

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2007-8

Mr. "DD", Applicant v. International Monetary Fund, Respondent

Introduction

1. On November 15 and 16, 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. "DD", a former staff member of the Fund.
2. Applicant contends that he was subjected to harassment, a hostile work environment and retaliation by his supervisor, which violated Fund rules and adversely affected his health and career, and that the Fund failed to respond effectively to his complaints. Additionally, Applicant maintains that the Fund improperly declined to consider his application for a vacancy, a decision that he asserts was affected by impermissible discrimination on the basis of his gender. Finally, Applicant challenges the fairness of elements of the administrative review and Grievance Committee consideration of his complaint and asserts that he experienced retaliation for pursuing such review.
3. Respondent, for its part, maintains that Applicant was not subjected to harassment, a hostile work environment or retaliation by his supervisor and that the Fund responded appropriately to his complaints. Additionally, Respondent asserts that it did not abuse its discretion or discriminate against Applicant by applying Fund rules in declining to consider his application for a vacancy that arose a few months after he had assumed the position in which he alleges he experienced harassment. Finally, Respondent maintains that Applicant's contentions in respect of the administrative review and Grievance Committee consideration of his claims, as well as alleged retaliation for pursuing channels of review, are not properly before the Tribunal and, in any event, are without merit.

The Procedure

4. On November 7, 2006, Mr. "DD" filed an Application with the Administrative Tribunal. The Application was transmitted to Respondent on November 9, 2006. On November 15, 2006, pursuant to Rule IV, para. (f),¹ the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

¹ Rule IV, para. (f) provides:

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

...

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5. Respondent filed its Answer to Mr. “DD”’s Application on December 20, 2006. On February 2, 2007, Applicant submitted his Reply. The Fund’s Rejoinder was filed on March 16, 2007.

Requests for Anonymity

6. Pursuant to Rule XXII,² para. 1 of the Tribunal’s Rules of Procedure, Applicant requested that his name not be made public by the Tribunal on the ground that his case involves “confidential personal and professional information, including information regarding his health.” In accordance with Rule XXII, para. 3 and Rule VIII, para. 5,³ the Fund had the opportunity to respond, stating that it had no objection to Applicant’s request and that, moreover, in the Fund’s view, it was essential that the Tribunal’s judgment be “appropriately sanitized” so as not to disclose the identities of Fund officials against whom “serious and unfounded accusations have been lodged.” Accordingly, the Fund requested anonymity of other persons in accordance with paragraph 2 of Rule XXII. Applicant has disputed the Fund’s request, maintaining that a determination by the Tribunal that Fund officials failed to perform their duties properly should be a matter of public record and, in the alternative, that a determination that the accusations are unfounded would protect the officials’ reputational interests.

(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; ...”

² Rule XXII provides:

“Anonymity

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

³ 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.”

7. On November 8, 2007, the Administrative Tribunal notified the parties of the following decisions. As to Applicant's request for anonymity, the Tribunal decided, consistent with its governing precedents, that in light of the nature of the case and the evidence brought out in the course of it, including information relating to Applicant's health and allegations by Applicant of mistreatment by his supervisor, Applicant's name will not be made public. *See Ms. "BB", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 20; *Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), paras. 14-15. As to the Fund's request for anonymity of other persons, in accordance with the Tribunal's usual practice, such persons will not be named in the Judgment. *See Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), note 1.

Request for Production of Documents

8. Pursuant to Rule VII, para. 2(h)⁴ and Rule XVII⁵ of the Tribunal's Rules of Procedure, in his Application, Mr. "DD" requested "the investigative report and related documents" prepared

⁴ Rule VII, para. 2(h) provides:

"2. 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."

⁵ 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

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by an outside consultant engaged by the Fund to investigate Applicant's complaint following submission of his request for administrative review.⁶ In accordance with Rule XVII and Rule VIII, para. 5,⁷ Respondent had the opportunity to present its views. The Fund opposed production of the report and preparatory materials on the ground that the documents are irrelevant to Applicant's challenge to the impugned actions because they were prepared after those actions were taken and that they are protected by "work product" and related privileges. The issue of production of the consultant's report and witness notes was extensively briefed before the Grievance Committee, pursuant to its own discovery rule. (*See* GAO No. 31, Rev. 3, Section 7.06.4.) The Committee ordered that the documents not be produced to Mr. "DD".

9. In Mr. "F", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-1 (March 18, 2005), a similar question arose as to the production of an investigative report prepared by an outside consultant following the applicant's request for administrative review. In Mr. "F", the Tribunal concluded that there was merit to the Fund's contention that the consultant's report should be shielded from disclosure as not relevant to the consideration of the issues of the case, as it did not bear on the decision but rather was produced after that decision. In addition, while not embracing the "work product doctrine" as such, the Tribunal held that denying the request for production of the report was "consistent with protecting the candor essential to preserving the twin purposes of administrative review: to reconsider and provide opportunities for settlement of a dispute and to prepare for litigation." Mr. "F", para.13, citing Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66. At the same time, the Tribunal in Mr. "F" concluded that "the record reflected that there was some ambiguity as to the exact nature of the outside consultant's role with respect to the administrative review process, and that Applicant possibly may have understood that he would have access to the report." *Id.*, para. 14. Accordingly, the

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

⁶ *See infra* The Channels of Administrative Review. Among the deficiencies that Applicant alleges in the Grievance Committee's consideration of his case is that the Committee should have permitted the introduction into evidence of the Annual Performance Reports ("APR"s) of his supervisor. *See infra* Consideration of the Issues of the Case; Alleged deficiencies in the administrative review and Grievance Committee consideration of Applicant's complaint. Respondent has addressed this issue as a request for the production of the supervisor's APRs before this Tribunal. Applicant's pleadings, however, do not make a request for these documents. Rather, the discussion of the issue by Applicant is confined to his allegation that he was prejudiced by the evidentiary rulings of the Grievance Committee, contending that the APRs "would have been" relevant to several issues and "should therefore have been produced." Accordingly, there is no basis for the Tribunal to consider a request for production of the supervisor's APRs.

⁷ 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."

Tribunal in Mr. "F" decided that it was appropriate to examine the report *in camera* to decide on the disposition of Mr. "F"'s request.⁸

10. Taking the same approach in the instant case, on October 23, 2007, pursuant to paragraph 2 of Rule XVII, the Tribunal requested that Respondent submit the consultant's report for its *in camera* review to decide upon the disposition of the request. Respondent submitted the document for *in camera* inspection on October 26, 2007.

11. On November 8, 2007, the Administrative Tribunal, following *in camera* review of the consultant's report, concluded that the consultant's findings had been fairly represented in a summary that had been provided to Applicant and his counsel by the Fund's counsel in correspondence of December 12, 2002. Additionally, in view of the other information in the record before the Tribunal, in particular, the transcript of the oral hearings of the Grievance Committee, the report's disclosure would not have been of probative value to Applicant. *See Mr. "F"*, para. 15. Accordingly, the parties were notified that Applicant's request for the report and "related documents" was denied.

Request to disregard portions of Applicant's brief and supporting exhibits that are claimed to establish "medical causality"

12. Respondent has requested that portions of Applicant's brief and supporting exhibits be "wholly disregarded insofar as they are claimed to 'establish' medical causality." In particular, the Fund asks the Tribunal to disregard two medical reports that were part of the record before the Grievance Committee, i.e. the fitness-for-duty report of the independent medical examiner (psychiatrist) and the consultation notes of the Health Services Department psychologist, as well as the affidavit of Applicant's treating psychologist that the Grievance Committee had excluded from its record⁹ but which Applicant has submitted with his pleadings in the Tribunal.

13. The question of what weight, if any, should be given to evidence relating to Applicant's medical condition in deciding his claim of harassment has been extensively briefed by the parties and is integral to the consideration of the issues of the case.¹⁰ Accordingly, on November 8, 2007, the Administrative Tribunal notified the parties that it had decided to defer its decision on Respondent's request until its consideration of the merits of the case.

⁸ Having made that examination, the Tribunal concluded that the HRD Director's letter to Applicant at the conclusion of the administrative review process had fairly summarized the conclusions of the report and that the report's contents did not support the applicant's claim that it contained "information damaging to Respondent's position and favorable to his own." Moreover, as similar information was found elsewhere in the record before the Tribunal, disclosure of the report to Mr. "F" would not have been of probative value. Therefore, following *in camera* review, the request was denied. Mr. "F", para. 15.

⁹ *See infra* The Channels of Administrative Review.

¹⁰ *See infra* Consideration of the Issues of the Case; What weight, if any, should the Tribunal give to evidence relating to Applicant's medical condition in deciding his claim of harassment?

Request for Oral Proceedings

14. Applicant requested oral proceedings, pursuant to Rule VII, para. 2(i)¹¹ and Rule XIII, para. 1,¹² specifying that he did not seek an evidentiary hearing before the Tribunal but only to

¹¹ Rule VII, para. 2(i) provides:

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

....

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

¹² Rule XIII 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.

2. At a time specified by the President, before the commencement of oral proceedings, each party shall inform the Registrar and, through him, the other parties, of the names and description of any witnesses and experts whom the party desires to be heard, indicating the points to which the evidence is to refer. The Tribunal may also call witnesses and experts.

3. The Tribunal shall decide on any application for the hearing of witnesses or experts and shall determine, in consultation with the parties or their counsel or representatives, the sequence of oral proceedings. Where a witness is not in a position to appear before the Tribunal, the Tribunal may decide that the witness shall reply in writing to the questions of the parties. The parties shall, however, retain the right to comment on any such written reply.

4. The parties or their counsel or representatives may, under the direction of the President, put questions to the witnesses and experts. The Tribunal may also examine witnesses and experts.

(a) Each witness shall make the following declaration before giving evidence:

"I solemnly declare upon my honor and conscience that my testimony shall be the truth, the whole truth and nothing but the truth."

(b) Each expert shall make the following declaration before giving evidence:

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present oral argument through counsel. Applicant maintains that his case raises “serious and substantial issues about the interpretation and implementation of important Fund policies and practices,” warranting “fulsome and rigorous review by the Tribunal, [which] would benefit from, and should include, oral argument.” Respondent counters that the ample record and pleadings before the Tribunal provide sufficient basis for making both findings of fact and conclusions of law and that Mr. “DD”’s Application does not raise issues that are either “systemic or unusually far-reaching.” Therefore, maintains the Fund, oral proceedings should not be held.

15. 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.” Paragraph 6 of that Rule provides that the Tribunal may “... limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate.”

16. On November 8, 2007, the Administrative Tribunal notified the parties that, for the following reasons, it had concluded that holding oral proceedings in the case for the purpose of hearing the oral arguments of counsel would not be useful to the disposition of the case. The legal issues raised by the case have been extensively briefed by the parties in their pleadings before the Tribunal. In addition, the Tribunal has the benefit of a transcript of the oral hearings conducted by the Fund’s Grievance Committee, at which numerous witnesses testified, including Applicant, his former supervisor, senior officials of Applicant’s Department, the Director of Human Resources, a physician on the staff of the Joint Bank-Fund Health Services Department (“HSD”), Applicant’s spouse, and current and former staff members who provided evidence on a variety of issues that the Committee deemed relevant to its consideration of the case. 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.

The Factual Background of the Case

17. The relevant factual background may be summarized as follows.

"I solemnly declare upon my honor and conscience that my testimony will be in accordance with my sincere belief."

5. The President is empowered to issue such orders and decide such matters as are necessary for the orderly disposition of cases, including ruling on objections raised concerning the examination of witnesses or the introduction of documentary evidence.

6. The Tribunal may limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate.”

18. Mr. “DD” began his career with the Fund in 1997 as a Grade A10 staff member in “Division 1”¹³ of one of the Fund’s departments. In 2000, Applicant was promoted to Grade A11. He continued to serve in the same position until May 2001, when, as the result of the Department’s reorganization, several new pairs of supervisor/supporting positions were created to carry out new and broader responsibilities than those assigned to the Division in which Applicant had been serving.

19. Applicant applied and was selected for one of the new supporting positions, reporting to “Supervisor 1”. The position was designed as a two-year “rotational assignment” to which the appointee carried his current grade level. (Tr. 155.) Applicant earlier had expressed to the then Senior Personnel Manager (“SPM 1”) of the Department his interest in advancing his career within the Department, and it is not disputed that Applicant sought out the new position as an opportunity to broaden his skills and experience with an eye toward future advancement in the Fund. (Tr. 36, 50, 1002.)

20. Applicant testified in the Grievance Committee proceedings that he had been “a bit wary” when he learned the identity of the supervisor to whom he would be reporting in his new position, as he regarded her as having a reputation for being “nasty” and “abusive, to some extent.” Nonetheless, in initial meetings before beginning the assignment he thought she seemed a “pleasant, decent person.” (Tr. 1012.) Applicant formally began his new position on May 15, 2001. He testified that he and “Supervisor 1” had a “good working relationship” during the first month, although on the first or second day of the assignment he was surprised that she had “put [him] on the spot in front of all [his] colleagues” in a meeting. (Tr. 1019.)

21. In July 2001, a vacancy arose for a Grade A12/A13 position in “Division 1”, the Division in which Applicant previously had served and in which he had developed specialized skills. He first spoke with another member of his new work unit “Supervisor 2” (who, in October of that year became the new Senior Personnel Manager (“SPM 2”) of the Department) about the possibility of applying for the vacancy. At the same time, Applicant also related his view, based on information he had recently gathered, that he had been undergraded when first hired by the Fund, in light of his previous grade and service in another public international organization. (Tr. 161, 1025.) “Supervisor 2” confirmed that Mr. “DD” sought his advice at the end of July regarding the opening in “Division 1.” “Supervisor 2” advised that staying in the current position might be more advantageous for Mr. “DD”’s career growth. Moreover, he noted:

“... we really were expecting people to stay in their position for at least one year. There was also the career opportunities rule... that people should really be in their position for a year before moving. But I did say, look, if he felt very strongly about this particular job and about the fact that he had been unfairly treated [in initial grading], that he should in the first instance talk to the SPM.”

¹³ 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.”

(Tr. 162-63) Reviewing his notes of the meeting, “Supervisor 2” recalled: “Yeah, I think he’s encouraged to explore and to go for it.” (Tr. 169-70.)

22. According to Applicant’s account, he submitted his application for the vacancy on July 30, 2001, forwarding a copy to “Supervisor 1” and asking to meet with her on the following day. In Applicant’s view, their July 31 meeting was a turning point in the work relationship. Applicant testified that “Supervisor 1” became angry and launched a “personal attack,” in which she allegedly told him “You have problems that are going to stop you from being successful, no matter what road you take,” and “I can’t fathom how your mind operates.” (Tr. 1032-35.) Mr. “DD” testified that he felt “devastated” by the exchange:

“I had never been talked to like that before in my entire career or personal life, I don’t think, and I was quite stunned. I was very concerned. I realized that the attack she had made in that meeting on me was personal, I realized that I was in a situation where I was working with her directly and I felt that I was at great risk.”

(Tr. 1044-45.)

23. Following the meeting, Applicant asserts, he experienced a “palpable difference in [“Supervisor 1”]’s demeanor toward me,” that she became “extremely cold.” (Tr. 1064-65.) Applicant testified: “In terms of coaching, [“Supervisor 1”] provided strictly criticism. There was nothing positive, there was no teaching.” (Tr. 1076.) “[I]t was chilling to be in her presence.” (Tr. 1077.) He testified that he was “frightened” because he felt that she had started a process that could lead to his being fired. (Tr. 1077-79.)

24. “Supervisor 1”, for her part, recalled the July 31 meeting quite differently. In her Grievance Committee testimony, she described her tone in the discussion as “positive.” (Tr. 769.) She recalled that she thought the vacancy appeared to be a “good opportunity for him” and she “encouraged him to certainly go ahead and find out whether he was eligible to apply for the position.” (Tr. 757.) At the same time, she testified, Mr. “DD” asked for “some feedback as to how I thought he was doing.” (Tr. 758.) “Supervisor 1” noted that she was “seeing [his] managing multiple tasks as a difficulty” (Tr. 770) and that she “would have expected more on juggling projects and meeting deadlines, but ... it was a new position.” (Tr. 763-64.)

25. Shortly thereafter, Applicant met with the “Division 1” Chief and recounted the events of his meeting with “Supervisor 1”. In her testimony, the “Division 1” Chief recalled that Applicant “expressed his concern about the situation. So I was aware that things weren’t wonderful” in the working relationship with “Supervisor 1”. (Tr. 427.)

26. On the following day, August 1, “SPM 1” met with Applicant to discuss the issue of his application for the vacancy which, had he been selected, would have provided Mr. “DD” with an opportunity for promotion. “SPM 1” instructed Applicant to withdraw his application for the vacancy (Tr. 67) on the basis that the position in which Mr. “DD” had begun less than three months earlier was to be a two-year commitment and that he should serve for at least a year for the success of the Department’s program. On August 3, 2001, Mr. “DD” withdrew his application for the vacancy, citing “SPM 1”’s request.

27. Additionally, at the meeting of August 1, Applicant conveyed to “SPM 1” concerns about his working relationship with “Supervisor 1”:

“Q: Did he tell you he was frightened of her?

A: I don’t remember the specific words, but that would probably fit. He was concerned about the relationship and as I said ... he felt underappreciated and that the relationship was not going well with her...”

(Tr. 72.) When questioned, “SPM 1”, who had institutional responsibility for the Fund’s harassment policy, testified that what Applicant related to him that day was “absolutely not,” in his view, a situation of supervisory harassment on the part of “Supervisor 1”. (Tr. 87-88.) Nonetheless, “SPM 1” testified that on the same or following day he conveyed to “Supervisor 1” Applicant’s concerns about the working relationship because “... clearly, the way of resolving those concerns had to go through a discussion first with me and me raising some of those issues with his supervisor to create a discussion between them first on the things that were of concern.” (Tr. 74.)

28. According to “SPM 1”, “Supervisor 1” later reported that she had discussed his concerns with Applicant, especially as to workload and assignments. “Supervisor 1” testified that she was “surprised” when “SPM 1” informed her that, in Mr. “DD”’s view, she “had been rough with him in my meeting with him.” (Tr. 772.)

29. Applicant testified that in August 2001 he sought out assistance from the Fund’s Ombudsperson, as well as from a counselor in the Health Services Department (see below). (Tr. 1104-05.)

30. In October 2001, “Supervisor 2” assumed responsibilities as the Senior Personnel Manager of the Department. “SPM 2” testified that at an October meeting, Mr. “DD” informed him that he was having a “very difficult time” in his working relationship with “Supervisor 1”. “SPM 2” testified that Mr. “DD” expressed to him at the time that he “felt his work was not being fully appreciated, that he wasn’t really being given the type of work which he felt he was capable of doing...that he was just being given negative feedback and nothing on the positive side” (Tr. 191) and that he was “being belittled.” (Tr. 199.) As the situation was “causing him a great deal of distress,” “SPM 2” advised Applicant to seek consultation with the Health Services Department:

“During the course of the conversation, he said that this was causing him a great deal of distress, that, you know, it was causing him to not always sleep well and it was – generally, he felt very sort of stressed, stressed about the work situation.

... I recommended or suggested several things. One was that if he was not feeling well, if he was feeling very stressed, that he might want to seek consultation with our Health Services Department, which deals with these types of situations.

Secondly, I got the impression that the conversations had been rather, at least from his perspective, had been rather one-sided with ["Supervisor 1"]. And I pointed out that it was very important, 'If you weren't sure what was expected or what you need to do, you go back and clarify.' Thirdly, to actively seek feedback and, you know, not just generally wait for this."

(Tr. 192-93.)

31. Applicant testified that when he met with "SPM 2" he asked for a transfer, telling him that he was "treated like a glorified staff assistant" and that the situation was affecting his health. (Tr. 1090-91.)

32. According to the testimony of "SPM 2", following the October meeting, he raised Mr. "DD"'s concerns with "Supervisor 1" who expressed the view that she was giving Applicant a lot of feedback. (Tr. 194.) "SPM 2" also alerted the "Division 1" Chief because it was clear to him that "this was something that was really probably not going to go beyond the year." (Tr. 197.) He also informed the HRD Director of the situation because "this didn't seem to be going in the right direction, [but "SPM 2"] still hoped it would get back on track." (Tr. 201.) Before the end of 2001, in consultation with the HRD Director, "SPM 2" decided that Mr. "DD" would be transferred as of May 2002 to "Division 1". (Tr. 234.)

33. In October 2001, Applicant also met with the Fund's Ethics Officer, seeking investigation of his concern that his email was being improperly accessed. He did not request an investigation of alleged harassment; however, in a background discussion with the Ethics Officer he related his concerns about the work relationship with "Supervisor 1". The Ethics Officer testified that he discussed with "Supervisor 1" these concerns and formed the following opinion about the situation:

"I just feel that he believed, and he may well have sincerely believed, that she had demeaned him. Of course, her view was basically, it had to do with his competence or lack thereof."

(Tr. 564.) According to the Ethics Officer, "Supervisor 1" told him that Mr. "DD" was "a problem child across the board ... took up an inordinate amount of her time and was complaining a great deal and not getting the job done and didn't have a clue about the substance of the job...." (Tr. 628.) As noted, Mr. "DD" did not ask the Ethics Officer to investigate a complaint of harassment and, based on the facts made known to him at that time, the Ethics Officer did not consider such an investigation to be warranted. (Tr. 629-31.)

34. According to Applicant, his contact with the Ethics Officer had a "chilling" effect and thereafter people in the office would not say hello to him. (Tr. 1098-99.) He testified that he overheard a phone conversation in which "Supervisor 1" allegedly remarked: "[M]y incompetent assistant is having me investigated." (Tr. 1101.)

35. On January 4, 2002, "SPM 2" met with Applicant to inform him that he would be transferred to "Division 1" as of May of that year, i.e. when he had completed a full year in the new position. In his testimony before the Grievance Committee, Mr. "DD" said that he became

increasingly emotional during the meeting upon learning that the transfer would not be effected until May, and that he cried uncontrollably in the presence of “SPM 2.” (Tr. 1111-12.) Applicant described his distress when learned he would be required to continue to report to “Supervisor 1” until May 2002:

“... I really didn’t think that I could make it another several months, that my health had deteriorated enough that the prospect of having to remain under that situation for several more months was devastating to me.”

(Tr. 1114.) As Applicant described the situation in his Grievance Committee testimony, by January 2002 he was “at the end of [his] rope” (Tr. 1113) and his self-confidence had been “... completely eroded. I had no self-confidence in anything I could produce and that it would be acceptable.” (Tr. 1120.) In contrast, “SPM 2” testified that he did not recall that the meeting was an especially emotional one or that Mr. “DD” had cried at the time. (Tr. 236.)

36. Based upon Applicant’s testimony before the Grievance Committee and other elements of the record of the case, the history of Applicant’s medical treatment may be summarized as follows.

37. Applicant testified that in early 2001, before taking up his assignment under “Supervisor 1”, he had sought treatment from a psychologist for anxiety related to nervousness in meetings. He attributed this anxiety to a medication he took, which had been prescribed following a physical illness some years before. (Tr. 1787-90.) The psychologist’s affidavit is one of the documents that the Fund asks the Tribunal to disregard insofar as it is claimed to establish medical causality. This question is addressed below.

38. The psychologist’s affidavit of October 22, 2003 states that he had begun treating Applicant in early 2001 for “social phobia, an anxiety disorder,” which was “effectively and successfully treated.” He further noted:

“By August, 2001, Mr [“DD”]’s clinical picture began to deteriorate precipitously. At that time, Mr. [“DD”] began reporting harassment by a new supervisor, including severe and undeserved public criticism, the imposition of impossible deadlines, and the persistent refusal to provide him any coaching or support in his new developmental position. As the months progressed, Mr. [“DD”] became increasingly distressed and reported increasingly hostile working conditions.”

The psychologist also opined that (1) stress experienced as a result of Mr. “DD”’s supervisor’s “apparently hostile treatment” as well as the “ineffectiveness of his complaints to management” contributed to his cardiac event of January 2002, and (2) “significant workplace stress ... caused his severe clinical depression.”

39. Applicant testified that in August 2001, he consulted with a counselor at the Joint Bank-Fund Health Services Department (“HSD”) principally because he had become concerned that his wife might be depressed; he sought and received a referral for her treatment.¹⁴

40. The counselor’s notes of August 30, 2001 reveal that Mr. “DD” reported:

“[His] work pressure has involved what he perceives as harassment by his new supervisor...He is very tense and apprehensive now each day he goes to work. He has talked to the department’s SPM about this, and the supervisor then eased up a bit. He has also consulted with the Ombudsman. ... He plans to try to get himself moved to work with another manager who does the same type of work as the current one.”

On January 15, 2002, Mr. “DD” returned to consult with the HSD counselor, reporting “increasing depression over the past several months, which he attributed primarily to his deteriorating relationship with his manager.” He sought guidance on how to cope and about his treatment. The counselor’s notes record: “No one in the office knows he is in treatment.” On February 15, 2002, the counselor noted a phone call from Mr. “DD” following his release from the hospital and before returning to work:

“[Mr. “DD”] consulted about how to handle the return to work. We discussed how to present his absence, and he will relate his stressful relationship with his manager as a contributor to his health problems. He does not want to admit he has been depressed.”

41. Applicant additionally testified that in October 2001 he began seeing a private psychiatrist. (Tr. 1108.)

42. On January 16, 2002, Mr. “DD” suffered an episode of atrial fibrillation, a condition which he also had experienced the previous September. He was hospitalized for two days in January for cardiac care. The following week, Applicant began the first of what would be several hospitalizations for treatment of depression.

43. According to Respondent, Applicant was placed on extended sick leave from approximately January 15, 2002 through mid-June 2002, serving intermittent periods of part-time employment as his health permitted.

44. Applicant returned briefly to work under “Supervisor 1” in February 2002. On February 25, 2002, Applicant met with a physician on the staff of the HSD, expressing his view that his work relationship with “Supervisor 1” was affecting his health. (Tr. 1145-46.) The physician was sufficiently concerned that he brought the issue to the attention of the HRD Director on the

¹⁴ The Fund has asked the Tribunal to disregard these counselor’s notes “insofar as they are claimed to ‘establish’ medical causality.” This question is addressed below.

following day. The HRD Director testified that the physician requested that Mr. “DD” be transferred immediately to “Division 1” for health reasons. (Tr. 1649.) Approximately a week later, in consultation with “SPM 2”, the HRD Director decided that the transfer would be made immediately. (Tr. 1660). As “SPM 2” suggested that a fitness-for-duty examination be conducted before Mr. “DD” returned to work, the HRD Director communicated this plan to the HSD physician:

“While the cause of Mr. [“DD”]’s stress is not entirely clear we have decided that it would be in everyone’s interest for Mr. [“DD”] to transfer to work in an area with which he is familiar as soon as possible....

While we are prepared to reassign Mr. [“DD”] we are concerned that he may not yet be ready to return to work full time his health problems appear to have taken a turn for the worse this week. We therefore intend to request through normal channels that a fitness for duty be undertaken by an independent medical advisor before assigning Mr. [“DD”] to his new duties”

(March 5, 2002 email from HRD Director to HSD physician.)

45. Applicant formally transferred to “Division 1” as of March 2002.

46. The fitness-for-duty report¹⁵ of April 8, 2002, prepared by an independent medical examiner (“IME”), a psychiatrist engaged by the Health Services Department, concluded that Mr. “DD” could return to work, initially on a part-time basis, outside the supervision of “Supervisor 1.” (The Fund points out that the decision to transfer Applicant, however, had been made prior to the fitness-for-duty assessment.) The following is a summary of the conclusions contained in the fitness-for-duty report:

“Mr. [“DD”] presents a credible picture of a previously successful and high-achieving man who ran afoul of an extremely difficult female supervisor who mistreated him rather badly. At the time, he was subjected to additional stress from his friend’s suicide (which may have emphasized to him the dangers of losing one’s job) and, later from his wife’s serious health scare and depression. He responded with acute symptoms of depression and exacerbation of his pre-existing social anxiety, which is frequently a symptom of depression....

His pre-existing condition of social anxiety appears to have been under adequate control prior to his job change of May 2001, at least by his own report. Without further information it is not

¹⁵ The fitness-for-duty report is the third document that the Fund asks the Tribunal to disregard insofar as it is claimed to establish medical causality. This question is addressed below.

possible to ascertain whether he may have had previous vulnerabilities to anxiety or depressive disorders ..., but no sign of these was elicited during my examination.

It is likely that Mr. ["DD"] will be able to return to work at least part-time in short order, and full-time not too long after that, provided, of course, that he does not have to work in the vicinity of ["Supervisor 1"] who clearly has a toxic effect upon him. He should remain in psychotherapy with medication until it is clear to him and his therapist that his life is stable and back on track and there are no more important issues to deal with."

47. Following the fitness-for-duty assessment, Applicant returned to work on a part-time basis on June 10 and resumed full-time status in August 2002.

48. Applicant recounted in his Grievance Committee testimony that he required several additional hospitalizations during 2002 for treatment of depression. (Tr. 1802-11.)

49. As of April 8, 2002, Mr. "DD" returned to work in "Division 1". (Tr. 472.) The "Division 1" Chief testified that initially she asked HSD what kind of assignments to give him. In her Grievance Committee testimony, she expressed her view (as of the date of those proceedings) that, from a health perspective, Mr. "DD" seemed "much improved" (Tr. 507) and "seems a little more settled and a little more focused." (Tr. 474-75.) She explained that she had chosen assignments for him to build his confidence and also to accommodate the fact that he was not always able to be there because of his medical condition. (Tr. 530.) The "Division 1" Chief also testified that she had provided Mr. "DD" with extra structure in supervising him. (Tr. 512-13.) In contrast, Applicant testified that the assignments he received after returning to "Division 1" were not consistent with his grade level or specialized experience. (Tr. 1131.)

50. Applicant continued to serve as a staff member in "Division 1" until September 2005, when he resigned from his employment with the Fund to take up a position with another public international organization.

The Channels of Administrative Review

51. On August 8, 2002, Applicant sought administrative review pursuant to GAO No. 31, alleging that he had been subjected to conduct violative of the Policy on Harassment and other elements of the Fund's internal law. (Letter from Applicant's counsel to HRD Director, August 8, 2002.) The HRD Director replied on August 19, 2002, noting that it was the Fund's intention to engage "an independent outside investigator to review these allegations and report to me before I take my decision on the matter." (Letter from HRD Director to Applicant's counsel, August 19, 2002.)

52. On September 12, 2002, counsel for the Fund confirmed to Applicant's counsel that an outside consultant had been retained to "conduct an inquiry into the allegations raised in Mr. ["DD"]'s request for administrative review." The attached Terms of Reference stated that the consultant was to assess, based upon documentary evidence and interviews, "whether

Mr. ["DD"] was the subject of harassment and retaliation defined in the relevant IMF policies, including the nature and extent thereof," as well as any actions taken by senior officials in response to the alleged harassment, and whether the alleged conduct adversely affected Mr. "DD" "in terms of his IMF career as well as his health." (Letter and attachments from Fund's counsel to Applicant's counsel, September 12, 2002.)

53. Three months later, following the completion of the investigation, but "[b]efore the report [was] submitted to management and administrative review [was] concluded," counsel for the Fund provided a written summary to Applicant's counsel of the consultant's principal findings and conclusions. These included: (a) that there was no evidence of discrimination based on gender, in particular as to the application of the one-year rule governing eligibility for vacancies; (b) that the consultant did not find that "the supervisor/subordinate relationship" was harassing or in violation of Fund rules; and (c) that the consultant did not find that the supervisor retaliated against Mr. "DD" as a result of his expressed desire to transfer from his position. At the same time, the consultant also found as follows:

(a) "... that Mr. ["DD"]'s health has suffered in the last 16-18 months, but [the consultant] cannot attribute causation solely to his workplace relationships or working environment.... [and] it was beyond the scope of [the consultant's] review to determine whether or to what extent Mr. ["DD"]'s mental and physical health problems were directly caused by any one factor;"

(b) the supervisor "... was not as sensitive to Mr. ["DD"]'s concerns and needs as hindsight would suggest. She may not have styled her feedback in ways that would optimize Mr. ["DD"]'s ability to hear and respond positively. However, it is also entirely possible that Mr. ["DD"] was strongly predisposed against his new supervisor.... this situation involved two individuals with some fundamental incompatibilities who were placed together in a new and untested function;" and

(c) "... throughout the period of his complaint, Mr. ["DD"] made his concerns about ["Supervisor 1"] and his opinion about their working relationship known to [Department] management. [The consultant] found a rather significant lapse in management attention to the deteriorating relationship between ["Supervisor 1"] and Mr. ["DD"], about which earlier intervention might have prevented the situation now faced."

Finally, according to the communication of the Fund's counsel, the consultant expressed the view that the issues raised by Mr. "DD"'s complaint "would seem more appropriate for informal resolution than for legal adjudication." (Letter from Fund's counsel to Applicant's counsel, December 12, 2002.)

54. According to Respondent, Applicant and his counsel met with the consultant to review the findings and conclusions. Thereafter, a period of settlement negotiations ensued, lasting throughout 2003. On May 8, 2003, the Fund communicated its view, in light of unresolved issues as to Mr. "DD"'s health and his ability to return to work, that "... administrative review of [his] grievance has not been formally concluded, and the possibility of a negotiated settlement remains." (Letter from Fund's counsel to Applicant's counsel, May 8, 2003.) However, by

January 12, 2004, the Fund concluded that the parties had reached an impasse and formally notified Applicant's counsel that it regarded the process of administrative review pursuant to GAO No. 31 as having been exhausted. (Letter from Fund's counsel to Applicant's counsel, January 12, 2004.)

55. On March 12, 2004, Applicant filed a Grievance with the Fund's Grievance Committee, which considered it on the basis of oral hearings and the briefs of the parties.¹⁶ (Statement of Grievance, March 12, 2004.) During the course of its proceedings, the Committee decided to bifurcate its consideration of the liability and damages aspects of Applicant's complaint. Later, on January 3, 2005, following consideration of the briefs of the parties, the Committee issued an Order that it would not consider "any information or argument" relating to the issue of "medical causality," which it deemed to be properly before the Fund's Workers' Compensation Claim Administrator. Accordingly, an affidavit of Applicant's treating psychologist was stricken from the Grievance Committee's record.¹⁷ (Grievance Committee Order, January 3, 2005.)

56. On July 25, 2006, the Grievance Committee issued its Recommendation and Report. The Grievance Committee concluded that Mr. "DD" had not been subjected to a hostile work environment and that the Fund did not fail to take timely and effective action to remove Mr. "DD" from the supervision of "Supervisor 1". In addition, it concluded that the Fund's rules relating to application for vacancies had been applied "even-handedly and in a non-discriminatory manner." Accordingly, the Grievance Committee recommended the denial of Mr. "DD"'s Grievance on the ground that he had not shown that any of the decisions he challenged constituted an abuse of discretion by the Fund. By letter of August 8, 2006, the Deputy Managing Director notified Applicant that Fund management had accepted the Committee's recommendation.

57. On November 7, 2006, Mr. "DD" filed his Application with the Administrative Tribunal.

Summary of Parties' Principal Contentions

Applicant's principal contentions

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

1. Applicant's supervisor harassed and retaliated against Mr. "DD" and subjected him to a hostile work environment in violation of Fund policies.
2. The Fund failed to take timely and effective action in response to Applicant's complaints about "Supervisor 1"'s conduct.

¹⁶ According to Respondent, during a hiatus in the Grievance Committee's proceedings, from January to September 2005, settlement efforts resumed but were unsuccessful.

¹⁷ This same affidavit is the subject of a request of the Fund that the Tribunal disregard portions of Applicant's brief and supporting exhibits that are claimed to establish "medical causality."

3. Applicant's complaints of significant workplace stress warranted prompt consideration and effective intervention from management regardless of whether "Supervisor 1"'s treatment of him amounted to actionable harassment in its own right.
4. Applicant's medical evidence is relevant, probative and admissible with respect to his claim of harassment.
5. The Fund wrongfully declined to consider Applicant's application for a vacancy in "Division 1", discriminating against him on the basis of his gender.
6. The administrative review of Applicant's claims was unfair, unduly protracted and caused him further harm. The Grievance Committee Chairman and the Fund's counsel engaged in unfair conduct during the Grievance proceedings. Applicant was subjected to retaliation for pursuing channels of review.
7. Applicant seeks as relief:
 - a. the additional compensation Applicant would have received had he been promoted to the "Division 1" vacancy in 2001;
 - b. "substantial moral and punitive damages" for psychological, physical and other intangible injuries caused by alleged discriminatory treatment, harassment, hostile work environment and retaliation, and management's failure to take timely and effective action in response;
 - c. "substantial moral and punitive damages" for the Fund's "mishandling" of the administrative review of Applicant's claims;
 - d. payment of unreimbursed medical expenses;
 - e. expungement of APR prepared by allegedly harassing supervisor; and
 - f. attorney's fees and costs.

Respondent's principal contentions

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

1. Applicant was not subjected to harassment or a hostile work environment by "Supervisor 1". Nor did she subject him to retaliation for his application for a vacancy outside of her supervision. "Supervisor 1"'s "management style" was in no way inappropriate.

2. The Fund responded appropriately to Applicant's complaints.
3. The Fund did not discriminate against Applicant on the basis of his gender in applying the "one-year rule" in respect of his application for a vacancy.
4. The Tribunal has no basis to review the subject of "medical causality" and should disregard portions of Applicant's brief and supporting exhibits that relate to this topic "insofar as they are claimed to 'establish' medical causality."
5. Applicant's complaints of unfair treatment in the administrative review process and the Grievance Committee proceedings, and for retaliation for pursuing channels of review, are not properly before the Administrative Tribunal. These claims, in any event, are without merit.
6. Applicant is not entitled to any of the remedies he seeks.

Consideration of the Issues of the Case

Was Applicant subjected to impermissible harassment or a hostile work environment to which the Fund failed effectively to respond?

Did Applicant experience harassment in contravention of the Fund's internal law?

60. The case of Mr. "DD" is the third in which the Administrative Tribunal has been presented with review on the merits¹⁸ of a claim that a staff member has been the object of acts of supervisors or colleagues that allegedly violate the Fund's Policy on Harassment (1999). The Fund's prohibition on harassment defines that term broadly, as follows:

"What is harassment?"

3. Harassment is any behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment. It can take many different forms, including intimidation or sexual harassment."

("Policy on Harassment," Staff Bulletin 99/15 (Harassment – Policy and Guidance to Staff) (June 18, 1999, revised July 21, 1999).)

61. The Policy on Harassment also describes intimidation:

¹⁸ A fourth Application raising a claim of workplace harassment was summarily dismissed for failure to exhaust channels of administrative review. See Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application), Judgment No. 2006-5 (November 27, 2006).

“4. **Intimidation** includes physical or verbal abuse; behavior directed at isolating or humiliating an individual or a group, or at preventing them from engaging in normal activities. Behaviors that might constitute intimidation include, *inter alia*:

- degrading public tirades by a supervisor or colleague;
- deliberate insults related to a person’s personal or professional competence;
- threatening or insulting comments, whether oral or written—including by e-mail;
- deliberate desecration of religious and/or national symbols; and
- malicious and unsubstantiated complaints of misconduct, including harassment, against other employees.”

62. The Tribunal additionally has noted that the Policy on Harassment provides, under “**Conduct that would not be considered harassment**,” the following caveat:

“14. ... a negative performance report, as such, is not harassment. Supervisors have a responsibility to give appropriate feedback and to take appropriate corrective action. However, such feedback should be made in a reasonable and constructive manner and should not be used as retaliation.”

63. In 1998, the Fund introduced the Code of Conduct which provides *inter alia*:

“Courtesy and respect

14. You should treat your colleagues, whether supervisors, peers, or subordinates, with courtesy and respect, without harassment, or physical or verbal abuse. You should at all times avoid behavior at the workplace that, although not rising to the level of harassment or abuse, may nonetheless create an atmosphere of hostility or intimidation.”

64. As to the responsibilities of supervisors, the Policy on Harassment states:

“18. The Fund strives for an environment which is free of harassment, and supervisors are expected to support this objective, including stopping harassment in the areas under their supervision....”

Similarly, the Fund’s Code of Conduct provides:

“Conflict resolution

19. Managers have a responsibility to make themselves available to staff members who may wish to raise concerns in confidence and to deal with such situations in an impartial and sensitive manner. Managers should endeavor to create an atmosphere in which staff feel free to use, without fear of reprisal, the existing institutional channels for conflict resolution, [footnote omitted] and to express concerns about situations which are, or have the potential to be, conflictive.”

65. Additionally, the Fund’s Policy on Harassment protects staff from retaliation for making a good faith complaint of harassment:

“Freedom from reprisal

30. Anyone who feels harassed, particularly by a supervisor, is likely to fear reprisal should he or she bring the matter to the attention of those in authority. However, reprisal against anyone who files a complaint in good faith is unacceptable and in itself constitutes misconduct subject to disciplinary action.

31. A person who brings a complaint in good faith should not be subjected to retaliation, and adverse action taken against a complainant that appears to stem from the registering of a complaint will be thoroughly investigated. As part of follow-up measures to formal complaints, officials of HRD will check from time to time with complainants to ensure that no such adverse actions have been taken as a result of their filing a complaint.”

66. Finally, the seriousness of the matter of harassment is underscored by the fact that the Policy on Harassment warns staff that conduct constituting harassment as defined by the Fund’s internal law may result in disciplinary action:

“2. ... Employees should be aware that all forms of harassment may constitute misconduct, providing a basis for disciplinary action up to and including termination of employment (see General Administrative Order No. 33, Conduct of Staff Members, Section 8, Disciplinary Measures).”

(Policy on Harassment.)

67. In Mr. “F”, Applicant v. International Monetary Fund, Respondent, Judgment No. 2005-1 (March 18, 2005), the Tribunal concluded that the applicant had been the object of workplace harassment related, in particular, to his religious affiliation. Mr. “F” identified a number of incidents that he regarded as representing religious hostility, including that co-workers reportedly had told him that if he did not convert to their religion they would make his life in the work unit “miserable” and that these same staff members refused to take direction from him in the course

of their work. Other allegations related to the display of religious symbols. A senior economist assigned to assess and recommend solutions to personnel problems in the Section testified to an incident in which two staff members had raised with him the issue of Mr. “F”’s religion. Mr. “F”, paras, 86, 88.

68. In Mr. “F”, para. 93, the Tribunal noted that the Fund’s Discrimination Policy, p. 5, explains that harassment can manifest itself as a form of discrimination:

“Harassment, unfair treatment, abuse of power, and favoritism are also separate from discrimination, but they can all become discriminatory if they develop into a pattern and systematically address certain individuals or groups of individuals and have an impact on employees’ performance, development, career opportunities, and career progress.”

69. The Tribunal in Mr. “F”, while acknowledging the “admittedly contradictory and uneven evidence” (para. 100) as to whether Mr. “F” was a victim of religious discrimination and harassment, concluded:

“... the evidence predominantly sustains the conclusion that the Section in which Mr. “F” worked suffered from an atmosphere of religious bigotry and malign personal relations among certain of its members, and that he in particular suffered accordingly. ...

... Mr. “F” felt, and had reason to feel, that he was the object of hostility on the part of certain of his colleagues because his religion was different from theirs. ... there is also evidence that an atmosphere of religious animosity was tantamount to harassment that adversely affected the work performance and perhaps health of Mr. “F”. Harassment also appears to have had origins not of a religious kind. The deportment of Mr. “F” himself was at times offensive, combative and excessive but, on the evidence in the record, not such as to excuse the behavior of which he was the victim.”

Mr. “F”, paras. 100-01. The Tribunal awarded Mr. “F” financial compensation in the sum of \$100,000 for the Fund’s failures (a) “to take effective measures in response to religious intolerance and workplace harassment of which Mr. “F” was an object” and (b) to give him reasonable notice of the abolition of his post. Mr. “F”, Decision, Para. 2.

70. In a subsequent Judgment, Ms. “BB”, Applicant v. International Monetary Fund, Respondent, Judgment No. 2007-4 (May 23, 2007), para. 77, the Tribunal distinguished harassment “linked to religious intolerance as the Tribunal found in the case of Mr. “F”, which ... is a form of discrimination prohibited by the Fund’s internal law as well as by universally accepted principles of human rights,” from “harassment without discriminatory animus” as was

alleged by Ms. “BB”. In the instant case of Mr. “DD”, Applicant does not attribute alleged harassment to any discriminatory animus.¹⁹

71. The evidence presented by Ms. “BB” in support of her contention of harassment included what she referred to as a “pattern of hypercriticism, combined with periods of isolation and being completely ignored” and that she was the target of “bullying.” She additionally described “major communications difficulties” in that she felt that whatever she said was contested by her supervisor. *Id.*, paras. 79–86.

72. The Tribunal in Ms. “BB”, para. 87, considered whether the “management style” described by Applicant (and two colleagues) amounted to “harassment” as defined by the Fund’s internal law, i.e. did it “...unreasonably interfere[] with work or create[] an intimidating, hostile, or offensive work environment?” In the circumstances of that case, the Tribunal concluded that “... the fact that a supervisor is demanding, even in respect of minor detail, is not to be equated with harassment.” Ms. “BB”, para. 88. Observing that two witnesses in addition to Applicant had testified that the supervisor went beyond the normal bounds of supervision and was unduly critical of Applicant or largely inaccessible to her, the Tribunal concluded that it was “... questionable whether such a pattern of behavior can properly be described as harassment that is actionable and justifying of payment of monetary compensation.”

“... Certainly the treatment that Applicant sustained cannot be equated with the religious intolerance of which Mr. “F” was a victim. This is not to say that supervisors should not make every effort to get along with those they supervise and to be open to their sensitivities. Everyone is entitled to courtesy and civility. But it does not follow that damages are payable to those who do not invariably enjoy such treatment.

At the same time, the Fund has adopted, in the form of Staff Bulletin No. 99/15, a statement of the Fund’s policy on ‘Harassment - Policy and Guidance to Staff,’ which defines harassment as quoted above The Fund has done so with obviously commendable objectives. The Fund and members of its staff accordingly are charged with upholding that policy.”

Ms. “BB”, paras. 88-89. The Tribunal further commented that the case of Ms. “BB” illustrated the difficulties that may arise in applying the Fund’s policy. *Id.*, para. 89.

¹⁹ Mr. “DD” raises separately from his harassment claim an allegation that he was discriminated against on the basis of his gender in the application of Fund rules in respect of eligibility for vacancies. *See infra* Consideration of the Issues of the Case; Did the Fund abuse its discretion in asking Applicant in August 2001 to withdraw his application for a vacancy? Was that decision affected by impermissible discrimination on the basis of Applicant’s gender? Similarly, Ms. “BB” raised an ancillary contention that discrimination on the basis of gender and nationality had impermissibly affected her non-promotion to a higher grade level, expressly distinguishing that claim from her claim of harassment. Ms. “BB”, paras. 76, 119.

73. In Ms. "BB", however, "the only pertinent question before the Tribunal," (para. 89) was whether the applicant should be awarded, in respect of harassment claims, compensation additional to the sum of \$80,000 already granted by the Fund on the basis of the recommendation of the Grievance Committee. The Tribunal concluded on the facts of the case that she should not be additionally compensated.

74. The evidence relating to Mr. "DD"'s claim of harassment may be summarized as follows.

75. Applicant alleges that "Supervisor 1" reacted adversely to his decision to apply for the vacancy that had arisen in "Division 1" in July 2001, and he dates the harassment of which he complains to the July 31 meeting in which he raised with her the issue of the vacancy. "Supervisor 1", for her part, testified that she did not oppose Mr. "DD"'s application for the vacancy.

76. Applicant also recounts in some detail a series of incidents that he claims were intended by "Supervisor 1" to expose him to embarrassment and that he was "set up to be embarrassed" in meetings among colleagues. (Tr. 1343.) "There were other meetings where she criticized my work in front of others, which was unfair, which did not reflect what had taken place" (Tr. 1345.) No "others," however, gave testimony in support of Applicant's claim in this regard.

77. It is recalled that the Fund's Policy on Harassment defines prohibited "intimidation" as including "behavior directed at isolating or humiliating an individual or a group," for example, "deliberate insults related to a person's personal or professional competence." (Policy on Harassment, para. 4.)

78. Furthermore, Applicant maintains that the performance feedback he received from "Supervisor 1" was negative and unbalanced, and that this feedback was given in retaliation for his expressed interest in returning to "Division 1". In Applicant's words: "... she didn't hold back showing me that she had, you know, considered me to be a dope, basically, that I just couldn't do anything right." (Tr. 1122.) It is recalled that the Fund's Policy on Harassment, para. 14, provides that performance feedback "should be made in a reasonable and constructive manner and should not be used as retaliation."

79. "Supervisor 1", for her part, testified that she did not view any of Mr. "DD"'s performance issues as "insurmountable" and that "there was a lot of benefit of the doubt given, because it was a new position and it was something ... he was coming new to and had a set of skills and experience in the Fund, but didn't have a set of some other skills." (Tr. 893-94.)

80. "SPM 1" testified that as part of his responsibilities he had reason to be aware of "Supervisor 1"'s managerial relationships with subordinates. He characterized her as "demanding ... in a positive sense," (Tr. 30) noting that "... there were a number of instances where she provided to me and others in the department very good advice on how to manage people and how to work with people well." (Tr. 86.)

81. "Supervisor 2" (later "SPM 2") testified that "Supervisor 1" had a reputation for being direct with people and not "mincing her words:"

“I think she’s known as somebody who is highly results oriented. She has a reputation of being particularly adept at process, work on processes, streamlining and so on....

I think she has a reputation of somebody who does demand of people to get things done and, you know, is again, tied in with this results orientation, tries to get people galvanized and working towards an objective.

Some people find her quite blunt; I mean what you see is what you get and so, you know, she is pretty outspoken. ...”

(Tr. 141-43.) At the same time, he noted that she was appreciated for her coaching abilities. (Tr. 343-44.) These perceptions were confirmed by a number of witnesses who had worked with “Supervisor 1” at various times during her Fund career.

82. In addition, testimony indicated that, consistent with her general style, “Supervisor 1”’s feedback on performance matters was also direct, an approach that may have differed from that which was customary in the Fund. A former colleague testified:

“... she was direct in telling people where they stood, what was expected of them, what she wanted them to do or what they needed to do to succeed. And I think that was something that she worked fairly tirelessly at to make sure that she did things in that way.

And I suspect that that was unusual. Certainly in my experience in the Fund, that is sometimes unusual, that giving direct feedback and direct comprehensive information to people about what they are doing well and what they can improve on was probably unusual.”

(Tr. 1429.) Similarly, a former subordinate described the feedback provided by “Supervisor 1” as direct and effective, an objective that “for years the Fund’s been working on.” (Tr. 1723.)

83. “SPM 2” and other witnesses testified that they had never heard “Supervisor 1” use offensive language to describe Fund staff members. (Tr. 331.) Applicant asserted, however, that “Supervisor 1” generally “reserved the rough treatment for when it was one on one with the door closed.” (Tr. 1123.)

84. Another colleague, the “Division 1” Chief, testified that “Supervisor 1” “evokes some strong reactions in people...good and bad,” that she is “very direct” and “confrontation is a very comfortable mode for her,” (Tr. 414-15) and that she was “focused on the task and less focused on the people.” (Tr. 483.) This description is reminiscent of that offered by a colleague of the supervisor at issue in the case of Ms. “BB”, i.e. that she was ““more driven by the task at hand and how to do it well, as well as possible, and maybe not as sensitive to how people react in these types of situations.”” Ms. “BB”, para. 83.

85. Two former subordinates of “Supervisor 1” testified to complaints they had raised as to her supervision. The testimony of other witnesses, however, suggested that these complaints were generated by discontent relating to structural changes in the department that were associated with “Supervisor 1”.

86. Applicant contends that “Supervisor 1” responded to his application for the “Division 1” vacancy with severe and unwarranted criticism of his performance and abilities, and that her actions included “... imposing unreasonable and untenable assignments on Mr. [“DD”], providing inadequate or non-existent support, belittling his abilities and competence, humiliating him inappropriately in front of coworkers, and regularly subjecting him to unwarranted criticism. Additionally, Applicant asserts that “Supervisor 1” failed to give him balanced feedback, as demonstrated by a draft Annual Performance Report.

87. Respondent maintains that the evidence Applicant presents does not rise to the level of a “hostile work environment” but rather represents “normal workplace incidents in which expectations were not met and/or miscommunication between a subordinate and supervisor occurred.” In the Fund’s view, Applicant’s depiction of the July 31 meeting with his supervisor, as well as of events thereafter, “lacks credibility.” Respondent suggests in respect of the July 31 meeting that in response to Mr. “DD”’s request to know how he was faring in his new position “Supervisor 1” gave “perhaps unexpectedly candid feedback” regarding potential performance issues that she was beginning to observe.

88. There is no question that Mr. “DD” perceived himself to be belittled and unappreciated by his supervisor. He reported such perceptions, and the distress caused by them, contemporaneously following the July 2001 meeting both to “SPM 1” and to “Supervisor 2” in late July/early August 2001 and later in October of that year, after “Supervisor 2” had assumed responsibilities as the Senior Personnel Manager of the Department. The record also shows that Mr. “DD” reported these perceptions and consequent distress in August 2001 to the counselor in the Health Services Department, the Ombudsperson, and the “Division 1” Chief, and in October to the Ethics Officer.

89. Taking into account this Tribunal’s precedents and the evidence presented in this case, was Mr. “DD” subjected to harassment or a hostile work environment in contravention of the Fund’s internal law? Has Applicant established that his supervisor’s conduct “...unreasonably interfere[d] with work or create[d] an intimidating, hostile, or offensive work environment?” (Policy on Harassment, para. 3.)

90. In the view of the Tribunal, Mr. “DD” was not subjected to harassment or a hostile work environment in contravention of the Fund’s internal law. Nor has he established that his supervisor’s conduct “...unreasonably interfere[d] with work or create[d] an intimidating, hostile, or offensive work environment.” It is clear that Applicant was offended by, and may have even been frightened by, his supervisor’s direct and critical style, but he has failed to carry the burden of establishing that her behavior was tantamount to harassment and that she created a hostile work environment. The Tribunal rather concludes that there was a severe clash of personalities, that Applicant appears to have been hypersensitive in his reaction to his supervisor’s manner and she, for her part, appears to have been insensitive to his sensitivities. Such incompatibility between a supervisor and a supervisee is not unusual in organizations,

however difficult such a situation may be, especially for the one supervised. The Tribunal does not regard such a pervasive personality clash as constituting harassment on the part of the Fund or maintenance of an intimidating, hostile, or offensive work environment.

91. The next section considers the Fund's response to Applicant's perceptions of impermissible conduct.

Did the Fund take appropriate measures in response to Applicant's complaints and concerns?

92. It is recalled that the Fund's Policy on Harassment, para. 18, provides that supervisors are expected to "stop[] harassment in the areas under their supervision." Likewise, the Code of Conduct, para. 19, states that managers have a responsibility to make themselves available to staff members who may wish to raise concerns and to deal with such situations in an "impartial and sensitive" manner.

93. In Mr. "F", the Tribunal found "no evidence in the record that Fund supervisors took effective action" to deal with the impermissible work environment:

"They did appoint the senior economist who appears to have made some effort to rebuke expressions of religious hostility but the atmosphere of hostility persisted after his departure. there is no other evidence that the supervisors of the Section concerned moved vigorously, or indeed moved at all, to investigate Mr. "F"'s complaints of religious hostility or to discipline staff members found to be the source of such hostility."

Mr. "F", paras. 100-01. Accordingly, the Tribunal awarded Mr. "F" financial compensation for the Fund's failure to take effective measures in response to religious intolerance and workplace harassment. Mr. "F", Decision, Para. 2.

94. In Ms. "BB", para. 93, the Tribunal concluded that "[t]he actions of the Fund in attempting to meet the difficulties encountered by Ms. "BB" contrast[ed] favorably with the ineffective action by the Fund in the admittedly much more extreme case of Mr. "F"." These actions included the Office Director's taking over direct supervision of Ms. "BB" to "avoid any kind of friction," and working with the allegedly harassing supervisor on "people management skills." Ms. "BB", para. 91. The Office Director concluded that "there was too much emotion involved from [Ms. "BB"]'s side" vis-à-vis the supervisor and therefore it was not appropriate to have Ms. "BB" report to her any longer. *Id.*, para. 82. Ultimately, the HRD Director arranged a temporary assignment for Ms. "BB" in another Fund Department, noting in her testimony that "... if there are problems between staff members, regardless of whose fault it is, if one can do something to keep them apart and give the staff member who says they're being affected sort of a chance to do something else, we do that." Ms. "BB", para. 92. It was the conclusion of the Tribunal in Ms. "BB", para. 93, that "... the responsive actions of the Fund mitigate[d] any liability it could be found to have for the inappropriate supervision of Applicant."

95. In the instant case of Mr. “DD”, it should be recalled that “SPM 1”, although he did not believe the reported conduct rose to the level of harassment (Tr. 87-88), promptly reported to “Supervisor 1” the concerns that Mr. “DD” reported to him in early August 2001 about the working relationship because “clearly, the way of resolving these concerns had to go through a discussion first with me raising some of these issues with his supervisor to create a discussion between them.” (Tr. 74.)

96. The Fund acknowledges that in October 2001 Applicant raised his acute concerns about his work situation with “SPM 2” and asked to be transferred to a different position outside of the particular work unit. “SPM 2” also related Mr. “DD”’s concerns to “Supervisor 1” and the HRD Director.

97. The HRD Director testified that “toward the end of 2001” she became aware of problems in the work relationship between Mr. “DD” and “Supervisor 1” (Tr. 1635) when “SPM 2” brought the matter to her attention, including Applicant’s request to be reassigned. In the view of the HRD Director, it did not make sense for Mr. “DD” to move so quickly after assuming a new position: “... when someone is in a new position, they will feel, if it’s not their area of expertise, they will obviously feel a little bit unsure of themselves” (Tr. 1641.) “I was aware that he was struggling with the assignment, I was also aware that that was causing some stress. But you know, I think at the point in time that I heard that, that was similar to the experience that a lot of staff members have.” (Tr. 1643.) In the HRD Director’s view:

“The view that I think I had was that these are situations which arise quite often in an organization ... where a staff member moves into a new position and ... they’re moved out of their comfort zone and then they have expectations of themselves which ... they can’t quite meet it, and some people react to that differently.

... [I]n general, as a manager, you do try to help people develop and you don’t move someone out of a position because they don’t feel comfortable, when from a longer term point of view, it’s to their advantage to further develop.”

(Tr. 1651 - 52.) The HRD Director testified that she never spoke either to Applicant or to “Supervisor 1” about the work relationship after becoming aware of Mr. “DD”’s concerns. (Tr. 1663.)

98. It is further recalled that the outside consultant engaged to review Applicant’s complaint of harassment concluded, in the words of the Fund’s counsel’s synopsis of those findings, that “... throughout the period of his complaint, Mr. [“DD”] made his concerns about [“Supervisor 1”] and his opinion about their working relationship known to [Department] management.” At the same time, the consultant also found “a rather significant lapse in management attention to the deteriorating relationship between [“Supervisor 1”] and Mr. [“DD”]” (Letter from Fund’s counsel to Applicant’s counsel, December 12, 2002.)

99. Applicant asserts that his “... complaints of significant workplace stress warranted prompt consideration and effective intervention by management regardless of whether

[“Supervisor 1”]’s treatment amounted to actionable harassment in its own right,” and that senior officials “disregarded Mr. [“DD”]’s requests for assistance until he became professionally and personally incapacitated by the effects of his work environment.” Applicant maintains that the Fund missed opportunities to transfer him from “Supervisor 1”’s supervision, including when one of his peers in the unit left her position. Respondent counters that the proposition that an employee’s complaint about treatment by a supervisor, even if that treatment does not amount to harassment, imposes a duty on the Fund to intervene, for example to accede to an employee’s request for an immediate transfer, “goes too far.”

100. Accordingly, the facts presented by the case of Mr. “DD” raise the question whether, although the Tribunal has concluded that Applicant was not subjected to impermissible harassment, liability may be found on the ground that Fund managers failed to take effective action in response to a supervisory situation that Applicant maintained gave rise to great distress and a threat to his health.²⁰ Applicant as early as the summer of 2001 voiced complaints about his treatment by his supervisor, complaints in whose validity he genuinely believed. He then had recourse to the Health Services Department, a course of action that his SPM in October suggested. Applicant was not transferred outside the supervision of “Supervisor 1” until March 2002, however, by which time his health had seriously deteriorated. Applicant testified that, as of January 15, 2002, no one in the office knew he was in psychiatric treatment, although they knew that “SPM 2” had referred him in October 2001 for counseling with the Health Services Department. Applicant further confirmed that he did not ask the HSD counselor to alert anyone at the Fund to his situation. (Tr. 1847-48.) Nonetheless, the facts presented by the case of Mr. “DD” raise troubling questions as to whether Fund officials should have taken steps earlier to remedy a work situation that Mr. “DD”, for whatever reason, apparently perceived as more than he could handle.

101. In this case, did the Fund have a duty to transfer Mr. “DD” into a position outside the supervision of “Supervisor 1” sooner, for example in October 2001, when the Fund acknowledges that Applicant requested from his Senior Personnel Manager such a transfer? “SPM 2” maintains that he made no connection between Mr. “DD”’s expressions of distress relating to the work relationship with “Supervisor 1”, for which he referred Applicant to the Health Services for consultation in October 2001, and the serious health conditions Applicant suffered thereafter.

102. “SPM 2” testified that after Applicant was hospitalized in mid-January, he learned that he had episodes of atrial fibrillation, but he did not associate that condition with the work situation. (Tr. 251.) Nor was “SPM 2” aware that later in January Mr. “DD” was hospitalized for treatment of severe depression. (Tr. 256.) At the time that he requested a fitness-for-duty examination of Applicant, “at that stage, we had just been told that there may be an association between his illness and his work environment.” (Tr. 274.)

²⁰ It is recalled that in Ms. V. Shinberg, Applicant v. International Monetary Fund, Respondent, Judgment No. 2007-3 (March 5, 2007), para. 70, the Fund acknowledged that “one of its primary duties to injured staff is to provide, to the extent possible, the required work accommodations recommended by medical personnel in light of his or her medical conditions.” In the case of Mr. “DD”, it was not until late February 2002 that any accommodation was recommended by medical personnel.

103. The record before the Tribunal shows that Applicant brought to the attention of two Senior Personnel Managers of his Department, the Fund's Ombudsperson, the Ethics Officer, the "Division 1" Chief, and the Health Services Department, his view that his working relationship with "Supervisor 1" was insupportable to him and was causing him great distress. Respondent, for its part, maintains that responsible Fund managers acted appropriately to transfer Mr. "DD" out of the working environment once HSD brought the matter to their attention. In the Fund's view, "[i]t cannot be said, based on what these managers knew (consistent with the rules on medical confidentiality) and when they knew it, that their response was derelict."

104. The question then is, although Applicant has been held not to have been subjected to harassment or to a hostile work environment, did the Fund take timely and effective measures in response to Applicant's distressed situation?

105. The Tribunal accepts that Applicant found himself in a painful situation which may well have had a severe impact upon his health. While the Tribunal has every sympathy for the difficulties Applicant encountered, it does not follow that the Fund is liable for these difficulties. He sought to apply for a vacancy a few months after beginning to work in a position whose span was to have run two years. A few months later, Mr. "DD" sought a transfer out of his position. It was unsurprising for the Fund not to agree to those requests. The Fund cannot be held liable whenever a supervisee experiences difficulties with his supervisor, as a result of which requests for a transfer are made. Such difficulties are commonplace in bureaucracies. With the benefit of hindsight, the Fund would have done well to have carried out the removal of Applicant from the supervision of "Supervisor 1" months earlier than it did. But it is understandable that, within a few months of his appointment, the Fund was not disposed to conclude that considerations of efficiency and of Applicant's capacities and health required an immediate transfer. This is particularly so because Applicant himself did not reveal to Fund officials the extent of the psychological problems that he believed to be visited upon him by his supervisor. While it is understandable that Applicant may not have wished to exhibit those problems to his colleagues, the Fund cannot be held liable for his not having done so. Having regard to these considerations, the Tribunal, on the one hand, regrets that Applicant was not moved to another position months earlier, but, on the other hand, is obliged to conclude that the Fund is not liable for failure to carry out that transfer earlier than it did.

What weight, if any, should the Tribunal give to evidence relating to Applicant's medical condition in deciding his claim of harassment?

106. Notable among the facts presented in the case of Mr. "DD" is evidence that Applicant experienced significant physical and psychological illness, i.e. atrial fibrillation and depression, both of which necessitated hospitalizations, contemporaneously with the treatment of which he complains.

107. In the Fund's view, the Tribunal has no basis to review the subject of "medical causality." It is recalled that the Fund has requested that portions of Applicant's brief and supporting exhibits be "wholly disregarded insofar as they are claimed to 'establish' medical

causality.”²¹ Applicant, for his part, maintains that the medical evidence is relevant, probative and admissible with respect to his claim of harassment.

108. Respondent asserts that “... an evaluation of the claimed linkage between Applicant’s health condition and the workplace is most appropriately carried out by the workers’ compensation administrator appointed by the Fund for this purpose and its experts in the relevant medical fields.” In the view of the Fund, “... where, as here, the Applicant has bypassed the administrative body that could properly have rendered a decision on the question of medical causality as a part of an earlier administrative process, it is entirely inappropriate for Applicant to seek a determination on that question by the Tribunal in the first instance.” Accordingly, asserts Respondent, “... Applicant’s medical condition should not be taken into account in evaluating his harassment claim unless and until there has been a proper determination of medical causality.”

109. It is not entirely clear whether Respondent would have this Tribunal wholly disregard evidence of Applicant’s medical condition in evaluating liability for his claims or whether it requests only that such evidence not be considered in determining a remedy in the event that the Tribunal were to conclude that Mr. “DD” was the object of harassment. Each of these questions is considered below. (The question of the exclusivity of the Fund’s Workers’ Compensation policy vis-à-vis Mr. “DD”’s complaint of harassment is considered in the next section of this Judgment.)

110. In two previous Judgments, the Tribunal was confronted with similar requests of the Fund to disregard medical evidence. In Ms. “BB”, the Fund objected to the inclusion in the record of documents relating to Applicant’s health on the grounds that they could not be rebutted by the Fund without a waiver of confidentiality by Applicant in respect of additional medical records and, moreover, the exhibits would be of no probative value as they did not assess the cause of symptoms or demonstrate any link between actions of the Fund and the Applicant’s reported condition. In that case, the Tribunal noted that Ms. “BB” had testified before the Grievance Committee that she had experienced adverse health effects that she attributed to alleged harassment by her supervisor. Additionally, the HRD Director (the Fund’s witness) testified to her own interaction with the Ombudsperson on the case of Ms. “BB”, asserting that the Ombudsperson had requested that the HRD Director seek a transfer for Ms. “BB” because of problems she was encountering in her work relationship with the supervisor. According to the testimony of the HRD Director, “... she [the Ombudsperson] felt that it [i.e. the work relationship] may be affecting [Ms. “BB”]’s health.” Ms. “BB”, paras. 12 and 13. (Similar facts have been adduced in the case of Mr. “DD”.) In Ms. “BB”, para. 14, the Tribunal decided not to strike the health-related documents proffered by Applicant, deferring the question of whether the documents had any probative weight until the Tribunal “addresse[d] the question of liability, if any, of the Fund for harassment of Applicant and, in the event that it should find such harassment, the extent of damages arising out of that harassment.” As the Tribunal found no liability for harassment, it did not revert to the documents.

²¹ See *supra* The Procedure.

111. Similarly, in Mr. M. D’Aoust (No. 2), Applicant v. International Monetary Fund, Respondent, Judgment No. 2007-3 (May 22, 2007) a staff member challenged elements of the process by which the Fund had filled a vacancy for which he had been an unsuccessful candidate. In addition to seeking rescission of the contested decision, he sought compensation for “moral injury,” alleging humiliation, injury to his health and well-being, as well as to his professional reputation and career prospects. The Tribunal concluded that as “... 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.” D’Aoust (No. 2), paras. 177-78. The Tribunal additionally noted that the Fund had 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, but that “in view of the Tribunal’s conclusion above, it has not had occasion to refer to the disputed documents.” *Id.*, note 46.

112. The question arises as to what weight, if any, the Tribunal may give to evidence of Mr. “DD”’s medical conditions in deciding whether he experienced treatment in violation of the Fund’s internal law. The further question arises whether, even if such evidence were excluded in deciding liability, it might properly be considered at the remedial stage. (Among the remedies sought by Applicant is payment of unreimbursed medical expenses purportedly resulting from the Fund’s alleged wrongdoing.) A distinction may be drawn between the evaluation of medical evidence with a view to assessing whether or not a complainant was the object of impermissible harassment, e.g., as circumstantial evidence of harassment, and the question of what remedies may be available to a staff member who incurs a medical condition arising from workplace harassment.

113. The Fund’s Workers’ Compensation policy provides staff members with “... benefits and compensation in the event of illness, accidental injury or death arising out of, and in the course of, their employment.” (GAO No. 20, Rev. 3 (Workers’ Compensation Policy) (November 1, 1982), Section 1.) *See generally* Ms. V. Shinberg (No. 2), Applicant v. International Monetary Fund, Respondent, Judgment No. 2007-5 (November 16, 2007). As this Tribunal has noted, coverage of claims under a Workers’ Compensation program is not an admission of negligence on the part of the employer. Ms. V. Shinberg, Applicant v. International Monetary Fund, Respondent, Judgment No. 2007-2 (March 5, 2007) (“Shinberg I,”), para. 66. *See generally* A. Larson, Larson’s Workers’ Compensation § 1.03 (2004). Accordingly, the inquiry in a Workers’ Compensation case differs from the question to be resolved when a staff member alleges that he has been the object of harassment or a hostile work environment in contravention of the Fund’s internal law. The question for the Workers’ Compensation Claim Administrator would be whether Applicant sustained a compensable injury, i.e. an injury “arising out of, and in the course of” his employment. The question for the Tribunal in the instant case is whether Applicant experienced impermissible treatment to which the Fund failed effectively to respond.

114. A conclusion by the Tribunal that Applicant had not established that he was the object of harassment contravening the Fund’s Policy on Harassment would not necessarily preclude a conclusion by the Workers’ Compensation Claim Administrator that Mr. “DD” sustained an injury arising from his employment. That would be a separate inquiry taken in the first instance by a separate decision-maker, the Claim Administrator. In his pleadings, Applicant asserts that he has not pursued the Workers’ Compensation claim that he filed in January 2003 under a cover letter “propos[ing] that this worker’s compensation claim be stayed until the grievance process is

resolved.” If the Workers’ Compensation Claim Administrator were to deny Applicant’s claim, then that decision would be subject to review first by the Grievance Committee and then by this Tribunal. *See generally* Shinberg (No. 2).

115. Accordingly, there is no Workers’ Compensation claim before the Tribunal for review. Except in respect of his request for remedies, Applicant has not expressly asked for a conclusion by the Tribunal as to the work-relatedness of a particular medical condition but rather whether the Fund violated its internal law in failing to take effective measures in response to mistreatment of which he alleges he was the object, of which health effects may be evidence. As noted, Applicant also seeks as a remedy payment of unreimbursed medical expenses.

116. In reviewing Applications raising claims of workplace harassment, this Tribunal has taken cognizance of possible health effects upon the complainant of the allegedly impermissible conduct. In Mr. “F”, para. 101, the Tribunal noted that there was “... evidence that an atmosphere of religious animosity was tantamount to harassment that adversely affected the work performance and *perhaps health* of Mr. “F”.” (Emphasis supplied.) Additionally, in its recitation of the factual background of the case, the Tribunal had noted that Mr. “F” had received counseling from the Joint Bank/Fund Health Services Department for work-related stress and had expressed to the counselor his perceptions of religious hostility in his office environment. When his emotional health declined further, he was placed on sick leave for a month. Mr. “F”, paras. 32, 88. Likewise, in Ms. “BB”, para. 92, the Tribunal noted the HRD Director’s testimony that the Fund’s Ombudsperson had requested a transfer of the Applicant because her work environment ““may be affecting [Ms. “BB”]’s health.”” Ms. “BB” herself testified that she had suffered a deterioration in her health that she attributed to her work situation. *Id.*, para. 80.

117. It is also significant that the Terms of Reference of the outside consultant engaged by the Fund to review Mr. “DD”’s harassment claim specified that the consultant should assess whether the conduct alleged by Mr. “DD” had adversely affected him “in terms of his IMF career *as well as his health*.” (Emphasis supplied.) Among the consultant’s findings (as related by the Fund’s counsel in her communication to Applicant’s counsel) was that “... Mr. [“DD”]’s health has suffered in the last 16-18 months, but [the consultant] cannot attribute causation *solely* to his workplace relationship or working environment...” (Emphasis supplied.) At the same time, the consultant concluded that “... it was beyond the scope of [the consultant’s review] review to determine whether or to what extent Mr. [“DD”]’s mental and physical health problems were directly caused by any one factor.” (Letter from Fund’s counsel to Applicant’s counsel, December 12, 2002.)

118. As noted, in the case of D’Aoust (No. 2), the Tribunal addressed the issue of medical evidence as relating solely to the remedial stage. In that case, however, the cause of action was discrimination and improper procedures in the selection process for a vacancy. Mr. D’Aoust contended that he had suffered intangible injury, including to his health. In contrast, in the instant case of Mr. “DD”, the cause of action requires that Applicant establish that he was the object of “... behavior, verbal or physical, that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment.” (Policy on Harassment, para. 3.) Intimidation, hostility, and offensiveness are terms that are given meaning only in reference to emotional response. While this emotional response may not in itself be actionable, i.e. it may not constitute an “administrative act” within the jurisdiction *ratione materiae* of the Tribunal, it is

nonetheless a predicate to showing that harassment occurred. Then, assuming it was brought to the attention of Fund management (or that otherwise it can be said that Fund management should have known of it), the complainant must show that the Fund failed to act appropriately in response. Accordingly, the question arises whether evidence as to a complainant's emotional response to the alleged impermissible conduct, whether that evidence is in the nature of a medical report or of the observations of laypersons, may be probative of harassment or other actionable mistreatment as defined by the Fund's internal law. May such evidence be probative of Applicant's state of mind in respect of his interactions with his supervisor, without reference to the issue of "medical causality"?

119. It is recalled that the Fund, in its request to exclude portions of the record "insofar as they are claimed to 'establish' medical causality," cites two medical reports that were part of the record before the Grievance Committee, i.e. the fitness-for-duty report of the independent medical examiner (psychiatrist) and the consultation notes of the Health Services Department psychologist, as well as an affidavit of Applicant's treating psychologist that the Grievance Committee excluded from its record²² but which Applicant has submitted with his pleadings in the Tribunal.

120. This Tribunal has recognized in the context of its review of disability retirement decisions that medical reports may be weighed for their probative value in the light of such factors as the purpose for which the report has been prepared and its internal consistency. *See Ms. "J", Applicant v. International Monetary Fund, Respondent*, Judgment No. 2003-1 (September 30, 2003); *Ms. "K", Applicant v. International Monetary Fund, Respondent*, Judgment No. 2003-2 (September 30, 2003), para. 67; *Ms. "CC", Applicant v. International Monetary Fund, Respondent*, Judgment No. 2007-6 (November 16, 2007), para. 126.

121. How should the Tribunal evaluate medical reports in assessing the claims in this case? Should the Tribunal "wholly disregard" them insofar as they are claimed to "establish" medical causality, as the Fund suggests, or may they be given some probative weight in assessing the Fund's responsibility, if any, for alleged harassment? Is it legitimate to ask to what extent the erosion of Mr. "DD"'s self-confidence that he reported he had experienced by January 2002 may be attributed to acts for which Respondent may be deemed responsible and to what extent it may properly be assigned to other external "stressors" brought to light in the course of the proceedings, including the suicide of a close friend in April 2001 and the illness of Mr. "DD"'s wife, or to his own predispositions and internal mental processes. Likewise, may the Tribunal consider to what extent Applicant's reaction was to impermissible supervisory conduct and to what extent to his new job responsibilities which, by their nature, were untested and designed to expose him to new challenges to broaden his skills?

122. In *Lusakueno-Kisongele v. International Bank for Reconstruction and Development*, WBAT Decision No. 327 (2004), the World Bank Administrative Tribunal, dismissing an ancillary claim that an applicant had been a victim of harassment, retaliation and a hostile environment that caused him to suffer a nervous breakdown, took into account medical evidence as follows:

²² *See supra* The Channels of Administrative Review.

“51. ... The record, however, shows no evidence to support the Applicant's allegations. In fact, the Applicant's physician indicated that the Applicant's disorders appeared to be a reaction to life events....”

123. The WBAT in Lusakueno-Kisongele further distinguished a staff member’s perception of a hostile work environment (and attendant stress) from an actionable claim of harassment:

“52. The Tribunal finds that the Applicant reacted negatively to comments and recommendations from colleagues and supervisors, and had an unfortunate perception that these constituted a hostile environment. This may well have placed him under stress. As the Tribunal held in *Schiesari*, Decision No. 314 [2004], para. 34, however,

stress is not an actionable hostile environment. Managers have a responsibility to make business decisions that are not always favorable to individual employees. Criticism or adverse decisions about performance or work assignments does not in and of itself constitute harassment, discrimination or retaliation.”

124. By its terms, the Fund’s Policy on Harassment imposes an objective standard for the evaluation of conduct, prohibiting “behavior, verbal or physical that *unreasonably* interferes with work or creates an intimidating, hostile or offensive work environment.” (Policy on Harassment, para. 1.) (Emphasis supplied.) While conduct need not be intended to harass in order to be violative of the Policy -- and therefore the conduct’s effect on others may be taken into account in assessing whether it constitutes harassment under the Fund’s internal law-- that effect must meet a test of “reasonableness.”

“9. ... One important element to consider is that the definition of harassment concerns not only a person’s intent in engaging in certain conduct, but also the effect of that conduct on others. Therefore, if a specific action by one person is *reasonably* perceived as offensive or intimidating by another, that action might be seen as harassment whether intended or not.”

(Policy on Harassment, para. 9.) (Emphasis supplied.) Accordingly, the question arises whether medical evidence may be relevant not only as circumstantial evidence of harassment or other mistreatment, but also to the “reasonableness” of Applicant’s perception and reaction to the actions of his supervisor. Respondent maintains, in assessing the question of whether “Supervisor 1”’s behavior transgressed the bounds of acceptable managerial conduct, that it is appropriate to consider “whether Applicant’s own reaction was unreasonable, disproportionate, or unduly inclined to take offense or assign improper motives” to her. (The Fund distinguishes such an assessment of “reasonableness” from the issue of “medical causality.”) The markedly

different recollections or perceptions of events in this case raise the question of the reasonableness of Mr. "DD"'s reactions to the actions of his supervisor.

125. The management of the Fund has recognized a link between "psychological and physical problems" and workplace-related "stress," noting that "[e]xcessive work-related stress is a problem that has been growing steadily as a result of both external and internal factors." (Statement By Management on Stress, Executive Board Meeting, April 25, 2000, BUFF/00/61 (April 20, 2000).)

126. Accordingly, the question arises whether, assuming that Mr. "DD"'s medical conditions were at least in part the result of his perception that he was the object of harassment by his supervisor -- a conclusion consistent with the view of outside consultant that causation could not be attributed "solely" to Mr. "DD"'s workplace relationship or working environment -- was Mr. "DD"'s perception a reasonable one?

127. If the Tribunal takes account of the medical reports, what do they reveal? From the fact that his supervisor may have had upon Mr. "DD" (in the words of the psychiatrist independent medical examiner who performed the fitness-for-duty assessment) a "toxic effect," does it necessarily follow that Applicant was the object of actionable harassment, as that term is defined by the relevant Fund policy? It should be noted that the medical reports advanced on Applicant's behalf largely recount his perceptions, as well as the examining physicians' conclusions. However, the evaluation of the Fund's independent medical examiner who spoke of the "toxic effect" of Applicant's supervisor upon him does lend a measure of support to Applicant's contentions.

128. The Tribunal concludes that medical reports that bear upon the validity of complaints of harassment or other mistreatment may be considered and weighed by the Tribunal. Insofar as they recount the perception of the Applicant rather than the evaluations of the examining physician, they will be subject to discount as not objectively bearing on the question of causality.

129. The Tribunal has concluded that the conduct of Applicant's supervisor did not amount to harassment for which the Fund may be held accountable under its internal law. The Tribunal in Ms. "BB", para. 88, suggested that supervisors should be "open to the[] sensitivities" of those they supervise; it added that it "d[id] not follow that damages are payable to those who do not invariably enjoy such treatment."

Does the Fund's Workers' Compensation policy provide the exclusive means of redress for any medical condition of Applicant that may have arisen from the alleged harassment or hostile work environment?

130. Respondent maintains that the Fund's Workers' Compensation policy provides the "exclusive remedy" for any medical condition arising out of an allegedly hostile work

environment. Although the exclusivity of the Fund's Workers' Compensation policy is not made explicit in GAO No. 20, the Fund contends that it is implicit.²³

²³ The Fund's Workers' Compensation policy may be compared with that of the World Bank, which expressly provides:

“11 Exclusive Remedy

11.01 The claim for compensation which a claimant may file under this Rule constitutes an exclusive remedy against the Bank Group for any illness, injury or death arising out of and in the course of the staff member's employment, except to the extent that the other benefits specified in Section 10 of the Rule [Disability Pension; Funeral Expenses; Social Security] may also be paid.”

Similarly D.C. Code Section 32-1504 provides:

“§ 32-1504. Exclusiveness of liability and remedy [Formerly § 36-304]

(a) The liability of an employer prescribed in § 32-1503 shall be exclusive and in place of all liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.

(b) The compensation to which an employee is entitled under this chapter shall constitute the employee's exclusive remedy against the employer, or any collective-bargaining agent of the employer's employees and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent (while acting within the scope of his employment) for any illness, injury, or death arising out of and in the course of his employment; provided, that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death. In such action the defendant may not plead as a defense that injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

(c) The furnishing of, or failure to furnish, insurance consultation services related to, in connection with or incidental to an applicable policy of insurance shall not subject the insurer, its agent or employees undertaking to perform such services to liability for damages from injury, death or loss occurring as a result of any act of omission in the course of such services.

(d) This section shall not apply:

(1) If the injury, loss or death occurred during the actual performance of consultation services and was caused by the active negligence of the carrier, its agent or employees which was the proximate cause of the injury, death or loss; or

(continued)

131. A fundamental principle underlying Workers' Compensation law in the United States is that Workers' Compensation provides the "exclusive remedy" against an employer for injuries and illnesses arising out of the complainant's employment. As such, the Workers' Compensation system provides a basis for compensating employees for workplace injuries that removes such controversies from the system of tort law, providing a predictable system of payments to the employee without a finding of negligence against the employer. *See Larson, supra*, § 1.03.

132. Respondent contends that although the Fund's Workers' Compensation policy (GAO No. 20, Rev. 3) does not expressly state that it provides an "exclusive remedy," that principle is implicit in the system. Moreover, notes the Fund, the Fund's internal law governing Workers' Compensation, GAO No. 20, Rev. 3 (November 1, 1982) (Workers' Compensation Policy), provides at Section 10.01: "The Claim Administrator will dispose of claims first on the basis of the provisions of this Order and next, when not specified otherwise in this Order, in accordance with established procedures for disposition of claims under the District of Columbia Workers' Compensation Regulations." *See generally Shinberg (No. 2)*.

133. The Fund further maintains that because a hostile work environment has been recognized as a compensable injury under District of Columbia Workers' Compensation law, because under D.C. law Workers' Compensation is an exclusive remedy, and because the Fund's Claim Administrator is bound to apply District of Columbia Workers' Compensation law, therefore the Fund's Workers' Compensation policy is the exclusive means of redress for any medical condition that may have been sustained by Mr. "DD" as a result of alleged harassment or a hostile work environment.²⁴

134. If the Tribunal were to adopt Respondent's view, it would leave a right (under the Harassment Policy) without a remedy. As the Tribunal's precedent in *Mr. "F"* makes clear, the Tribunal can award compensation for intangible injury without any finding of a medical condition arising from harassment or a hostile work environment. Clearly such injury can be assessed without regard to medical evidence, as the Tribunal did in *Mr. "F"*. A distinction may be drawn, consistent with the jurisdiction of this Tribunal, between a remedy for "intangible injury" which the Tribunal has applied in the past, and the remedy of reimbursement of medical expenses, which would require a decision that such reimbursement was required to "correct the effects" of the contested decision (Statute, Article XIV, Section 1), i.e. that an effect of the Fund's failure to respond effectively to harassment or other mistreatment was that the Applicant incurred a particular medical condition. Such a conclusion would be difficult to reach where, as here, the evidence suggests that there may have been multiple factors contributing to the ill health of Applicant.

(2) To any consultation services required to be performed under the provisions of a written service contract not incidental to an applicable policy of insurance.

(July 1, 1980, D.C. Law 3-77, § 5, 27 DCR 2503; 1981 Ed., § 36-304.)"

²⁴ The parties dispute the significance of the decisional law of the District of Columbia on this issue.

135. GAO No. 20, Section 10.01 directs the Fund’s Workers’ Compensation Claim Administrator in “dispos[ing] of claims” (and this Tribunal in reviewing denials of Workers’ Compensation claims) to apply District of Columbia law in deciding matters “not specified otherwise” by the Fund’s Workers’ Compensation policy. It does not follow that Section 10.01 directs the Tribunal in deciding upon an Application raising a cause of action for harassment to conclude, on the basis of District of Columbia law, that the Fund’s Workers’ Compensation policy provides the exclusive remedy to a staff member who sustains injury as a result of harassment or a hostile work environment. District of Columbia law cannot be said to preempt the Tribunal’s unique jurisdictional mandate to interpret the internal law of the Fund, in this case its prohibition on workplace harassment.

136. The Administrative Tribunal does not have jurisdiction over common law tort claims,²⁵ rather its jurisdiction is limited to deciding challenges to “administrative acts” of the Fund. (Statute, Article II.) While the Fund’s Workers’ Compensation policy may provide an exclusive remedy in lieu of tort actions, it does not displace the Tribunal’s remedial powers under its Statute to “correct the effects” of an administrative act that it concludes has contravened the internal law of the Fund.

Did the Fund abuse its discretion in asking Applicant in August 2001 to withdraw his application for a vacancy? Was that decision affected by impermissible discrimination on the basis of Applicant’s gender?

137. Applicant additionally alleges that the Fund wrongfully denied him the opportunity to be considered for a vacancy that arose a few months after he began his assignment under “Supervisor 1”, a decision that he asserts was affected by impermissible discrimination on the basis of his gender. Respondent, for its part, maintains that the decision was taken in accordance with Fund rules and was not affected by discrimination.

138. It is recalled that in July 2001, a vacancy arose which, assuming he had been successful in attaining it, would have returned Applicant to “Division 1” in a position that would have provided him an opportunity for promotion. Applicant, however, withdrew the application at the request of “SPM 1.” Applicant contests the Senior Personnel Manager’s decision (which was also confirmed by the HRD Director (Tr. 1637)) to decline to consider his application for the vacancy. In particular, Applicant contends that the Fund gave preferential treatment to a similarly situated female staff member, engaging in disparate treatment in contravention of the Fund’s internal law prohibiting discrimination in the workplace.

139. The Administrative Tribunal consistently has held that the principle of nondiscrimination imposes a substantive limit on the exercise of discretionary authority. *See, e.g., Mr. “F”*, para. 81. In accordance with Fund policy, prohibited discrimination within the Fund is defined as follows:

“In the Fund, discrimination should be understood to refer to differences in the treatment of individuals or groups of employees

²⁵ *See generally* Bares v. Asian Development Bank, AsDBAT Decision No. 5 (1995).

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.)

140. Applicant also maintains, citing personnel statistics, that the contested decision was “part of a wider pattern of preferential treatment of female managerial candidates.” As this Tribunal recently reaffirmed, however, statistics alone do not establish discrimination and an inference of discrimination is not drawn merely from the demographic outcome of a selection process. D’Aoust (No. 2), para. 137; *see also Ms. “T”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2006-6 (June 7, 2006), para. 50.

141. The evidence relevant to Applicant’s discrimination claim may be summarized as follows. Mr. “DD”’s peers in the other two new subordinate positions were both females. Like Mr. “DD”, each sought out an opportunity to fill a vacancy that arose within one-year of assuming the new posts. Applicant contends that “Subordinate 2” was given special preference and permitted, on an exceptional basis, to underfill a division chief position for which she applied, even though she had held a comparable position to that of Mr. “DD” for only about six months. As Respondent explains, however, a key distinction between the position for which “Subordinate 2” was allowed to compete and that for which Mr. “DD” was asked to withdraw

his application was that the position sought by the female staff member was that of a division chief within the specialized career streams.

142. In *D'Aoust (No. 2)*, the applicant, also a male alleging discrimination on the basis of gender (as well as age and nationality) in the process of selection for a vacancy, cited as evidence of preferential treatment the “meteoric rise” of the appointee within the ranks of the Fund. *Id.*, para. 140. The Tribunal observed:

“... 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.’

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.)”

Id., paras. 140 - 41.

143. There is no time-in-grade requirement that applies in determining eligibility for a deputy division chief position in the specialized career streams. In contrast, the Grade A12/13 position that Applicant sought in “Division 1” was a non-managerial position and therefore was governed by the “one year rule.” See Application, Vol. III, Grievant’s Exh. 3 “Eligibility to Apply for Career Opportunities Vacancies,” which states under the heading “A1 – A14 Vacancies (Excluding Deputy Division Chief and Assistant to the Director Positions) in specialized career streams:” “A regular staff member who has worked in his/her current position for at least one year.” (Emphasis supplied.)

144. Applicant cites regulations, governing at the time, that limited eligibility for a B level managerial vacancy to B level and staff at Grades A14/A15 who met advertised job requirements. Evidence adduced in the Grievance Committee proceedings, however, showed that there was only one other candidate who had applied for the division chief position sought by “Subordinate 2”, a male, also at Grade A13. Both candidates were allowed to proceed to the selection process. Accordingly, Applicant’s theory that a special exception was permitted to favor the female candidate is not sustainable, although the evidence showed that the female was ultimately selected for the position and underfilled it on a “deputy-in-charge” basis.

145. Applicant maintains that because “Subordinate 2” did not satisfy the minimum requirement for consideration for a Grade A14/A15 Deputy Division Chief position she was subject to the “one year rule” on the same basis as Mr. “DD” in his application for the Grade

A12/A13 vacancy in “Division 1.” This does not necessarily follow. As to the positions sought by “Subordinate 2” and Mr. “DD”, different rules governed. Applicant also maintains that the case of “Subordinate 2” demonstrates that the Fund made exceptions to the one-year rule facilitating the female’s early departure from the new position and speedy ascent through the ranks of the Fund. As a managerial position, however, the position for which she applied was not governed by the “one-year rule.”

146. Respondent additionally introduced evidence that a third subordinate, also a female, was required to wait a full year before taking up a position as an ASPM (Assistant to the Senior Personnel Manager) in one of the Fund’s departments, for which she earlier expressed interest. Applicant rightly counters that, unlike in respect of the position for which he sought to apply, an express limitation had been set out in the documentation relating to the positions assumed in 2001 by himself and his two female peers stating that “[s]taff who apply for these positions agree, if selected, to not compete for ASPM positions for a period of one year.”

147. This Tribunal has recognized that 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.” D’Aoust (No. 2), para. 67. Accordingly, in addition to the issue of gender discrimination, the question arises whether the Fund abused its discretion by not making an exception in Applicant’s favor.

148. According to the testimony of the then Senior Personnel Manager (“SPM 1”), each of the staff members appointed to serve under the new supervisors was advised upon taking up the assignment that he or she would need to serve for two years to assure the success of the new organizational arrangements, which “presented a major shift in the way the department was working.” This initial understanding of the duration of the position as “rotation assignment (2 years)” is likewise reflected in the information disseminated to staff at the time the openings were announced. It is notable, however, that none of the three individuals who entered the supporting positions in 2001 remained for the two-year period, the position ultimately vacated by Mr. “DD” was never re-filled, the supervisory positions also changed hands, and ultimately the Department abandoned altogether the three supervisor/three supporting positions organizational structure that it initially had conceived. (Tr. 300, 1669-72.) In the light of these circumstances, despite “SPM 1”’s vision as of August 2001 that Mr. “DD” should remain in the position for a two-year period, the question arises whether the Fund abused its discretion in invoking the “one-year rule” to preclude Mr. “DD” from applying for the “Division 1” vacancy.

149. Applicant contends that when he consulted in late July 2001 with “Supervisor 2” (later to become “SPM 2”), the Division Chief of “Division 1”, and “Supervisor 1”, he was advised by each that he should go ahead and apply, as the one-year rule was subject to waiver. In his testimony before the Grievance Committee, “Supervisor 2” testified that the one-year rule “can be waived by mutual consent.” (Tr. 188.)

150. Applicant additionally testified that he attended a Human Resources meeting in August 2001 in which one of the officials gave “an extensive explanation about waivers” of the one-year rule, stating that it did not apply to “developmental” assignments, as it was appropriate that persons in such assignments not be impaired in their mobility when opportunities for advancement arose. (Tr. 1212.) Applicant expressed the view, moreover, that if his application

for the “Division 1” vacancy had been barred by a Fund rule, then it would have been screened out automatically and “SPM 1” would not have had to ask that he withdraw it. (Tr. 1219.) Applicant further testified to what he had understood from his conversation with “Supervisor 2” in July/August 2001: “I think he was saying that [“SPM 1”] was not going to allow an exception in my case,” rather than that exceptions could not be made. (Tr. 1222.)

151. It may be that exceptions were made, or could have been made, to the “one year rule.” The fact that such exception was not made in the case of Mr. “DD” does not of itself establish abuse of discretion on the part of the Fund. *See Mr. “R”, Applicant v. International Monetary Fund, Respondent*, Judgment No. 2002-1 (March 5, 2002), para. 65; *Ms. “G”, Applicant and Mr. “H”, Intervenor v. International Monetary Fund, Respondent*, Judgment No. 2002-3 (December 18, 2002), para. 91. In “Shinberg I”, paras. 58-68, the Tribunal rejected the applicant’s contention that the Fund should have made an exception to personnel policies on the ground that they resulted in an “unfair and discriminatory result” in the circumstances of her case. The Tribunal considered whether the exception urged by the applicant would have been consistent with the essential objectives of the Fund’s policies on grading and promotion and concluded that the Fund did not abuse its discretion in declining to make an exception in the applicant’s favor. In that case, the Tribunal noted that the applicant did not contend that she had requested and was denied an exception by Fund management.

152. Finally, Applicant asserts that “... had the Fund allowed Mr. [“DD”] to transfer into the [“Division 1”] position, it would have avoided the devastating consequences of forcing him to remain in the intolerable working conditions created by [“Supervisor 1”]’s ongoing supervision of him” and that the Fund’s “refusal to make the accommodation” in the circumstances was arbitrary and capricious. The question accordingly arises whether the Fund’s decision not to make an exception to the “one-year rule” in the circumstances presented by the case of Mr. “DD” constituted an abuse of discretion because it contributed to alleged harassment. “SPM 1” testified that although Mr. “DD” brought to his attention concerns relating to the work relationship at the time he raised the issue of applying for the vacancy, “SPM 1” did not regard the situation as one of “harassment” or that these concerns were the motivating factor in Mr. “DD”’s interest in a vacancy that afforded the possibility of promotion. It is recalled that in late 2001, as senior officials became aware of Applicant’s continuing distress in respect of his relationship with “Supervisor 1”, they arranged for his transfer to “Division 1.” It was initially determined that the transfer would take place as of May 2002. Upon the intervention of the Health Services Department, the transfer was effected in March 2002.

153. As of end of July 2001, when Applicant raised with “SPM 1” and others his interest in applying for the “Division 1” vacancy, the record reflects that the Senior Personnel Manager had little basis to consider that Applicant’s work assignment with “Supervisor 1” might constitute harassment, might be contributing to any ill health on the part of Applicant, or otherwise furnish cause for making exception to Fund rules. Indeed, although raising concerns at the time with “SPM 1” and others about his work relationship with “Supervisor 1”, Applicant did not in July/August 2001 seek a transfer from “Supervisor 1”’s supervision but rather the opportunity to apply for a vacancy offering career-progression opportunities. In any event, it cannot be assumed that had Applicant been permitted to apply his application would have succeeded.

154. The Tribunal accordingly concludes that the Fund did not abuse its discretion when it requested Applicant to withdraw his application for the “Division 1” vacancy in August 2001. It further concludes that the decision was not tainted by impermissible discrimination on the basis of gender.

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

155. Applicant raises a number of contentions relating to the fairness of the administrative review and Grievance Committee consideration of his complaint and also asserts that he experienced retaliation for pursuing channels of review. The Fund responds that these claims are not properly before the Tribunal and, in any event, are without merit.

Administrative review process

156. Applicant’s challenges the following elements of the administrative review process anterior to the filing of his Grievance. Applicant contests the review by an outside consultant following his submission of his request for administrative review, the fact that no decision was ever taken on his request by the HRD Director, and that the entire process was protracted and costly. Accordingly, Applicant contends that the administrative review of his claims was fundamentally unfair, unduly protracted, and caused him further harm. Respondent maintains that the Fund did not fail to provide Applicant with efficient means of redress of his complaint.

157. It is recalled that Applicant’s counsel initially had been notified by the HRD Director that it was the Fund’s intention to engage “an independent outside investigator to review these allegations and report to me before I take my decision on the matter.” (Letter from HRD Director to Applicant’s counsel, August 19, 2002.) According to Respondent, Applicant and his counsel met with the consultant to review her findings and conclusions. Thereafter, a period of settlement negotiations ensued, lasting throughout 2003. On May 8, 2003, the Fund communicated its view, in light of unresolved issues as to Mr. “DD”’s health and his ability to return to work, that “... administrative review of [his] grievance has not been formally concluded, and the possibility of a negotiated settlement remains.” (Letter from Fund’s counsel to Applicant’s counsel, May 8, 2003.) However, by January 12, 2004, the Fund concluded that the parties had reached an impasse and formally notified Applicant’s counsel that it regarded the process of administrative review pursuant to GAO No. 31 as having been exhausted. (Letter from Fund’s counsel to Applicant’s counsel, January 12, 2004.)

158. Applicant has requested, irrespective of the Tribunal’s decision as to the request for production of the consultant’s report,²⁶ that it conclude that the process of engaging an outside investigator was misleading and improper.

159. A similar issue arose in the case of Mr. “F”, in which the same outside consultant had been engaged by the Fund to investigate and report on Mr. “F”’s claims following his submission of a request for administrative review. As in the instant case of Mr. “DD”, Mr. “F” cooperated in

²⁶ See *supra* The Procedure; Request for Production of Documents.

providing information to the outside consultant and later he and his counsel met with the consultant to review the findings.²⁷ The Tribunal in Mr. “F” concluded that the record reflected that there was some ambiguity as to the exact nature of the outside consultant’s role with respect to the administrative review process.²⁸ Mr. “F”, para. 14. Mr. “F” contended that he had been lulled into inactive pursuit of his Grievance and also that there was ground to consider that the consultant would not be objective in the review. The Tribunal, having considered the circumstances and terms of the consultant’s appointment, as well as the Report itself, concluded that Applicant sustained no prejudice. Mr. “F”, paras. 40-41.

160. Mr. “DD” asserts that in cooperating with the consultant’s investigation he and his counsel were “wholly unaware” that the Fund would later contend that the investigation was privileged and had been conducted to assist in the Fund’s defense against his claims. The Fund maintains that it never represented that the consultant’s report would be provided to Applicant’s counsel. As Applicant points out, after settlement efforts failed, the Fund used the consultant’s report as a tool for litigation preparation, as demonstrated for example by the affidavit of “SPM 1”. Applicant accordingly contends that the Fund unfairly had the advantage of having gathered more contemporaneous statements of witnesses.

161. The Tribunal concludes that the Fund’s engagement of a consultant, and the process of the rendering of a report by the consultant, were proper. The Applicant had due notice of the procedure, whose implementation was not prejudicial to an objective consideration of Applicant’s contentions.

162. The HRD Director never issued a decision on Mr. “DD”’s request for administrative review. Applicant was not prejudiced by the failure of the Director to take a decision, which kept open the possibility for settlement. The HRD Director testified that she was never provided with the consultant’s report because she considered that it would be inappropriate, given that some of Applicant’s allegations were directed at senior management, that she make the decision on administrative review and that she intended to request one of the Deputy Managing Directors to take such a decision. (Tr. 1688–92.)

163. The Tribunal concludes that Applicant has not shown that he was prejudiced by the manner in which the Fund conducted the administrative review of his complaint.

Grievance Committee proceedings

164. Applicant contends that the Grievance Committee manifested bias in favor of Fund management through its evidentiary rulings. A similar claim was raised in the case of Ms. “Z”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-4 (December 30, 2005). In Ms. “Z”, para. 119, the Tribunal held that “... the Grievance

²⁷ In Mr. “F” also, the consultant’s report became the subject of a request for production of documents in both the Grievance Committee and the Administrative Tribunal.

²⁸ On that basis, the Tribunal in Mr. “F”, as in the instant case, reviewed the document *in camera* to decide upon the disposition of the applicant’s request for its production. Mr. “F”, para. 15.

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).

165. The Tribunal has held on a number of occasions that it 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." D'Aoust, para. 17; D'Aoust (No. 2), para. 171.

166. 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," citing Estate of Mr. "D", para. 135; *see also* D'Aoust (No. 2), para. 172.

167. 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 above. Significantly, while Applicant alleges that there were deficiencies in the review of his complaint by the Grievance Committee, he has expressly not requested an evidentiary hearing before the Administrative Tribunal but only oral argument by counsel.²⁹

168. Applicant maintains that the Fund "ratifies" the decisions of the Grievance Committee by an administrative act adopting its recommendations. This Tribunal has emphasized, however, that the Committee only makes recommendations and the Tribunal reexamines all issues *de novo*. For example, in Ms. "BB", paras. 60 – 66, the Tribunal concluded that the fact that management had accepted the recommendation of the Grievance Committee to compensate the applicant for workplace harassment in an effort to resolve the dispute was not dispositive of the Tribunal's own conclusion as to whether Ms. "BB" had sustained such harassment under the Fund's internal law. Accordingly, the proceedings of the Grievance Committee are not dispositive of matters before the Tribunal, which consistently has insulated the other elements of the Fund's dispute resolution system from the adjudicatory role served by the Administrative Tribunal. *See, e.g.*, Estate of Mr. "D", para. 85; Ms. "AA", para. 30.

169. Accordingly, the Tribunal denies Mr. "DD"'s contentions as to the Grievance Committee's rulings on his requests for production of documents and to call particular witnesses.

²⁹ *See supra* The Procedure; Request for Oral Proceedings.

170. 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 before the Tribunal. *See Ms. “Z”*, para. 121; D’Aoust (No. 2), para. 176. 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 retaliation for pursuing channels of review

171. Respondent contests the admissibility of Applicant’s retaliation claim, maintaining that he has not met the requirement of Article V, Section 1 of the Tribunal’s Statute, which provides: “When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Administrative Tribunal only after the applicant has exhausted all available channels of administrative review.” Applicant counters that the Fund “elevates form over function” by suggesting that Applicant is required to bifurcate interrelated claims into two sequential proceedings.

172. While the facts relating to Applicant’s claim of retaliation did not arise until after the filing of his Grievance, they were nonetheless the subject of testimony by Applicant in the Grievance Committee proceedings, as well as by other witnesses.

173. This Tribunal has emphasized the importance of the requirement of its Statute that an Application may be filed only after exhaustion of all available channels of administrative review, *see, e.g., Ms. “W”*, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-2 (November 17, 2005), para. 116, and has observed that the exhaustion of remedies requirement serves “... the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.” Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66. The Tribunal has held, however, that when a later arising claim is (a) closely linked with the principal decision contested in the Tribunal and (b) has been given some measure of review prior to the Application in the Tribunal, it may in some circumstances be admissible. The Tribunal took such an approach in Ms. “W”, explaining its decision as follows:

“118.The Tribunal considers the following factors to be determinative. Applicant’s additional contentions, i.e. that the Fund failed to implement fully the remedial action granted under the DRE process and improperly used the review team’s report to influence the denial of a promotion, arose in the unique circumstance of the pendency of a complex review procedure, including voluntary mediation, designed to achieve a final resolution of the DRE complaints. This procedure ensued after Applicant lodged her Grievance with the Fund’s Grievance Committee. *Moreover, the Grievance Committee, during its subsequent hearings in Ms. “W”’s case, admitted testimony as to the allegations that she now seeks to raise before the Tribunal, allegations that were closely related to but nonetheless postdated*

the Grievance. The Tribunal accordingly has the benefit of this evidentiary record and the parties have had the opportunity to settle their claims, thereby fulfilling policies underlying the requirement for exhaustion of administrative review.”

(Emphasis supplied.) Applying the same test, however, the Tribunal in Ms. “Z”, Applicant v. International Monetary Fund, Respondent, IMFAT Judgment No. 2005-4 (December 30, 2005), para. 14, declined to review a newly raised claim where it found “no link” between that claim and the principal decision contested in the Tribunal, as well as no prior review of the claim.

174. The question accordingly arises whether Mr. “DD”’s retaliation claim is (a) “closely linked” (Ms. “W”, para. 119) with his underlying challenge to the conditions of his employment, and (b) has been given some measure of review in the dispute resolution process. In other words, have the twin purposes of the exhaustion of remedies requirement, to provide opportunities for the resolution of the dispute and to build an evidentiary record, been fulfilled in this case? In the view of the Tribunal, Mr. “DD”’s retaliation claim is sufficiently linked with his underlying challenge so as to permit the Tribunal to pass upon it.

175. Applicant contends that he experienced retaliation for challenging alleged harassment through the Fund’s internal dispute resolution process. Specifically, Applicant asserts that following submission of his request for administrative review, “his work assignments were restricted, his professional advancement was stalled and his [then] current supervisor ... became infuriated with him during the course of the proceedings before the Grievance Committee.”

176. Applicant testified during the Grievance Committee proceedings that his relationship with the “Division 1” Chief was never the same after he returned to the Division and that he became a “social pariah” among his colleagues. The testimony of the “Division 1” Chief, however, tended to show that considerations of health influenced the choice of his assignments. Ultimately, the “Division 1” Chief was, in Applicant’s own estimation, helpful to his securing a new job outside of the Fund.

177. As this Tribunal has recognized, 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.”³⁰ Protection from reprisal is essential to the fair and

³⁰ 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.

....

(continued)

effective operation of the Fund's system for the resolution of staff complaints. See D'Aoust (No. 2), para. 166.

178. In addition, the Fund's Policy on Harassment provides:

“30. Anyone who feels harassed, particularly by a supervisor, is likely to fear reprisal should he or she bring the matter to the attention of those in authority. However, reprisal against anyone who files a complaint in good faith is unacceptable and in itself constitutes misconduct subject to disciplinary action.

31. A person who brings a complaint in good faith should not be subjected to retaliation, and adverse action taken against a complainant that appears to stem from the registering of a complaint will be thoroughly investigated. As part of follow-up measures to formal complaints, officials of HRD will check from time to time with complainants to ensure that no such adverse actions have been taken as a result of their filing a complaint.”

179. This Tribunal has held that “[t]he sustainability of an accusation of harassment made in good faith is not a pre-condition for a finding of reprisal in response to that accusation.” Ms. “C”, Applicant v. International Monetary Fund, Respondent, Judgment No. 1997-1 (August 22, 1997), para. 22, citing Belas-Gianou v. The Secretary General of the United Nations, (UNAT Judgment No. 707 (1995), p. 45.

180. The Tribunal considers that, on the facts of the case, Applicant has not substantiated a claim of retaliation. There is no evidence supporting the contention that any difficulties Applicant experienced once he returned to “Division 1” flowed from the pursuit of his Grievance.

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.”

Decision

FOR THESE REASONS

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

The Application of Mr. “DD” is denied.

Stephen M. Schwebel, President

Nisuke Ando, Associate Judge

Michel Gentot, Associate Judge

Stephen M. Schwebel, President

Celia Goldman, Registrar

Washington, D.C.
November 16, 2007