

REGISTRY'S SUMMARY¹: *Mr. "RR", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-2 (December 24, 2021)

NON-CONVERSION OF FIXED-TERM APPOINTMENT – MANAGEMENT REJECTION OF REVIEW COMMITTEE (RC) RECOMMENDATION – FAILURE TO PROVIDE WRITTEN DECISION – NON-SELECTION FOR VACANCY – RESCISSION OF NON-CONVERSION DECISION – COMPENSATION IN LIEU OF REINSTATEMENT – REMEDY FOR INTANGIBLE INJURY – LEGAL FEES

Applicant challenged two decisions: (1) the non-conversion of his fixed-term appointment to an open-ended appointment; and (2) his non-selection to a vacancy for a similar but lower-graded position, to which he applied after his appointment was not converted.

For a fixed-term staff member such as Applicant, who had been appointed at Grade A15, a decision in favor of conversion to an open-ended appointment is to be taken by Fund Management only after the staff member's department recommends the conversion and that recommendation is endorsed by the Review Committee (RC). The RC, which is comprised of top-level (Grade B4) managers from across the Fund and chaired by the HRD Director, advises the Managing Director on managerial appointments, conversions and promotions at Grades A15-B2, following a due diligence review.

Applicant's case was unusual. It was the first to reach the Tribunal in which the conversion of the staff member's fixed-term appointment was recommended by his department and endorsed by the RC, but the Deputy Managing Director/Chief Administrative Officer (DMD/CAO) declined to follow the RC's advice. Accordingly, the focus of the Tribunal's inquiry was whether the DMD/CAO's decision constituted an abuse of discretion.

The Fund's written internal law sets out three criteria for conversion of a fixed-term appointment to an open-ended one: whether the staff member meets the Fund's performance requirements; whether they have demonstrated potential for a career at the Fund; and whether their appointment meets the Fund's staffing requirements. (GAO No. 3, Rev. 7, Section 3.02.1.3.)

Based on the record of the case, the Tribunal concluded that it could not be certain what the DMD/CAO's reasons were to reject the RC's recommendation to convert Applicant's appointment. A first communication from the DMD/CAO to the RC seemed to explain the decision in terms of a lack of business need. A second communication indicated instead that the decision was because Applicant had "not sufficiently demonstrated his leadership potential in driving innovation and strategic changes." In her Grievance

¹ This summary is provided by the Registry to assist in understanding the Tribunal's Judgment. It does not form part of the Judgment. The full Judgment of the Tribunal is the only authoritative text. The Tribunal's Judgments are available at: www.imf.org/tribunal.

Committee testimony, the DMD/CAO referred to both possible bases for her decision. Given the absence of a coherent account on the record of the reasons for the DMD/CAO's decision, the Tribunal proceeded to analyze that decision under each of the two mentioned criteria, that is, lack of business need and lack of career potential.

To the extent that the DMD/CAO's decision was based on lack of business need, the Tribunal found that the evidence on the record was inconsistent with that view. Applicant's managers testified to a need for the position and for the skills that Applicant brought to it. That need was underscored by the fact that as soon as the decision was taken not to convert Applicant's appointment, a vacancy was posted for a similar but lower graded position to fulfill many of the same responsibilities. The Tribunal accordingly concluded, to the extent that the decision to reject the RC's recommendation was based on lack business need, that the DMD/CAO had made a material error on the facts.

To the extent that the DMD/CAO's decision was based on lack of career potential, specifically, that Applicant had "not sufficiently demonstrated his leadership potential in driving innovation and strategic changes," the Tribunal concluded that Applicant had not been afforded adequate opportunity to demonstrate performance consistent with suitability for career employment, as required by the Fund's internal law. This was so because the DMD/CAO's view that Applicant lacked career potential was based on the premise that Applicant could not have improved his performance sufficiently within four months of having been advised of performance concerns to have met the bar for conversion. The consequence of that reasoning, said the Tribunal, was that Applicant could not have been given an adequate opportunity to demonstrate suitability for conversion during the period of his fixed-term appointment.

The Tribunal also considered the question whether the discretionary decision not to convert Applicant's fixed-term appointment had been taken consistently with fair and reasonable procedures, given that Applicant had not been provided an account in writing of the decision or the reasons for it. In the view of the Tribunal, the "obligation of a decision maker to give a reasoned written explanation for a decision, particularly where the decision has a profound and fundamental impact on the employment status of a person, is a general principle of international administrative law." (Para. 125.) Applying that principle to Applicant's case, the Tribunal observed:

[T]he absence of a written decision setting out its rationale deprived Applicant of a transparent account of the reason for the decision. It also hampered the process of this Tribunal's review of the decision for compliance with the internal law of the Fund [I]n the view of the Tribunal, the absence of a reasoned decision may [also] have been one of the factors that resulted in the failure clearly to articulate the reasons for the

decision in this case. If the DMD/CAO had formulated her reasons in writing and furnished them to the Applicant, some of the inconsistencies identified in this Judgment might have been avoided.

(Para. 129.) “Where, as in Applicant’s case,” said the Tribunal, “Fund Management’s decision on non-conversion diverges from the advice given it by the RC, it was essential to avoid arbitrariness that the DMD/CAO provide a reasoned explanation for rejecting that advice.” (*Id.*)

Accordingly, the Tribunal concluded that the non-conversion decision constituted an abuse of discretion, given that it could not be substantiated on either of the possible bases that the DMD/CAO appeared to give for it, and because it was not taken in accordance with fair and reasonable procedures.

The Tribunal next considered whether the Fund had abused its discretion in the process of taking the decision not to select Applicant to a vacancy for a similar, but lower graded, position to which he applied following the non-conversion decision. Applicant alleged that the decision was improperly influenced by the non-conversion decision and that HRD officials wrongfully precluded his selection on that basis. Having reviewed the record, the Tribunal found that HRD did improperly interfere with the selection process in relation to Applicant: The Tribunal observed that it is “not open to the Fund, on the one hand, to say that the candidate is eligible for appointment to a position, and then once the candidate is under consideration by the selection panel to convey to the selection panel that the appointment of the candidate will not be approved by HRD despite HRD’s having advised that the candidate is eligible to apply.” (Para. 153.) Given that the Fund had not identified any rule that precluded Applicant’s selection for the Grade A13/A14 vacancy following the non-conversion of his fixed-term appointment at Grade A15, the intercession of the HRD officials unfairly deprived Applicant of the opportunity to compete for the position. Thus, the Fund abused its discretion in the process it applied in taking the non-selection decision.

Having concluded that Applicant had prevailed on both of his principal claims, the Tribunal decided what relief should be granted:

With respect to the non-conversion decision, the Tribunal rescinded that decision, in accordance with Article XIV, Section 1, of its Statute. Rescission of the non-conversion decision, however, does not automatically reinstate Applicant in the employment of the Fund. In the circumstances of the case, including the considerations mentioned in the Commentary on the Statute, p. 37, as well as the seniority of Applicant’s position and the time elapsed since Applicant separated from the Fund, the Tribunal concluded that monetary compensation was a more appropriate remedy. “[C]ompensation in lieu of reinstatement,” emphasized the Tribunal, “must be substantial, and it must take account of the advanced

stage of Applicant's career at the time when the non-conversion decision was taken and, consequently, his diminished prospects for reemployment." (Para. 167.) The Tribunal set that sum at the equivalent of three times Applicant's last annual salary from the Fund.

With respect to the non-selection decision, the Tribunal awarded monetary compensation for intangible injury. "[I]ntangible injury ordinarily arises when the Fund 'fails through inaction to discharge a duty imposed by its written law or by general principles of international administrative law, such as the obligation to take decisions in accordance with fair and reasonable procedures.'" (Para. 170, citations omitted.) In such cases, the Tribunal must identify the injury and assess its nature and severity, giving due weight to factors that may either aggravate or mitigate the degree of harm to the applicant. In this case, said the Tribunal, "[a] singular aggravating factor . . . is that the non-conversion decision, which the Fund interposed as an obstacle to the fair consideration of Applicant's candidacy for the vacancy, was itself an abuse of discretion and has been rescinded by this Tribunal." (Para. 172.) Accordingly, the Tribunal found that the "career-ending nature of the invalid non-conversion decision was compounded by the procedurally unfair non-selection decision." (*Id.*) For that reason, the Tribunal awarded a substantial sum for intangible injury, that is, a sum equivalent to Applicant's last annual salary from the Fund (reduced by the amount that the Fund had earlier paid Applicant in relation to the Grievance Committee's recommendation in the case).

Lastly, pursuant to Article XIV, Section 4, of the Statute, the Tribunal ordered the Fund to pay Applicant the legal fees and costs he had incurred in bringing the case, in the sum of \$95,397.86, including unreimbursed fees incurred in the Grievance Committee proceedings.