

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2012-3

Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)

Introduction

1. On September 10 and 11, 2012, the Administrative Tribunal of the International Monetary Fund, composed for this case¹ of Judge Catherine M. O'Regan, President, and Judges Edith Brown Weiss and Francisco Orrego Vicuña, met to adjudge the Motion for Summary Dismissal of the Application brought against the International Monetary Fund by Mr. Brian Tosko Bello, a former staff member of the Fund. Applicant was represented by Ms. Veronika Nippe-Johnson, Schott Johnson, LLP. Respondent was represented by Ms. Jennifer Lester, Assistant General Counsel, and Ms. Melissa Su Thomas, Counsel, IMF Legal Department.
2. Applicant seeks to challenge directly the policy of the Fund not to re-hire staff members who separated voluntarily under the terms of the 2008 Fund-wide downsizing exercise, a policy that he also alleges was applied in his individual case. Applicant contends that he was denied the opportunity to compete for a contractual position on the basis of the policy, which he asserts was first communicated to him when he inquired in January 2012 with the Human Resources Department (HRD) Director about his eligibility for re-employment.
3. The Fund has responded to the Application with a Motion for Summary Dismissal on the ground that the Tribunal lacks jurisdiction *ratione personae* over a former staff member who challenges the denial of his eligibility for re-employment.
4. A Motion for Summary Dismissal suspends the period for answering the Application until the Motion is acted on by the Tribunal. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Application.

The Procedure

5. Mr. Tosko Bello filed an Application with the Administrative Tribunal on April 12, 2012. The Application was transmitted to Respondent on April 13, 2012. On April 18, 2012, pursuant to Rule IV, para. (f),² the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

¹ Article VII, Section 4, of the Tribunal's Statute provides in part:

The decisions of the Tribunal in a case shall be taken by a panel composed of the President and two other members designated by the President.

² Rule IV, para. (f), provides:

(continued)

6. On May 14, 2012, pursuant to Rule XII³ of the Tribunal's Rules of Procedure, Respondent filed a Motion for Summary Dismissal of the Application. The Motion was transmitted to Applicant on the following day. On June 15, 2012, pursuant to Rule XII, para. 5, Applicant filed an Objection to the Motion, which was transmitted to the Fund for its information.

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

...

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

³ Rule XII provides:

Summary Dismissal

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

7. The Tribunal decided that oral proceedings, which neither party had requested in respect of the Motion, would not be held as they were not deemed useful to its disposition.⁴

The Factual Background of the Case

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

9. Applicant began his employment with the Fund on March 1, 2001. In early 2008, the Fund announced a downsizing initiative, unprecedented in the Fund, to trim and reshape its workforce with the purpose of reducing expenditures and refocusing the mission of the organization. *See generally Mr. C. Faulkner-MacDonagh, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-2 (February 9, 2010); *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010); *Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012). Under the initial phase of the downsizing, the Fund sought to attract volunteers through enhanced separation benefits (also made available to those separating later under the mandatory phase of the process). Staff were given a narrow window from March 1-April 21, 2008 in which to volunteer. Some 492 volunteers separated under the beneficial terms of the downsizing exercise. Applicant is one of those volunteers.

10. During the period in which members of the staff considered the decision to volunteer pursuant to the terms of the downsizing program, the Fund established on its intranet a website titled “Exploring Your Options,” which Respondent describes as a “source of practical information for potential volunteers.” Staff Bulletin No. 08/03 (Refocusing and Modernizing the Fund: The Framework for the Downsizing Exercise) (February 29, 2008), p. 2, referred staff to that website, advising: “All staff will be able to volunteer to leave the Fund with a separation package described in the *Exploring Your Options* website”

11. In a “Q&A” section, the intranet posting stated:

Q. If I volunteer and take a package, is there a specific rule that will prevent me from being hired by the Fund sometime in the future?

A. No. The Fund has no prohibition from being reemployed in the future because you have taken a separation package. You may not be reemployed at the Fund during the separation leave or the period that it would cover if you take the separation leave as a lump sum. There also are some restrictions on reemployment while you are also receiving a pension.

⁴ Article XII of the Tribunal’s Statute provides that the Tribunal shall “. . . decide in each case whether oral proceedings are warranted.” Rule XIII, para. 1 of the Rules of Procedure provides that such proceedings shall be held “. . . if . . . the Tribunal deems such proceedings useful.”

In its Motion for Summary Dismissal, the Fund explains this posting as follows: “As a general matter, staff members who receive SBF [Separation Benefits Fund] benefits become eligible for re-employment by the Fund after the end of the period of time corresponding to those benefits. [footnote omitted] This long-standing policy, among other policies of possible relevance to staff members considering separation from the Fund, was explained to staff in the form of a ‘Q&A’ that was part of an intranet website called ‘Exploring Your Options,’ . . .”

12. On April 21, 2008, Applicant requested voluntary separation under the terms of the Fund-wide downsizing program. On May 2, 2008, he was informed that his request had been accepted. By letter of May 19, 2008, the Fund confirmed the administrative arrangements under which Applicant “. . . agreed to voluntarily separate from the Fund, in the context of the downsizing exercise.” (Letter from HRD Director to Applicant, May 19, 2008.) That letter included the following paragraph:

In agreeing to these arrangements, you also voluntarily agree that the terms of this memorandum represent a full and final resolution of any and all demands and claims by you, your heirs and legal representatives of every nature, known or unknown, including consequential, indirect and punitive damages, arising out of or in connection with your Fund employment to date, *other than the enforcement of this agreement*. You further agree to release the Fund from any and all claims, demands, actions, judgments and executions by you, your heirs and legal representatives, arising out of or in connection with your Fund employment to date, *other than the enforcement of this agreement*.

(Emphasis added.) The letter confirmed that Applicant would receive, as of the effective date of his separation, a separation benefit in the form of a lump-sum payment equivalent to 7.5 months of his net annual salary. Applicant’s separation from the Fund became effective on May 13, 2009.

13. The Fund states that in the course of the year in which most of the downsizing volunteers separated, it re-considered the applicability of the general rule relating to re-employment of former staff members and, based upon concerns about possible “reputational risk” to the Fund associated with the re-hiring of former staff who had received separation benefits under that program, adopted the policy that is the subject of Applicant’s challenge. On April 2, 2009, HRD communicated this new policy to the Senior Personnel Managers (SPMs) of the Fund’s departments via a “Strictly Confidential” email message as follows:

Just to reconfirm policy on this issue, for yo[u]r information: Management has decided that we do not at this stage envisage the re-hiring of volunteers, either as regular staff (fixed-term or limited-term) or as contractals.

We mentioned this at our recent SPM meeting, but it may not have been fully clear as we are still getting some proposals.

We'll be grateful for your cooperation in implementing this policy.

(Email from HRD to SPMs, April 2, 2009.)

14. According to Applicant, in January 2012, he was contacted by an official of his former department who extended to him a verbal offer for a contractual appointment with the Fund. On January 11, 2012, Applicant inquired by email to the HRD Director about his eligibility to apply for the position. On January 12, 2012, the HRD Director notified Applicant that “[b]ecause you left under the downsizing initiative, you are not eligible to compete for any contracts at the Fund.” (Email from HRD Director to Applicant, January 12, 2012.)

The Channels of Administrative Review

15. Article V, Section 1, of the Tribunal’s Statute provides that “[w]hen the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review.” Article VI⁵ provides that an application challenging the legality of an “individual decision” must be filed within three months of the exhaustion of administrative review; an application challenging directly the legality of a “regulatory decision” must be filed within three months of the announcement or effective date of the decision, whichever is later; and the illegality of a “regulatory decision” may also be asserted at any time in support of an

⁵ Article VI provides in full:

ARTICLE VI

1. An application challenging the legality of an individual decision shall not be admissible if filed with the Tribunal more than three months after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision.
2. An application challenging the legality of a regulatory decision shall not be admissible if filed with the Tribunal more than three months after the announcement or effective date of the decision, whichever is later; provided that the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision.
3. In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible.
4. The filing of an application shall not have the effect of suspending the implementation of the decision contested.
5. No application may be filed or maintained after the applicant and the Fund have reached an agreement on the settlement of the dispute giving rise to the application.

admissible application challenging the legality of an “individual decision” taken pursuant to that “regulatory decision.”

16. Applicant states that he seeks to bring a direct challenge to the contested policy as a “regulatory decision” of the Fund, pursuant to Article VI, Section 2, of the Tribunal’s Statute. There are no channels of administrative review to exhaust when a “regulatory decision” is challenged directly,⁶ which must be done within three months of its announcement or effective date. Applicant maintains that in the case of the policy that he challenges there is no discernible announcement or effective date, as the policy appears to have been communicated in writing only by the “Strictly Confidential” email to SPMs. Applicant asserts that he was first informed of the policy barring the re-employment of staff members who separated voluntarily under the downsizing when the HRD Director notified him of his lack of eligibility for a contractual appointment on January 12, 2012. Applicant filed his Application with the Administrative Tribunal within three months of that date.

17. At the same time, Applicant states that he found himself in a “jurisdictional conundrum.” On April 5, 2012, he filed a Grievance with the Fund’s Grievance Committee, in which he challenged both the individual decision and the policy on which it appeared to be predicated, in order to preserve his rights to proceed in either forum. Applicant indicated in his Application to the Tribunal that he was willing to withdraw the Grievance should Respondent agree to proceed solely in the Administrative Tribunal. In his Objection to the Fund’s Motion for Summary Dismissal, Applicant states that “[i]f the Tribunal finds his application to be admissible, Applicant will withdraw his Grievance at that time.”

18. On May 14, 2012, Respondent filed its Motion for Summary Dismissal in the Administrative Tribunal, contending that the Application is inadmissible for lack of jurisdiction *ratione personæ*. Thereafter, on June 1, 2012, Respondent filed in the Grievance Committee a Motion to Dismiss the Grievance for lack of subject matter jurisdiction on the ground that “. . . the only basis [Applicant] asserts to support his claim rests on the legality of the policy itself, rather than whether the policy was correctly applied in his individual case.”⁷ Also, in parallel with its Motion for Summary Dismissal in the Tribunal, the Fund maintained that Applicant, as a former staff member whose claim in the Fund’s view did not arise from his former employment, could not invoke the jurisdiction of the Grievance Committee.

19. In respect of the requirement of Article V, Section 1, of its Statute, the Tribunal observes that to the extent that Applicant challenges an “individual decision,” as well as a purported

⁶ See, e.g., *Daseking-Frank et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-1 (January 24, 2007), para. 39; *Baker et al., Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005) (“*Baker I*”), para. 13.

⁷ The Grievance Committee’s jurisdiction, unlike that of the Administrative Tribunal, is limited to complaints in which a “. . . staff member contends that he or she has been adversely affected by a decision that was inconsistent with Fund regulations governing personnel and their conditions of service.” It expressly excludes challenges to “staff regulations as approved by the Managing Director” and “decision[s] of the Executive Board.” GAO No. 31, Rev. 4 (October 1, 2008), Section 4.

“regulatory decision,” it is clear that Applicant has taken steps to exhaust channels of administrative review through the Fund’s Grievance Committee. Although that Committee determines its own jurisdiction for purposes of proceeding with a grievance, this Tribunal must decide whether Applicant has met the exhaustion of remedies requirement of the Tribunal’s Statute. *See Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 85. It is notable that, although stating that he brings a direct challenge to a “regulatory decision,” Applicant seeks as relief in the Tribunal the rescission of both the contested policy and the decision applying it in his individual case.

20. The Tribunal observes that Applicant’s complaint against the “individual decision” rests entirely on his challenge to the underlying policy. Applicant makes no allegations that are specific to the application of that policy in the circumstances of his case. In the view of the Tribunal, the purposes of administrative review, i.e., to provide opportunities for resolution of the dispute and to produce a detailed record in the event of subsequent litigation, *Estate of Mr. “D”*, para. 66, would not be served by any further proceedings in the Grievance Committee. *See generally Ms. “G”, Applicant and Mr. “H”, Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), paras. 19-20; *Billmeier*, para. 49. *Cf. Ms. C. O’Connor, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2010-1 (February 8, 2010), paras. 40-41. The Tribunal accordingly concludes that Applicant has satisfied the requirement of Article V, Section 1, of the Statute.

21. As to the requirement of Article VI that an Application be timely filed with the Tribunal, the Tribunal need not decide at this stage (i.e., in the context of deciding the Motion for Summary Dismissal) whether the contested policy meets the statutory definition (*see infra* at note 10) of a “regulatory decision”⁸ such that, in the absence of a challenge to an “individual decision,” Applicant would be required to file his Application within three months of the policy’s announcement or effective date. The fact that Applicant has identified an “individual decision” giving effect to the policy obviates any concern under Article VI as to the timeliness of his challenge to the policy itself, a policy that Applicant asserts has no discernible announcement or effective date. Article VI, Section 2, provides that the “. . . illegality of a regulatory decision may be asserted at any time *in support of an admissible application* challenging the legality of an individual decision taken pursuant to such regulatory decision.”⁹ (Emphasis added.) The question presented by the Fund’s Motion is whether the Application is admissible or whether it shall be dismissed for lack of jurisdiction *ratione personæ*.

⁸ The Tribunal has reviewed the legality of policy decisions of the Fund as applied to an individual applicant even where the contested policy may not have met the statutory definition of a “regulatory decision.” *See, e.g., Mr. M. D’Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 35; *Mr. “R” (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004), paras. 50-51; *Mr. M. D’Aoust (No. 3), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2008-1 (January 7, 2008), para. 40.

⁹ *See also Ms. “B”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (December 23, 1997), para. 57.

Summary of Parties' Principal Contentions

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

Applicant's contentions on the merits

1. The later-adopted policy barring the re-employment of former staff members who separated voluntarily under the terms of the 2008 Fund-wide downsizing exercise directly contravenes written information provided by the Fund, which was reasonably relied upon by staff members including Applicant, in deciding to opt for separation under that program.
2. The contested policy discriminates impermissibly against staff members who separated voluntarily under the 2008 downsizing vis-à-vis other former Fund staff members in respect of eligibility for re-employment.
3. The Fund's policy against re-employment of staff members who separated voluntarily under the 2008 downsizing is not supported by any proper business rationale.
4. The contested policy has been implemented in the absence of fair and proper procedures.
5. Applicant seeks as relief:
 - a. rescission of the HRD Director's January 12, 2012 decision that Applicant was not eligible for appointment to a contractual vacancy in the Fund;
 - b. rescission of the Fund's policy against re-hiring (either as regular staff or contractual) former staff members who separated voluntarily under the 2008 downsizing exercise;
 - c. compensation in the amount of one-year's salary as "compensatory and moral damages"; and
 - d. legal fees and costs incurred in pursuing his case before the Grievance Committee and the Administrative Tribunal, including those incurred in responding to the Motion for Summary Dismissal.

Respondent's contentions on admissibility

1. The Application is "clearly inadmissible" (Rule XII, para. 1) for lack of jurisdiction *ratione personæ*.

2. The drafters of the Tribunal’s Statute did not contemplate that the Tribunal would have jurisdiction to consider a challenge by a person not currently on the staff of the Fund to a decision not to select him for employment opportunities. Applicant is in the same position as any other external job seeker.
3. An application in the Tribunal by a former staff member must arise from the prior relationship between the staff member and the Fund. That condition is not met in this case.
4. There was no firm, individualized commitment of re-employment in this case that might, under some circumstances, give rise to a contractual obligation and thus a receivable claim.

Applicant’s contentions on admissibility

1. Applicant challenges a “regulatory decision” of the Fund that is within the Tribunal’s subject matter jurisdiction.
2. Applicant, as a member of the group of former staff members who separated voluntarily under the 2008 Fund-wide downsizing exercise, is “adversely affected” by the contested policy within the meaning of Article II of the Tribunal’s Statute.
3. Applicant’s challenge is timely, as he filed his Application within three months of being notified of the challenged policy.
4. Applicant’s situation differs fundamentally from that of any other external unsuccessful job seeker.
5. Former staff members may resort to the Fund’s dispute resolution bodies.

Consideration of the Admissibility of the Application

23. The question presented by the Motion for Summary Dismissal is whether Applicant, as a former member of the staff of the Fund who separated voluntarily under the terms of the 2008 Fund-wide downsizing program, is within the Tribunal’s jurisdiction *ratione personæ* to contest the policy later adopted by the Fund barring the re-employment of such former staff members and the application of that policy in his individual case.

24. The Tribunal’s jurisdiction *ratione personæ* is prescribed in relevant part as follows: “The Tribunal shall be competent to pass judgment upon any application . . . by a member of the staff challenging the legality of an administrative act adversely affecting him.” (Statute, Article II,¹⁰ Section 1.a.) The Statute then defines “member of the staff” as “any person whose current or

¹⁰ Article II prescribes the Tribunal’s jurisdiction *ratione personæ* and *ratione materiæ* as follows:

former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff.” (Statute, Article II, Section 2.c.(i).) The Tribunal has affirmed that its jurisdiction is conferred exclusively by its Statute and that it may not exercise powers beyond those granted by that Statute.¹¹

25. Respondent points to the following statement in the Statutory Commentary:¹² “The statute would not allow unsuccessful candidates to the staff to bring claims before the tribunal.” Commentary on the Statute, p. 15. The Fund maintains that Applicant “. . . stands in the same position as any other would-be job applicant who is disappointed not to have been selected for a

1. The Tribunal shall be competent to pass judgment upon any application:
 - a. by a member of the staff challenging the legality of an administrative act adversely affecting him; or
 - b. by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant.
2. For purposes of this Statute:
 - a. the expression "administrative act" shall mean any individual or regulatory decision taken in the administration of the staff of the Fund;
 - b. the expression "regulatory decision" shall mean any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund;
 - c. the expression "member of the staff" shall mean:
 - (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;
 - (ii) any current or former assistant to an Executive Director; and
 - (iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund;

. . . .

¹¹ See Mr. “A”, *Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999), paras. 56-59, 96, 100 (dismissing for lack of jurisdiction *ratione personae* and jurisdiction *ratione materiae* application by contractual employee who alleged, based upon the nature of his work and successive contracts, that he should have been categorized as a staff member and accorded the benefits thereof).

¹² The consolidated Commentary on the Statute comprises the Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992) and the Report of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009).

position, and falls within the very class of individuals who were intended to be excluded from the jurisdiction of the Tribunal, *ratione personae*.” Respondent additionally maintains that to be admissible in the Tribunal an application by a former staff member “. . . must arise from the prior relationship of the former staff member with the Fund”

26. In the view of the Tribunal, Applicant’s status is not the same as that of any other job seeker. That is so precisely because of the policy he contests. By adopting the policy that Applicant challenges, Respondent has differentiated Applicant—and all other former staff members who separated voluntarily under the 2008 downsizing program—from other job seekers by deeming them ineligible for future Fund employment. That condition arises directly from their prior relationship with the Fund. Accordingly, the Tribunal does not agree that the contested policy or its application in Applicant’s case fails to arise from Applicant’s prior Fund employment.

27. The Tribunal notes that in *Mr. M. D’Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 10, it was faced with another case in which the issue of its jurisdiction *ratione personae* arose. The Tribunal concluded that it had jurisdiction over a staff member’s challenge to a decision that had taken place prior to his employment. The applicant challenged the grade and salary at which he had been offered and accepted employment, as well as the Fund’s policy governing the methodology for setting initial salaries of non-economist staff. The Tribunal exercised jurisdiction on the ground that the contested decision, although taken prior to the applicant’s becoming a staff member, “. . . thereupon and thereafter affected him as a member of the staff” *See also Mr. “A”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999), paras. 53-55 (distinguishing jurisdiction in *D’Aoust* from jurisdictional claim raised by contractual appointee who had “never become a member of the Fund’s staff”).

28. The Fund concedes that in a variety of circumstances former staff members may bring applications before the Administrative Tribunal, including those alleging “failure by the Fund to adhere to a legally-binding commitment.” The Tribunal observes that the letter confirming the administrative arrangements under which Applicant separated from the Fund states that Applicant releases Respondent from all claims arising out of his employment *up to the date of that agreement*. That release expressly excludes claims for “enforcement of this agreement.” In *Mr. “V”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-2 (August 13, 1999), the Tribunal exercised jurisdiction over a complaint that the Fund had breached the terms of a settlement and release agreement by circulating redacted information about the applicant in a confidential report within the Fund. Like Mr. “V”, Applicant in the instant case alleges that the Fund has violated a material term of the agreement by which he separated from the Fund.

29. The essence of Applicant’s complaint is that the Fund unilaterally and retroactively amended the understanding by which he separated in respect of his eligibility for future Fund employment. In the view of the Fund, however, “. . . there was no firm, individualized commitment of re-employment that might, under some circumstances, give rise to a contractual obligation and thus a receivable claim.” Respondent accordingly maintains that “[t]here is thus

no contractual obligation on the part of the Fund that can be said to have been breached, so as to create standing for a non-staff member before this Tribunal.”

30. As this Tribunal recognized in exercising jurisdiction in *Mr. “V”*, and the Fund acknowledges in its Motion, the Tribunal has jurisdiction to decide a claim for failure by the Fund to adhere to a legally binding commitment with a former staff member. That is what Applicant alleges here. The question of whether a contractual obligation has indeed been breached goes to the merits of the dispute, a question not before the Tribunal at this stage of the proceedings. What suffices in conferring jurisdiction on the Tribunal is that Applicant alleges such a breach. The threshold of admissibility “. . . is not steep, because, by the terms of Rule XII of the Rules of Procedure, an application may be summarily dismissed only ‘if it is clearly inadmissible.’” *Baker et al. Applicants v. International Monetary Fund, Respondent (Admissibility of the Applications)*, IMFAT Judgment No. 2005-3 (December 6, 2005) (“*Baker I*”), para. 20.

31. In the view of the Tribunal, there are two grounds for its exercise of jurisdiction in this case. First, the essence of the policy that Applicant contests is to distinguish former staff members who separated voluntarily under the beneficial terms of the downsizing from other job seekers. Second, Applicant asserts a violation of a material term of the agreement by which he separated, an agreement that expressly permits claims for its enforcement. The Tribunal accordingly concludes that it may exercise jurisdiction *ratione personæ* in this case because the issues arise directly out of Applicant’s Fund employment.

32. In the light of the foregoing considerations, the Tribunal concludes that the Application is not “clearly inadmissible.” (Rule XII, para. 1.) Accordingly, the Tribunal denies the Fund’s Motion for Summary Dismissal.

33. As the Fund’s Motion for Summary Dismissal is denied, the exchange of pleadings pursuant to Rules VIII – X of the Tribunal’s Rules of Procedure will resume. The filing of the Motion suspended the time for answering the Application until the Motion was acted on by the Tribunal. (Rule XII, para. 2.) Thus, in view of the denial of the Motion, the Fund’s Answer on the merits, Applicants’ Reply and the Fund’s Rejoinder will follow, according to the schedule prescribed by the Rules.

Legal Fees and Costs

34. In his Objection, Applicant seeks legal fees and costs incurred in responding to the Motion for Summary Dismissal, “[r]egardless of the outcome on the merits of this case.” The Tribunal commented in *Baker et al., Applicants v. International Monetary Fund, Respondent (Dismissal of the Applications as Moot)*, IMFAT Judgment No. 2006-4 (June 7, 2006) (“*Baker II*”), para. 26, that the remedial portion of the Tribunal’s Statute¹³ does not contemplate an award

¹³ Article XIV, Section 4, provides:

4. If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case,

of legal fees and costs in the absence of a decision on the merits of a case. Nonetheless, citing the exceptional circumstances presented by that case, the Tribunal awarded the *Baker* applicants legal fees and costs incurred in their earlier successful defense against a Motion for Summary Dismissal. See "*Baker I*". The Tribunal made the fee award concurrently with its dismissal of the applications as moot, a decision that necessarily precluded any future ruling on the merits.¹⁴

35. In the instant case, as the Tribunal denies the Motion for Summary Dismissal, the pleadings on the merits will resume and the Tribunal will later have the opportunity to consider an award of legal fees and costs pursuant to Article XIV, Section 4. The Tribunal finds no ground to grant Applicant's request for legal fees and costs at the present stage of proceedings. It leaves open the possibility of revisiting the question of an award of attorney's fees for successfully defending against the Motion for Summary Dismissal at the time of its decision on the merits of the Application.

including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

¹⁴ In *Baker II*, para. 26, the Tribunal observed:

. . . . Applicants did prevail in respect of the denial of the Fund's earlier Motion for Summary Dismissal. *Baker et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2005-3 (December 6, 2005). Accordingly, and in view of the exceptional character of the case [challenging revisions to the staff compensation system] which is of importance to the staff as a whole, costs are awarded to Applicants insofar as they relate to the earlier phase of the proceedings, i.e. for the fees incurred in preparing their Objection to that earlier Motion

Decision

FOR THESE REASONS

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

The Fund's Motion for Summary Dismissal is denied.

Catherine M. O'Regan, President

Edith Brown Weiss, Judge

Francisco Orrego Vicuña, Judge

Catherine M. O'Regan, President

Celia Goldman, Registrar

Washington, D.C.
September 11, 2012