

# **ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND**

## **JUDGMENT No. 2006-5**

### **Ms. "AA", Applicant v. International Monetary Fund, Respondent** **Admissibility of the Application**

#### Introduction

1. On November 27, 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 Motion for Summary Dismissal of the case brought against the International Monetary Fund by Ms. "AA", a former staff member of the Fund.
2. Applicant contests the decision not to convert her fixed-term appointment to a regular staff position. Applicant further maintains that, during her employment, she was subjected to harassment and a hostile work environment in contravention of the Fund's internal law. In Applicant's view, the alleged harassment unfairly affected her work performance and the appraisal thereof, resulting in the non-conversion of her fixed-term appointment.
3. The Fund's Grievance Committee dismissed Applicant's Grievance on the ground that she had failed to pursue on a timely basis the administrative review process prerequisite to the filing of the Grievance.
4. The Fund has responded to the Application in the Administrative Tribunal with a Motion for Summary Dismissal, contending that Applicant has not met the requirement of Article V of the Tribunal's Statute that all available channels of administrative review must be exhausted before an application is filed with the Administrative Tribunal. Applicant maintains that exceptional circumstances excuse her delay in initiating administrative review, contending that only after leaving the employment of the Fund did she become aware that the harassment of which she now complains was part of a pattern and practice in her work unit.
5. A Motion for Summary Dismissal suspends the period for answering the Application until the Motion is acted on by the Tribunal. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Application.

#### The Procedure

6. On February 27, 2006, Ms. "AA" filed her Application with the Administrative Tribunal. The Application was transmitted to Respondent on March 1, 2006. On March 9,

2006, pursuant to Rule IV, para. (f),<sup>1</sup> the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

7. On March 31, 2006, pursuant to Rule XII<sup>2</sup> of the Tribunal's Rules of Procedure, Respondent filed a Motion for Summary Dismissal of the Application. The Motion was

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<sup>1</sup> Rule IV, para. (f) provides:

“Under the authority of the President, the Registrar of the Tribunal shall:

...

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

<sup>2</sup> Rule XII provides:

*“Summary Dismissal*

1. Pursuant to Article X, Section 2(d) of the Statute, the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible.
2. The Fund may file such a motion within thirty days of its receipt of the application. The filing of the motion shall suspend the period of time for answering the application until the motion is acted on by the Tribunal.
3. The complete text of any document referred to in the motion shall be attached in accordance with the rules established for the answer in Rule VIII. The requirements of Rule VIII, Paragraphs 2 and 3, shall apply to the motion. If these requirements have not been met, Rule VII, Paragraph 6 shall apply *mutatis mutandis* to the motion.
4. Upon ascertaining that the motion meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Applicant.
5. The Applicant may file with the Registrar an objection to the motion within thirty days from the date on which the motion is received by him.
6. The complete text of any document referred to in the objection shall be attached in accordance with the rules established for the reply in Rule IX. The requirements of Rule VII, Paragraph 4, shall apply to the objection to the motion.
7. Upon ascertaining that the objection meets the formal requirements of this Rule, the Registrar shall transmit a copy to the Fund.
8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests.”

transmitted to Applicant on the same day. On April 26, 2006, pursuant to Rule XII, para. 5, Applicant filed an Objection to the Motion, which was later transmitted to the Fund for its information. On April 27, 2006, the President of the Administrative Tribunal, pursuant to Rule XXI, para. 3,<sup>3</sup> requested that Respondent present its views on Applicant's requests for (a) anonymity, and (b) oral proceedings (insofar as the request reflected a request for oral proceedings on the issue of admissibility).<sup>4</sup> Respondent's views were submitted on May 12, 2006 and transmitted to Applicant for her information.

8. Pursuant to Rule XII, para. 2, the filing of a Motion for Summary Dismissal suspends the period of time for answering the Application until the Motion is acted on by the Tribunal. Accordingly, the present consideration of the case is confined to the issue of its admissibility.

#### Request for Anonymity

9. In her Application, Ms. "AA" has requested anonymity pursuant to Rule VII, para. 2(j)<sup>5</sup> and Rule XXII, and the Fund has presented its views in accordance with Rule VIII, para. 5<sup>6</sup> and Rule XXII. Applicant seeks anonymity on the ground that she allegedly was the victim of "egregious behavior, harassment and a hostile work environment" by Fund supervisors and "... if the remedy of reinstatement is granted, the Applicant will face possible retribution and/or retaliation in the Fund." The Fund has responded to the request for anonymity as

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<sup>3</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>4</sup> Had Respondent filed an Answer on the merits, it would have been required, pursuant to Rule VIII, para. 5, to respond therein to Applicant's requests (made in her Application) for anonymity, for oral proceedings and for production of documents. Consideration of only the requests for anonymity and for oral proceedings (which Applicant sought on the issue of admissibility) were deemed necessary to the disposition of the Motion for Summary Dismissal. Accordingly, Respondent's views on the requests for documents, which would be included in its Answer on the merits if the Motion were to be denied, accordingly, were not sought at this stage of the proceedings.

<sup>5</sup> Rule VII, para. 2(j) provides:

"An application instituting proceedings shall be submitted to the Tribunal through the Registrar. Each application shall contain:

...

(j) any request for anonymity as provided by Rule XXII below."

<sup>6</sup> Rule VIII, para 5 provides:

"The Fund shall include in the answer its views on any requests for production of documents, oral proceedings, or anonymity that the Applicant has included in the application."

follows: "... while strongly objecting to applicant's statements regarding the reasons for her request for anonymity, the Fund has no objection to the request for anonymity itself."

10. Applicant's request for anonymity is the first that the Tribunal has been called upon to decide pursuant to Rule XXII, which was adopted by the Tribunal, along with other revisions to its Rules of Procedure, with effect with respect to all applications filed after December 31, 2004. Rule XXII provides in its entirety:

*"Anonymity*

1. In accordance with Rule VII, Paragraph 2(j), an Applicant may request in his application that his name not be made public by the Tribunal.
2. In accordance with Rule VIII, Paragraph 6, the Fund may request in its answer that the name of any other individual not be made public by the Tribunal. An intervenor may request anonymity in his application for intervention.
3. In accordance with Rule VIII, Paragraph 5, and Rule IX, Paragraph 6, the parties shall be given an opportunity to present their views to the Tribunal in response to a request for anonymity.
4. The Tribunal shall grant a request for anonymity where good cause has been shown for protecting the privacy of an individual."

The adoption of Rule XXII effectively revised a policy earlier instituted by the Tribunal of designating the names of persons by acronyms.<sup>7</sup>

11. The Tribunal notes at the outset that the formulation of Applicant's request suggests that she may desire anonymity only in the event that she were to succeed on the merits of her case and reinstatement were effected as a remedy. As the Tribunal decides below to dismiss the Application as inadmissible, Applicant's professed concern regarding reprisal upon reinstatement cannot provide a basis for a grant of anonymity. Nonetheless, in view of the lack of clarity as to whether Applicant seeks anonymity irrespective of the outcome of the case and the pending Motion, the Tribunal will consider whether Applicant has met the requirement of Rule XXII, para. 4 that "... good cause has been shown for protecting the privacy of an individual."

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<sup>7</sup> See Ms. "B", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-2 (December 23, 1997), note 1; "Decision on the protection of privacy and method of publication" (December 23, 1997). On June 8, 2006, the Administrative Tribunal issued a "Revised Decision on the protection of privacy and method of publication," superseding the 1997 Decision in view of the amendment of the Rules of Procedure. The Revised Decision retains the policy that "[t]he departments and divisions of the Fund shall be referred to by numerals unless specification is desirable for the comprehensibility of the Judgment or Order." Additionally, the Revised Decision provides, when a Judgment or Order is placed on the Fund's *external* website, that "... for the name of an Applicant (or Intervenor) initials may be substituted."

12. The Fund’s submission stating that it “has no objection” to Applicant’s request raises the question whether the Tribunal may grant a request for anonymity pursuant to Rule XXII solely on the basis of the consent of the parties, i.e. without a showing of “good cause.” For the following reasons, the Tribunal concludes that it may not.

13. Implicit in the text of Rule XXII is that a party—whether an Applicant, Intervenor, or the Fund—that seeks that a name not be made public carries the burden of showing good cause. That the burden rests with the party seeking anonymity is confirmed by the fact that Rule XXII operates as an exception to the general rule of making public the names of parties to a judicial proceeding. With the adoption of Rule XXII, the IMFAT sought to bring its practice into conformity with that generally observed, including the practice of other international administrative tribunals.

14. As the Asian Development Bank Administrative Tribunal (“AsDBAT”) has commented:

“... the Tribunal holds that the disclosure of the names of parties and the relevant facts in its Decision must be the rule, and confidentiality the exception. The publication of allegations and findings would in every case cause some loss, damage or prejudice to the party affected, and that would not be sufficient to claim confidentiality: the burden lay on the Applicant to establish the likelihood of serious loss, damage or prejudice. That is not the case here, having regard to the Tribunal’s findings and decision.”

Toivanen v. Asian Development Bank, AsDBAT Decision No. 51 (2000), para. 60 (rejecting request for anonymity in case of non-conversion of fixed-term appointment). International administrative tribunals generally have granted anonymity only in cases such as those involving alleged misconduct, *see, e.g., N v. International Bank for Reconstruction and Development*, WBAT Decision No. 356, para. 1 (2006) (applying “seriously prejudicial” standard) and Ms. C v. Asian Development Bank, AsDBAT Decision No. 58 (2003), para. 1, or matters of personal privacy such as health, *see, e.g., A v. International Bank for Reconstruction and Development*, WBAT Decision No. 182 (1997), or family relations, *see, e.g., E v. International Bank for Reconstruction and Development*, WBAT Decision No. 325, para. 1 (2004).

15. These considerations notwithstanding, if the name of the Applicant in this case were to be made known, her allegations against her supervisors would be given a measure of currency. These allegations have not been considered by the Tribunal, since the Application is found to be inadmissible. Accordingly, while not for the reason assigned by the Applicant, but in order to protect her supervisors from allegations that have not been tested, the Tribunal deems it appropriate to treat the name of the Applicant anonymously.

#### Request for Oral Proceedings

16. Pursuant to Rule XIII, para. 1, as amended in 2004, the Administrative Tribunal may hold oral proceedings “... if, on its own initiative or at the request of a party and following an

opportunity for the opposing party to present its views ..., the Tribunal deems such proceedings useful.”

17. Applicant has requested oral proceedings for the purpose of establishing through testimony the truth of the facts she alleges in support of her theory that her request for review is timely. Respondent, for its part, maintains that there is no disputed issue of fact for the Tribunal to rule upon as to the question of admissibility, and that oral proceedings are therefore not warranted.

18. The Tribunal concludes that it is able to decide the question of admissibility on the basis of the pleadings and the documentary evidence alone. As set out below, the Tribunal decides that, even accepting the content of the telephone communication to Applicant from her successor as alleged by Applicant, Ms. “AA”’s argument that she has met the requirements of Article V, Section 1 is unconvincing.

#### The Factual Background of the Case

19. The relevant factual background may be summarized as follows. Applicant was employed as a staff member of the Fund on a two-year fixed-term appointment from September 17, 2001 through September 16, 2003, during which time she served at Grade A9 in a position initially designated as a Deputy Section Chief and later reclassified. On March 20, 2003, Applicant’s fixed-term appointment was not converted, on the ground of inadequate performance. Accordingly, upon the expiration of her appointment, Applicant left the employment of the Fund.<sup>8</sup>

20. In January 2005, according to Applicant’s account, she received a telephone call from the staff member who succeeded her in her position and served under the same supervisors. That staff member, maintains Applicant, communicated to Ms. “AA” that she and others in her division were experiencing harassment.

#### The Channels of Administrative Review

21. The issue posed by this case is whether Applicant has fulfilled the exhaustion of remedies requirement of Article V of the Tribunal’s Statute. It is not disputed that Applicant did not initiate administrative review procedures within the six-month time period following either the non-conversion decision or the conclusion of her employment with the Fund. On the basis that Applicant failed to make her request for review within the time limits prescribed by GAO No. 31, the Fund declined to undertake an administrative review of Applicant’s complaint.<sup>9</sup> Following is an account of the steps taken by Applicant to seek administrative review, leading to her Application in the Tribunal.

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<sup>8</sup> For a discussion of the law governing conversion of fixed-term appointments, see Ms. “T”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-2 (June 7, 2006) and Ms. “U”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-3 (June 7, 2006).

<sup>9</sup> The circumstances of Applicant’s case accordingly differ from those presented in Mr. “O”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-1 (February 15, 2006), para. 65, in

22. By letter of May 4, 2005, Applicant, through counsel, addressed a “Request for Review of [her] Appointment Expiration” to the Fund’s First Deputy Managing Director. The request asserted that “[a]lthough the expiration of appointment decision was made some time ago, Ms. “AA” has recently learned that the reason for the performance shortcomings attributed to her by her supervisors was pre-textual, and that the true reason for her performance difficulties was the hostile work environment which existed in that division....” Applicant further contended that she had been subjected to treatment violative of the Fund’s Policy on Harassment, “[s]pecifically, there was a pattern and practice of isolation, manipulation and intimidation by supervisors as well as subordinates....” Accordingly, Ms. “AA” sought administrative review of the “latent injury” that she suffered as a result of the decision not to extend or convert her fixed-term appointment, maintaining that “... she did not know that [the non-conversion decision] was unjustified until facts were recently brought to her attention showing this to be the case.”

23. The First Deputy Managing Director referred Applicant’s request to the Director of the Department of Human Resources (HRD). By letter of May 27, 2005, HRD provided Applicant’s counsel the opportunity to supplement the request for review with an explanation of what “new facts” had come to Ms. “AA”’s attention and how they were relevant to her complaint, noting that the Fund would take such information into account in deciding “... whether an administrative review is permitted under GAO No. 31.”

24. Applicant’s counsel responded on June 14, 2005, alleging that more than a year after Ms. “AA” had left the employment of the Fund her successor alerted her that she and others in the division were experiencing harassment. Applicant’s counsel cited examples that he termed “eerily similar” to what Ms. “AA” had experienced:

“Accordingly, from what Ms. [“AA”] has recently learned from other staff members, it has come to her attention that the decision on her performance, and hence the decision not to extend or convert her employment contract, was completely arbitrary and did not reflect her true performance while she was at the Fund. This gave Ms. [“AA”] new facts which show a history of arbitrary performance determinations being used to mask what has now become systemic deliberate egregious behavior on the part of supervisors in that division who are engaging in a pattern or practice of harassment, intimidation, and a hostile work environment that unreasonably interferes with work in violation of the Fund’s personnel policies....”

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which the Tribunal concluded that “... when a staff member brings his complaint to the highest levels of Fund management and when management elects to review that complaint rather than advising the staff member that his complaint either should be reviewed through prescribed channels or is untimely, the Tribunal is of the view that that election by management exceptionally stands in lieu of seeking administrative review pursuant to the procedures of GAO No. 31.” (Emphasis supplied.)

Accordingly, Applicant sought administrative review of the non-conversion decision "... which she did not know was unjustified until these facts were brought to her attention."

25. By letter of July 15, 2005, the HRD Director responded that the facts alleged by Ms. "AA" did not provide a basis for undertaking administrative review of her "belated challenge," concluding that "[w]hile the 'new information' that has recently come to her attention about the alleged experiences of another staff member may explain her motivation in bringing the complaint now, it cannot explain her failure to do so previously."

26. Thereafter, on August 5, 2005, Applicant filed a Grievance with the Fund's Grievance Committee. Following an exchange of written submissions by the parties on the question of admissibility, by order of December 20, 2005, the Grievance Committee dismissed the Grievance as untimely on the grounds that Ms. "AA" "... knew or should have known the staff rules applicable to the dispute resolution process during her Fund employment [and] ... by her own admission, 'knew in late 2003 of the fact that she was being harassed and that her performance appraisals did not reflect her true performance.'"

27. On February 27, 2006, Ms. "AA" filed her Application with the Administrative Tribunal.

#### Summary of Parties' Principal Contentions

28. The parties' principal arguments as presented by Applicant in her Application and Objection to the Motion and by Respondent in its Motion for Summary Dismissal may be summarized as follows.

##### Applicant's contentions on the merits

1. Applicant was subjected to harassment and a hostile work environment in contravention of Fund rules.
2. The decision not to convert Applicant's fixed-term appointment to regular staff was impermissibly affected by this harassment.
3. Specifically, the harassment and hostile work environment to which Applicant was subjected unfairly affected both her work performance and the appraisal thereof. The assessment of Applicant's performance did not reflect her true performance.
4. Applicant seeks as relief:
  - a. rescission of the non-conversion decision;
  - b. reinstatement and appointment as a regular staff member with retroactive pay and benefits;
  - c. moral and punitive damages; and



d. attorneys' fees and costs.

Respondent's contentions on admissibility

1. Applicant failed to challenge the non-conversion decision or any aspect of her treatment by supervisors within the time limits prescribed by GAO No. 31, and, therefore, her Application in the Tribunal is inadmissible.
2. Applicant's claim of "exceptional circumstances" to excuse her delay in initiating administrative review is without merit.
3. Neither the "discovery rule" nor "equitable tolling" excuse Applicant's delay. Her complaint involves facts that by their nature would have been known to Applicant at the time they occurred. Moreover, the record demonstrates that during the term of her Fund employment Applicant believed that her negative performance reviews were unjustified.
4. Information concerning the experience of other staff members might be relevant to Applicant's claims but was not essential to them.
5. As a Fund staff member, applicant must be presumed to have had knowledge of the rules governing the dispute resolution process.

Applicant's contentions on admissibility

1. Applicant's request for administrative review was timely under the "discovery rule" because it was made within six months of when Applicant learned of all of the facts essential to support her claims.
2. Applicant did not discover, and could not have discovered, until after she left the Fund, all of the essential elements of her claim because not until January 2005, upon learning of another staff member's experience, did Applicant know that she had been subjected to a pattern or practice of impermissible conduct.
3. Additionally, the doctrine of "equitable tolling" applies because Applicant, despite all due diligence, was unable to obtain earlier than January 2005 the essential facts bearing on the existence of her claim.
4. Applicant was not given notice of the applicable recourse procedures at the time of the non-conversion of her appointment.

Consideration of the Admissibility of the Application

29. The Tribunal has before it but one question on the Motion for Summary Dismissal, namely whether Applicant has met the requirements of Article V, Section 1 of the Tribunal's Statute, which 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."

30. The Tribunal takes note of the Grievance Committee’s decision that Ms. “AA”’s Grievance was barred from consideration by that body on the ground that she failed to initiate in a timely manner the administrative review procedures of GAO No. 31 prerequisite to the Grievance Committee’s review. In Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application), IMFAT Judgment No. 2001-1 (March 30, 2001), para. 91, the Tribunal held that such a determination of the Grievance Committee is “relevant to but not necessarily dispositive of” the question of whether an applicant has exhausted channels of administrative review, as required by Article V, Section 1 of the Statute, for purposes of bringing an Application before the Administrative Tribunal. While the Grievance Committee rules upon its own jurisdiction for purposes of proceeding with a grievance, the Administrative Tribunal, in adjudging a challenge to the Tribunal’s jurisdiction, necessarily decides for itself whether channels of administrative review have been exhausted. Estate of Mr. “D”, para. 85.

31. The Tribunal has observed that

“... the recourse procedures of the Fund are meant to be complementary and effective. They are designed to afford remedies where merited, not to debar them. If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse.”

Estate of Mr. “D”, para. 102. Accordingly, the Tribunal has held that it has the authority to consider the “presence and impact of exceptional circumstances” at anterior stages of the dispute resolution process. *Id.*

32. In evaluating factors that may excuse failure to initiate timely administrative review, the Tribunal has considered “... the extent and nature of the delay, as well as the purposes intended to be served by the requirement for exhaustion of administrative remedies.” Estate of Mr. “D”, para. 108. These purposes include “... providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.” *Id.*, para. 66. Moreover, “[t]he timeliness of the review process is directly linked to the purposes of the review:

‘Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors – when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies....’”

*Id.*, para. 95, quoting Alcartado, AsDBAT Decision No. 41, para. 12. The Tribunal has emphasized that, “... in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal processes, such requirements should not be lightly dispensed with and ‘exceptional circumstances’ should not easily be found.” *Id.*, para. 104;

*see also Mr. “O”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-1 (February 15, 2006), paras. 48-50.*

33. It is not disputed that Applicant did not initiate administrative review of the decision not to convert her fixed-term appointment, or of the “related decisions, actions and inactions” of her supervisors allegedly subjecting her to harassment and a hostile work environment, until more than two years following the non-conversion decision and almost twenty months after the conclusion of her employment with the Fund.

34. As Applicant acknowledges, GAO No. 31, Rev. 3, Section 6.02, requires that a request for administrative review of a decision concerning a staff member’s work or career must be made “...within six months after the challenged decision was made or communicated to the staff member ....” Invoking the “discovery rule” and the principle of “equitable tolling,”<sup>10</sup> Applicant maintains that her Application is admissible because she requested administrative review within six months of the date on which she maintains she acquired knowledge of all of the elements of her claim, specifically, that the treatment she experienced was part of a “pattern or practice” of conduct in violation of the Fund’s rules.

35. In Ms. “AA”’s view, “... it was not until January of 2005 that the Applicant learned all of the essential elements necessary for her to know that the treatment she was subjected to was not due to a performance deficiency on her part, but was in fact a pattern of behavior which she and others in [her department], including her successor, had experienced which were repeated and therefore constituted a violation of the Fund’s Harassment Policy.” Applicant cites paragraph 10 of that policy, which provides:

“Another important element to consider is the extent to which the conduct interferes with the working environment. Mildly offensive comments or behaviors can rise to the level of harassment if they are repeated or become pervasive. At the same time, a single incident will be considered harassment if it is so severe that it poisons the overall working environment.”

Staff Bulletin No. 99/15 (June 18, 1999) (Harassment—Policy and Guidance to Staff), Attachment, para. 10. In Applicant’s view, the meaning of the cited provision is that an “essential element” of a claim of harassment, “... where a single incident is not sufficiently severe, is behavior that ‘rise[s] to the level of harassment if they are repeated or become pervasive’ ....It is this pattern or practice of repeated or pervasive behavior by the Applicant’s supervisors which the discovery rule applies to, because the Applicant thought the behavior she was subjected to was due to her poor performance, as her supervisors told her it was.”

36. Applicant urges the Tribunal to apply the “discovery rule” as among the generally recognized principles of international administrative law concerning judicial review of

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<sup>10</sup> Applicant cites 51 Am. Jur. 2d 174, 179 (2000) for these doctrines.

administrative acts<sup>11</sup> and cites in support Article XVI of the Statute of the IMFAT. Article XVI provides that: “A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal, and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.” This statutory provision, however, which supplies a narrow exception to the rule of finality of judgments, is entirely inapposite to the question of excusing delay in the initiation of a claim.

37. In In re Saunders, ILOAT Judgment No. 1466 (1996), Consideration 5, the International Labour Organisation Administrative Tribunal held irreceivable a complaint seeking to impugn an applicant’s non-selection for appointments in 1990 and 1991. The applicant maintained that he had not initiated the internal recourse procedures of the employing organization within the prescribed time limits because it was not until 1994 that he learned that the Appointment and Promotion Board had been improperly constituted. The ILOAT concluded:

“Precedent has it that a time limit is a matter of objective fact and begins to run when a decision is notified. If that were not so, whatever considerations of equity there might be, there could be no certainty in legal relations between the parties, and such certainty is the whole purpose of time limits:....The only exceptions that the Tribunal has allowed are where the complainant has been prevented by *vis major* from learning of the decision (see Judgment 21: in re Bernstein) and where the defendant has misled him or withheld some document from him in breach of good faith (see Judgment 752).”

*See also In re Schulz*, ILOAT Judgment No. 575 (1983), Consideration 2 (“No doubt the complainant did not notice until March 1982 the inequality of treatment which she pleads. But according to Article 108 (3) of the Service Regulations the time limit for filing the appeal in this case began at the date on which the impugned decision was notified to her, not at the later date on which she became aware of the alleged inequality.”)

38. The Administrative Tribunal, in ruling on the Motion in Ms. “AA”’s case, is not called upon to decide whether a “discovery rule” may ever be applied to establish “exceptional circumstances” under the Tribunal’s jurisprudence; that is a possibility which should not be excluded. Rather, the question is whether such a principle supports a finding of “exceptional circumstances” on the facts of the present case. The Tribunal concludes that it does not. For even if a “discovery rule” were to be applied, the facts as presented by Ms. “AA” simply do not bear out her assertion that she did not have knowledge of the elements of her claim until January 2005. To the contrary, Applicant’s assertions in her

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<sup>11</sup> See Article III of the Tribunal’s Statute, which provides in part: “In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts.”

pleadings before this Tribunal reveal that "... she knew in late 2003 of the fact that she was being harassed and that her performance appraisals did not reflect her true performance." Furthermore, Applicant maintains that during her employment she made "pleas of assistance" to Fund officials, including her Senior Personnel Manager, the Ombudsperson, and the Health Services Unit, "... for the stress she was suffering from because she was wrongly being blamed for poor performance by her supervisors...."

39. This knowledge was sufficient for Applicant to make out a claim of harassment under the internal law of the Fund. While Applicant maintains that a "pattern or practice" is an "essential element" of a cause of action under the Fund's personnel policy governing harassment, the Tribunal notes the definition of harassment provided in the Fund's policy, at para. 3: "Harassment is any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment."

40. What is significant for purposes of deciding the Motion for Summary Dismissal is when Applicant was on notice of an administrative act of the Fund adversely affecting her. *See, e.g., Mr. "O"*, para. 57. Ms. "AA" knew at the time of the non-conversion of her appointment that she had been adversely affected by an administrative act of the Fund. It is not necessary in every case to show a "pattern or practice" in order to bring a complaint of harassment under the Fund's regulations. It follows that the Tribunal cannot sustain Applicant's assertion that she was prevented until January 2005 from knowing the essential elements of her cause of action.

41. Finally, Applicant, citing the principle of "equitable tolling," maintains that her delay in initiating administrative review should be excused on the ground that the Fund did not give Applicant notice of review procedures, as the decision set out on the Expiration of Fixed-Term Appointment form provided no notification to Applicant of the possibilities of recourse through the Fund's dispute resolution system. The Tribunal has ruled, however, that, as a general rule, lack of individual notification of review procedures does not excuse failure to comply with such procedures, *Estate of Mr. "D"*, para. 120, and finds nothing in the circumstances of this case of a fixed-term staff member to support an exception to that rule.<sup>12</sup>

42. The Tribunal concludes, taking account of the asserted reasons for Applicant's delay, and in light of the purposes favoring the prompt initiation of administrative review, *see Estate of Mr. "D"*, para. 108, that Ms. "AA" has not established "exceptional circumstances" to excuse her substantial delay in instituting a request for review pursuant to the Fund's internal recourse procedures. Accordingly, Applicant has not met the exhaustion of remedies requirement of Article V, Section 1 of the Tribunal's Statute. The Application is therefore "clearly inadmissible" (Rule XII) and is summarily dismissed.

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<sup>12</sup> The case is to be distinguished from that in which the Tribunal has found "exceptional circumstances" in respect of notice of review procedures to a non-staff member applicant. *See Estate of Mr. "D"*, para. 128 (daughter and executrix of the estate of a non-staff member enrollee in the Fund's medical benefits plan).

Decision

FOR THESE REASONS

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

The Motion for Summary Dismissal of the Application is granted.

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.  
November 27, 2006