

# ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

## JUDGMENT No. 2007-3

### Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent

#### Introduction

1. On May 21 and 22, 2007, 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 Mr. Michel D'Aoust, a staff member of the Fund.

2. Applicant challenges elements of the process by which the Fund filled the vacancy for Deputy Division Chief of the Recruitment and Staffing Division ("RSD") of the Human Resources Department ("HRD"),<sup>1</sup> for which Applicant was an unsuccessful candidate. Mr. D'Aoust contends that the selection process was affected by procedural deficiencies that contravened Fund rules and substantially affected its outcome. In particular, Applicant maintains that the three candidates who were shortlisted for the position (including the individual ultimately selected for appointment) did not meet its qualifications as set out in the Vacancy Announcement and Job Standard, and that, accordingly, their applications should have been rejected at the screening stage. In Applicant's view, this error was repeated by the Selection Panel, the Head of the hiring Department, and the Review Committee. In addition, Applicant maintains that in filling the vacancy, the Fund improperly took account of the "diversity profiles" of candidates, which, he alleges, resulted in impermissible discrimination against him on the basis of his gender, race, nationality and age. Accordingly, Applicant contends that the initial shortlisting of three candidates and the ultimate selection and appointment of the Deputy Division Chief were arbitrary, capricious and discriminatory and therefore represented an abuse of the Fund's discretion. Applicant additionally contends that he has suffered damage to his professional reputation and health as a result of the allegedly improper selection procedure, as well as retaliation for pursuing his complaint. Finally, Applicant challenges aspects of the review of his Grievance by the Fund's Grievance Committee.

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<sup>1</sup> The Tribunal's "Revised Decision on the protection privacy and method of publication" (June 8, 2006), para. 3, provides in part: "The departments and divisions of the Fund shall be referred to by numerals unless specification is desirable for the comprehensibility of the Judgment or Order." In the instant case, identification of the department and division is necessary to the consideration of the issues of the case. See Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), note. 1.

Pursuant to Rule XXII, para. 2 of the Tribunal's Rules of Procedure, the Fund has requested that in order to protect their privacy of the shortlisted candidates for the vacancy their names not be published by the Tribunal. Applicant has responded that he does not object to this request. Paragraph 2 of the Tribunal's "Revised Decision on the protection of privacy and method of publication" provides: "The name of any other individual involved shall not appear where the Fund has so requested pursuant to Rule XXII, para. 2, and 'where good cause has been shown for protecting the privacy of an individual,' or where the Tribunal decides that a reference to a named person would be inappropriate." In accordance with its usual practice, the Tribunal will not name persons other than the Applicant in this case.

3. Respondent, for its part, maintains that it did not abuse its discretion in filling the vacancy for the RSD Deputy Division Chief position, and that the overall selection process, as well as its stages, were procedurally sound. Respondent maintains that all candidates' qualifications were properly assessed at each stage of the process, and that it was within the discretion of the Selection Panel to determine the significance and weight to be accorded the various "critical competencies" referred to in the Vacancy Announcement and to assess the candidates' qualifications in their light. Respondent denies that considerations of "diversity" played a role in the process of filling the vacancy of RSD Deputy Division Chief, a process that it maintains was designed to minimize the possibility of bias and favoritism. Respondent furthermore denies that HRD failed to address Applicant's complaint in good faith or that he was subjected to retaliation for the making of that complaint. Respondent additionally maintains that Applicant's challenge to elements of the Grievance Committee proceedings is not properly before the Tribunal.

### The Procedure

4. On December 19, 2005, Mr. D'Aoust filed an Application with the Administrative Tribunal. Pursuant to Rule VII, para. 6 of the Tribunal's Rules of Procedure, the Registrar advised Applicant that the Application did not fulfill the requirements of paras. 3 and 5 of that Rule. Accordingly, Applicant was given fifteen days in which to correct the deficiencies. The Application, having been brought into compliance within the indicated period, is considered filed on the original date.<sup>2</sup>

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<sup>2</sup> Rule VII provides in pertinent part:

*"Applications*

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

...

5. An application shall include evidence that the Applicant has satisfied the requirements of Article V, and that the application is being submitted to the Tribunal within the time prescribed by Article VI, of the Statute.

6. If the application does not fulfill the requirements established in Paragraphs 1 through 5 above, the Registrar shall advise the Applicant of the deficiencies and give him a reasonable period of time in which to make the appropriate corrections or additions. If this is done within the period indicated, the application shall be considered filed on the original date. ..."

5. The Application was transmitted to Respondent on December 22, 2005. On January 9, 2006, pursuant to Rule IV, para. (f),<sup>3</sup> the Registrar circulated within the Fund a notice summarizing the issues raised in the Application. Respondent filed its Answer to Mr. D'Aoust's Application on February 3, 2006. On March 2, 2006, Applicant submitted his Reply. The Fund's Rejoinder was filed on April 5, 2006.

Request for production of documents

6. Pursuant to Rule VII, para 2(h)<sup>4</sup> and Rule XVII<sup>5</sup> of the Tribunal's Rules of Procedure, in his Application, Mr. D'Aoust made the following requests for production of documents:

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<sup>3</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>4</sup> Rule VII, para. 2(h) provides:

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

....

(h) any request for production of documents as provided by Article X of the Statute and Rule XVII below.”

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

*“Production of Documents*

1. The Applicant, pursuant to Rule VII, Paragraph 2(h), may 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. The request shall contain a statement of the Applicant's reasons supporting production accompanied by any documentation that bears upon the request. The Fund shall be given an opportunity to present its views on the matter to the Tribunal, pursuant to Rule VIII, Paragraph 5.

2. The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals. For purposes of deciding on the request, 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, within a time period provided for in the order. The President may decide to suspend

1. The names and profiles of applicants to Vacancy No. 040356, which would list for each candidate: degree(s) and professional certification(s); total years of human resources experience; total years of Fund human resources experience; total years of recruitment and staffing experience; total years of Fund recruitment and staffing experience; total years of supervisory and managerial experience; largest number of staff supervised; gender; race; nationality; and date of birth;
2. The shortlisted candidates' applications for the vacancy;
3. The Fund history of the shortlisted candidates as described in their "chrons" (the People Soft report which details the Fund history of a staff member); and
4. The resumes of the shortlisted candidates, on file at the time of their application for the vacancy in question.

7. Applicant contended that the requested documents were relevant to the issues of the case because the Fund's assertions that the shortlisted candidates met the vacancy requirements were not substantiated in the record. In Applicant's view, the documents were "essential to demonstrate that the shortlisted candidates did not meet the vacancy requirements and that their applications, thus, should not have been forwarded for consideration." In addition, Applicant maintained that the requested documents "formed part of the proceedings which led to [the] decision to shortlist three unqualified candidates and to appoint one of the them." Finally, Applicant maintained that the demographic information sought as to each of the nine applicants for the vacancy was relevant to his contention that the selection process was tainted by discrimination on the basis of gender, race, nationality and age.

8. In accordance with Rule XVII and Rule VIII, para. 5<sup>6</sup> of the Tribunal's Rules of Procedure, Respondent was provided the opportunity to present its views as to whether the document requests should be granted. Respondent opposed Applicant's requests for production of documents, maintaining that the record was sufficiently complete as to the qualifications of the shortlisted candidates and that disclosure to Applicant of the requested documents would infringe on the privacy of the candidates for the position. The Fund additionally contended that the requested documents were "irrelevant as to the reasons why Applicant was not selected for

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or extend time limits for pleadings to take account of a request for such an order."

<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."

the vacancy,” which, in the Fund’s view, is the only decision properly before the Tribunal for review.<sup>7</sup>

9. The Tribunal initially denied Applicant’s requests for documents on February 15, 2006, following the submission of the Application and the Answer. On January 25, 2007, having had the benefit of the Applicant’s Reply and the Fund’s Rejoinder, and upon further consideration of the issues of the case, the Tribunal informed the parties that it had reconsidered its decision and requested that Respondent transmit to the Tribunal for its *in camera* review all documents responsive to Applicant’s requests, for the purpose of deciding upon their disposition. (Rule XVII, para. 2.) *See Mr. “F”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 10. On February 8, 2007, Respondent submitted responsive documents for the Tribunal’s inspection.

10. On April 23, 2007, following *in camera* review, the Tribunal decided to transmit to Applicant for his review and comment a portion of the documents that had been supplied for inspection, namely, the official Fund CVs of the nine candidates for the vacancy. The Tribunal redacted the names of the five candidates, other than Mr. D’Aoust, who had not been shortlisted for the vacancy, substituting for their names “male/female non-shortlisted candidate.”<sup>8</sup> The Tribunal concluded, however, that the remainder of the responsive documents, i.e. the applications for the vacancy and the “chrons”<sup>9</sup> of all nine candidates, would not be transmitted to Applicant and accordingly would not be made part of the record before the Tribunal. In the view of the Tribunal, the potential probative value of these documents, although perhaps greater than that of the Fund CVs, was outweighed by the privacy interests of the candidates. *See generally Mr. “F”, paras. 12, 15.* In arriving at its decision to require production of the official Fund CVs for Applicant’s review, thereby making them part of the Tribunal’s record, the Tribunal took account of the lack of objective evidence in the record as to the qualifications of the candidates for the vacancy, in particular of the documentation that formed the basis for the initial screening of the candidates by the Fund’s Human Resources staff.<sup>10</sup> Finally, the Tribunal communicated to

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<sup>7</sup> *See infra* Consideration of the Issues of the Case; The Decision under Review.

<sup>8</sup> The names of the three shortlisted candidates had been made known in the Grievance proceedings and pleadings before the Tribunal.

<sup>9</sup> The “chron” is a computer-generated listing maintained on each staff member, chronicling each personnel action taken, such as promotion, transfer, merit increase, the dates thereof, associated salary information and performance ratings, as well as identifying personal data.

<sup>10</sup> *See generally In re Der Hovsepian (Interlocutory order)* ILOAT Judgment No. 1177 (1992), Considerations 4 and 5 (“An item that forms part of the decision may not be withheld from the Tribunal’s scrutiny;” disclosing to applicant for his review and comment disputed document relating to his rating by Appointment and Promotion Committee); *Alves v. The Secretary General of the United Nations*, UNAT Judgement No. 1245 (2005), Additional Statement of Judges Flogaitis and Goh:

“... the Tribunal finds that it is impossible for anyone competing for a post to establish discrimination and request judicial review, unless he or she has full access to the file. Being prevented from having full access may jeopardize the person’s rights and interests. The Respondent may argue that disclosure of a file would not respect confidentiality, but this must be balanced with the right of an applicant to defend himself or herself. Otherwise, a violation of due process rights may occur.”

Applicant the Fund's statement that it does not compile information as to the race of the candidates.

11. On May 1, 2007, Applicant submitted his observations on the documentation. The Fund filed its response on May 11, 2007.

Request for oral proceedings

12. In his Application, Applicant requested oral proceedings, pursuant to Rule VII, para. 2(i)<sup>11</sup> and Rule XIII, para. 1<sup>12</sup> on the ground that only two of the nine members of the Review Committee, the body that reviewed and endorsed the hiring Department's selection for the vacancy, had testified during the Grievance Committee's proceedings. Respondent, for its part, maintained that the ample record before the Tribunal rendered additional oral proceedings unnecessary.

13. In accordance with Rule XIII, para. 1 of the Tribunal's Rules of Procedure, "[o]ral proceedings shall be held if ... the Tribunal deems such proceedings useful." The Tribunal in this case has the benefit of the transcript of the full evidentiary hearing before the Fund's Grievance Committee, at which the HRD staff member who conducted the initial screening of applications, all four members of the Selection Panel, the Review Committee member charged with conducting the "due diligence" inquiry into the candidates' qualifications, and the HRD Director who served both as the Head of the hiring Department and Chairperson of the Review Committee 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.

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*See also* Capt v. The Secretary General of the United Nations, UNAT Judgement No. 1304 (2006), para. II.

<sup>11</sup> Rule VII, para. 2(i) provides:

“... Each application shall contain:

....

(i) any request for oral proceedings as provided by Article XII of the Statute and Rule XIII below.”

<sup>12</sup> Rule XIII, para. 1 provides:

“1. Oral proceedings shall be held if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views pursuant to Rules VII–X, the Tribunal deems such proceedings useful. In such cases, the Tribunal shall hear the oral arguments of the parties and their counsel or representatives, and may examine them. In accordance with Article XII of the Statute, oral proceedings shall be open to all interested persons, unless the Tribunal decides that exceptional circumstances require that they be held in private.”

14. In view of the extensive Grievance Committee record and the written documentation of the case, the Tribunal decided not to hold oral proceedings.<sup>13</sup>

### The Factual Background of the Case

15. The relevant factual background, some of which in dispute between the parties, may be summarized as follows.

#### Overview

16. Applicant began his employment with the Fund in 1993 as a Human Resources Officer in the Compensation Policy division of the Administration Department. In 1995, he was promoted to Senior Human Resources Officer. In 2001, Applicant became a Senior Human Resources Officer in the Recruitment and Staffing Division (“RSD”) of HRD, in which position he was serving in September 2004 when a vacancy was posted on the Fund’s Career Opportunities vacancy list for the position of RSD Deputy Division Chief, at Grade A14. Along with eight other Fund staff members, Applicant applied for the vacancy.

17. The selection process was governed by the rules prescribed in Staff Bulletin No. 03/27 (Senior Promotions and Appointments in the Fund) (December 19, 2003) and the Career Opportunities: Policy and Guidelines (January 1, 2003, revised on July 27, 2004). Staff Bulletin No. 03/27 describes the steps in the process for selection of a Grade A14 Deputy Division Chief in the specialized career streams as follows:

“Position advertised

HRD screens all applications and forwards applications of qualified candidates to department for consideration

Department interviews candidates and shortlists the three most qualified candidates

RC [Review Committee] assesses shortlisted candidates, selects candidate, and makes recommendation to management

Management makes final decision”

(Staff Bulletin No. 03/27, p. 13.)

18. It is not disputed that in filling the contested vacancy the Fund proceeded according to the essential steps set out in the applicable Staff Bulletin. As a result of the initial screening of applications by RSD and confirmation by the Senior Personnel Manager (“SPM”) of the hiring Department, all nine candidates were sent forward for consideration by a Selection Panel

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<sup>13</sup> Applicant’s challenges to elements of the review of his Grievance by the Grievance Committee are considered *infra* at Consideration of the Issues of the Case; Additional Claims.

comprised of senior officials of the hiring Department HRD.<sup>14</sup> The Selection Panel administered a “selection process,” consisting of a written test and Panel interviews. The Selection Panel “shortlisted” the three candidates who ranked highest as a result of this process. The shortlisted candidates were then interviewed by the HRD Director in his capacity as Head of the hiring Department; he endorsed the Selection Panel’s ranking. Thereafter, the Review Committee reviewed the assessment of the candidates and recommended to management the candidate who had received the highest ranking by the hiring Department. The selection of the appointee was announced to members of the Recruitment of Staffing Division on December 15, 2004.

### Job Standard and Vacancy Announcement

19. The two documents that served as the basis for assessing the qualifications of the candidates for the position were the “Job Standard,” which sets out in generic terms the requirements for a Grade A14 Deputy Division Chief in the Human Resources job ladder, and the “Vacancy Announcement,” which specified the requirements for the position of Deputy Division Chief of the Recruitment and Staffing Division.<sup>15</sup>

20. The applicable Job Standard set out the “typical duties and responsibilities,” “minimum qualifications,” and “critical competencies” required of a Deputy Division Chief in the human resources stream as follows:

#### **“Deputy Division Chief (HR)**

....

#### **Typical duties and responsibilities**

- Assumes Acting Chief role, with all its associated managerial and supervisory functions, in absence of Division Chief.
- Assists Division Chief in delegated responsibilities for supervising, assessing, developing and training staff in the division.
- Assists Division Chief in planning, organizing and monitoring the programs assigned to the division.

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<sup>14</sup> In the instant case, HRD performed a dual role in the process of filling the vacancy. First, as is its usual function, RSD, a division of HRD, performed the initial screening of applications. Second, the applications of the eligible candidates were forwarded to the hiring Department for selection; in this case the hiring Department was also HRD. See Staff Bulletin No. 03/27; Career Opportunities: Policy and Guidelines.

<sup>15</sup> See Ms. “B”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1997-2 (December 23, 1997), para. 77 (vacancy announcements may properly refine and particularize qualifications set out in the job standards).

- Assists Division Chief in ensuring proper organization and management of the division's EDP facilities
- Assists Director in overseeing the implementation of major HR policy changes approved by the Executive Board and/or management.
- Takes a lead role in the development of major HR policies. Is responsible for responding to technical and factual questions of Executive Directors on Board papers within area of expertise.

### **Minimum Qualifications**

For Grade A14, educational development, typically acquired by the completion of a relevant advanced university degree, supplemented by a minimum of 11 years of relevant progressively responsible work experience, is required. Alternatively, a university degree and seventeen years of professional HR experience is required.

### **Critical Competencies**

#### **HR proficiency**

- Has thorough knowledge of HR management principles, practices and applications. Has authoritative knowledge in assigned areas.
- Has proven ability and judgment to discern the probable effects of introducing new or changed HR policies and procedures.

#### **Work management**

- Is able to translate the objectives of HRD Front Office into action plans, and to organize resources carrying out these plans.
- Demonstrates ability and skill in managing large numbers of staff, including counseling and developing both professional and support-level staff.

#### **Relationship building**

- Has experience in dealing with members of the Executive Board and of the Committee on Administrative Policies. Is familiar with the decision-making process within HRD Front Office.

**Business understanding**

- Has thorough knowledge of Fund’s organization, functions, current activities and environment. Understands the effect that HRD’s actions may have on the Fund’s current situation.”

21. The Vacancy Announcement, which referred to the Job Standard, announced the “duties and responsibilities,” as well as the “qualifications,” for the RSD Deputy Division Chief position as follows:

**“Vacancy Details**

....Deputy Division Chief

....HRD/Recruitment and Staffing Division ....

**Duties and Responsibilities:**

*See above job standards for Human Resources on the Compensation and Benefits Policy web page....*

Assists the Division Chief in the formulation and implementation of policies and programs related to recruitment and staffing. These include categories of employment, internal staffing, external recruitment, diversity, sourcing strategies, and terms of appointment. Assists in monitoring the efficiency and effectiveness of policies and processes in place.

Assumes acting chief role in the absence of the Division Chief.

Has primary responsibility for managing several recruitment programs including supervising the associated staff.

Takes a lead role in drafting of Board paper and providing periodic analyses of recruitment and retention experience, as well as progress reports on diversity recruitment.

Plays key role in implementing best practices and making efficient use of technology.

Deals effectively with staff at all levels, including senior departmental managers, and with member country senior officials, university contacts, and potential candidates.

Participates in various Fund-wide committees and working groups on human resource management topics.

**Qualifications:**

*In addition to the qualifications set forth in the job standards, the following competencies are critical to the position:*

- HR delivery: strategic vision (identifies systemic issues and trends; develops and implements strategies); broad HR proficiency and specialized knowledge and experience in employment policies, recruitment strategy and techniques, and internal mobility programs; analytical skills; change agent (identifies and diagnoses needs and facilitates necessary interventions).
- Relationship building: customer focus; diplomatic skills; fostering teamwork.
- Communications skills: public presentation; written communication.
- Business understanding: understanding the role and work of Fund departments.
- Work management: organizing for results and innovation;
- Other managerial skills: delegation; adaptability; appraising and developing staff.
- Should have potential for advancement to Grade B-level positions.”

(Bold in original; italics supplied.) It may be noted that in the Vacancy Announcement the term “Qualifications” is defined as “competencies [that] are critical to the position.” Hence, in the testimony of witnesses, as well as in the parties’ pleadings, these “qualifications” often were referred to as “critical competencies,” a term that more precisely refers to a set of generic competencies prescribed in the Job Standard (*see* above).

Initial screening of applications by RSD

22. A Human Resources (“HR”) Assistant in the Recruitment and Staffing Division performed the initial screening of the nine applications received in response to the Vacancy Announcement. The HR Assistant testified before the Grievance Committee that, in accordance with RSD’s usual practice, he reviewed the candidates’ (i) applications for the vacancy, (ii) “chrons,” and (iii) official Fund CVs to ascertain whether the candidates met the “minimum qualifications” identified in the Job Standard and referenced in the Vacancy Announcement, i.e. the minimum requirements of education and experience.

23. According to the HR Assistant’s testimony, he did not undertake to assess whether candidates possessed the “critical competencies” required for the position, as, in his view, such an assessment was outside the scope of the RSD screening. Another RSD staff member, who

assumed the screening function subsequent to the events at issue in this case, confirmed that RSD screens applications on the basis of the education and experience requirements. The RSD Division Chief and the SPM of HRD likewise testified that an assessment of “minimum qualifications” constituted the basis for the initial screening, consistent with RSD’s usual practice.

24. The HR Assistant emphasized in the Grievance Committee the nature of his role in the process as follows:

“A: ... I need to make sure that they’re meeting certain minimum standards and it almost becomes very basic. Do they have an advanced degree, do they have significant years of experience, work experience, and is it related experience? If that test is being met at a minimum, then my feeling was that I’d leave it to the hiring Department to decide whether or not they wished to consider the applicant.”

25. The HR Assistant noted that there was a “subjective” element to screening for “relevant progressively responsible work experience:”

“A: In terms of the work experience, I would have looked at their application, just to see whether or not it indicated how long they had been working in X function. And if it wasn’t clear from the application or from their chron., I would have looked at their Fund application to see if they had been doing something directly relevant prior to joining the Fund.

....

.... It would have to have been in HR more generally and one component of that could have been recruitment....”

According to the HR Assistant’s interpretation of the Vacancy Announcement, experience in recruitment was one example of “HR delivery,” rather than a separate requirement. He testified: “I was looking for the components of HR delivery under the qualifications and if someone had recruitment strategy and techniques, in my opinion, that was the bonus ....” Similarly, he interpreted the Job Standard’s reference to “authoritative knowledge in assigned areas” (an aspect of “HR proficiency”) to refer to the field of human resources generally, rather than to recruitment in particular. He also considered applicants’ managerial experience, but not whether they were able to manage “large numbers” of staff (as stated in the Job Standard), as this notion “would have been open to interpretation.”

26. The HR Assistant testified that on the basis of his review of the paper record, all nine applicants met the requisite “minimum qualifications.” In his view, while two of the candidates who were later shortlisted, including the candidate who was ultimately appointed, did not have recruitment experience within the Fund, he had noted that both of these candidates had such experience in their prior employment.

27. The HR Assistant further testified that he had questions as to whether one of the nine applicants, an economist, met the “minimum qualifications.” Mindful that the incumbent was an economist by training, he asked the RSD Division Chief whether an economist would be considered again for the position and received an affirmative reply. The Division Chief testified that this decision was reached in consultation with HRD’s Front Office, in view of the successful practice of employing senior economists in HRD, the possibility under the Fund guidelines of substituting extensive relevant experience for lack of a specialized degree, and the candidate’s good “business understanding,” which was one of the “critical competencies” stated in the Job Standard.

28. The HR Assistant also testified that screening for managerial positions tends to be more inclusive, essentially leaving elimination decisions to the hiring Department.

Assessment of candidates by hiring Department

29. Following the HR Assistant’s initial screening, the applications of all nine candidates, along with supporting materials, were forwarded to HRD, as the hiring Department in this instance.

30. The HRD Senior Personnel Manager testified that he was responsible, on behalf of HRD as the hiring Department, for confirming the HR Assistant’s screening of the applications. The SPM reviewed the applications in light of both the “minimum qualifications” and “critical competencies” set out in the Job Standard and Vacancy Announcement. He described his approach as follows:

“I took a rough cut at the number of years of experience, looked at how much recruitment and other HR experience they had, came to the conclusion that rather than try to short list ... the five or six who seemed to be the strongest, to go ahead and actually interview them all, including, I should add, the economist staff member who did not meet the qualifications as described.”

31. As to the three candidates who ultimately were to become shortlisted for the position (*see* below), the SPM determined that the candidate who was ultimately appointed to the position had about 12 years of relevant experience and had recruitment experience that pre-dated her Fund employment. With respect to another shortlisted candidate, the SPM testified:

“She possessed, from what I recall -- again, there’s some judgment on how you count this, but between 10-1/2 and 11-1/2 years of HR experience.

...

[I]f you count this couple of years of experience, which one can argue one way or the other might be counted, given full credit, it was HR experience. But the level of the experience, if it’s not fully professional level, it would get half credit; if it is fully professional level, it would get full credit.

...

She did have good knowledge in the recruitment area, she had done some recruitment in her prior Fund experience. And she had been involved in recruitment in her then assignment as [Assistant to Senior Personnel Manager ('ASPM') in one of the Fund's departments]."

He testified that this candidate had joined the Fund at the support level "because there were no professional vacancies available for which she could apply. Prior to coming to the Fund, however, she had completed two master's degrees in human resource management and had professional level experience ... as a human resource officer." He further determined that as an ASPM this candidate had had some experience "managing the assistants and dealing with managerial issues," but did not have experience in managing large numbers of staff and "would need some additional seasoning" in this respect. The SPM testified that the third shortlisted candidate had 10.7 years of relevant experience and had experience in recruitment and related policies prior to joining the Fund.

32. The SPM concluded that all eight HR professionals who applied for the position met the "minimum qualifications." (He noted that one of them had very limited direct experience in recruitment, but had many years of other experience and some of the "critical competencies.") Although, in his judgment, the economist candidate did not meet the qualifications as described "if you strictly read the job description," the SPM supported the inclusion of this candidate, based on precedent and on the candidate's business knowledge. He testified that he later confirmed this approach with the other Selection Panel members (*see* below) who also reviewed the candidates' applications and agreed that all nine candidates would be interviewed.

#### Selection Panel administered by the hiring Department HRD

33. Accordingly, based on the screening of the applications by the hiring Department, all nine candidates were admitted to the next stage of competition for the vacancy. The SPM of HRD assembled a Selection Panel comprised of himself, the RSD Division Chief, the Chief of another HRD Division, and an HRD Business Advisor. The SPM testified that he followed the established practice of constituting a Panel with a "broad perspective ... meant to underscore that we're not just recruiting for a division, but ... more on a department-wide basis."

34. The Selection Panel members testified that the competitive phase entails evaluation of candidates in light of the "critical competencies" referred to in the Vacancy Announcement. The SPM testified that candidates did not have to possess all of the stated competencies. He added that there was probably not one candidate who possessed all stated competencies, but that this "one has to determine often in the course of an interview."

35. The SPM of HRD, together with the RSD Division Chief, determined that the "selection process" would consist of a written test followed by Panel interviews, to be weighed equally in the overall score.

36. The written test was comprised of the following questions, designed to assess the candidates' recruitment-related knowledge:

“1. The Fund is mandated to hire the best qualified staff from as broad a geographical basis as possible. How would you formulate a recruitment strategy and take this mandate into account? How should the selection process be structured to avoid cultural bias in assessing candidates’ capabilities?”

2. What would be the advantages and the drawbacks of introducing e-recruitment in the Fund? And what recommendation would you formulate?”

The Selection Panel members testified that the written test was “blindly” scored and the results were not matched with candidates’ names until after the interview process had been completed. The answers were rated by each Panel member independently of the other members.

37. As for the Panel interview component of the “selection process,” the interview questionnaire, which has been included in the record before the Tribunal, reflects the following assessment categories: “motivation; strategic vision, judgment and analytical skills; client relations; adaptability and sensitivity to diversity issues; managing conflict or differences of opinion; balancing roles; coaching and giving feedback; open communication, sharing information; organizational skills; delegation; and translating initiatives or mandates into deliverables.” The Panel members testified that the questions were designed to reflect the “critical competencies” identified in the Job Standard. In the course of the interviews, with minor exception, each of the candidates was asked the same questions, by the same Panel members, in the same order. (Not all questions were asked in each interview, but some were asked from each category.) As with the written test, the candidates’ performance during the interviews was rated by each Panel member independently of the others.

38. The testimony of the Selection Panel members revealed that some of the “qualifications” stated in the Vacancy Announcement were given greater weight in the selection process than were others. Each of the Panel members testified that “strategic vision” was considered to be particularly important. The RSD Division Chief further testified that “strategic vision” had to be “based on a broad-based HR knowledge, because our recruitment policies and employment policies are not isolated, they are intertwined with other policies, HR policies;” other Panel members also emphasized the importance of broad HR proficiency. The Panel members also underscored the importance of analytical and written communication skills, including the ability to produce high-quality Board papers, as well as potential to advance to Division Chief level or to B-level positions in other HRD divisions.

39. Several Panel members testified that managerial skills were very important to the position. The Business Advisor testified that the ability to manage large numbers of staff was important because the position entailed managing about half of the total number of RSD staff, and, on occasion, acting as Division Chief. The Business Advisor further testified that all shortlisted candidates had managerial skills, elaborating as follows:

“... two of the top three candidates had been in section chief roles here in HRD and had demonstrated their managerial skills.

The third one of that top three had not had formal managerial ... experience, rather – had not been a section chief or a team leader in the Fund, certainly, and so that did in fact affect that person’s ranking in the top three.”

Other Panel members also noted in their testimony the somewhat limited nature of the managerial experience of one of the candidates who later was to be shortlisted but ultimately was not selected for the position.

40. All Panel members agreed that while knowledge and experience in recruitment were taken into account, they were secondary in importance because the position did not entail frequent participation in recruitment, which is a function of other RSD staff members. The SPM testified:

“[I]n the division chief and deputy division chief jobs in our department, we’re not looking just for specialists in that area. On the contrary, we are looking for people who have the ability to adapt, to bring strategic vision analysis to the position, to manage the division, and to be able to move, to take over other divisions.”

The SPM testified that these qualifications had to be assessed as part of a range of skills, rather than in isolation, and furthermore, that the required level of skills could be acquired on the job:

“Q. So would you agree that the position does require specialized knowledge in recruitment and staffing at the division chief level?

A. I think, as I say, it is something that the incumbent clearly has to, if they don’t already have it, have to pick up ... over a reasonable period of time.

Q. Are we talking about picking it up on the job or are we talking about picking it up to be eligible for the job?

A. Well, the way we’ve interpreted this and the way we’ve practiced it is of actually picking it up on the job. And again, this is where looking at ... the broad range of HR skills that people bring to us has been more important than ... very specific technical knowledge.”

He testified that, in his view, all of the shortlisted candidates did have knowledge and experience in recruitment.

41. All four Panel members testified that, in addition to the written test, the interview questions also probed the candidates’ knowledge of recruitment. The RSD Division Chief testified that the following two questions were specific to recruitment and technical skills:

“The MD [Managing Director] presented the objectives of the employment, compensation and benefits review. In your view, what elements should the consultant firm consider to define an employment framework that would meet the institution’s evolving staffing needs?”

At present starting salary and grade calculation is based exclusively on factual data and quantitative factors such as educational background and years of relevant experience. What would be the pros and cons of introducing a qualitative appreciation of candidates’ work experience in the salary and grade determination process?”

Several Panel members testified that the following opening question also provided an opportunity for a candidate to discuss his or her recruitment background and technical expertise:

“What motivated your application for this position? How does it fit in your career plan? How has your work so far (inside the Fund and outside) prepared you to take on this job?”

In addition, the SPM testified that candidates were asked the following question not reflected in the questionnaire: “for people who were in the [RSD] division, ‘What would be the pros and cons of ... being in the division,’ and for those who were not in the division ..., ‘What would you see are the advantages and disadvantages of going to the division as an outsider?’” He added that questions were designed to create a “level playing field” so as to avoid giving candidates from a particular Division a strong advantage.

42. As recounted in the testimony of the Business Advisor, during the course of the interview process, the Selection Panel became aware that some RSD staff members had raised questions as to the eligibility of some of the candidates, particularly as to whether the candidates met the “years of relevant experience, particularly taking into account ... whether their experience was gained before or after graduate training.” Accordingly, the interview process was interrupted to solicit a second opinion from the Compensation Division as to whether all candidates satisfied the “minimum qualifications.” The Business Advisor testified:

“[T]his question arose just after the first two interviews were conducted and we took a break in the process and checked with the Compensation Division on all of the candidates’ qualifications for this vacancy.

....

[W]e decided, given the sensitivity of this position, to consult with an independent group outside of Recruitment, in Compensation, to get a second opinion.”

43. According to the testimony of the RSD Division Chief, at the conclusion of the selection process, the Selection Panel again verified that the shortlisted candidates met the “minimum

qualifications.” In contrast, another Panel member testified that he was not called upon to check the candidates’ “minimum qualifications,” such as years of experience.

#### Shortlisting and ranking of candidates by the Selection Panel

44. The Selection Panel members testified that the same three candidates were given the highest ratings by each of the four Panel members independently of the other members on both the blindly scored written test and the interviews, with some deviation in the order of the top three. The rankings for both the written test and the interviews were then consolidated. The Panel members emphasized in their testimony that there was a distinct gap in the scores between the three top-ranked candidates and the others, and the SPM noted that he had “rarely seen such a degree of unanimity” in the outcome of a selection process.

45. The Selection Panel accordingly shortlisted the top three candidates. All of the shortlisted candidates were females and nationals of countries underrepresented within the Fund. Applicant’s ranking did not qualify him for the shortlist, and, accordingly, he and the five other lower-ranked candidates were eliminated from the competition.

46. When asked during the Grievance Committee’s proceedings about the qualities that made the shortlisted candidates stand out, each of the Panel members cited such factors as stronger performance in demonstrating analytical skills, strategic thinking, innovativeness (including ability to draw from experience gained outside the Fund), and broad HR knowledge gained both within and outside the Fund.

#### Applicant’s complaint to the HRD Director

47. According to notes prepared by Applicant and included in the record before the Tribunal, Mr. D’Aoust was informed by the SPM on November 8, 2004 that he had not been shortlisted for the vacancy. On November 12, he met with the HRD Director. In a memorandum of December 6, 2004 the HRD Director defended the selection process and the resulting shortlisting decision, which he maintained was based on “... information gained during the selection process on the qualifications for the position, not on gender or nationality grounds.” He also warned Applicant about accessing confidential personnel information in connection with his complaint.<sup>16</sup>

48. Also on December 6, 2004, Applicant initiated administrative review.<sup>17</sup> Furthermore, he notified the HRD Director: “This is to inform you, in your capacity as Chairperson of the Review Committee, that I intend to challenge the selection panel’s recommendation with regard[ ] to vacancy no. 040356, RSD Deputy Division Chief. I trust that you may wish to advise the Review Committee members accordingly.”

#### Referral of shortlisted candidates to Head of hiring Department

49. Following the shortlisting of the three highest-ranked candidates by the Selection Panel, their applications were referred to the Head of the hiring Department, i.e. the HRD Director, for

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<sup>16</sup> See *infra* Consideration of the Issues of the Case; Additional Claims.

<sup>17</sup> See *infra* The Channels of Administrative Review.

his assessment. The HRD Director interviewed the three shortlisted candidates, not having been apprised of the candidates' respective rankings. Based on his review, the HRD Director identified as the strongest candidate the same individual who had been given the highest ranking by the Selection Panel. The HRD Director testified that he did not assess the candidates' "minimum qualifications," but rather evaluated their analytical and strategic skills, and concluded that all three candidates had such skills. He added that having worked together with two of them, he had a favorable impression of their skills and, in particular, had been very impressed with the top candidate's analytical skills.

50. In his testimony, the HRD Director emphasized that strategic and analytical skills were particularly important in view of the need to develop a more analytical approach to recruitment and retention issues, including salary competitiveness and diversity recruitment. He testified that HRD was under a mandate from Fund Management to develop new approaches to implement the Fund's policy of recruiting diverse and highly qualified staff, and that "for that, we needed people in the division that could think in strategic terms and have the analytical skills and that could think in terms of organizational development."

Review of the hiring Department's rankings by the Review Committee

51. Having been endorsed by the HRD Director, the shortlist of three candidates, as ranked, was submitted to the Review Committee. The Review Committee ("RC") is comprised of the Director of HRD (Chairperson) and eight members at Grade B4 appointed by the Managing Director to advise Management on the suitability of proposed candidates for positions within the Grade A14 – B2 range, including Grade A14 Deputy Division Chief positions. (Staff Bulletin No. 03/27, pp. 7, 27.)

52. One of the Review Committee members was assigned to conduct a "due diligence" inquiry into the qualifications of the three shortlisted candidates. He testified that the Review Committee had been provided by the hiring Department with a memorandum outlining the selection process, the ranking of the candidates and the rationale for the ranking. In addition, it was provided with a list of all nine candidates, their "chrons," as well as information on merit increases and performance ratings for the last few years. He was unable to recall whether CVs and APRs were provided for all candidates or only for those who were shortlisted. He testified that the Review Committee assessed the shortlisted candidates' qualifications against the requirements for the position as stated in the Vacancy Announcement and Job Standard.

53. The Review Committee member further testified that he conducted due diligence in accordance with his standard practice. He reviewed the shortlisted candidates' dossiers in light of the Vacancy Announcement and Job Standard. He assessed the candidates' years of experience based on their "chrons" and CVs, but did not make a "thorough assessment" of the length of the shortlisted candidates' experience relative to the non-shortlisted candidates.

54. The Review Committee member also posed questions to the SPM of the hiring Department about the shortlisted candidates, as well as about some of the other candidates. In particular, he inquired about the reasons for not shortlisting one of the candidates who had RSD experience. He testified that he was satisfied with the SPM's explanation that this decision was based on the extent to which the candidate had demonstrated ability "to think outside the box"

and the Selection Panel's conclusion that the shortlisted candidates were more imaginative, more creative and would bring new ideas to the job. He next interviewed the shortlisted candidates' supervisors, peers and subordinates, as well as the top-ranked candidate.

55. The Review Committee member further testified that in conducting due diligence, he focused on the following qualifications:

“... the depth and breadth of experience, the nature of the work that they'd done both inside and outside the Fund, ... [and] the relevance of their educational qualifications or broader HR work, which to me is also a sign of fungibility within the Human Resources Department, not just for the current job, and their skills as managers, both task management and people management.”

He further testified that the due diligence inquiry calls for “a very substantial focus on supervisory experience,” and in the present case:

“[W]hat I focused on was that these people had worked more in small teams, but they had worked with, supervised projects and that typically, these projects involved a handful of people, but that they had supervised a number of different projects involving different small groups of people.”

He added that assessments provided by the shortlisted candidates' subordinates were very positive.

56. The Review Committee member testified that, having assessed the shortlisted candidates against the requirements for the position as set out in the Job Standard and Vacancy Announcement, he concluded that all three were qualified for the position. He presented his findings to the Review Committee, which subsequently endorsed HRD's top-ranked candidate, leading to her selection as the RSD Deputy Division Chief. According to Applicant, the HRD Director announced the selection to the Division on December 15, 2004.

#### The Channels of Administrative Review

57. On December 6, 2004, Applicant addressed a memorandum to the HRD Director “... to request administrative review under General Administrative Order No. 31.” The HRD Director responded on December 10, 2004 that in order to initiate administrative review Applicant would need to provide additional information, “[i]n particular...the specific decision(s) that you wish to have reviewed.” Applicant replied on the same day, stating that he was challenging “... the decision of the [selection] panel members – a decision which you subsequently endorsed -- to interview and shortlist three candidates who do not meet the minimum qualification requirements for the Vacancy...” The SPM of HRD replied on December 30, 2004, advising Applicant that because the decision to shortlist the candidates was a decision taken by the Director of HRD, it

was not subject to administrative review and Applicant could proceed to file a Grievance with the Grievance Committee.<sup>18</sup>

58. On January 3, 2005, Applicant filed his Grievance with the Fund's Grievance Committee, which considered it in the usual manner, on the basis of oral hearings and the briefs of the parties. On August 29, 2005, the Grievance Committee issued its Recommendation and Report, recommending denial of Applicant's Grievance on the ground that Applicant had not shown that the decision not to select him for the position of RSD Deputy Division Chief was arbitrary, capricious, discriminatory or procedurally defective in a manner that substantially affected its outcome. By letter of September 27, 2005, the Deputy Managing Director notified Applicant that Fund management had accepted the Committee's recommendation.

59. On December 19, 2005, Mr. D'Aoust filed his Application with the Administrative Tribunal.

### Summary of Parties' Principal Contentions

#### Applicant's principal contentions

60. The principal arguments presented by Applicant in his Application, Reply, and Comments on Fund Documents may be summarized as follows.

1. Applicant need not challenge his own non-selection for the Deputy Chief position, as a procedural breach in the selection process may constitute "adverse effect" within the meaning of Article II, Section 1 of the Tribunal's Statute.
2. The shortlisting of three candidates, and the subsequent selection and appointment of one of these candidates, was arbitrary, capricious and discriminatory and was based on an erroneous assessment of the information to be properly considered.
3. The contested decisions were affected by procedural deficiencies that contravened Fund rules and substantially affected the outcome of the selection process, in particular in recognizing as "eligible" three candidates, i.e. the shortlisted candidates, who did not meet the stated requirements of the position.
4. The three shortlisted candidates, the economist candidate, and two others should have been screened out by RSD, as these candidates failed to meet several position requirements stated in the Vacancy Announcement and the Job

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<sup>18</sup> See GAO No. 31, Rev. 3 (November 1, 1995), Section 6.06:

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

Standard. HRD, in its role as hiring Department, also failed to assess properly their qualifications on the strength of their written records. Accordingly, the Fund breached its own rules and a general principle of international administrative law that a candidate must meet all the requirements of the position in order to be qualified for appointment to that position.

5. Following the screening stage, the selection process was not designed to ensure the appointment of the best qualified candidate. The interview questionnaire failed to assess adequately the candidates' recruitment and supervisory knowledge and experience. Respondent's contention that the Selection Panel had full discretion to determine the weight of different competencies contradicts the need to safeguard objectivity in the competition.
6. The Review Committee failed to assess fully the shortlisted candidates' qualifications against the position requirements, in contravention of Fund rules and principles of objectivity and transparency of competition. The "due diligence" inquiry conducted by a member of the Review Committee was incomplete, and his assessment of the shortlisted candidates' qualifications was at odds with the facts.
7. HRD withheld relevant information from the Review Committee. Given that the shortlisted candidates were the three most junior in grade and seniority, the three youngest, and the three with the least work experience, the Selection Panel could not have fully substantiated its ranking, and the Review Committee failed to scrutinize it.
8. It was a breach of Fund procedures to make use of candidates' Annual Performance Reports ("APR"s) in its selection decision process.
9. The selection procedure took into account the "diversity profiles" of the candidates, which resulted in impermissible discrimination against Applicant on the basis of his gender, race, nationality, and age, in violation of the internal law of the Fund. From the start, HRD sought to shortlist three female candidates of nationalities underrepresented in the Fund. The selection process was orchestrated to favor these candidates in that candidates' qualifications were not properly assessed, position requirements were effectively lowered and the shortlisted candidates' qualifications were misrepresented.
10. The HRD Director exhibited bias by failing to assess adequately the shortlisted candidates' qualifications and by withholding from the Review Committee information concerning Applicant's intention to file a Grievance.
11. The Review Committee fosters diversity in promotions, which can be achieved only through quotas and "reverse discrimination," in contravention of Fund rules and the principle of non-discrimination.

12. The selection process was designed to favor younger candidates in that it discounted functional and managerial knowledge and experience. The HRD Director also showed bias in favor of younger candidates.
13. Applicant was subjected to retaliation for pursuing his complaint. The HRD Director abused his authority by threatening Applicant with disciplinary action. In responding to Applicant's complaint, the Fund breached its duty of care and failed to act in good faith.
14. The Tribunal may take account of the treatment of an applicant in connection with the Grievance proceedings, and where such treatment is deficient, as in the present case, an award of damages is appropriate.
15. Applicant seeks as relief:
  - a. rescission of the appointment of the RSD Deputy Division Chief position;
  - b. re-advertising of the vacancy (or, in lieu thereof, additional monetary damages);
  - c. damages for moral injury, including humiliation and injury to professional reputation, career prospects and health and well-being, in the amount of \$100,000;
  - d. punitive damages; and
  - e. legal costs.

Respondent's principal contentions

61. The principal arguments presented by Respondent in its Answer, Rejoinder, and Response to Applicant's Comments on Fund Documents may be summarized as follows.

1. Applicant may challenge only his own non-selection for the position, as it is the only "administrative act adversely affecting him" within the meaning of Article II, Section 1 of the Tribunal's Statute.
2. All shortlisted candidates met the "minimum qualifications" for the position. There was no procedural defect in accepting their applications, and those of the other candidates, at the initial vetting stage. The decision to include the economist candidate was made because there was an operational basis for considering an economics background as relevant work experience for the RSD Deputy Division Chief post. Applicant was not harmed by the decision to interview all candidates.
3. The Selection Panel properly assessed all candidates' competencies and it was within its discretion to determine the weight to be accorded the various "critical

competencies” referred to in the Vacancy Announcement. Contrary to Applicant’s unsubstantiated view, recruitment experience was not considered the foremost among the required competencies.

4. The selection process was designed to test both technical skills (including recruitment skills), in particular through the written examination, and managerial skills through a structured set of interview questions. The interview questions also permitted the candidates to convey a sense of their technical expertise.
5. All three shortlisted candidates did have recruitment experience, if not at the Fund, then in their prior employment. However, the qualities that made them stand out were their demonstrated analytical skills and aptitude for strategic thinking. The consistency of the top three rankings, with subsequent endorsement by the HRD Director and the Review Committee, leaves little doubt that those candidates best demonstrated the skills deemed most important by the Panel.
6. While APRs may properly be used to separate candidates when the results of the selection process are close, they were not used in creating the shortlist in the appointment of RSD Deputy Division Chief.
7. Applicant’s claim that the selection process was tainted by discrimination against candidates who were not seen as “diversity candidates” is baseless. The selection process was designed to avoid such bias in that it was partially blindly rated and was inclusive in permitting all candidates to compete. In their testimony, the Selection Panel members strongly denied taking diversity into account in ranking the candidates.
8. The mere fact that the top-ranked candidate, following a rigorous selection process, happened to be a woman from an underrepresented country does not create a presumption that diversity was the basis for her selection.
9. Applicant’s claims that HRD did not deal with his complaint in good faith and that he was subjected to retaliation are unfounded. It was appropriate for the HRD Director not to inform the Review Committee of Applicant’s intention to file a Grievance, as this information was not relevant and should not have influenced the Review Committee’s impartial review. The HRD Director’s warning concerning the use of confidential information pertaining to other candidates was entirely legitimate.
10. Applicant’s claims against the Grievance process are not properly before the Tribunal. Applicant did not establish that he was prejudiced by the Grievance Committee’s application of the existing standard of review.
11. The Tribunal is not empowered to award punitive damages, and Applicant failed to substantiate his other claims for damages. Applicant’s claim for

damages due to alleged injury to his health should be disregarded since he failed to exhaust administrative remedies on this issue.

### Consideration of the Issues of the Case

#### The Decision under Review

62. The Administrative Tribunal must determine as a preliminary matter what administrative act or acts of the Fund it properly has been called upon to review in this case. Applicant maintains that he challenges the “procedural deficiencies of the selection process” for the RSD Deputy Division Chief position, which, he contends, substantially affected the outcome of that process. Respondent, by contrast, maintains that Mr. D’Aoust may contest only his own non-selection for the position. In Respondent’s view, “[a]lthough Applicant argues that he is challenging the ‘procedural deficiencies of the selection process’ rather than his own non-selection, ... the only ‘administrative act adversely affecting him,’ and hence the only decision that he could challenge under Article II, Section 1 of the Statute of the Tribunal, is the Fund’s decision not to select him for the Deputy Division Chief position.” Applicant counters that he need not invoke his own non-selection as a basis for his Application, since “procedural breach may constitute adverse effect,” as required under Article II, Section 1.

63. Article II of the Statute of the Administrative Tribunal provides in relevant part:

#### ***“ARTICLE II***

1. The Tribunal shall be competent to pass judgment upon any application:

a. by a member of the staff challenging the legality of an administrative act adversely affecting him; ....

...

2. For purposes of this Statute:

a. the expression ‘administrative act’ shall mean any individual or regulatory decision taken in the administration of the staff of the Fund ....”

64. While Applicant does not contend that he necessarily should have been selected for the vacancy, he alleges that the three shortlisted candidates, including the individual ultimately selected for appointment, did not meet the qualifications for the position as set out in the Vacancy Announcement and Job Standard. Accordingly, he seeks as relief rescission of the appointment and re-advertising of the vacancy. The question arises whether, without contending that he was the candidate best suited to fill the post, Applicant was “adversely affected” by an “administrative act” (or acts) of the Fund for purposes of maintaining an Application pursuant to Article II, Section 1 of the Statute. For the reasons set out below, the Tribunal concludes that Applicant has standing to challenge the elements of the process that resulted in the selection of a

candidate for appointment to the RSD Deputy Chief position, for which he was an unsuccessful candidate.

65. In Ms. “G”, Applicant and Mr. “H”, Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 61, the Tribunal held that the “intendment of [the ‘adversely affected’] requirement is simply to assure, as a minimal requirement for justiciability, that the applicant has an actual stake in the controversy:”

“With respect to the requirement that an applicant be ‘adversely affected’ by an administrative act of the Fund, the Commentary observes as follows:

‘...a staff member would have to be adversely affected by a decision in order to challenge it; the tribunal would not be authorized to resolve hypothetical questions or to issue advisory opinions.’

(Report of the Executive Board, p. 13.) .... it is clear that the Applicant is adversely affected, because her claim is not hypothetical nor is the response that she seeks to her claim merely advisory.”

Ms. “G”, para. 61; see also Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications), IMFAT Judgment No. 2005-3 (December 6, 2005), paras. 17-21. Likewise, Mr. D’Aoust’s stake in the controversy in the instant case is not a hypothetical one. Applicant applied for the RSD Deputy Division Chief position. Respondent has not disputed that he met the eligibility requirements to be further considered for the post. Following the Selection Panel’s assessment of the candidates, Mr. D’Aoust was not shortlisted for the vacancy. At that stage, he clearly became “adversely affected” by an “administrative act” of the Fund.

66. The Tribunal concludes that Applicant may also challenge the initial screening process by which all nine applicants were determined to be eligible to advance to the Selection Panel phase. Applicant maintains that the initial screening was defective in improperly failing to screen out as unqualified the three candidates who were later to be shortlisted. The initial screening substantially affected the outcome of the overall selection process because a decision that a candidate met the screening criteria was a necessary, although not sufficient, condition for selection for the appointment. Accordingly, the screening decision had “some present effect” on Applicant’s position.<sup>19</sup> Baker, para. 21; *see also* Mr. “O”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-1 (February 15, 2006), paras. 55-56 (earlier decision “had ‘some present effect’ on Applicant’s position” and “set in motion a series of acts, any one of which Applicant might have challenged.”)

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<sup>19</sup> The Tribunal observes in this connection that Applicant voiced his dissent as to the Fund’s decision-making as soon as he became aware that he had not been shortlisted, and he initiated formal administrative review before the appointment decision had been announced. *See supra* The Factual Background of the Case; Applicant’s complaint to the HRD Director; and The Channels of Administrative Review.

67. A staff member applying for a vacancy within the Fund has a right to have his candidacy fairly considered in accordance with the internal law of the Fund and general principles of international administrative law. Applicant need not contend that he himself was the candidate best suited to fill the vacancy, a contention that in any event the Tribunal would not be in a position to judge. *See In re De Riemaker (No. 3)*, ILOAT Judgment No. 1595 (1997), Consideration 4 (“Whether or not the Tribunal quashes the impugned decision it may not replace the Organisation’s assessment of the applicants with its own and order any particular appointment”).

68. Other international administrative tribunals similarly have held that applicants for vacancies have standing to pursue such claims. *See De Riemaker*, Consideration 10 (“... even if she were unqualified for the post the complainant would not forfeit her right to challenge the appointment”); *In re Pinto*, ILOAT Judgment No. 1646 (1997), Consideration 11 (respondent’s argument that the applicant was “not up to the job anyway” was immaterial to the tribunal’s consideration of his contention that the organization had violated “cardinal rule” of the selection process); *accord In re Cassaignau (No. 4)*, ILOAT Judgment No. 1359 (1994), Consideration 7 (“however he may compare with the other applicants the complainant qualified under the wording of the notice and was entitled as a Eurocontrol official to have his application considered and assessed by a process that complied with the rules. As has been shown, it was not, and the breach of his rightful interest affords grounds for this complaint”); *In re Van Der Peet (No. 17)*, ILOAT Judgment No. 1316 (1994), Consideration 4 (“The material question is whether the complainant’s rights as a candidate for the post were infringed. ... [The respondent organization] included the complainant in the list of applicants eligible for consideration by the Selection Board and thereby accepted his candidature. So it may not now contend that he had no interest in the outcome of the procedure and has no right to challenge it.”); *In re Kirstetter (No. 2)*, ILOAT Judgment No. 1223 (1993), Consideration 20 (“[T]he staff member has undeniably the right to file an internal appeal or a complaint with the Tribunal if he believes that the appointment to a vacancy he has applied for is improper. He may for that purpose challenge any relevant decision, whether it be the express rejection of his own application or the rejection implied in the appointment of someone else.”)

69. The Tribunal accordingly concludes that Mr. D’Aoust, for purposes of maintaining an Application pursuant to Article II, Section 1 of the Statute, was “adversely affected” by the appointment decision as well as by those acts which necessarily led up to it. The Tribunal has made clear that the concept of “adversely affected” as that term applies to the admissibility of a claim before the Tribunal must be distinguished from an abuse of discretion on which an applicant might prevail on the merits. *See Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007), para. 87. Accordingly, the Tribunal now turns to the question of whether, as Mr. D’Aoust alleges, the Fund abused its discretion in filling the Deputy Division Chief position for which he unsuccessfully applied.

Did the Fund abuse its discretion in filling the vacancy for Deputy Division Chief of the Recruitment and Staffing Division, for which Applicant was an unsuccessful candidate?

70. Applicant contends that the process by which the position of RSD Deputy Division Chief was filled was tainted by both procedural and substantive defects. He maintains that the

assessment of the shortlisted candidates' qualifications was carried out in disregard of the published requirements for the position and the applicable procedural rules, and was based on errors of fact. Applicant further maintains that the selection process was vitiated by improper motive, namely, discrimination on the basis of gender, race, nationality and age.

71. In cases involving the review of individual decisions taken in the exercise of managerial discretion, this Tribunal consistently has invoked the following standard set forth in the Commentary on the Statute:

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

(Report of the Executive Board, p. 19.) *See generally* Ms. “J”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2003-1 (September 30, 2003), para. 106.

72. Moreover, selection of a staff member to fill a vacancy, like other decisions that involve weighing the suitability of a staff member to perform particular functions within the organization, is the province of the decision-making officials. Accordingly, “[w]hen managers take such a decision ... with deliberation and in the absence of improper motive, it is not for the Tribunal to substitute its judgment for their considered determination.” Ms. “T”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-2 (June 7, 2006), para. 53 (non-conversion of fixed-term appointment); *accord* Ms. “U”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-3 (June 7, 2006), para. 53. *See also* Ms. “J”, 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 to regular staff); Mr. “F”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 70 (citing pertinent provision of Statutory Commentary in finding “persuasive” the Fund’s view that Mr. “F” was not qualified for the position that had been redesigned following the abolition of his post). In reviewing such decisions, the Tribunal has often referred to the following observation in the Statutory Commentary:

“This principle [of 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.”

(Report of the Executive Board, p. 19.)

73. Accordingly, in reviewing selection decisions, the Tribunal may not substitute its own assessment of candidates' merits for that of the competent Fund officials. The International Labour Organisation Administrative Tribunal has articulated this principle as follows:

“As it has often [been] held, an appointment by an international organisation is a discretionary decision. Being subject to only limited review, it may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. The Tribunal will, in cases like the present, exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the organisation full responsibility for its choice.”

In re Mrs. M. D. S., ILOAT Judgment No. 2163 (2002), Consideration 1. *See also Hitch v. International Bank for Reconstruction and Development*, WBAT Decision No. 344 (2005), paras. 39-40 (“It is not for the Tribunal, in assessing the validity of the selection or non-selection of a staff member, to undertake its own examination of that staff member’s record, or a criterion-by-criterion assessment of his or her qualifications. That is for the Bank to do in the first instance, subject to review by the Tribunal only for abuse of discretion,” quoting Jassal v. International Bank for Reconstruction and Development, WBAT Decision No. 100 (1991), para. 37); Guioguo v. Asian Development Bank, AsDBAT Decision No. 59 (2003), para. 11; In re Pinto, ILOAT Judgment No. 1646 (1997), Consideration 4 (“The Tribunal will interfere only if there is some fatal flaw, such as a formal or procedural defect, or a mistake of law or of fact. And it will be especially cautious in reviewing an appointment because it may not substitute its own assessment of the candidates for the organisation’s.”)

74. At the same time, the respondent organization is bound to observe the vacancy announcement and the elements of its internal law governing selection decisions, as well as applicable principles of international administrative law. *See Pinto*, Consideration 6 (“When an organisation chooses to hold a competition it must abide by its written rules and by the general principles set forth in the case law, particularly insofar as they govern the formal side of the process.”)

75. In the Fund, the selection of candidates to fill senior positions announced via the Career Opportunities vacancy list is governed by Staff Bulletin No. 03/27 (Senior Promotions and Appointments in the Fund) (December 19, 2003) and the Career Opportunities: Policy and Guidelines (January 1, 2003, revised on July 27, 2004). Applicant’s challenges to the following stages of the selection process will be addressed in turn: (1) initial screening of applications for eligibility; (2) assessment of suitability and shortlisting of the three top-ranked candidates by the Selection Panel and subsequent endorsement by the Department Head; and (3) assessment and recommendation by the Review Committee. The question of whether the process of filling the

vacancy was improperly motivated by impermissible discrimination will be considered thereafter.<sup>20</sup>

Did the Fund abuse its discretion in screening candidates for eligibility to compete for the vacancy of RSD Deputy Division Chief?

76. The Fund's internal law emphasizes that the initial screening of applications for a Grade A14 Deputy Division Chief vacancy is to be based upon an assessment of candidates' "eligibility" for appointment. Accordingly, Staff Bulletin No. 03/27, p. 7, provides that "HRD screens candidates for promotion or appointment to senior positions to ensure that candidates meet the relevant eligibility criteria." This approach is reiterated by the Career Opportunities: Policy and Guidelines, p. 6, which provide for screening of applications by RSD as follows:

"RSD sends the hiring Department only the applications of *eligible candidates (those who meet the requirements for the position, including those who would be eligible for underfilling and, in case of interdepartmental mobility, those who have occupied their present jobs for the minimum required time)*. RSD will notify ineligible candidates that their application has not been forwarded and the reasons for this decision."<sup>21</sup>

(Emphasis supplied.)

Initial Screening by Recruitment and Staffing Division

77. Applicant contends that the three shortlisted candidates (as well as three others) should have been found ineligible, and their applications rejected, at the initial screening stage. In Applicant's view, these candidates failed to meet several requirements stated in the Vacancy Announcement and Job Standard. Applicant asserts that the "critical competencies" for the position had to be assessed in the initial screening, as they were, "in addition to minimum qualifications, indispensable, and ... any candidate who did not possess the said competencies should have been screened out and found unqualified for the position." In addition, Applicant maintains that "the hiring Department, HRD, represented by the SPM, the Selection Panel and

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<sup>20</sup> See *infra* Consideration of the Issues of the Case; Was the process of filling the vacancy for RSD Division Chief improperly affected by the candidates' "diversity profiles," resulting in impermissible discrimination against Applicant on the basis of his gender, race, nationality or age?

<sup>21</sup> The policy of "underfilling" permits filling of a position by a candidate who is within 12 months of reaching the "minimum qualifications." See Career Opportunities: Policy and Guidelines, p. 8:

"Underfilling situations:

A staff member is appointed to a position at a grade lower than the minimum entry grade of the position advertised in the full grade band applicable to the position when he/she does not fully meet the requirements of the position as per the vacancy announcement or the job standard but is expected to meet these requirements within 12 months from the date of the decision."

the Director, also failed to make a proper assessment of the qualifications of the candidates on the strength of their written records” to ensure that candidates who did not meet the requirements of the position were excluded from the competition.

78. Respondent counters that Applicant’s view “... reflects a confusion between the objective requirements, or prerequisites, that candidates must meet in order to be considered qualified and allowed to compete for the position, and the critical competencies on which all qualified candidates will subsequently be assessed through the competitive process.” Respondent maintains that the three shortlisted candidates met the “minimum qualifications” for the position, and there was no procedural defect in accepting as eligible the applications of these and the other candidates for the vacancy. In Respondent’s view, “... the more complex and nuanced assessment of whether the candidates possess the various ‘critical competencies’ listed in the Vacancy Announcement is properly carried out by the selection panel, through the more in-depth phases of the selection process.”

79. The HR Assistant who was charged with the task of performing the initial screening based on the candidates’ applications, official Fund CVs, and “chrons,” testified that his role was limited to assessing “minimum qualifications” for the vacancy as set out in the Job Standard and referenced in the Vacancy Announcement:

**“Minimum Qualifications**

For Grade A14, educational development, typically acquired by the completion of a relevant advanced university degree, supplemented by a minimum of 11 years of relevant progressively responsible work experience, is required. Alternatively, a university degree and seventeen years of professional HR experience is required.”<sup>22</sup>

The RSD Division Chief and the Senior Personnel Manager of the Human Resources Department likewise testified that an assessment of “minimum qualifications” constituted the basis for the initial screening, consistent with RSD’s usual practice.

80. This approach is consistent with the Fund’s regulations, which provide that “[n]one of the candidates for the position will be informed of their standing prior to the RC meeting, except for those who do not meet the advertised position’s *minimum requirements* and who are not interviewed.” (Staff Bulletin No. 03/27, p. 1.) (Emphasis supplied.) The implication of this provision is that only those candidates meeting “minimum” requirements will advance to the Selection Panel stage of the process. Finally, the Tribunal observes that responsibility for initial screening is placed in the hands of an HR Assistant, a junior officer of the Recruitment and Staffing Division.<sup>23</sup> This factor also suggests that the eligibility screening does not involve a sophisticated assessment of qualifications.

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<sup>22</sup> It is undisputed that ten years of relevant experience would make a candidate eligible pursuant to the “underfilling” policy. *See* Career Opportunities: Policy and Guidelines, p. 8.

<sup>23</sup> When eligibility questions arose, such as those relating to the economist candidate for the vacancy, the HR Assistant consulted with his superiors to resolve the matter. *See supra* The Factual Background of the Case.

81. Nonetheless, the Tribunal recognizes that even in assessing “minimum qualifications” the screening process did require the exercise of some discretion. As the HR Assistant himself testified, there was necessarily a “subjective” element involved in quantifying the number of years of “relevant progressively responsible work experience.” In exercising this discretion, the HR Assistant testified that he looked to the various “competencies” involved in fulfilling the position.

Confirmation of eligibility by SPM of hiring Department

82. The Senior Personnel Manager of HRD testified that he was responsible, on behalf of HRD as the hiring Department, for confirming the HR Assistant’s screening of the applications and that he reviewed them in light of the “minimum qualifications” and “critical competencies” stated in the Job Standard and Vacancy Announcement. He testified that, while the “critical competencies” did not come into play in the initial vetting stage, in reviewing the screening decision, he “would obviously look at them.” He also consulted with other members of the Selection Panel, who reviewed the application materials and concluded that all nine applicants for the vacancy would advance to the next stage of the competition. The SPM acknowledged that as to the assessment of years of relevant experience “there’s some judgment on how you count this” and that he took a “rough cut at the number of years of experience.”

83. The SPM testified that, in his view, all of the shortlisted candidates had recruitment experience, if not in their Fund careers, then through prior employment. (Indeed, later when the Selection Panel conducted its interviews, it noted that successful candidates demonstrated that they were able to draw upon this experience in innovative ways.) Moreover, they had experience in the field of human resources more broadly defined. This breadth of experience, rather than technical recruitment skills, was a quality that the Selection Panel later looked to as a strength, in light of the responsibilities of the position to be filled. (*See* below.) The decision to admit the economist candidate into the next phase of the competition was taken on the basis of the Fund’s experience in placing economists in positions with human resources responsibilities and the particular qualities of the individual candidate.

84. What is notable about the screening process carried out in the case of the RSD Deputy Division Chief position is the decision taken by senior officials of the Human Resources Department to give candidates the benefit of the doubt in meeting the eligibility requirements, including in calculating their years of relevant experience. The Senior Personnel Manager, who reviewed the screening on behalf of HRD as the hiring Department, testified in some detail as to his method for assessing years of experience.<sup>24</sup>

85. The question arises whether there was any abuse of discretion on the part of the Fund in taking this “inclusive” approach in assessing the candidates’ eligibility and forwarding all nine applicants for further testing through the “selection process” implemented by the Selection Panel.

86. In defining the limits of an organization’s discretion in selecting staff members for vacancies, other international administrative tribunals have recognized that an organization must

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<sup>24</sup> *See supra* The Factual Background of the Case; Assessment of candidates by hiring Department.

observe the terms of the applicable vacancy notice in order to safeguard the objectivity and transparency of the competitive process, and, accordingly, must reject any candidate who does not satisfy the essential requirements of the position stipulated in the notice. *See, e.g., Pinto*, Considerations 10 and 11 (appointment set aside where organization neglected the “cardinal rule of any process of selection: the chosen candidate must have at least the qualifications stipulated in the notice;” appointee had neither the university degree nor the experience that the notice required); *In re Vianney*, ILOAT Judgment No. 1158 (1992), Consideration 9 (organization failed to abide by requirements it set for the post: language fluency); *Perea v. International Finance Corporation*, WBAT Decision No. 326 (2004), para. 74 (“material inconsistency” between advertised criteria and basis upon which manager made his decision).

87. Under the terms of the Vacancy Announcement, the “critical competency” of “HR delivery” included both “broad HR proficiency” and “specialized knowledge and experience in employment policies, recruitment strategy and techniques.” The testimony of the HR Assistant and the SPM of HRD indicates that, consistent with the terms of the Vacancy Announcement, assessment of the shortlisted candidates’ “relevant” experience took into consideration their broader HR experience as well as recruitment experience. This approach to the assessment of “relevant” experience is consistent with the Fund’s policy on senior promotions, prescribed in Staff Bulletin No. 03/27, which lists among the competencies for positions both “[s]pecialty expertise” and “[b]readth of expertise: maintains expertise in a number of sufficiently different areas to be able to work in a variety of positions throughout the organization.” (“Competencies and Key Behaviors for Assessing Candidates for Managerial Positions,” Staff Bulletin No. 03/27, Annex VI.) Several HRD officials emphasized in their testimony before the Grievance Committee the importance of broad HR proficiency for the RSD Deputy Division Chief position.<sup>25</sup>

88. As for recruitment experience, the SPM of HRD testified that review of the shortlisted candidates’ applications and supporting background materials established that they had the requisite experience in recruitment, gained either at the Fund or prior to joining the Fund. The HR Assistant and the Business Advisor (who was a member of the Selection Panel) also testified to the same effect.

89. The SPM testified that he assessed the extent of candidates’ “recruitment and other HR experience.” He determined that the candidate who was ultimately selected had about 12 years of relevant experience, including recruitment experience pre-dating her Fund employment. While Applicant acknowledged that the successful candidate “carried the very minimum twelve years of HR experience,” he contested her selection on other grounds. The SPM further determined that the other two shortlisted candidates had sufficient HR experience, having regard to pre-Fund as well as Fund history; Applicant disputes this assessment.

90. The testimony of the HR Assistant suggested that screening for managerial positions tends to be more inclusive, essentially leaving elimination decisions to the hiring Department. Significantly, the decision to take an inclusive approach at the screening stage was linked to the view that qualifications for a managerial position in the human resources stream could not be

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<sup>25</sup> *See supra* The Factual Background of the Case: Selection Panel administered by the hiring Department HRD.

fully or meaningfully assessed until the candidates reached the “selection process” administered by the Selection Panel.

91. The SPM testified that HRD had a history of “look[ing] pretty carefully at everybody and unless they really are out of the picture” of interviewing them: “... I wouldn’t be too hung up on this first screening because ... it’s interpreted in different ways, different practices in different departments. I think we just choose to take a more liberal approach....”

92. The question arises whether this “liberal approach” to the screening process represents an abuse of discretion on the part of the Fund. For the following reasons, the Tribunal concludes that it does not. As set out in the testimony of the Human Resources officials, the decision to promote the selected candidate was a reasoned one, supported by the facts, and was the outcome of a multi-step process in which the Human Resources Assistant performed the initial review of candidates’ dossiers and the Senior Personnel Manager of the hiring Department, in this case HRD, corroborated the initial vetting by evaluating the applications himself in the light of his experience in the management of the human resources functions of the Fund. Further confirmation was provided by the team of Human Resources managers that was assembled to serve as the Selection Panel. (*See below.*)

93. In deciding to take an inclusive approach at the screening stage, the SPM appropriately recognized the limitations of the paper record in assessing candidates’ qualifications:

“[A]t that stage [the initial screening of applications] ... there was no indication that they didn’t meet [the stated requirements]. Now if you ask me if everybody met every single requirement, qualification as defined in the job description, the answer is no, they didn’t, I don’t think there was anybody, actually, who met all the qualifications.

But again, that’s something that one has to determine often in the course of an interview, because one is looking at the application materials people have provided and ... that’s part of the reason for having an interview and the various tests in the selection process.

....

[T]he main purposes of the testing, the interview and the written test is precisely to find out whether people actually do have these competencies.”

94. The Tribunal has examined the official Fund CVs of all nine candidates for the vacancy, which were produced for Applicant’s review during the course of these proceedings.<sup>26</sup> Taking into account this documentary evidence and the parties’ written observations on it, the testimony of Fund officials during the Grievance Committee proceedings, and Applicant’s allegations as to

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<sup>26</sup> *See supra* The Procedure; Request for production of documents.

the lack of relevant experience of several of the candidates for the position, the Tribunal concludes that the Fund did not abuse its discretion in determining that the three shortlisted candidates met the “minimum qualifications” making them eligible to advance to the next stage of the selection process. It is also significant that while Applicant maintains that all three of the candidates who were to become shortlisted as a result of the “selection process” were “unqualified” for the position, he does not contend that the individual ultimately appointed to the post failed to meet the “minimum qualifications” of educational attainments and years of relevant work experience which, in the view of the Tribunal, was the only test required at the screening stage. Applicant, however, does maintain that the individual ultimately appointed was unqualified because her HR experience allegedly did not embrace all of the requirements of the position. That contention will be considered below.

95. The Tribunal notes that Applicant additionally maintains that the Selection Panel, the Head of the hiring Department and the Review Committee also failed to assess properly the “minimum qualifications” of the candidates. Having concluded that the Fund did not abuse its discretion in the initial screening performed by RSD and confirmed by the Senior Personnel Manager of the Human Resources Department, the Tribunal cannot sustain those latter claims.

Did the Fund abuse its discretion in its assessment by the Selection Panel of the suitability of the candidates for the RSD Deputy Division Chief position?

96. Having so concluded that the Fund did not abuse its discretion in screening, the Tribunal now turns to the question of whether there was any abuse of discretion in the assessment of candidates’ suitability by the Selection Panel and in the resultant shortlisting of the three candidates who emerged from that process with the highest rankings. While the eligibility screening properly focused on the candidates’ meeting “minimum qualifications,” the Selection Panel phase entailed an evaluation of candidates’ suitability in light of the “qualifications” (also referred to as “critical competencies”) set out in the Vacancy Announcement.

97. Staff Bulletin No. 03/27 provides that in selecting a candidate for a Deputy Division Chief position at Grade A14 within the specialized (i.e. non-economist) career streams, the “[d]epartment interviews candidates and shortlists the three most qualified candidates.” (Staff Bulletin No. 03/27, p. 13; *see also* Annex I.) The Career Opportunities: Policy and Guidelines, p. 7, provide as follows as to the selection of candidates:

“All internal candidates who meet the position requirements should be interviewed. However, if the list of eligible candidates is long, the Department shortlists and interviews the candidates with the best match of credentials and experience;

- Departments may use various methods to shortlist and select (e.g., tests, one-to-one interviews, panel interviews).”

Accordingly, the Fund’s internal law provides for the exercise of some discretion in deciding on the elements of the “selection process.” The question arises whether, in filling the vacancy of RSD Deputy Division Chief, the selection instruments, i.e. the blindly scored written test and the

Panel interviews, were reasonably calculated to test the competencies required for the position as set out in the Job Standard and Vacancy Announcement.

98. Applicant contends that the “selection process” failed to make a proper assessment of the candidates’ qualifications against the requirements of the position. In his view, all three shortlisted candidates, including the official ultimately selected, lacked the following “qualifications” set out in the Vacancy Announcement: “broad HR proficiency” and “specialized knowledge and experience in employment policies, recruitment strategy and techniques,” as well as the following “critical competencies” stated in the Job Standard: “authoritative knowledge in assigned areas” and “[d]emonstrates ability and skill in managing large numbers of staff.” Therefore, maintains Applicant, the shortlisting of three candidates and the selection and appointment of one of them were “based on erroneous facts, in disregard of essential facts, or [based] on manifestly erroneous assessment of the information to be properly considered and taken in violation of applicable procedures in a manner that affected the outcome.”

99. Applicant further contends that the interview questionnaire “prevented qualified candidates from highlighting their qualifications and experience most pertinent to the position” and “discount[ed] the functional and managerial knowledge and experience of candidates.” In Applicant’s view: “Essentially, it meant that recruitment and staffing experience, as well as supervisory experience, would be disregarded.”

100. Respondent, for its part, maintains that all candidates’ competencies were properly assessed by the Selection Panel and that it was within the Panel’s discretion to determine the relative weight to be accorded to the various competencies which, according to the Vacancy Announcement, were “critical to the position.” Respondent further maintains that it was reasonable for the Selection Panel not to regard recruitment experience as foremost among the required competencies because the position to be filled was not that of a “recruitment technician,” but rather of a Deputy Division Chief who could help manage the Division, think strategically, bring new ideas to the table, and potentially advance to more senior positions in other areas of HRD’s practice. In Respondent’s view, the “selection process” tested both technical skills (including recruitment skills), particularly through the written examination, and managerial skills through a structured set of interview questions, which additionally permitted the candidates to convey a sense of their technical expertise.

101. The testimony of the Selection Panel members confirmed that some of the “qualifications” stated in the Vacancy Announcement were given greater weight in the selection process than were others. In the Tribunal’s view, there was no abuse of discretion on the part of the Selection Panel in assigning different weights to different competencies. This was reasonable in light of the Fund’s regulations and general principles of international administrative law, and it was consistent with the observation of one of the Panel members that the “broad range of HR skills that people bring to us has been more important than ...very specific technical knowledge.”

102. While position requirements in a vacancy notice may leave room for discretionary judgment in the selection of candidates, selecting officials may not disregard the advertised requirements in designing and implementing a selection process. As the ILOAT has observed, “... though the qualifications stated in a notice of vacancy are not absolutely binding and the

Director General may still exercise some discretion, he may not so utterly discard them as to flout the rules that ensure the proper openness and objectivity of the competition.” In re De Riemaeker (No. 3), ILOAT Judgment No. 1595 (1997), Considerations 7, 9, 10 (where vacancy notice expressly required *inter alia* “long experience (at least 10 years) of translation, revision and interpretation,” organization did not have discretion to select individual for head of the Translation and Interpretation Division who had “never worked as an interpreter ... let alone [had] the ‘long’ experience the notice had called for.”) *See also Perea*, para. 74 (“ ... significant disregard of the advertised criteria, and the lack of any written evaluation of the skills of each candidate, lead the Tribunal to conclude that the selection process was lacking in transparency, and was arbitrary and an abuse of discretion.”); In re Mr. R. S. I., ILOAT Judgment No. 2393 (2004), Consideration 15 (upholding selection process but noting that “[d]ifferent considerations would apply if, for example, the interview was conducted in such a way as to prevent a candidate [from] giving relevant information as to his qualifications, skills or experience.”)

103. At the same time, international administrative tribunals also have recognized the breadth of managerial discretion that properly may be exercised in assessing skills and weighing competencies. As the United Nations Administrative Tribunal has observed:

“[T]he discretion to be exercised concerning appointments is a true discretion, meaning that the body making the selection will make its assessment as to the relative strengths and weaknesses of the various candidates.

....

Many would say that the selection of candidates is frequently more an art than a science and the Tribunal would not disassociate itself from this sentiment.”

Byaje v. The Secretary-General of the United Nations, UNAT Judgement No. 1126 (2003), para. VII. Similarly, as to the role of discretion in assessing management skills, the ILOAT has noted:

“[M]anagement is far from an exact science. .... There is no objective basis on which management skills can be measured: all that can be expected is that the person called upon to assess and compare the relative skills of one candidate over another will bring to bear their experience and knowledge in forming a value judgment. Similarly, it is a matter of value judgment as to what weight should be given to any particular aspect of a person’s management skills and experience.”

Mr. R. S. I., Consideration 18.

104. In the Tribunal’s view, the record does not substantiate Applicant’s contention that the interview questionnaire failed to reflect the requirements of either recruitment or managerial knowledge and experience. While Panel members testified that the interview portion of the “selection process” had the broader purpose of testing a variety of competencies, nonetheless, at least two of the questions were specific to recruitment and technical skills. Moreover, both of the

questions comprising the written test were designed to test recruitment-related knowledge. (The relevant interview and written test questions are set out above at paras. 36 and 41.)

105. That recruitment experience, and especially RSD experience at the Fund, was not emphasized by the Selection Panel process was highlighted by the testimony of the RSD Division Chief, who served as a member of the Panel:

“... my understanding from [the] insiders’ [i.e. RSD staff members’] results was that they were not as innovative, they were not able to think outside the box. They mostly described the existing practices that are in place, but outside our division, candidates were actually able to step back and think through the issues with a more innovative approach, because they were not as familiar with the existing practices and with the existing solution in place.”

The RSD Division Chief further testified: “... the position doesn’t require a recruitment technician, it requires somebody who is able to supervise, to design, implement and monitor the implementation of policies and processes.” The SPM took a similar approach: “As in many other areas of the Fund, one is looking not necessarily for the technical specialist, but for somebody who has the competencies, the skills to acquire the necessary level of technical expertise, but to be able to function fungibly within that department as a manager.”

106. Regarding the role of recruitment-specific questions in the written test and interviews, the SPM testified that the intent was to create a “level playing field” in order to avoid giving candidates from a particular division a strong advantage over candidates from other divisions or career streams. Contrary to Applicant’s assertion, this testimony does not suggest improper bias in the selection process or disregard of the advertised qualifications. Rather, it is consistent with the Fund’s policy for assessing candidates for managerial positions, which includes both “specialty expertise” and “breadth of expertise.” (“Competencies and Key Behaviors for Assessing Candidates for Managerial Positions,” Staff Bulletin No. 03/27, Annex VI.)

107. All Selection Panel members testified that while knowledge and experience in recruitment were taken into account, they were not deemed of primary importance, particularly as the position did not entail frequent participation in recruitment, which is a function of other members of the RSD staff. The Panel members further testified that the competency they considered most important was “strategic vision,” which is the first competency listed in the Vacancy Announcement under “HR delivery.” Panel members also emphasized the importance of managerial skills as well as oral and written communication skills. The SPM characterized the Panel’s views as follows:

“[I]n the division chief and deputy division chief jobs in our department, we’re not looking just for specialists in that area. On the contrary, we are looking for people who have the ability to adapt, to bring strategic vision analysis to the position, to manage the division, and to be able to move, to take over other divisions.”

This same theme was voiced by other Panel members.

108. In the Tribunal's view, the Fund, in implementing the Selection Panel process for the RSD Deputy Division Chief position, did not abuse its discretion in assigning different weights to the various competencies, in particular, recruitment experience. While Applicant may disagree with the Fund's judgment as to the appropriate role of recruitment experience in identifying the best qualified candidate, he has not shown that the Fund denied candidates the "opportunity to demonstrate their suitability for the position they had applied for bearing in mind the totality of requirements needed to perform the job." See Guioguo, para. 12.

109. Additionally, Applicant's contention that the selection process improperly relied on candidates' Annual Performance Reports ("APRs") is without merit. Staff Bulletin No. 03/27, Annex I, expressly provides that when "HRD reviews all applications and forwards to the department advertising the vacancy the names of those staff members who meet the eligibility requirements of the position[,] [t]he department will also receive:

- Updated biographical information; and
- Copies of the last two Annual Performance Reports (APRs)."

Applicant himself has also included in the record a document entitled "Annual Performance Review and Planning (APR) Frequently Asked Questions," which states that APRs are "used by departments for screening and selection decisions for vacancies and by the appropriate Review Committees as input for promotion decisions." Additionally, applicants for vacancies in the Fund are notified via the Career Opportunities "Application Form," currently posted on the HRD website: "Your application form, Fund employment history, and Curriculum Vitae will be submitted to the advertising department by the Recruitment and Staffing Division (RSD), together with copies of your last two Annual Performance Reports."

110. As to the role of Annual Performance Reports ("APRs") in the selection process for the RSD Deputy Division Chief, several Panel members testified that while APRs may be used to differentiate between candidates whose scores are tied or where there is a discrepancy between a candidate's performance and the results of the test and interview, such circumstances did not obtain in the case of the vacancy for the RSD Deputy Division Chief. The SPM testified that "what the Selection Panel, the selection group was focusing on were the interviews and the written test. Now everyone on the Panel had copies of the APRs; however, in coming up with the shortlist, there was no discussion of the APRs."

111. The Tribunal notes the intrinsic procedural fairness of the process administered by the Selection Panel. As described above, with only a few deviations, each candidate was asked the same questions, by the same Panel members, in the same order. The same three candidates received the highest ratings by each of the four Panel members independently of the other members on both the blindly scored written test and the interviews, and there was a distinct gap between their scores and those of the lower-ranked candidates. Finally, the RSD Division Chief testified that at the conclusion of the selection process and prior to making a recommendation to

the Review Committee, the Selection Panel once again verified that the shortlisted candidates met the “minimum qualifications” for the vacancy:

“[W]e checked at the end again to make sure that ... we would not appoint somebody who didn’t meet the minimum qualifications, ... I think that every department does that at the end, just to make sure that there’s not an error that fell through the cracks and that we don’t appoint somebody[ ] who’s not eligible.”

112. In view of the foregoing, the Tribunal concludes that there was no abuse of discretion in the Selection Panel phase of the process for filling the vacancy of RSD Deputy Division Chief. The “selection process” tested recruitment competencies through both its written test and interview components. Moreover, the Selection Panel did not abuse its discretion by assigning differing weights to its assessment of various competencies. In particular, it was not an abuse of discretion for the Panel to accord less emphasis to recruitment skills than to some other competencies of the position such as “strategic vision.” This decision was tenable in light of the Vacancy Announcement, the Job Standard and the actual responsibilities of the position, which Panel members, including the RSD Division Chief, explained involved relatively little in the way of day-to-day recruitment responsibilities. This decision, furthermore, was consistent with an overall policy, reflected in the applicable regulations and articulated by the Senior Personnel Manager of the Human Resources Department, that fungibility and broad skills in management and human resources generally were regarded as more pertinent to discharging the responsibilities of the position of Deputy Division Chief of the Recruitment and Staffing Division than were technical skills in the recruitment field.

113. In sum, the Fund pursued a strategy of filling the RSD Deputy Division Chief position in the Human Resources Department with a person considered to possess new ideas, an aptitude for leadership and for suitability to take up other managerial positions. This strategy did not represent a departure from the requirements of the position as set out in the Vacancy Announcement and Job Standard. Nor, as the Tribunal concludes below, did the strategy serve as a pretext for impermissible discrimination on the basis of gender, race, nationality or age. At the same time, the Fund, in formulating and implementing its policies on promotion, may find it in the interests of the Fund, as well as of its long-serving staff, to take full account of the value of the expertise and experience of that staff by affording it opportunities for advancement.

#### Endorsement by Head of hiring Department

114. Applicant contends that in endorsing the Selection Panel’s assessment of the candidates, the Head of the hiring Department failed to discharge his duties in an impartial manner. In particular, Applicant maintains that the HRD Director improperly based his assessment of the individual who was to become the selectee on his previous interactions with her rather than on an evaluation of her skills and experience against the requirements of the position. Applicant cites paragraph 10 of the Fund’s Code of Conduct,<sup>27</sup> which requires staff members to act without “bias or favoritism” in discharging their duties.

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<sup>27</sup> Paragraph 10 of the Code of Conduct provides:

115. Applicant, however, has not substantiated any claim of impartiality or personal bias on the part of the HRD Director. To the contrary, the HRD Director's testimony in the Grievance Committee proceedings suggested that the Director, in drawing upon his work experience with the shortlisted candidates, concluded that there was a good fit between their skills and the attributes required to fill the RSD Deputy Division Chief position. Specifically, the HRD Director testified that, having worked together with two of the shortlisted candidates, he had a favorable impression of their skills and had been particularly impressed by the top-ranked candidate's analytical abilities. As he testified, this attribute was consistent with the HRD Director's vision for the Recruitment and Staffing Division, which he believed needed to develop a more analytical approach to recruitment and retention issues.

116. In the view of the Tribunal, it was not an abuse of discretion for the Head of the hiring Department in assessing candidates' qualifications for the position to take into account his direct work experience with them. Indeed, it would have been unreasonable for him to have set aside such first-hand information about a candidate's suitability for the position. It is also significant that his ranking of the candidates independently corroborated the conclusions drawn by the Selection Panel as a result of the blindly scored written test and Panel interview process, as the HRD Director had not previously been apprised of the rankings.

117. Finally, Applicant maintains that the HRD Director, as Head of the hiring Department, improperly failed to determine whether the candidates met the minimum requirements for the position. Applicant cites no authority for any duty of the Head of the hiring Department to have undertaken independently such an assessment as to whether the candidates met minimum qualifications for the vacancy, a task that had been performed initially by the Recruitment and Staffing Division, confirmed by the Senior Personnel Manager of HRD, and, according to the testimony of the RSD Division Chief, checked once again by the Selection Panel at the conclusion of the "selection process." As the Tribunal has held above, the Fund did not abuse its discretion in concluding that the applicants for the vacancy had met the initial eligibility requirements for the position.

Did the Review Committee abuse its discretion in reviewing and endorsing the decision of the hiring Department?

118. Applicant's complaint in respect of the actions of the Review Committee is largely derivative of his claim that HRD as the hiring Department proceeded in a procedurally defective manner. In Applicant's words, "[t]he subsequent approval of HRD's decision by the Review Committee is therefore also procedurally defective." In the Applicant's view, had the Review

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**"Impartiality**

10. You are expected to act with impartiality. You should take care that your expression of personal views and convictions does not compromise or appear to compromise the performance of your official duties or the interests of the Fund. Your official conduct must at all times be characterized by objectivity and professionalism. You should not allow personal relationships or considerations, including bias or favoritism, to influence the performance of your official duties and you should avoid situations that create a conflict of interest."

Committee properly carried out its responsibilities, it would have concluded that the “selection process” had been flawed.

119. As described above, the role of the Review Committee is to “... review[ ] and advise[ ] the Managing Director on the suitability of proposed candidates.... [including] internal or external candidates for promotion or appointment to managerial positions at Grades A14/15 in all career streams.” Accordingly, the Committee “... perform[s] an advisory role to the Managing Director who makes the final decision on every promotion or appointment to a senior position.” (Staff Bulletin No. 03/27, pp. 6-7.) In addition, Staff Bulletin No. 03/27, pp. 1-2, provides that “... departments will provide the RC [Review Committee] with a list of the three most qualified candidates in ranked order, together with detailed explanations for the rankings.” Thereafter,

“The RC will review the background of all shortlisted candidates and come to a view on the department’s proposal for the position. If the RC has questions about the relative strength of the first-ranked candidate vis-à-vis others, the department’s Senior Personnel Manager (SPM) will be called before the RC to put forward the departmental view and answer any questions. Joint agreement between the RC and the department on a final decision will be actively sought. The RC will advise management on the final decision and seek its approval.”

(Id.)

120. The procedures to be followed by the Review Committee are set out in detail in Staff Bulletin No. 03/27, Annex III, p. 27, as follows:

- “• **The RC reviews:** biographical information, last two APRs, TIG [time-in-grade], Management Development Center (MDC) report, Individual Development Plans (IDP) for those proposed for the RC List or for Grade B1 promotions, SAM [i.e. Subordinate Assessment of Manager], if applicable, and the list of shortlisted candidates and all other applicants.
- **The RC evaluates the candidate’s experience in:** (i) analytical and research work; (ii) guiding and influencing policy; (iii) leading missions and project teams; (iv) managing work programs; and (v) guiding staff. The RC also evaluates **the relevant competencies** (see Annex VI).
- In addition, each RC member is assigned the responsibility of **conducting independent inquiries** about candidates proposed for inclusion on the RC List or for promotion. These inquiries are conducted through discussions with the candidate, current and former supervisors, subordinates, and peers who are

familiar with the individual's work and managerial and leadership abilities.

....

- Based on the information described above, the RC discusses the absolute and relative merits of each candidate, and **advises management** about the promotion decision. ...”

(Emphasis in original.)

121. Consistent with the applicable rules, HRD provided the Review Committee with the shortlist of three candidates ranked in order of preference, together with an explanation for the ranking. A member of the Review Committee was charged with conducting the “due diligence” inquiry into the qualifications of the shortlisted candidates. He concluded that all three were qualified for the position and presented his findings to the Review Committee. The Review Committee subsequently endorsed HRD’s top-ranked candidate, leading to her appointment.

122. Applicant contends that the Review Committee process was flawed in that the Committee failed to conduct full “due diligence” and to assess properly the shortlisted candidates’ qualifications against the position requirements. Applicant additionally asserts that HRD breached Fund rules by providing tables of salary increases to the Review Committee.

123. Respondent, for its part, maintains that the Review Committee member charged with conducting the “due diligence” found all shortlisted candidates to be qualified for the position. Respondent asserts that the Committee member did not limit his “due diligence” to these candidates but inquired about other candidates as well. Furthermore, maintains Respondent, he did not rely solely on the SPM’s assessment of selected candidates, but also contacted their peers and subordinates.

124. In the view of the Tribunal, the Review Committee’s review of the hiring Department’s selection process was thorough and fully consistent with its responsibilities pursuant to the Fund’s regulations. The Review Committee member testified that the Committee was provided with the shortlisted candidates’ “chrons,” CVs, APRs and salary information and did review the shortlisted candidates’ backgrounds. In conducting the “due diligence” inquiry, the Committee member reviewed these candidates’ background materials, interviewed the SPM of HRD, and contacted the candidates’ peers and subordinates, who provided “very positive” assessments of candidates. He also interviewed the top-ranked candidate. He testified that in the course of “due diligence” he assessed

“... the depth and breadth of experience, the nature of the work that they’d done both inside and outside the Fund, ... [and] the relevance of their educational qualifications or broader HR work, which to me is also a sign of fungibility within the Human Resources Department, not just for the current job, and their skills as managers, both task management and people management.”

His assessment of the shortlisted candidates' eligibility and suitability for the position was consistent with the conclusions reached earlier by RSD and the Selection Panel assembled by the hiring Department.

125. Pursuant to Staff Bulletin No. 03/27,

“... each RC member is assigned the responsibility of **conducting independent inquiries** about candidates proposed ... for promotion. These inquiries are conducted through discussions with the candidate, current and former supervisors, subordinates, and peers who are familiar with the individual's work and managerial and leadership abilities.”

(Emphasis in original.) It appears that in the instant case such inquiries were delegated to a single member of the Review Committee charged with performing “due diligence.” He testified that this was consistent with the Committee's usual practice and the Tribunal finds in this case no deficiency in the due diligence performed by the Committee member and shared with the full Committee.

126. Citing one of the competencies set out in the Job Standard, i.e. “[d]emonstrates ability and skill in managing large numbers of staff, including counseling and developing both professional and support-level staff,” Applicant asserts that the shortlisted candidates were unqualified for the position because, in his view, none of them had “experience in managing large numbers of professional and support-level staff.” Applicant cites the Review Committee member's testimony that his “due diligence” revealed that candidates “had supervised a number of different projects involving different small groups of people.” The Tribunal notes that the Vacancy Announcement, which particularized the Job Standard, did not specify the ability to manage “large numbers” of staff; Applicant has shown no defect in the Review Committee's due diligence in this regard.

127. The Review Committee member testified that he assessed the shortlisted candidates against the requirements set out in the Vacancy Announcement and Job Standard. He further testified that he did not limit his “due diligence” to the shortlisted candidates, but also questioned the SPM of the hiring Department about other candidates. In particular, he inquired about the reasons for not shortlisting a candidate who had prior experience in RSD, and was satisfied with the SPM's answer that this decision was based on the extent of this candidate's ability “to think outside the box” and the Selection Panel's conclusion that the shortlisted candidates were “more imaginative, were more creative and would bring new ideas to the job.”

128. Applicant further contends that the Review Committee

“... was not provided with significant personal characteristics of the candidates, i.e. that the three youngest and only candidates from under-represented countries were shortlisted, which should have raised suspicion; and was not informed of the concerns which had been raised by HRD staff, which should have called for closer scrutiny of the Selection Panel's recommendations.”

The Review Committee was surely informed of the ages and nationalities of the shortlisted candidates, as nationality and date of birth of a staff member are reflected in the “chron,” and nationality is also reflected in the Fund CV. That data, however, was no more “suspicious” than data would have been that listed only older candidates from overrepresented countries. Applicant’s claim of discrimination is treated below.

129. Applicant additionally asserts that HRD breached Fund rules by providing tables of salary increases and ratings to the Review Committee. Staff Bulletin No. 03/27, Annex III provides, however, that “biographical information” and “last two APRs” are to be provided to the Review Committee. This procedure is consistent with the review by the hiring Department of candidates’ “chrons,” Fund CVs and APRs. These documents include information on performance ratings and merit-based salary increases.

130. Finally, Applicant also seeks to impugn the HRD Director as Chairperson of the Review Committee for allegedly withholding key information from the Committee, that is, the intention, communicated by Applicant to the HRD Director on December 6, 2004, to challenge the Selection Panel’s shortlisting recommendation.<sup>28</sup> In that communication, Applicant advised that he was informing the HRD Director “in [his] capacity as Chairperson of the Review Committee,” noting that “I trust that you may wish to advise the Review Committee members accordingly.” The HRD Director testified that he did not notify the Review Committee because he did not think the information was “pertinent” to the Committee’s consideration. In Applicant’s view, the HRD Director “withheld” information to shield the Selection Panel’s recommendation from the scrutiny it deserved and which the Review Committee was obliged to give it. Respondent maintains that Applicant’s dissatisfaction with the shortlisting decision was not relevant and should not have influenced the Committee’s impartial review.

131. The Tribunal notes that the Review Committee member was asked during the Grievance Committee proceedings: “Had you been made aware that the contention was that the three short-listed candidates did not meet the specific eligibility requirements as stipulated in the vacancy announcement and the job standards, would you have perhaps given more consideration to this in your due diligence?” The Review Committee member replied: “Perhaps, yes.”

132. In the view of the Tribunal, the HRD Director was not obliged to inform the Review Committee of Mr. D’Aoust’s intention to file a Grievance. The possibility that the Review Committee might have given greater scrutiny to the candidates’ qualifications had it been made aware of Applicant’s complaint in no way vitiates the process undertaken by the Review Committee, which in every respect evidences a thorough assessment of the selection process. Furthermore, as noted above, Applicant’s contentions regarding the Review Committee process are largely derivative of his complaints against earlier stages of the process for filling the vacancy. As the Tribunal has concluded above that there was no abuse of discretion in permitting all candidates to proceed to the Selection Panel stage, nor was there any abuse of discretion in the “selection process” administered by that Panel, the Tribunal cannot sustain Applicant’s contentions in respect of the actions of the Review Committee.

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<sup>28</sup> See *supra* The Factual Background of the Case; Applicant’s complaint to the HRD Director.

Was the process of filling the vacancy for RSD Deputy Division Chief improperly affected by the candidates' "diversity profiles," resulting in impermissible discrimination against Applicant on the basis of his gender, race, nationality or age?

133. Applicant contends that the process by which the vacancy for RSD Deputy Division Chief was filled improperly took account of the "diversity profiles" of the candidates, which, he alleges, resulted in impermissible discrimination against him on the basis of his gender, race, nationality and age. Applicant marshals three arguments in support of his claim that the selection process was improperly motivated by "diversity" considerations: (1) the process itself was defective, suggesting that it was pretextual; (2) the outcome of the process, resulting in the shortlisting of three candidates who fit a particular "diversity profile" further demonstrates that the process was discriminatory; and (3) the Fund's policies promoting "diversity" in the workplace provide circumstantial evidence of discriminatory motive in his case. For the reasons set out below, the Tribunal does not sustain these claims.

134. This Tribunal has recognized that it is a "... well-established principle of international administrative law that the rule of nondiscrimination imposes a substantive limit on the exercise of discretionary authority...." Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002), para. 30; *see also* Report of the Executive Board, p. 19. Moreover, the Tribunal has distinguished between a general principle of equal treatment, for example, in the allocation of benefits to different categories of staff,<sup>29</sup> and a principle of nondiscrimination that implicates "universally accepted principles of human rights." Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent, Judgment No. 2006-6 (November 29, 2006), para. 124, citing Mr. "F", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), para. 81. The Tribunal has observed that the latter type of claim calls for a "greater degree of scrutiny" over the Fund's discretionary acts. Ms. "M" and Dr. "M", para. 117. The instant case of Mr. D'Aoust is the first in which the Tribunal has been presented with an allegation of so-called "reverse discrimination," i.e. a claim by a member of a group which has not traditionally been disadvantaged that he has been the object of discrimination on the basis of a factor such as race, nationality or gender. Applicant is a white male of Canadian nationality. (As one of the older candidates, Applicant's claim of age discrimination is not in the nature of "reverse discrimination.")

The allegation that the process of filling the vacancy was pretextual

135. First, Mr. D'Aoust maintains that the process of filling the vacancy itself reflected flaws suggesting that it was "orchestrated" to produce a particular result.<sup>30</sup> That contention is answered

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<sup>29</sup> *See* Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1996-1 (April 2, 1996) (economist v. non-economist staff); Mr. "R", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-1 (March 5, 2002) (overseas Office Directors v. Resident Representatives); Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent, IMFAT Judgment No. 2002-3 (December 18, 2002) (Legal Permanent Residents v. G-4 visa holders).

<sup>30</sup> Applicant asserts in his Application to the Tribunal:

"HRD intended from the start to shortlist three female candidates of nationalities underrepresented on Fund staff. Accordingly, its actions were

above.<sup>31</sup> In the Tribunal's view, the process itself was sound and reasonably designed, first, to screen for eligible candidates, next, to test their competencies in light of those prescribed by the Job Standard and Vacancy Announcement, and, finally, to review the qualifications of candidates and the recommendation of a selectee under the applicable standards. Having concluded that there was no procedural irregularity in the filling of the contested vacancy, the Tribunal accordingly finds no merit to Applicant's contention that the Fund's explanation for the shortlisting and selection decisions was "merely a pretext for reverse discrimination." *See generally* Mr. "F" (abolition of position not motivated by religious discrimination where post was redesigned to meet institutional needs and incumbent was not qualified to meet its requirements; no nexus between religious hostility of colleagues and impugned decision).

#### The demographic outcome of the process

136. Second, Applicant asks the Tribunal to draw an inference of discrimination based upon the demographic results of the competition. Mr. D'Aoust asserts that of the nine applicants for the position, the three shortlisted candidates were the only nationals of countries underrepresented on the Fund staff and were also the three youngest. Additionally, Applicant alleges that while all three shortlisted candidates were women, the pool of nine candidates included four men. Respondent counters that the mere fact that the top-ranked candidate happened to be a woman from an underrepresented country does not create a presumption that considerations of "diversity" affected her selection. Respondent additionally denies that the selecting officials were improperly motivated by the ages of the candidates.

137. In recent decisions, this Tribunal has rejected the view that statistics alone might establish discrimination. For example, in Ms. "T", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2006-6 (June 7, 2006), para. 50, the Tribunal found "far from probative of discrimination" the allegation put forward by the applicant that the non-conversion of her fixed-term appointment had a "discriminatory impact" upon a Fund department in which members of her racial and nationality group allegedly were already underrepresented. *See also* Ms. "Z", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 74, and cases cited therein.<sup>32</sup> Moreover, in view of its conclusion in

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premeditated, calculated and orchestrated. Premeditated in that the applications were not screened for eligibility; calculated in that the interview was structured so as to discount functional and managerial knowledge and experience; and orchestrated so that the Selection Panel's recommendations would not be challenged by the Review Committee. All this to achieve greater diversity in HRD managerial ranks and in the B-level pipeline. But greater diversity cannot be achieved through reverse discrimination."

<sup>31</sup> *See supra* Consideration of the Issues of the Case; Did the Fund abuse its discretion in filling the vacancy for Deputy Division Chief of the Recruitment and Staffing Division, for which Applicant was an unsuccessful candidate?

<sup>32</sup> *See* Ms. "W", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 21; Sebastian (No. 2) v. International Bank for Reconstruction and Development, WBAT Decision No. 57 (1988), para. 34 ("Discrimination against the Applicant cannot be proven by the mere presentation of general statistics purporting to show that as a class the women employees of the Bank are not treated as well as male employees"); Nunberg v. International Bank for Reconstruction and Development, WBAT Decision

this case that the process of filling the vacancy was itself sound, the Tribunal is unable to draw any inference of discrimination from the outcome of that process. As will be shown below, the claim of discriminatory motive was also strongly rebutted by the testimony of the selecting officials.

138. Turning first to the claim of age discrimination, the Tribunal addresses Mr. D’Aoust’s assertion that the shortlisted candidates were “the three most junior in grade and seniority, the three youngest, and the three with the least total work experience.”<sup>33</sup> Significantly, Applicant’s age discrimination claim is expressly linked to his contention that the selecting officials improperly “discounted” what he considered to be the most relevant qualifications for the job:

“In discounting functional and managerial knowledge and experience, the Selection Panel discriminated particularly against the more senior candidates as they were the ones most likely to have the broadest knowledge and the most considerable experience.”

As the Tribunal has concluded above, however, it was within the Fund’s discretion to fashion a selection process that gave greater weight to attributes such as “strategic vision” than to specialized knowledge or long-term experience in the field of recruitment. Accordingly, the Fund’s approach to assessing suitability for the position cannot be said to evidence age discrimination.

139. Applicant additionally contends that the HRD Director showed bias in favor of younger candidates, citing the following testimony:

“A: .... I have found that young candidates have the skills that I need and sometimes, you know, the younger candidates have it, sometimes not, but the fact that they are younger doesn’t make any difference.

Q [by Applicant]: Why would young candidates have the skills that you need?

A: I’m not saying all the candidates have it, but younger candidates would have it because younger candidates generally have been ... better trained in qualitative and analytical skills and the kind of strategic approaches and organizational development that I’m looking for.”

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No. 245 (2001), paras. 53-58; Alexander v. Asian Development Bank, AsDBAT Decision No. 40 (1998), para. 76 (“In regard to such general evidence presented by the Applicant in aid of her claim of gender discrimination, the Tribunal finds that although it may provide useful background for such a claim, particularly in the way it manifests the overall atmosphere within the Bank, it does not by itself suffice to prove such a claim”).

<sup>33</sup> Respondent has not disputed this assertion, which is borne out by the Fund CVs in the case of two of three shortlisted candidates, including the selectee.

In the view of the Tribunal, this exchange, in which the HRD Director expressly stated that the fact that a candidate might be younger “doesn’t make any difference,” but that younger candidates might be more likely to have particular training, does not establish impermissible bias in favor of younger candidates “unrelated to ... work-related capabilities, qualifications and experience” (*see* Discrimination Policy, July 3, 2003, p. 4).

140. As further evidence of alleged age discrimination, as well as of purported preferential treatment in favor of the selectee, who was not only one of the younger candidates but also a female, national of an underrepresented country, Applicant cites what he refers to as the “meteoric rise” of the appointee within the ranks of the Fund. It is not disputed that, at the time of her appointment to RSD Deputy Division Chief at Grade A14, the selectee held a position at Grade A12. This fact, however, does not signify any irregularity in the appointment process, nor does it establish, as Applicant maintains, that the selectee’s “career progression at the Fund can only lead to a conclusion of preferential treatment.”

141. The governing regulations make clear that “[o]n appointment to a vacant supervisory position, including ... Deputy Division Chief ..., a staff member may be promoted without regard to the TIG [time-in-grade] requirements provided that the staff member meets the specific experience and educational qualifications for the position as set forth in the job standard and the internal advertisement for the position.” (Career Opportunities: Policy and Guidelines, p. 8.) Staff Bulletin No. 03/27, p. 13, confirms the following “criteria for promotion” to Grade A14 Deputy Division Chief in the specialized (i.e. non-economist) career streams:

“Meet specific educational and experience requirements for the position as advertised

Show clear and strong potential for advancement to the B-level

No TIG [time-in-grade] required.”

142. The HRD Director noted in his testimony that he “... would have preferred that [the appointee] had been an A13 before promoting her to deputy division chief, but I knew she was already performing at the level of an A13,” and that she was qualified, given her “substantial outside experience, including managing her own enterprise” and had been recruited at the Fund at a lower level “because of the question of when she got her degree.” Likewise, the Review Committee member testified that “given our rigid guidelines of initial hiring, ... [this candidate] had probably been underhired” considering the “work that she’d done outside the Fund, the fact that she got her master’s after she got here, but we don’t have flexibility to catch up within the normal course of things; promotions allow that catch-up.” The HRD Director also related that the Review Committee had discussed the selectee’s grade level and decided to leave it up to the hiring Department to decide whether to appoint her at A13 or A14. As the HRD Director explained, “[t]he decision was that she was qualified for the position and that it was important in that if she was going to be deputy chief, that she have the authority for that.” In view of the foregoing, the Tribunal concludes that there was no irregularity or evidence of bias in the promotion of the selectee from a Grade A12 position to the vacancy of RSD Deputy Division Chief at A14.

143. As to Applicant's allegation of gender discrimination, the testimony of the Business Advisor indicated that Selection Panel members were aware that the results of the selection process had resulted in the shortlisting of three female candidates, but concluded that the outcome was fully justified by the merits of the candidates' qualifications for the position:

Q [by Applicant]: Along those same lines, as it worked out, those top three candidates were all women. Did that raise concerns among the panel or was there any discussion of that fact?

A: I think that we were aware of that fact and the issue that there was talk in the Department that women were being promoted sort of more quickly than men, but I think we were faced with the fact that the best candidates clearly had come out as they did and that we felt sincere about proposing them because we felt that they indeed were the ones that could do the job to the best that we expected."

144. The SPM also observed, on the matter of gender, that a greater supply of women in the human resources profession might naturally lead to greater numbers reaching higher levels of responsibility:

"I think if one looks at the annual reports or particularly the last annual report of the diversity advisor, HRD is one of the departments that's pretty well okay in terms of our composition of women, of men. I think there was a couple of years ago, there was some sort of enjoinder to increase the number of men recruited into the human resource officer positions, which we've tried to do but the market is not always favorable.

....

... there's a much larger supply of women in these professions. Therefore, ... one would obviously expect that the proportion of women reaching the higher levels would increase."

145. More generally, each of the four Selection Panel members testified that they did not take "diversity" of the candidates into consideration and that it was not discussed by the Panel. In the words of the SPM of HRD: "I can state categorically that I was not affected and I can state categorically that the issue of nationality, gender, race did not come up in any discussions or was not any part of the ... deliberations at all" for the RSD Deputy Division Chief position.

Fund's policies barring discrimination and promoting diversity in the workplace

146. Third, in addition to maintaining that alleged procedural errors and the demographic outcome of the selection exercise provide evidence of discrimination, Applicant cites the Fund's policies promoting "diversity" in the workplace as supporting a motive of discrimination in his case. While the Fund in its Rules and policy statements consistently has treated "nondiscrimination" and "diversity" as complementary objectives, Mr. D'Aoust cites as alleged

circumstantial evidence of discriminatory motive in the process of filling the RSD Deputy Division Chief vacancy the policies that the Fund has adopted in recent years to promote the “diversity” of its staff.

147. As this Tribunal has observed, the Fund, from its inception, has recognized the importance to a global institution of maintaining a nondiscriminatory and inclusive workplace, subject to the “paramount importance of securing the highest standards of efficiency and of technical competence” (Rule N-1). *See generally* Mr. “F”, para. 83; Ms. “M” and Dr. “M”, para. 126. Rule N-1 of the Fund’s Rules and Regulations, which mirrors the identical language of Article XII, Section 4(d) of the Fund’s Articles of Agreement, provides:

“In appointing the staff the Managing Director shall, *subject to* the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

*Adopted as N-2 September 25, 1946, amended June 22, 1979.”*

(Emphasis supplied.) Rule N-2 provides:

“*Subject to Rule N-1* above, the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, creed, or nationality.

*Adopted as N-1 September 25, 1946, amended June 22, 1979.”*

(Emphasis supplied.) Thus, it is clear that considerations of geographical diversity and of discrimination designed to promote that diversity are subordinate to -“subject to”- “securing the highest standards of efficiency and of technical competence.” Merit-based selection is the paramount, governing principle.

148. In recent years, the Fund has implemented a number of initiatives directed at addressing discrimination and promoting diversity in the workplace.<sup>34</sup> In 1996, the Fund adopted an “Action Plan to Promote Staff Diversity and Address Discrimination.” In July 2003, Management issued two separate directives, the “Discrimination Policy” (July 3, 2003) and the “Enhanced Diversity Action Plan” (July 18, 2003).

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<sup>34</sup> *See, e.g.*, “Steps to Achieve Greater Diversity and Address Discrimination Among the Fund’s Staff” (June 1, 1995); Fund’s Advisory Group on Discrimination, “Discrimination in the Fund” (December 1995). In 1995, a Special Advisor on Diversity was appointed and charged with advising and supporting the Fund’s management on matters pertaining to “personnel policies and procedures that help achieve diversity and limit discrimination in the Fund” and with monitoring progress in these areas. (*See* Terms of Reference for the Senior Advisor on Diversity.) Starting in 1996, each department has been required to prepare an annual diversity action plan and, since 2000, such plans have been integrated into departmental annual HR plans, which are monitored in the Fund-wide Diversity Annual Report.

149. In its introductory paragraphs, the Fund’s Discrimination Policy refers to both Rules N-1 and N-2 and the principles embodied therein, recognizing as complementary the Fund’s policies on discrimination and diversity: “This policy should be viewed in conjunction with the objectives of the Fund’s Diversity Action Plan. Both policies aim at ensuring that all employees are treated in a fair, supportive, and impartial manner.” (Discrimination Policy, p. 3.) The Discrimination Policy defines discrimination within the context of the Fund as follows:

“In the Fund, discrimination should be understood to refer to differences in the treatment of individuals or groups of employees where the differentiation is not based on the Fund’s institutional needs and:

- is made on the basis of personal characteristics such as *age*, *creed*, *ethnicity*, *gender*, *nationality*, *race*, or sexual orientation;
- is unrelated to an employee’s work-related capabilities, qualifications and experience—this may include factors such as disabilities or medical conditions that do not prevent the employee from performing her or his duties;
- is irrelevant to the application of Fund policies; and
- has an adverse impact on the individual’s employment, successful job performance, career opportunities, compensation, or other terms and conditions of employment.

Discrimination can occur in various ways, including but not limited to the following:

- basing decisions that affect the career of an employee—such as salary adjustments, assignments, performance evaluations, *promotions*, and other types of recognition—*on grounds other than professional qualifications or merit*,  
....”

(Discrimination Policy, July 3, 2003, p. 4.) (Emphasis supplied.)<sup>35</sup>

150. Through the Enhanced Diversity Action Plan, the Fund calls for departments to “develop objectives and measures, both qualitative and quantitative, that will contribute to achieving the Fundwide diversity goals.” (P. 5.) In a notice to staff announcing the adoption of the Enhanced

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<sup>35</sup> GAO No. 33 (Conduct of Staff Members) (May 1, 1989), Section 7.01(v), additionally provides that disciplinary measures may be imposed for “misconduct in an official capacity, including ... discrimination on the basis of sex, sexual orientation, race, creed or national origin.”

Diversity Action Plan, the Managing Director confirmed management’s commitment to “the objectives of providing equality of opportunity and promoting diversity, while at the same time continuing to recruit, develop, and retain staff of the highest caliber, as required by the Fund’s Articles of Agreement.” (July 18, 2003.)

151. The Enhanced Diversity Action Plan provides a set of quantitative indicators with respect to geographic representation of staff and the representation of women at senior levels in order to measure progress in promoting geographic and gender balance. “The Role of Diversity in the Fund’s Human Resource Strategy,” (May 28, 2003), p. 17, posted on the Fund’s external website,<sup>36</sup> explains the use of indicators as follows:

**“The choice of indicators rather than specific targets or quotas for nationality groups and gender representation was motivated by the need to achieve a diverse staff while maintaining a high quality staff, as required by the Articles of Agreement. Indicators help guide the institution’s recruitment efforts but they are not binding for departments.”**

(Emphasis in original.)<sup>37</sup>

152. The qualitative guidelines adopted by the Enhanced Diversity Action Plan, in contrast, focus on career development, (external) recruitment, and work environment. In outlining the measures related to career development of the Fund staff, the Enhanced Diversity Action Plan

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**“Quantitative Indicators to Measure Progress in Diversity**

**Geographic Indicators**

- Africa—8 percent
- MED—8 percent
- European Transition Economies—8 percent
- Developing Countries—40 percent
- **Gender Indicators**
- Women at B level—20 percent
- Economists at B level—15-20 percent
- Specialized Career Streams at B level—35-40 percent”

“The Role of Diversity in the Fund’s Human Resource Strategy” (May 28, 2003), p. 17.  
<http://www.imf.org/external/np/div.2003/052803.htm> (Emphasis in original.)

<sup>37</sup> The Fund’s Diversity Advisor has distinguished these “indicators” from the practices of some other international organizations:

“In order to reach the gender goals, institutions implement different strategies. The European Commission recommends that ‘women be given priority when competing candidates have equal merit and qualifications;’ the World Health Organization (WHO) ‘gives special attention and systematic consideration to women in promotions to managerial positions.’”

(2004 Diversity Annual Report, p. 29.)

calls for the development of “a pipeline of qualified candidates with diverse backgrounds for senior positions” by providing Fund staff with career development opportunities, e.g., through career planning, mobility, English language training, management training, and oversight of selection process by the Review and Senior Review Committees. Notably, the Fund’s 2003 Diversity Annual Report lists the practice of using “blind writing tests for selection” among the examples of “Departmental Best Practices” in promoting diversity. (2003 Diversity Annual Report, p. 27.)

153. Applicant further cites the Human Resources Department’s HR Action Plan and its Diversity Action Plan, specifically the provisions on “succession planning,” which call for action to “[i]dentify and develop a diverse pool of candidates for advancement to managerial positions. ...” Applicant asserts that “[f]or some time, HRD has been selecting candidates for senior-level vacancies on grounds of diversity ... Staffing results over the last few years show the disparate impact of the Enhanced Diversity Action Plan on non-diverse candidates.” Citing statistics reflected in the Fund’s 2004 Diversity Annual Report, Applicant asserts that “...representation of women at the B level in HRD is more than twice that of most other departments, and some 20% above the indicator for specialized career streams. This did not happen by mere chance, but rather through the concerted efforts of HRD to give preferential treatment to diverse staff, promoting them at the expense of non-diverse staff.”

154. Human Resources officials testified as to the effect of diversity-conscious policies on their decision-making. Some of the testimony suggested that, at least as to external recruitment, considerations of “diversity” might come into play, but only when selecting among equally qualified candidates. As considered above, the selecting officials’ testimony rebutted Applicant’s contention that “diversity” played a role in the filling of the vacancy for RSD Deputy Division Chief. The Division Chief of RSD testified:

“I don’t recall ever that diversity was really taken into account in any staffing decision regarding HRD. We do take in account diversity as a factor, take it in account. *When we examine the suitability of external candidates with equal scores, we tend to take the diverse candidate to rebalance the diversity representation on Fund staff. But we only look at the diverse candidate if the diverse candidate scores as well as any other candidate already well represented on Fund staff or overrepresented.*

[As for movement of Fund staff internally], basically people are already on board, so I don’t think this factor is ever taken in account. And in this particular case, certainly not, it was not even mentioned.”

(Emphasis supplied.) Similarly, the SPM of HRD highlighted the issue of diversity-conscious selection where candidates demonstrate equal qualifications:

“Q: In terms of diversity in the Department in general, would it generally be taken into account as a factor in an individual selection process for a particular position?

A: No. Very much among the officers, we've made special efforts to try and broaden our pool, so that we have a wider pool of diversity candidates, and that applies both to HR officers and also ASPMs, because we have an ASPM pool, as well, of external candidates.

But in terms of ... the actual recruitment and selection decision ... *if we had two people of equal qualifications, then diversity may play a factor at the officer level.*"

(Emphasis supplied.)

155. It is important to emphasize that the Tribunal in the case brought by Mr. D'Aoust has not been called upon to consider a situation where diversity may have been taken into account in selecting among candidates whose qualifications were deemed substantially equal. All three shortlisted candidates showed themselves, in respect of the testing criteria used by the Selection Panel, to be discernibly more qualified than those, such as Applicant, who, however estimable their records of Fund service were, did not emerge from that process as contenders on the shortlist.

156. The HRD Director testified that he sought to implement a systemic approach to promoting diversity objectives and did not "look at diversity as an element of promotion of any one person." The HRD Director testified: "I think HRD should promote diversity and I try to have senior staff and HR officers that try to promote diversity and that can give me instruments to promote diversity. But I won't focus on the diversity of the person ... for the position." He further testified that the Fund-wide approach to promoting diversity in promotions has been to ascertain whether there are groups that are being adversely affected by various factors, such as the way promotions are conducted, work practices, work environment or drafting difficulties. The HRD Director further noted:

"A: .... we have a problem in the Fund – ... we have a mandate to recruit people, staff of the highest quality and at the same time that have representation from our membership, broad representation of our membership.

And if you look at our diversity profile, there are many countries that are underrepresented and are countries in which it is difficult to get diversity candidates. And when discussing this with management, management asks, 'How come we cannot get candidates of a more diverse nature?' And management asks me to bring forth new ideas and new approaches in doing that."

157. Applicant contends that on December 15, 2004, the HRD Director called a special meeting of the Recruitment and Staffing Division to announce the appointment of the new Deputy Division Chief. According to Applicant, "prior to making the announcement, [the HRD Director] stressed the importance of the role of RSD and indicated that there is an increased emphasis on diversity, which has the full support of Management." Applicant maintains that "the

message was clear to all present: only diverse staff will be promoted.” The HRD Director denied any link:

“A: I did not say the diversity appointment of a staff, I did not say that. If I had said anything, I would have said diversity recruitment, which was the business of the division. ... There was talk about what is the mission of the division and it was talking about the diversity recruitment and for that, management had full support. I never mentioned diversity promotion because I never look at diversity as an element of promotion of any one person.

Q [by Applicant]: I accept your explanation, but this is not the message that was received.”

158. Finally, as to the Review Committee process, the Tribunal notes that Staff Bulletin No. 03/27, p. 7, provides:

“The RC [Review Committee] seeks to ensure high quality in promotions and appointments for managerial positions to foster a mix of skills, experience, and *diversity*. .... *In appointing Committee members, consideration is given to diversity in terms of nationality, gender, and career streams*, and to proven experience and interest in HR matters, including knowledge of the Fund and its staff....”

(Emphasis supplied.) Moreover, pursuant to the Enhanced Diversity Action Plan, “[t]he Review and Senior Review Committees will continue to exercise their oversight function to ensure that qualified candidates from underrepresented groups are not overlooked in the selection process.” In addition, the Enhanced Diversity Action Plan Progress Report states:

“The Review Committee considers carefully the background of all three candidates, *including diversity*, in making a recommendation to management on the most suitable candidate. Committee members, in their due diligence, ensure that strong diversity applicants were given full consideration in the selection process.”

(Emphasis supplied.)

159. These policy statements, however, do not demonstrate the truth of Applicant’s allegation of discrimination in the selection of the RSD Deputy Division Chief at the level of the Review Committee. All three shortlisted candidates bore indicia of “diversity;” accordingly, the role of the Committee to “ensure that qualified candidates from underrepresented groups are not overlooked in the selection process” (Enhanced Diversity Action Plan) did not come into play. The Review Committee member testified before the Grievance Committee that while he was aware that the shortlisted candidates were nationals of countries underrepresented in the Fund, he did not compare candidates on that basis. There is no ground to doubt this testimony.

160. While, however, all three shortlisted candidates were “diverse,” obviating any element of discrimination in choosing among them on grounds of diversity, that fact does not blunt the thrust of Applicant’s claim, namely, that the process of the selection of the RSD Deputy Division Chief as a whole was tainted by “reverse discrimination.”

161. The difficult question that the Tribunal accordingly must answer is whether Applicant has shown that the process of filling the position of RSD Deputy Division Chief was improperly affected by the candidates’ “diversity profiles,” resulting in impermissible discrimination against Applicant on the basis of his gender, race, nationality or age in violation of the internal law of the Fund. The Tribunal’s answer is that, on the facts of this case, in light of the soundness of the process itself, including the blind reading of test results, Applicant has not established impermissible discrimination against him. He has shown neither pretext nor improper motive. The Tribunal has not been convinced that there is reason to doubt the *bona fides* of the Fund’s position in this case.

162. Nevertheless, this said, there are disquieting indications that the Fund’s management, in its laudable pursuit of the objectives of a more diverse staff, is skating close to the line on the other side of which would be clear violation of the fundamentals of Fund law debarring discrimination in the promotion of staff. The Tribunal takes note of the statement of the International Labour Organisation Administrative Tribunal in In re Matthews, ILOAT Judgment No. 2004 (2001), Consideration 20:

“The Tribunal wishes to emphasise that there is nothing wrong in having a policy aimed at gender parity. For too long women have been subjected to discrimination in appointments to senior posts which can be proved by statistics. *But this policy cannot be achieved by setting quotas and by reverse discrimination, in other words, by the appointment – for particular posts – of women who are less qualified than men.* This is contrary to Regulation 4.3 which provides that selection shall be ‘without regard to race, creed or sex’. The policy can be achieved by different means such as actively encouraging qualified women to apply for senior posts, and by ensuring that work practices do not discourage women from applying. *But the bottom line must always be that the person best qualified should be appointed.*”

(Emphasis supplied.) This Tribunal fully adheres to the foregoing position so well expressed by the Administrative Tribunal of the ILO. In the view of the Tribunal, the Fund is chargeable with assuring that, in fact as well as form, no member of the Fund staff shall suffer from “reverse discrimination.” The Tribunal notes that the Fund’s Diversity Advisor in a recent communication to the staff has reaffirmed that “[p]erformance-based promotions will not be compromised” in the interest of promoting diversity. (See IMF Staff News (December 2006), p. 2.) For the reason set out in paragraph 147 of this Judgment, that position is required by the terms and intendment of the Fund’s Articles of Agreement.

### Additional Claims

163. In addition to his principal claim challenging the process of filling the vacancy for the position of RSD Deputy Division Chief, Applicant has put forward several related claims. These are considered below.

#### Alleged retaliation

164. Applicant contends that he experienced retaliation as a result of challenging the selection process. In particular, Applicant asserts that the HRD Director improperly threatened him with disciplinary action. He further characterizes the HRD Director's actions as an attempt to "intimidate and silence" him. Respondent denies as unfounded Applicant's claim of retaliation.

165. The HRD Director's memorandum to Mr. D'Aoust of December 6, 2004,<sup>38</sup> rejecting Applicant's complaint as to the shortlisting decision, additionally warned:

"... I wish to express my concern at the comments you have made with respect to the qualifications of other candidates for the RSD Deputy Division Chief position and of your current Division Chief. Use of such information, available to you by reason of your position in RSD, clearly is inappropriate and in contravention of the Fund's Code of Conduct, in particular paragraph 11 of the Code dealing with discretion. Any further use of information on this basis by you in the future will result in disciplinary proceedings."

The Fund's Code of Conduct provides in relevant part:

#### **"Discretion**

11. ... You must respect and safeguard the confidentiality of information which is available or known to you by reason of your official functions."

Likewise, Rule N-6 of the Fund's Rules and Regulations provides that persons on the staff of the Fund shall not "... use, or allow the use of, unpublished information known to them by reason of their service with the Fund for private advantage, directly or indirectly, or for any interest contrary to that of the Fund as determined by the Managing Director." (*Adopted as part of N-5 September 25, 1946, amended June 22, 1979.*) Moreover, GAO No. 33 (Conduct of Staff Members) (May 1, 1989), Section 7.01(vi), provides that disciplinary measures may be imposed for "unauthorized use or disclosure of information." In view of the foregoing, the Tribunal concludes that the HRD Director acted in good faith in warning Mr. D'Aoust of the potential disciplinary consequences of accessing personnel data for what the Director reasonably regarded as private purposes of Mr. D'Aoust.

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<sup>38</sup> See *supra* The Factual Background of the Case; Applicant's complaint to the HRD Director.

166. The Tribunal notes that staff members are expressly protected under the Fund’s internal law from reprisal for “pursuing a grievance through administrative channels,” as well as for “filing a grievance or complaint with the Grievance Committee, presenting any testimony to the Committee or assisting a grievant.”<sup>39</sup> Protection from reprisal is essential to the fair and effective operation of the Fund’s system for the resolution of staff complaints. On the facts of this case, however, Applicant has failed to substantiate his charge of retaliation.<sup>40</sup>

Alleged deficiencies in the administrative review and Grievance Committee consideration of Applicant’s complaint

167. Applicant further maintains that HRD failed to act in good faith in responding to his request for administrative review of his complaint. On December 6, 2004, Applicant addressed a memorandum to the HRD Director “... to request administrative review under General Administrative Order No. 31.” The HRD Director replied on December 10, 2004, advising that in order for HRD to proceed with administrative review, Applicant would have to provide additional information, in particular to identify the specific decision(s) being challenged. Applicant replied to the HRD Director on the same day, stating that he was challenging “... the decision of the [selection] panel members – decision which you subsequently endorsed -- to interview and shortlist three candidates who do not meet the minimum requirements for the Vacancy....” On December 30, 2004, citing the HRD Director’s absence, the SPM of HRD replied, advising Applicant that the decision to shortlist the candidates was not subject to administrative review pursuant to GAO No. 31, as it had been taken by the HRD Director, and that Applicant was therefore free to proceed to the Grievance Committee. Thereafter, on January 3, 2005, Applicant filed his Grievance with the Fund’s Grievance Committee.

168. The Tribunal observes that the HRD Director’s request for additional information in response to Applicant’s request for administrative review was consistent with the requirements

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<sup>39</sup> GAO No. 31, Rev. 3 provides:

*“Section 9. Protection*

*9.01 Protection of Staff Members.* No individual shall be subject to adverse action of any kind because of pursuing a grievance through administrative channels, filing a grievance or complaint with the Grievance Committee, presenting any testimony to the Committee, or assisting a grievant.

....

*9.04 Protection Against Reprisal.* Any adverse action taken against an individual in retaliation for his or her pursuit of, or participation in, a grievance may be grounds for a finding of misconduct and the imposition of disciplinary measures under General Administrative Order No. 33.”

<sup>40</sup> Applicant further asserts in his pleadings before the Tribunal that his “work environment had become visibly hostile.” Applicant, however, has not pursued any such complaint through the channels of administrative review.

of GAO No. 31.<sup>41</sup> Moreover, Applicant has not shown that the lapse of 20 days following Applicant's submission of a more detailed request, apparently occasioned by the HRD Director's absence, prejudiced his pursuit of review of his claim. Additionally, there appears to be no evidence of bad faith, especially considering that in his reply the SPM offered to provide additional feedback on the reasons for the shortlisting of other candidates and non-shortlisting of Applicant.

169. Accordingly, Applicant has failed to show any deficiency relating to the administrative review of his complaint.

170. Applicant additionally registers several objections to the handling of his Grievance by the Fund's Grievance Committee. In particular, Mr. D'Aoust seeks to impugn the following actions of the Committee: (1) denying particular requests for production of documents and witnesses; (2) applying the standard of review set out in GAO No. 31, Rev. 3 (November 1, 1995), which is currently in force, rather than a revised standard recommended by the External Panel on the Fund's Dispute Resolution System;<sup>42</sup> and (3) "re-stating" the question presented by his Grievance. For the following reasons, the Tribunal denies each of these objections.

171. As the Tribunal has held on a number of occasions, beginning with an earlier case brought by Mr. D'Aoust, the Tribunal does not serve as an appellate body vis-à-vis the Fund's Grievance Committee; the Committee's recommendations do not constitute "administrative acts" in the sense of Article II of the Tribunal's Statute. At the same time, the Tribunal "... may take account of the treatment of an applicant before, during and after recourse to the Grievance Committee" and "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.

172. In Ms. "Z", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 119, the Tribunal held that "... the Grievance

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<sup>41</sup> GAO No. 31, Rev. 3 (November 1, 1995), Section 6, which governs administrative review, provides in relevant part:

"6.01.2 *Suggested Format*. In all cases, in order to facilitate a thorough and expeditious review of the matter, staff members requesting such a review should endeavor to provide the following information in writing: (1) the decision being challenged; (2) any Fund rule or regulation that the staff member contends has been violated; (3) all facts known to the staff member that tend to support his or her allegations, including, in the case of a discretionary decision, the factual bases for the contention that the decision was arbitrary, capricious, or discriminatory; and (4) the relief sought."

<sup>42</sup> In its "Summary: The Report of the External Panel on the Fund's Dispute Resolution Systems and Implementation Plans" (April 15, 2002), pp. 16 – 18, see <http://www.imf.org/external/hrd/dr/index.htm>, the Fund endorsed a recommendation of the External Panel to revise the Grievance Committee's standard of review "to bring it more into line with that of the IMFAT and to make available to staff a more complete and understandable description of the factors and criteria that the Committee takes into account." To date, a revised standard of review has not been incorporated in GAO No. 31.

Committee's decisions as to the admissibility of evidence and production of documents are not subject to review by the Administrative Tribunal." These decisions, the Tribunal concluded, like the final recommendation of the Grievance Committee on the merits of a grievance, are not "administrative acts" within the contemplation of Article II of the Tribunal's Statute. Rather, they rest exclusively within the authority expressly granted the Grievance Committee under its constitutive instrument GAO No. 31 (Sections 7.06.3 and 7.06.4). Ms. "Z", para. 119. Accordingly, the Tribunal denies Mr. D'Aoust's complaint as to the Grievance Committee's rulings on his requests for production of documents and to call particular witnesses.<sup>43</sup>

173. Applicant's second objection, namely, that he was "prejudiced" by the Fund's "tardiness" in amending provisions of GAO No. 31 governing the Grievance Committee's standard of review, is likewise without merit. In Mr. "V", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 1999-2 (August 13, 1999), para. 129, the Tribunal rejected a claim relating to the standard of review applied by the Grievance Committee. Noting that "[a]s the Tribunal makes its own independent findings of fact and holdings of law, it is not bound by the reasoning or recommendation of the Grievance Committee," the Tribunal rejected as "misplaced" Mr. "V"'s concern that the Tribunal might be "misled" by the recommendation of the Grievance Committee, which he contended had been grounded on an inappropriate standard of review. Mr. "V", para. 129. The same rationale applies in the instant case.

174. Finally, Applicant contends that the Grievance Committee "re-stated" his Grievance, thereby "failing to address the crux of my grievance... and caus[ing] me further harm." The Committee's Report and Recommendation explains that, as the parties could not agree on a precise formulation of the issue to be decided, the Committee stated the issue as whether the Fund's decision "not to select Grievant" for the RSD Deputy Division Chief position was arbitrary, capricious, or discriminatory, or was procedurally defective in a manner that substantially affected the outcome.

175. The Tribunal concludes, for the reasons set out above, that this decision of the Grievance Committee also rests outside the scope of the Tribunal's review. Moreover, Applicant has not explained how he may have been prejudiced by the Grievance Committee's statement of the issue in his case, particularly as the Committee sustained Mr. D'Aoust's objections to the introduction of evidence relating to the assessment of his own qualifications. The controversy as to the formulation of Applicant's complaint has been raised and resolved before this Tribunal.<sup>44</sup>

176. Finally, the Tribunal recalls that as it is "authorized to weigh the record generated by the Grievance Committee as an element of the evidence before it," D'Aoust, para. 17, it may consider whether there is any cause to discount that record in the weighing of the evidence

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<sup>43</sup> The Tribunal further observed in Ms. "Z", para. 120, that because the Tribunal makes findings of fact as well as holdings of law "... any lapse in the evidentiary record of the Grievance Committee may be rectified, for purposes of the Tribunal's consideration of the case, through the Tribunal's authority, pursuant to Article X of its Statute and Rules XVII and XIII of its Rules of Procedure to order the production of documents, to request information and to hold oral proceedings." The Tribunal notes that Applicant in the instant case has availed himself of the opportunity to seek production of documents and oral proceedings before the Tribunal. The disposition of these requests is considered *supra*, The Procedure.

<sup>44</sup> See *supra* The Consideration of the Issues; The Decision under Review.

before the Tribunal. *See Ms. "Z"*, para. 121. For the reasons set out above, and having reviewed, as is its usual practice, the transcripts of the extensive Grievance proceedings in this case, the Tribunal finds no ground to hold that the Committee's proceedings should be given any less than the measure of weight that the Tribunal ordinarily accords to them.

Alleged humiliation, injury to health and professional reputation

177. In addition to seeking rescission of the contested selection decision and re-advertising of the vacancy for the RSD Deputy Division Chief position, Applicant seeks compensation for "moral injury," alleging humiliation, injury to his health and well-being, as well as to his professional reputation and career prospects. He also seeks compensation for "procedural flaws" in the selection process.<sup>45</sup>

178. As the Tribunal has concluded above that Applicant has not succeeded in his claim that there was irregularity in the filling of the contested vacancy, the relief that he seeks for alleged injury emanating therefrom is likewise without merit.<sup>46</sup> Neither has Applicant put forth evidence in support of allegations that HRD was "grossly negligent in processing the vacancy" or "egregiously aggressive in pursuing its diversity objectives," for which he seeks punitive damages.

179. Accordingly, the Tribunal denies these additional claims.

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<sup>45</sup> Applicant cites *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), in which the Tribunal, while sustaining the contested decision (non-conversion of a fixed-term appointment), awarded compensation for lapse of due process and other irregularities in the taking of the decision.

<sup>46</sup> The Fund has requested that the Tribunal remove from the record two "medical reports," submitted by Applicant in support of his claim of injury to his health and well-being. In view of the Tribunal's conclusion above, it has not had occasion to refer to the disputed documents.

Decision

FOR THESE REASONS

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

The Application of Mr. D'Aoust 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.  
May 22, 2007