discussion with the Division Chief. The mentor also offered advice to Ms. "T" at that time regarding communication skills. Later contacts between the mentor and Applicant are recorded for May (when Applicant emailed "...I think we can do without the discussion for the moment") and July 2001.

23. The "Division iii" Chief held a subsequent meeting with Ms. "T" on June 22, 2001 and recorded, by Memorandum for Files of the same date, that he had advised Ms. "T" of "some areas for further improvement or development:

- Further enhance understanding and awareness of Fund procedures and practice. This would help Ms. ["T"] prioritize tasks according to their urgency rather than when they were assigned (an example was the [country] staff statement).
- Similarly, Ms. ["T"] was encouraged to communicate with colleagues in order to ensure that there was a clear understanding on how the workflow should be prioritized."

24. Thereafter, on September 12, 2001, as the date approached for a decision on Applicant's conversion, i.e. six months in advance of the revised (April 3, 2002) termination date of

Applicant's fixed-term, the Deputy Division Chief who earlier had reported favorably on Applicant's mission performance of November 2000 prepared an overall assessment of Ms. "T"'s performance in "Division iii," which read in part:

"My general assessment, based on the period since March is that [Ms. "T"]'s performance has been below average for her grade, despite clear efforts to improve in areas earlier identified as requiring action. .... I did not have complete confidence that critical matters in her charge...would be done without very close and intense supervision..... For someone who has been working in the Fund for quite a considerable time, familiarity with correct Fund procedures was not assured, though she did make noticeable efforts to ask and to think ahead.... [Her performance is] not low enough to warrant formal action for a regular employee but inconsistent with sufficient confidence to either employ for the first time or convert from a contractual [i.e. fixed-term] status."

25. On September 20, 2001, the Division Chief, Deputy Division Chief and Administrative Assistant met with Ms. "T" to review her performance over the preceding six months. While identifying some positive elements of Applicant's work performance, the Division Chief in a Memorandum for Files that followed, emphasized that, based upon the views of a number of colleagues, there remained "important areas" for further development, including in the comprehensiveness of correction of typographical errors and knowledge of Fund procedures. By way of her own Memorandum for Files of September 27, 2001, Applicant brought to the attention of the SPM, the Division Chief and the Department Head her response to the alleged deficiencies in performance.

26. The Division Chief testified to a meeting in which senior management of the Department, including its Director, Deputy Director and the SPM took part, in which the Division Chief's views on Applicant's possible conversion were invited. Thereafter, on October 5, 2001, the SPM notified Ms. "T" of the decision not to convert her appointment. On the Expiration of Fixed-Term Appointment form of October 4, 2001, the SPM recorded:

**"Overall performance and particular strengths/weaknesses:**

Ms. ["T"]'s performance has been mixed. In the APR exercise that was completed in February 2001, concerns had been raised about her lack of knowledge of standard Fund procedures, her technical know-how, and the pace of work. There has been some improvement in her performance during the subsequent six-month assignment, and she consistently demonstrated a pleasant demeanor, a dedication to day-to-day task, and responsiveness to feedback. At the same time, however, her performance in other areas was less even, including with regard to attention to detail,

pace of work, and her facility to manage the work of major projects.

**Potential for the longer term:**

Although Ms. [“T”] has demonstrated a number of strengths in important areas, her overall aptitude for work in an operational department remains in doubt and, notwithstanding an extended period of employment, Ms. [“T”] has not demonstrated a clear potential for operating at a higher level in the future.”

The Channels of Administrative Review

27. Following the notification on October 5, 2001 of the decision not to convert her fixed-term appointment, Applicant sought administrative review pursuant to GAO No. 31. Applicant’s Grievance was filed on July 16, 2002. The Grievance Committee considered Ms. “T”’s complaint in the usual manner, on the basis of oral hearings and the briefs of the parties. On December 19, 2003, the Committee issued its Recommendation and Report, recommending denial of Applicant’s Grievance on the ground that Applicant had not shown that the non-conversion decision was arbitrary, capricious, discriminatory or procedurally defective in a manner that substantially affected the outcome. The Committee’s recommendation was accepted by Fund management on January 13, 2004.

28. On April 13, 2004, Applicant filed her Application with the Administrative Tribunal.

Summary of Parties’ Principal Contentions

Applicant’s principal contentions

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

1. The decision not to convert Applicant’s fixed-term appointment failed to consider all of the evidence and therefore was arbitrary and capricious.
2. The non-conversion decision was affected by procedural irregularities.
3. The Fund created an expectation that Applicant’s fixed-term appointment would be converted to regular staff and “mismanaged” Applicant’s career.
4. The non-conversion decision was discriminatory on the basis of Applicant’s race and nationality.
5. Applicant seeks as relief:

- a. reinstatement with a fair opportunity to demonstrate suitability for conversion to regular staff;
- b. reasonable monetary damages; and
- c. legal costs.

#### Respondent's principal contentions

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

1. The decision not to convert Applicant's fixed-term appointment to regular staff was taken in the reasonable exercise of managerial discretion and consistently with the applicable Guidelines for Fixed-Term Appointments.
2. The non-conversion decision was based on a proper assessment of Applicant's performance and potential for continued employment with the Fund, and did not fail to take account of any material facts.
3. Applicant was given regular feedback and monitoring, along with ample opportunities to improve her performance but nonetheless did not attain the level required for conversion to regular staff.
4. Applicant has not shown that the non-conversion decision was affected by procedural irregularities, that the Fund created an expectation of conversion, or that it "mismanaged" Applicant's career.
5. Applicant has not shown that the non-conversion decision was affected by discrimination on the basis of race or nationality.

#### Consideration of the Issues of the Case

##### Conversion of Fixed-Term Appointments

31. The case of Ms. "T", and another decided this day of Ms. "U", are the second and third in which the Administrative Tribunal has considered a challenge brought by a former staff member to the non-conversion of a fixed-term appointment. In an earlier Judgment, Ms. "C", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-1 (August 22, 1997), the Tribunal sustained the non-conversion decision while at the same time concluding that irregularities in the non-conversion process gave rise to a compensable claim.<sup>8</sup>

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<sup>8</sup> Ms. "C" contended that the non-conversion of her appointment was improperly motivated by retaliation for allegations she had made of sexual harassment. The Tribunal found no merit to the claim that the non-conversion decision was so motivated. Moreover, the Tribunal sustained as a reasonable exercise of the Fund's managerial

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32. It has been, and remains, the Fund's policy to hire virtually all new staff on a fixed-term basis preliminary to their attaining an appointment of indefinite duration,<sup>9</sup> and therefore the significance of the conversion process and the requirement that it be carried out consistently with legal norms cannot be overstated. For appointments commencing prior to December 2002, the Fund's Guidelines for Fixed-Term Appointments (August 1995) govern.<sup>10</sup> These Guidelines, with which Ms. "T" was provided at the time of her appointment, are intended by their terms "... to ensure that staff on fixed-term appointments gain an accurate understanding of the meaning of their fixed-term status and a realistic view of their prospects of being converted to a 'regular' (indefinite) appointment upon expiration of their fixed term." (Guidelines, p. 1.) The Guidelines inform appointees that "[t]he Fund's legal obligation does not go beyond the initial term ..." (emphasis in original) and set out three criteria for conversion, i.e. (a) performance during the fixed-term, (b) potential for a career with the Fund, and (c) the staffing needs of the organization:

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discretion the decision not to convert the appointment, noting that the evidence showed a pattern of deficiencies in interpersonal skills, which reservations had been conveyed to Ms. "C" in her first performance reviews. Ms. "C", paras. 38, 41.

At the same time, the Tribunal held in Ms. "C" that procedural irregularities did affect the non-conversion decision and that these permitted the applicant to prevail, not wholly, but in part:

"Two irregularities stand out. First, when Ms. "C" was accorded an extension of a year and transferred to ADM, she should have been given to understand (a) precisely why she was not converted to permanent status at the end of two years and (b) what steps should be taken by her to correct her perceived problems in interpersonal relations. Neither appears to have been done. Second, at the dispositive session of 29 March 1995, where Mr. "B"'s earlier highly positive appraisal was peremptorily overturned, Ms. "C" was confronted not by her critics nor by specific and rebuttable incidents of their criticism. That in particular was a lapse in due process."

Ms. "C", para. 41. For the procedural irregularities that affected the non-conversion decision, the Tribunal awarded Ms. "C" compensation in the sum equivalent to six months of salary. Ms. "C", Decision, para. Second.

<sup>9</sup> See Guidelines for Fixed-Term Appointments (1995) ("It is the Fund's current policy to maintain a large proportion of its staff on an indefinite basis, through 'regular' staff appointments. Initially, however, virtually all new staff are hired on a fixed-term basis for two or three years (a period of five years can be considered in exceptional circumstances regarding senior staff)" (emphasis in original) and GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.2 ("Before being offered an open-ended appointment, staff shall be hired initially on a fixed-term appointment for a specified period of time to test their suitability for career employment.")

<sup>10</sup> A revised fixed-term monitoring process became effective on December 2, 2002 (and was further updated as of January 1, 2005), applicable to fixed-term staff members appointed on or after that date, providing more specific monitoring requirements. The criteria for conversion, however, remain unchanged, i.e. that the staff member meets the performance requirements established for the position, that the staff member demonstrates potential for a career in the Fund, and that the conversion decision is consistent with the Fund's staffing needs. These same criteria are given effect in GAO No. 3, Rev. 7 (May 1, 2003), Section 3.02.1.3, *see supra* note 7. It is the 1995 Guidelines that govern the instant case.

“... the conversion decision depends in large part on the departmental assessment of the staff member’s performance during the fixed-term appointment and the related judgment about the individual’s potential for a successful career with the Fund. There must be a clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual. However, the short- and long-term staffing needs of the Fund are of paramount importance in this process.”

*(Id.)*

33. With respect to the monitoring and decision-making process, the Guidelines impose obligations on both the fixed-term appointee and supervisors:

“The mutual objective during the fixed-term appointment is to enable the staff member to perform at full capacity as quickly as possible, not just to maximize the contribution to the Fund’s work but also to provide an opportunity for the staff member to demonstrate potential for the future. Both the staff member and the supervisor(s) concerned have obligations in this respect.

The supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s). The staff in the Recruitment Division also stand ready to assist upon request, should the staff member or the supervisor find this necessary.”

*(Guidelines, pp. 1-2.)*

34. Under the Guidelines, checkpoints for performance assessment are provided at six, twelve and eighteen months after appointment. In the case of Grade A1-A8 staff, the first six months normally constitute a formal probationary period. At the time of the 12-month assessment, the “... prospects for conversion should be discussed ..., and this discussion should be reflected in the write-up, but no commitment can be made at this early stage. The complete assessment is reviewed by the Recruitment Division, and issues are raised with the staff member and the department as appropriate.” *(Guidelines, p. 2.)*

35. The formal decision as to conversion is to be taken eighteen months following the date of appointment. The Guidelines provide that, on an exceptional basis, a fixed-term appointment may be extended, as it was in the case of Ms. “T”, to allow for an additional period of testing:

“As an exception, if a department finds that it has inadequate information upon which to base a final decision about a fixed-term appointee’s conversion to regular staff, the department may request a one-time extension of the appointment for up to one year. A staff

member receiving such an extension should not take the extended affiliation with the Fund as any kind of indication, in itself, regarding the prospects for eventual conversion.”

(*Id.*)

Did Respondent abuse its discretion in deciding not to convert Applicant’s fixed-term appointment to a regular staff appointment?

36. In cases involving the review of individual decisions taken in the exercise of managerial discretion, the Administrative Tribunal consistently has invoked the standard set forth in the Commentary on the Statute which provides:

“... 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.”

(Report of the Executive Board, p. 19.) As this Tribunal observed in summarizing its jurisprudence with respect to standards of review, the decision whether to convert a fixed-term appointee is essentially a “performance-based decision.” Ms. “J”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 108. “Noting evidence in the record of performance deficiencies, the Tribunal [in Ms. “C”] deferred to management’s assessment...” that the applicant had not met the standard of performance required for conversion of her appointment to regular staff. Ms. “J”, para. 108. The Tribunal further cited the following excerpt from the Commentary on the Statute:

“This principle [of deference to managerial discretion] is particularly significant with respect to decisions which involve an assessment of an employee’s qualifications and abilities, such as promotion decisions and dismissals for unsatisfactory performance. In this regard, administrative tribunals have emphasized that the determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.[footnote omitted]”

(Report of the Executive Board, p. 19.)” Ms. “J”, note 27. *See also* Mr. “F”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 70 (citing the same provision while finding “persuasive” the Fund’s position that Mr. “F” was not qualified for the position that had been redesigned following the abolition of his post). In the context of conversion of fixed-term appointments, the World Bank Administrative Tribunal (WBAT) has observed: “... the Tribunal will not substitute its own judgment for that of the

Respondent on the staff member's suitability for permanent employment." Salle v. International Bank for Reconstruction and Development, WBAT Decision No. 10 (1982), para. 30.

37. Moreover, the discretion at issue in the conversion of fixed-term appointments is necessarily distinct from that exercised by management in the separation of a staff member for unsatisfactory performance. Accordingly, "...the concept of unsatisfactory performance as used in respect of probation is wider than the same concept used with respect to a confirmed staff member." McNeill v. International Bank for Reconstruction and Development, WBAT Decision No. 157 (1977), para. 34. The Fund's Guidelines emphasize that "[t]here must be a clearly positive assessment for taking the important step of committing the Fund to providing a career opportunity for the individual."<sup>11</sup> A fixed-term appointee has no entitlement to the continuation of his employment beyond the term of the appointment, and the burden of proof rests squarely with the applicant in challenging a decision not to convert his fixed-term appointment to regular staff. Ms. "C", para. 21.

38. While it is within the purview of the Fund's discretionary authority to decide upon a staff member's suitability for conversion to an appointment of indefinite duration, that discretion is necessarily constrained by principles of fairness, in particular adequate opportunity to demonstrate satisfactory performance and suitability for career employment. *See* McNeill, para. 44 ("While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met.") Such opportunity should indicate that the decision "... has not been based on a performance which has manifestly not benefitted from adequate supervision and guidance" (Salle, para. 32), that the appointee has been evaluated periodically, and that he has been given adequate warning of performance deficiencies and a reasonable opportunity to remedy them. These principles are recognized in both the Fund's Guidelines and the jurisprudence of international administrative tribunals.

39. Accordingly, the following questions arise. Was the non-conversion of Ms. "T"'s appointment taken consistently with the Fund's internal law and general principles of international administrative law governing conversion of fixed-term appointments? Did Applicant's supervisors provide Ms. "T" with appropriate monitoring and feedback? Was the non-conversion of Ms. "T"'s fixed-term appointment affected by procedural irregularities that give rise to a compensable claim?

40. The Tribunal initially addresses Applicant's contention that the Fund created an "expectation" of conversion, i.e. that "...over the course of her two-year appointment, the Fund consistently acted in a manner to cause Applicant to believe that she would be converted," in

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<sup>11</sup> By contrast, a staff member who already has attained an appointment of indefinite duration is presumed to continue in the Fund's employment in the absence of a showing of unsatisfactory performance, consistent with the requirements of GAO No. 16. The Fund observes in its pleadings in this case that in cases of dismissal for unsatisfactory performance the burden rests with the Fund.



particular by providing positive feedback and including her on mission assignments. For the following reasons, the Tribunal finds no merit to this contention.

41. The record indicates, as stated on Applicant's Expiration of Fixed-Term Appointment form of October 4, 2001, that Ms. "T"'s performance was perceived by her supervisors as "mixed." At various points, positive elements of her work performance were noted; nonetheless, the overall level of Applicant's performance was assessed as below the norm required for conversion. Accordingly, the periodic appraisals, both formal and informal, of Applicant's performance demonstrated—or should have demonstrated—to Ms. "T" that the Fund retained doubts about the prospects of her conversion to an appointment of indefinite duration. These cautions were communicated to Ms. "T" perhaps most clearly at the time of the extension of her appointment, which was taken "... in order to provide her with an opportunity to demonstrate that she meets the requisite standards to become a regular staff member in the department. The outcome will, however, depend on her performance and her efforts to address the areas identified for improvement." (Anniversary APR.) (Emphasis supplied.) That Applicant's fixed-term appointment was extended for a further period of development and testing should have signaled continued lack of demonstrated fitness for conversion of her appointment:

"Neither does the fact that the probationary period is extended give any decisive indication as to the likelihood of ultimate confirmation. Although continuation beyond the normal probationary period demonstrates that the staff member's performance is not so substandard as to justify immediate termination, it ought properly to alert him to the fact that up to that date his performance has not warranted the immediate grant of a permanent appointment and that a satisfactory level of performance must be achieved before confirmation becomes appropriate. ...."

Salle, para. 28. *See also* Fund's Guidelines, p. 2, quoted *supra* para. 35. Finally, the Guidelines for Fixed-Term Appointments, with which Applicant was provided, make clear that "[t]he Fund's legal obligation does not go beyond the initial term...." (Guidelines, p. 1.) (Emphasis in original.)

42. As to any possible procedural irregularity in the conduct of the non-conversion process, the Tribunal notes, as set out in the Fund's Guidelines, "[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback." Among the indicia of adequate supervision is that the fixed-term appointee is "... exposed to the types of tasks which would have been required of him as a permanent employee and that he had been given the opportunity to benefit from [his supervisors'] guidance and comments." Salle, para. 33. It is recalled that Ms. "T", at the time of her Anniversary APR discussions, expressed concerns about the adequacy of feedback from supervisors. The record indicates that in response

the SPM undertook efforts to clarify communications regarding performance shortcomings,<sup>12</sup> particularly through a follow-up meeting and thereafter through the extension of Applicant's appointment and her transfer to "Division iii." The SPM noted as well that feedback was given "... on an ongoing basis, for example, when [Ms. "T"] is told to follow through with e-mail requests, to attend to routine tasks such as the mail in a timely manner, or to put boxes on charts in Word documents." (Memorandum of February 16, 2001.) See Salle, para. 36 ("... supervision and guidance do not necessarily take the form of recorded conversations or otherwise specific acts or activities; they may consist as well in day to day work and contacts with supervisors and colleagues and in the exposure to the kind of tasks which the staff member would have to accomplish if his appointment were to be confirmed.")

43. Moreover, it was in recognition of the importance of providing Applicant a fuller opportunity to gain experience and receive feedback that Ms. "T"'s fixed-term appointment was extended and she was transferred to "Division iii." As the SPM described in her Grievance Committee testimony, the transfer was effected so that Ms. "T":

“...would have another opportunity to prove herself in a different environment and I thought that Division [“iii”] would be a supportive environment for her because she had been on mission with ....the deputy chief of that division, and she had good working relations with the people on the mission. So I thought that by putting her in a division with people that she worked well with, ... that should enable her to perform.”

In addition, upon Applicant's arrival in "Division iii," the Administrative Assistant supplied her with a detailed listing of her duties and the allocation of responsibilities between the assistants in the Division.

44. The conduct of Applicant's managers in this regard may be compared with the facts reviewed in Ms. "C", in which the Tribunal found that among the failures giving rise to a compensable claim was that "... the Fund should have taken steps to ensure that, when transferred to ADM, and in the course of her work there, Ms. "C" was fully aware of her need to improve her interpersonal skills and the possibilities of so doing." Ms. "C", para. 42. By contrast, Ms. "T" was advised on a series of occasions of performance shortcomings, as, for example, at the time of the Anniversary APR discussions of January 2001, when Applicant was provided (by way of an attached memorandum) a detailed listing of "areas for development." These included both "technological" and "work management" skills.

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<sup>12</sup> As set out in the Fund's Guidelines, "[t]he supervisor should endeavor to provide suitable assignments, clear expectations, appropriate guidance, and timely feedback. However, the fixed-term staff member must be prepared to seek this assistance from the supervisor(s)" The action of Ms. "T" and her supervisors in this regard was consistent with that contemplated by the Guidelines.

45. Applicant additionally maintains that the non-conversion decision was affected by procedural irregularity on the ground that the Anniversary APR, which is designed to give the fixed-term appointee an appraisal of his performance at the conclusion of the first 12 months of appointment, was not, in Ms. “T”’s case, completed until some 3 - 4 months thereafter, in January 2001. It is a matter of dispute between the parties as to what part Applicant’s own actions may have played in the delay in the Anniversary APR process. The Tribunal concludes that any deficiency in this respect was overcome by the six-month extension of Applicant’s appointment. *See Salle*, para. 46 (cause of six-month delay in completing performance appraisal immaterial as the applicant suffered no injury as a result, having received a six-month extension of the appointment; “[f]ar from losing time because of the belated [performance appraisal], the Applicant had more opportunity to improve his performance and to demonstrate his abilities.”) The Tribunal concludes that there was no irregularity of procedure and no “career mismanagement” with respect to the non-conversion of Ms. “T”’s fixed-term appointment.

46. Applicant further maintains that the Fund’s decision not to convert her fixed-term appointment was not substantiated and did not consider all of the evidence or weigh it fairly. This Tribunal has emphasized “[t]he importance of performance evaluation systems in avoidance of arbitrariness and discrimination...,” *Ms. “C”*, para. 36, citing *Lindsey v. Asian Development Bank*, AsDBAT Decision No. 1 (1992). *See also Salle*, para. 46 (“[t]he Respondent’s duty to evaluate periodically the probationer’s work is no doubt an important one, because it gives the staff member an opportunity to assess from time to time his deficiencies and to improve his performance before a final decision is made on his confirmation.”)

47. Moreover, “... it is the obligation of the Respondent, when assessing the performance of staff members for a given period of review, to take into account all relevant and significant facts that existed for that period of review.” *Romain (No. 2) v. International Bank for Reconstruction and Development*, WBAT Decision No. 164, para. 19. That the Fund met this obligation in the case of Ms. “T” is evident from the record. As reviewed above,<sup>13</sup> Applicant’s Anniversary APR, covering the period October 7, 1999 – October 7, 2000, was signed by and included comments from both Division Chiefs under whom Applicant had served during the first year of her two-year fixed-term appointment. Both Division Chiefs and the Administrative Officer participated with Ms. “T” in the Anniversary APR discussions of January 19, 2001. Likewise, the regular APR, covering the period October – December 2000, referred to Applicant’s positive performance on mission and attached the Deputy Division Chief’s favorable appraisal.

48. Accordingly, the Tribunal finds no merit to Applicant’s contention that Respondent failed to take account of relevant evidence or did not weigh it fairly. *Compare Toivanen v. Asian Development Bank*, AsDBAT Decision No. 51 (2000), para. 50 (non-conversion decision invalid where it was “...based not on facts accurately gathered, but rather on unsubstantiated beliefs, and was induced by suppression and misrepresentation of material facts, as to the Applicant’s past performance, her suitability for further employment, and her skills.”)

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<sup>13</sup> *See supra* The Factual Background of the Case.

49. Finally, Applicant contends that the decision not to convert her fixed-term appointment was affected by discrimination on the basis of her race and nationality, a serious accusation implicating the N Rules and later adopted policies prohibiting discrimination in the Fund. *See generally Mr. "F", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), paras. 81-84. The Tribunal observes that Applicant had voiced a perception of discrimination at the time of her disappointment with the evaluation of her performance in the Anniversary APR. The SPM accordingly looked into the matter and found no basis for the accusations, which Applicant apparently did not pursue. Ms. "T" was later said to have clarified that "... she had not accused anyone of discrimination but rather that the process followed for her APR led her to believe that she was being discriminated against." (Memorandum for Files of February 16, 2001.) Additionally, following the non-conversion of her appointment, Applicant contended that the Deputy Chief of "Division iii," who earlier had rated her mission performance quite favorably, had directed remarks to her that she took as offensive on the basis of her nationality. Applicant's account of this incident was credibly refuted by the Deputy Division Chief in a Memorandum for Files of June 9, 2002 and in his Grievance Committee testimony. Whatever Applicant's perception of these events, the Tribunal concludes that she has not demonstrated discrimination.

50. Lastly, in her pleadings in the Administrative Tribunal, Ms. "T" asserts that members of her particular racial and nationality group were underrepresented in "Department 1" and that her departure from the Fund resulted in a "discriminatory impact" by decreasing the number of such persons in the Department. The Tribunal finds this alleged fact far from probative of discrimination,<sup>14</sup> and concludes that Applicant has not shown that the decision not to convert her fixed-term appointment to a regular staff position was affected by discrimination on the basis of her race or nationality.

51. In sum, in light of its review of the extensive evidence of the issues of the case, the Tribunal concludes as follows. Applicant repeatedly was warned of the shortcomings in her performance and, accordingly, was not given by the Fund any "expectation" that she would be converted to regular staff. These warnings were consistent with the feedback required of supervisors by the Guidelines for Fixed-Term Appointments. Applicant's appointment was extended and she was transferred to a Division that was to provide a more favorable environment for her development. In addition, a mentor was assigned from the Staff Development Division of the Human Resources Department, although it is unclear to what extent Applicant availed herself of the assistance that the mentor offered. In connection with her extension and transfer, as well as on occasions before and after, Ms. "T" was advised of continued shortcomings in her performance.

52. While Applicant contended that her initial assignments in the Department failed to expose her to adequate opportunities for skill development and supervisory guidance, her

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<sup>14</sup> *See Ms. "Z", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 74 (rejecting the view that statistics alone prove discrimination).

transfers first to “Division ii” and later to “Division iii” (in conjunction with the 6-month extension of her appointment) made up for any possible deficiency in the opportunities afforded Applicant to prove her skills as a Staff Assistant. Likewise, the delay in preparation of the Anniversary APR, does not rise to a compensable claim in view of the extended period Applicant was afforded in which to demonstrate fitness for regular employment. Finally, the management of Applicant’s Department engaged in a collaborative process in completing her Annual Performance Reviews, taking into account the views of former supervisors when she transferred between Divisions of the Department.

53. The Tribunal concludes that while Applicant’s performance was seen by supervisors as “mixed,” in the end, following a 6-month extension of Ms. “T”’s appointment, her performance fell short of a “clearly positive” assessment, as required for conversion under the Fund’s Guidelines and supported by international administrative jurisprudence. Accordingly, Applicant’s progress remained insufficient and Ms. “T”’s potential for a Fund career unproven in the judgment of those properly charged with making the conversion decision. When managers take such a decision, as the evidence shows they have in this case, with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.

Decision

FOR THESE REASONS

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

The Application of Ms. "T" is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

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Stephen M. Schwebel, President

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Celia Goldman, Registrar

Washington, D.C.  
June 7, 2006