

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

JUDGMENT No. 2013-3

Ms. “GG”, Applicant v. International Monetary Fund, Respondent **(Admissibility of the Application)**

Introduction

1. On October 8, 2013, the Administrative Tribunal of the International Monetary Fund, composed for this case, pursuant to Article VII, Section 4 of the Tribunal’s Statute, of Judge Catherine M. O’Regan, President, and Judges Jan Paulsson¹ and Edith Brown Weiss, met to adjudge the Motion for Summary Dismissal of the Application brought against the International Monetary Fund by Ms. “GG”, a staff member of the Fund. Applicant represented herself in the proceedings. Respondent was represented by Ms. Diana Benoit, Senior Counsel, and Mr. Erik Plith, Counsel, IMF Legal Department.
2. First, Applicant contests her non-selection for a single B1 position in one of the Fund’s Departments in both 2009 (when no appointment was made) and 2010 (when an appointment was made). Second, she contests the Fund’s failure to appoint her to a different B1 position in the same Department in 2011. Third, Applicant contests elements of a revised promotion policy, adopted by the Fund in 2011, and the application of that policy in the circumstances of her case. Applicant asserts that the policy is arbitrary and discriminatory. Fourth, Applicant contests the Fund’s failure to address a pattern of harassment, retaliation and discrimination against her by a senior manager in her Department. Finally, Applicant contests decisions taken during the administrative review and Grievance Committee processes, which, Applicant asserts, constitute failures of due process and materially impair the evidentiary record before this Tribunal.
3. The Fund responded to the Application with a Motion for Summary Dismissal seeking to dismiss all of Applicant’s claims on a range of bases, which are set out below.
4. A Motion for Summary Dismissal suspends the period for answering the Application until the Tribunal determines the Motion. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Application.

Procedure

5. Ms. “GG” filed an Application with the Administrative Tribunal on July 23, 2012, which was corrected on August 6, 2012, pursuant to Rule VII, para. 6, of the Tribunal’s Rules of Procedure. The Application was transmitted to Respondent on August 7, 2012. On August 20,

¹ Judge Jan Paulsson suffered an indisposition which rendered it impossible for him to travel to Washington, D.C. for the session. Accordingly, he participated during the session by telephone conference call.

2012, pursuant to Rule IV, para. (f), the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

6. On September 6, 2012, pursuant to Rule XII,² Respondent filed a Motion for Summary Dismissal of the Application. The Motion was transmitted to Applicant on the following day. On October 4, 2012, pursuant to Rule XII, para. 5, Applicant filed an Objection to the Motion, which was transmitted to the Fund for its information.

7. The adjudication of the Motion for Summary Dismissal was not immediately undertaken by this Tribunal because the Fund had stated in the Motion that related Grievance proceedings (see below) were expected to conclude in early 2013. The Tribunal was later informed that this

² 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.

was unlikely to happen before the fall of 2013. Accordingly, the Tribunal scheduled the Motion for determination.

8. 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.

Applicant's Request for Anonymity

9. In her Application, Applicant requested anonymity pursuant to Rule XXII³ of the Tribunal's Rules of Procedure. Respondent opposed Applicant's request for anonymity.

10. Rule XXII provides that the Tribunal shall grant a request for anonymity "where good cause has been shown for protecting the privacy of an individual." This Tribunal has consistently held that granting anonymity to an applicant is an exception to the ordinary rule that the names of parties to a judicial proceeding should be made public. *See Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13; *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-1 (March 6, 2012), para. 9. Anonymity is generally only granted in cases "involving alleged misconduct or matters of personal privacy such as health or family relations." *Sachdev*, para. 9; *see also Ms. "AA"*, para. 14; *Mr. S. Ding, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2009-1 (March 17, 2009), para. 9.

11. In her Application, Applicant states that she requests anonymity "to protect my privacy and that of other staff members. This case involves issues of sexual harassment and other harassment, retaliation for reporting sexual harassment and other misconduct, and discrimination and bias." Respondent replies that Applicant's allegations of sexual misconduct do not transform

³ 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.

this case into one involving “matters of personal privacy.” The core of the case, according to the Fund, “is a challenge to career decisions, including performance ratings and promotions, which have not been considered ‘matters of personal privacy’” by the Tribunal.

12. In her Objection to the Fund’s Motion, Applicant replies that her challenge involves “many dimensions of misconduct, including sexual harassment and other harassment against me and other staff members, retaliation against me for reporting sexual harassment and other misconduct and discrimination and bias against me and other staff members.” Moreover, Applicant points out that there is no dispute that the Fund authorized the Ethics Office to investigate alleged misconduct by several senior staff members, arising out of complaints by Applicant and other staff members on matters similar to those raised in this case. Applicant submits that granting her request for anonymity will protect not only her, but also other staff members who, if Applicant’s identity is disclosed, will be identifiable.

13. This Tribunal has repeatedly found that allegations of misconduct warrant the grant of anonymity. *See Ms. “EE”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-4 (December 3, 2010), para. 11 (challenge to misconduct proceedings; accusations relating to the conduct of other staff members; evidence relating to sexual relationships among staff members); *Mr. “DD”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-8 (November 16, 2007), para. 7 (health of applicant; allegations of mistreatment by supervisor); *Ms. “CC”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-6 (November 16, 2007), para. 7 (disability retirement request; alleged misconduct); *Ms. “BB”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2007-4 (May 23, 2007), para. 20 (allegations of misconduct against applicant; allegations by applicant of mistreatment by supervisor); and *Ms. “AA”, para. 15* (to protect supervisors from allegations of harassment and hostile work environment that had not been tested, as application was summarily dismissed for failure to meet exhaustion of remedies requirement). This Application concerns allegations of misconduct made against staff members of the Fund, as well as a claim of a pattern of harassment, discrimination and retaliation against Applicant. Such conduct, if established, would constitute serious misconduct. In the light of the subject matter of these proceedings, therefore, the Tribunal grants Applicant’s request that her name not be made public. The effect of this order is that not only will Applicant’s identity be protected, but the identity of other staff members who have been affected by the events under consideration in this case will also be protected.

Factual Background

14. The relevant factual background may be summarized as follows. In setting out these facts, the Tribunal notes that at this stage the Fund has not lodged its Answer on the merits of the Application. The facts therefore record only the Applicant’s version.

15. Applicant is an economist in one of the Fund’s departments. Applicant states that during 2007 she reported alleged misconduct on the part of her immediate supervisor to her Department Director. The allegations included sexual harassment of a consultant while on mission, a biased attempt to prevent the conversion of a term staff member to permanent staff, sexist and racist

comments, inappropriate interference to provide advantages to “selected attractive young women” and hostility towards Applicant’s staff.

16. A few months later, during the 2007 Annual Performance Review (APR) round, Applicant notes that her APR rating and MAR (Merit-to-Allocation Ratio) declined “precipitously.” Applicant asserts that the decline occurred despite a significant increase in her responsibilities, performance and outputs. Applicant initially thought that the decline arose from retaliation by her immediate supervisor who was the subject of the misconduct allegations she had raised during the year. However, when she queried her rating, her immediate supervisor informed her that he had originally graded her “outstanding” but that the Department Director to whom she had reported the alleged misconduct had reduced Applicant’s APR rating to “average.” In the 2008 APR round, Applicant asserts, her immediate supervisor again informed her that he had rated her “outstanding” but stated that the Department Director had once more reduced Applicant’s rating to “average.” During the 2009 rating year, her immediate supervisor, who had been the subject of the misconduct complaint, left the Fund and Applicant’s new supervisor told Applicant that although he considered her performance to be “outstanding” he had rated her performance “average” to be a “team player” to the Department Director. According to Applicant, when she asked her Department Director how she could improve her ratings, he informed her that she should use “charm, humor, and personal appeal” to him to do so. Applicant considered this response to be sexual harassment.

17. In 2009, Applicant’s Department nominated her for the Review Committee list (the RC list). Inclusion in this list would have facilitated Applicant’s promotion to B-level positions in the Fund. According to an email which forms part of the record in this case, three members of the Review Committee stated that she was “very competitive” to be added to the RC list in 2009. However, according to the same email, her Department Director went to the meeting of the Review Committee and gave reasons why Applicant’s name should not be added to the list and Applicant’s name was not included.

18. At about the same time, a B-level vacancy arose in Applicant’s Department. Because Applicant’s name had not been included on the RC list, she was not initially eligible to apply. However, the selection committee decided that no eligible candidates had applied for the position and A15 staff members who were not on the RC list were notified of the vacancy and told they could apply. According to Applicant, she applied immediately. She was interviewed for the position. According to the email message now forming part of the record, the interviewing panel unanimously thought Applicant had the best interview but the Department nevertheless chose a different candidate, despite the fact that one member of the interviewing panel explicitly voted against that candidate.

19. According to Applicant, she was informed by her Department Director that the vacancy would not, however, be filled immediately. Applicant asserts that it was at this meeting that he advised her that she could improve her APRs by using “charm, humor, and personal appeal” to him.

20. Immediately after this meeting, according to Applicant, she met with the Ombudsperson to complain of a pattern of sexual harassment by her Department Director since 2007. She also

asserts that she met with the Human Resources Department (HRD) Director. According to Applicant, the HRD Director did not initiate any investigation of the alleged misconduct. The position that had not been filled in 2009 was filled in 2010. The selected candidate had also been interviewed at the time Applicant had been interviewed in 2009 and was the candidate preferred by the Department Director over Applicant.

21. In 2011, Applicant's Department advertised another B1 vacancy. Although Applicant asserts she would have been qualified for the job, she chose not to apply because the Department Director was the immediate supervisor of the position. Applicant states that she was "denied the chance to apply for the job, given that [my Department Director] had previously harassed me and discriminated against me over a period of several years. I could thus not take up the position for fear of further endangering myself."

22. Some time later, Applicant was appointed to a B1 vacancy in a different Department. At the time Applicant accepted this appointment, she asserts, she was not aware that a change in promotion policy would be announced on July 1, 2011, which would result in extending the time-in-grade requirement for promotion from B1 to B2 from twelve months to eighteen months. Once the new policy was announced in July 2011, Applicant asserts that her supervisors wrote to HRD requesting that Applicant be "grandfathered" under the old rules and that no response was received from HRD.

Channels of Administrative Review

23. On December 8, 2010, Applicant filed a request for administrative review in respect of her 2010 APR rating ("the original challenge"), stating that the decision was influenced by retaliation, discrimination and reflected a pattern of discrimination, harassment and retaliation over several years. On April 13, 2011, HRD denied her request for administrative review of the 2010 APR rating, and on June 9, 2011, Applicant filed a Grievance with the Fund's Grievance Committee. The Fund's witnesses testified at the Grievance Committee proceedings on September 15 and 16, 2011. On October 14, 2011, in response to a discovery request, the Fund produced an email, which contained information that Applicant contends "tainted the vacancy selection" for the 2009 position. The contents of that email are described above at paras. 17-18.

24. On November 14, 2011, following the production of the email message, Applicant filed a request for administrative review of the non-selection decisions of 2009, 2010 and 2011, as well as the new promotion policy, and the effective date of her promotion ("the new challenges"). HRD denied the new request for administrative review on December 13, 2011, and Applicant took her challenges to the Grievance Committee on December 16, 2011. The Fund filed a Motion to Dismiss the new challenges on January 6, 2012; Applicant responded on March 30, 2012. On April 25, 2012, the Grievance Committee granted the Motion and dismissed Applicant's new challenges. On April 30, 2012, Applicant sent an email to the Grievance Committee asserting that it had made factual and other errors in reaching its decision. The Grievance Committee construed this email message as a Motion for Reconsideration, a motion which was opposed by the Fund. On May 30, 2012, the Grievance Committee denied the Motion for Reconsideration. On June 8, 2012, the Fund informed Applicant that the Grievance

Committee's dismissal of the new challenges should be considered final with effect from that date.

25. The Grievance Committee proceedings in relation to the initial challenge to the 2010 APR rating were suspended in late 2011 following upon a Motion brought by the Fund seeking suspension of the Grievance Committee proceedings on the ground that an Ethics Office investigation had been authorized into the conduct of Applicant's supervisors arising out of complaints brought by Applicant and other staff members. Notwithstanding the fact that the Ethics Office investigation was not complete, the parties agreed to the resumption of the Grievance Committee proceedings in mid-2012. Applicant provided testimony and presented two witnesses. At the time of preparation of this Judgment, to the knowledge of the Tribunal, the Grievance Committee has not yet issued its Recommendation and Report in respect of Applicant's initial Grievance.

Summary of Parties' Principal Contentions relating to the Motion for Summary Dismissal

26. The principal arguments presented by Respondent in its Motion for Summary Dismissal may be summarized as follows.

1. Applicant's challenges to the three non-selection decisions (in 2009, 2010 and 2011) were not launched within the six-month period stipulated in GAO No. 31, Section 6, and no exceptional circumstances exist to excuse the delay.
2. Applicant did not apply for two of the positions in issue (those filled in 2010 and 2011) and so lacks standing to challenge her non-selection.
3. Applicant's challenge to the regulatory decision that introduced a change in the promotion policy is untimely under Article VI of the Tribunal's Statute.
4. Applicant's claim of harm arising from the application of the new policy to her is premature.
5. Applicant's claim relating to a pattern of harassment, retaliation and discrimination is under review by the Grievance Committee and therefore Applicant has not exhausted the established channels of administrative review, as required by Article V, Section 1,⁴ of the Statute of the Tribunal. Accordingly, the claim should be dismissed at this stage "without prejudice to Applicant's right to submit a new application on this claim" following the conclusion of the Grievance Committee process and Fund Management's decision on the matter, if Applicant is dissatisfied with the outcome.

⁴ Article V, Section 1, provides: "When the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review."

6. Applicant's claims of due process failures during the administrative review and Grievance Committee processes do not amount to separate "administrative acts" or "individual decisions" that may be reviewed by this Tribunal and should therefore be dismissed.
27. The principal arguments made by Applicant in her Objection to the Motion for Summary Dismissal may be summarized as follows.
1. In relation to the 2009 non-selection decision, although Applicant's challenge was not brought within the time limits stipulated in GAO No. 31, Section 6, "exceptional circumstances" warrant the consideration of the challenge by the Tribunal. There are three separate grounds that constitute "exceptional circumstances" within the meaning of GAO No. 31, Section 6. First, Applicant only became aware on October 14, 2011 of the discriminatory conduct that had adversely affected her in relation to the non-selection decision, and, accordingly, the Tribunal should conclude that Applicant has shown "exceptional circumstances" that would warrant the relaxation of the time limits stipulated in GAO No. 31, Section 6. Second, given that the decision forms part of a pattern of discriminatory conduct on the part of senior managers within the Fund, the Tribunal should, on its established jurisprudence, accept that it may take account of incidents of discrimination that form part of the pattern of discrimination even when each individual incident has not been the subject of a timely grievance. Third, in relation to the 2009 non-selection decision, the doctrine of "recurrent effects" should be adopted by the Tribunal to recognize that a flawed non-selection decision gives rise to a new cause of action each time an aggrieved staff member receives a paycheck that is less than she or he would have received if the flawed decision had not been made.
 2. Applicant's challenges to the 2010 and 2011 non-selection decisions are timely. Under GAO No. 31, Section 12, both challenges fall within the time limits stipulated in GAO No. 31, Section 6.⁵
 3. Applicant has standing to challenge the 2010 and 2011 non-selection decisions. With regard to the 2010 decision, she was originally a candidate for the position and the selection committee knew of her candidacy and her qualifications. As to the 2011 non-selection decision, Applicant asserts that she did not apply for the position because sexual harassment by Applicant's Department Director "effectively barred" her from applying for the position.
 4. In relation to the promotion policy, Applicant launched a timely challenge both to the decision as it applied to her, and to the regulatory decision itself.

⁵ Section 12.02 provides: "The time limits for submitting a request for administrative review or filing a grievance to the Grievance Committee shall be extended, day for day, for each day that the grievant is working on Fund business outside his or her duty station or is in recognized leave status, except for administrative leave and separation leave."

5. “Harassment, retaliation, and discrimination are part of all of the contested decisions before the Tribunal” and are also relevant to the consideration of the Motion for Summary Dismissal. The Grievance Committee is considering the issues of harassment, retaliation and discrimination in relation to Applicant’s challenge to the 2010 APR decision. Although that decision is not currently before the Tribunal, all of the decisions that are before the Tribunal are “infected by these improper motives and misconduct.” The evidentiary record of the Grievance Committee has been developed and placed before the Tribunal and “no further witnesses are expected.”

6. Applicant’s complaints regarding the process followed in the administrative review and Grievance proceedings are not “direct challenges” to the administrative review and grievance stages but instead relate to the effect of the flawed due process on the evidentiary record that will serve before the Tribunal. Rulings made by the Grievance Committee relating to disclosure of the witness list and content of witnesses’ testimony deterred witnesses for Applicant from testifying with the result that the evidentiary record excludes relevant evidence. Applicant has been denied access to documents on the basis of confidentiality, which has impaired her ability to litigate her case.

Consideration of the Admissibility of the Application

28. As in *Ms. C. O’Connor, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2010-1 (February 8, 2010), this Application, and the resulting Motion for Summary Dismissal, present a situation in which claims before the Tribunal have been dismissed by the Grievance Committee on jurisdictional grounds, but are closely related to a claim that remains pending before that Committee. *See O’Connor*, para. 28. In *O’Connor*, this Tribunal affirmed that its jurisprudence “strongly favors recourse” to the Grievance Committee because of the detailed legal and factual record produced by that Committee. *Id.*, para. 34; *see also Ms. “Y”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), paras. 42-43. While, in these proceedings, Applicant has placed before the Tribunal portions of the record before the Grievance Committee, that Committee has not yet produced a decision on that record. Although the Tribunal makes its own findings of fact and conclusions of law, it regularly draws on the record before the Grievance Committee.

29. In *O’Connor*, the Tribunal concluded that the claim before it was “closely allied” to the claim still pending before the Grievance Committee. *Id.*, para. 40. The Tribunal concluded that to entertain one claim before the conclusion of the Grievance proceedings in respect of the “closely allied” claim would “fail to serve . . . the ‘twin goals’ of the Article V’s exhaustion of remedies requirement, i.e., of ‘providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.’” *Id.*, para. 41, citing *Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66.

30. It is clear that Applicant considers the decisions she has challenged in these proceedings (the three non-selection decisions, her challenge to the promotion policy and its application to her, as well as the alleged failure of due process in the administrative review proceedings) to

have been tainted by a pattern of harassment, retaliation and discrimination that affected her adversely in her employment with the Fund and lasted from 2007 until 2011. It is also clear that Applicant considers the 2010 APR rating decision to have been similarly tainted by the same pattern of harassment, retaliation and discrimination. That decision is not before the Tribunal in these proceedings, but it is the subject of the Grievance Committee challenge.

31. The claims in this case are therefore “closely allied” with the claim pending before the Grievance Committee. As in *O’Connor*, the Tribunal is of the view that to consider the claims in these proceedings at this stage might undermine the achievement of the twin goals of Article V of the Statute of the Tribunal. Those goals are to provide opportunities for resolution of the dispute and for building a detailed record for subsequent adjudication.

32. The Tribunal concludes that the Application must be dismissed at this stage on the ground of its failure to meet the requirements of Article V, Section 1, of the Statute in that Applicant has not “exhausted all available channels of administrative review.” The dismissal of the Application is without prejudice to Applicant’s right to submit a new Application raising all the claims raised in this Application, as well as the claim currently pending before the Grievance Committee, following the conclusion of the Grievance Committee process and Fund Management’s decision on the matter, if Applicant remains dissatisfied with the outcome. In the light of this conclusion, the Tribunal has not considered the other grounds for summary dismissal raised by Respondent in its Motion. The dismissal of the Application is also without prejudice to Respondent’s right to raise those grounds if a new Application is brought.

Decision

FOR THESE REASONS

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

The Application of Ms. “GG” is dismissed in its entirety, without prejudice to Applicant’s right to bring a new Application in due course, and without prejudice to Respondent’s right to raise in response issues of admissibility not disposed of in this Judgment.

Catherine M. O’Regan, President

Jan Paulsson, Judge

Edith Brown Weiss, Judge

/s/
Catherine M. O’Regan, President

/s/
Celia Goldman, Registrar

Washington, D.C.
October 8, 2013