

REGISTRY'S SUMMARY¹: *Mr. "SS", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-3 (December 27, 2021)

REQUEST FROM ANOTHER STAFF MEMBER – ANONYMITY – CONFIDENTIALITY OF MEDIATION PROCEEDINGS – DISCRIMINATION ON THE BASIS OF DISABILITY – REASONABLE ACCOMMODATIONS – RETALIATION – BREACH OF MEDIATION AGREEMENT – UNFAIR TREATMENT

Applicant, a staff member, alleged that the Fund denied him reasonable accommodations for his hearing disability and discriminated against him in other ways based on his disability; retaliated against him for seeking reasonable accommodations, alleging discrimination, and raising ethics complaints through various channels; breached terms of a partial mediation agreement; and subjected him to a pattern of unfair treatment.

This is the first instance in which the Tribunal was asked to interpret the Fund's written policy on disability accommodations as set out in the Staff Handbook, Chapter 11.01, Section 5.3. The case also presented other novel procedural and substantive issues.

An initial procedural question arose when, pursuant to Rule IV(f) of the Tribunal's Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Application. Another staff member stated that they believed they had experienced similar issues and requested that the Registrar convey their name and email address to Applicant. Considering, among other points, the Registrar's obligation to maintain confidentiality and neutrality, the Tribunal determined that the Registrar should not accede to the other staff member's request.

The Tribunal also addressed whether to accord anonymity to an applicant over the applicant's objection. The Fund requested anonymity for "all concerned in this case" on the grounds that the case presents each of the three types of circumstances that the Tribunal had previously concluded would warrant anonymity: a challenge to a performance assessment, allegations of staff misconduct, and health issues. Applicant objected to anonymity for himself, asserting that his earlier privacy concerns regarding his disability had been rendered moot. The Tribunal reasoned that "even if Applicant may decline to protect the privacy of his own health information, the Fund retains valid interests in protecting the privacy of staff whom Applicant has accused of discrimination, retaliation, and other misconduct; and in preserving the integrity of performance assessment processes, such as the APR at issue in this case, which rely on candid feedback." (Para. 22). Were Applicant to be identified by name, it would be impossible to protect the identities of the individuals whom he had accused of misconduct or who had provided feedback for his APR. The Tribunal thus concluded there was good cause to protect the identity of all concerned, including Applicant.

Applicant's request for production of documents raised the issue of the confidentiality of mediation proceedings. Applicant asserted that an email in the Fund's possession would show that his supervisor was aware of his mediation request before she took allegedly retaliatory actions. The Fund argued that the email was a protected

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 and Orders are available at: www.imf.org/tribunal.

communication between the supervisor and the Mediator. The Tribunal considered the Mediation Rules and reviewed the email *in camera*. The Tribunal stated:

The Tribunal recognizes the importance of protecting the confidentiality of mediation proceedings in general, consistent with the provisions of the Mediation Rules. It is particularly essential to protect the strict confidentiality of substantive bilateral communications between each party and the Mediator. The parties must feel free to express views and explore possibilities for resolution privately with the Mediator, without fear that such views may be revealed or used against them in the course of the mediation or subsequent proceedings.

(Para. 26) (internal footnote omitted). At the same time, the Tribunal noted that the Mediation Rules recognized certain exceptions to mediation confidentiality; and stated that it would consider the potential relevance and probative value of the information requested. As both parties had acquiesced in the disclosure of the fact of the mediation in these proceedings, it was not necessary for the Tribunal to protect the confidentiality of that fact. Considering the parties' positions and the record as a whole, the Tribunal determined that the email in question should be admitted in redacted form, solely to establish the timing of the supervisor's awareness of Applicant's mediation request.

Turning to the merits of the case, the Tribunal began its consideration of Applicant's discrimination claims with the following observations (Para. 97):

The Fund's antidiscrimination policies recognize that discrimination based on disability is on a par with religious bias and other serious types of discrimination. . . . Discrimination based on disability violates not only the Fund's internal law, but also universally accepted principles of human rights. Accordingly, the Tribunal shall apply heightened scrutiny to allegations of discrimination based on disability. This applies not only to claims of discriminatory actions taken against staff with disabilities, but also to claims that the Fund has through its inaction failed to provide the types of reasonable accommodations that are needed to level the playing field for disabled staff.

The Tribunal also noted the Fund's standards for disability accommodations (Para. 100):

This case presents the first instance in which the Tribunal is asked to interpret the Fund's written policy on disability accommodations as set out in the Staff Handbook, Chapter 11.01, Section 5.3. . . . Under the provisions of Section 5.3. . . . , the Fund was obliged to provide reasonable accommodations, at Applicant's request, to enable him to perform "the essential

functions” of his job. The Fund had the discretion to decide between “one or more reasonable options” where available. The Fund was not obliged to provide accommodations that would cause “undue hardship for the Fund (i.e., significant and disproportionate expense or difficulty).”

Applying heightened scrutiny, the Tribunal found no merit to Applicant’s discrimination claims. First, the Tribunal found that the Fund fully satisfied its duty to provide reasonable accommodations for Applicant’s disability. The Tribunal observed that the record reflected extensive engagement between Applicant and the Fund to identify accommodations that would support his core work, and also that many of those accommodations were implemented.

In considering Applicant’s claim that the Fund failed to provide adequate accommodations for social events, the Tribunal held that “a fair approach, consistent with the touchstone of ‘reasonableness’ embodied in Section 5.3, is to recognize that the Fund should make efforts to facilitate disabled employees’ participation in social events proportionate to the significance of such events to building work effectiveness in a team environment.” (Para. 124). The Tribunal found that the Fund met this standard.

The Tribunal also addressed Applicant’s complaint that the Fund failed proactively to engage in an effective interactive process, and that the burden thus fell on him to follow up on accommodations with various offices:

The Tribunal accepts that both sides must engage in an interactive process. Identifying, refining, and applying appropriate accommodations based on individual disabilities is an inherently iterative process that requires active engagement from both staff and management. Contrary to Applicant’s suggestion, the Tribunal does not find that the Fund must be the more “proactive” party in that process. Rather, the need to tailor accommodations to the individual employee, based on the employee’s confidential health conditions, requires a mutually interactive process that is largely employee-initiated and employee-led. Indeed, Section 5.3 specifies that the Fund’s duty to provide reasonable accommodations only arises “at the[] request” of the employee. The employee must pursue accommodations in the first place and identify when further adjustments may be needed.

(Para. 131). The Tribunal found ample evidence to establish the Fund’s good-faith engagement in an appropriate interactive process.

With respect to Applicant’s remaining discrimination claims, the Tribunal found that Applicant failed to meet his burden of proof to show any discrimination in the Fund’s

handling of his main work project, his FY2018 APR, or his office reassignment and safety arrangements.

Turning next to Applicant's retaliation claims, the Tribunal addressed the scope of activities protected under Fund law. The Tribunal rejected the Fund's argument that retaliation is prohibited only with respect to participation in formal ethics investigations or grievance proceedings (Para. 170):

The Retaliation Policy's wording makes clear that the Fund's prohibition against retaliation protects not only complainants and witnesses in formal ethics or grievance proceedings . . . but also "anyone" who uses "any of" the "channels available for speaking up, reporting suspected misconduct, raising ethical concerns, and participating in formal and informal dispute resolution." . . . Thus the Fund broadly protects all staff who "speak up" or "raise ethical concerns," either formally or informally, with managers or through other workplace conflict resolution channels.

With respect to Applicant's claims that he had suffered retaliation on numerous occasions over the course of a year, the Tribunal found that Applicant failed to meet his burden to show in each instance that (i) he had engaged in a protected activity, (ii) he had suffered an adverse action, and (iii) there was a causal link between his protected activity and the adverse action. For example, the Tribunal found that it was Applicant's hostile behavior, rather than any protected activities, that led to several of the actions he viewed as retaliatory. The Tribunal also determined that requesting accommodations in itself does not amount to "raising ethical concerns" or other protected activity under the Retaliation Policy (although complaints regarding such requests and the Fund's alleged failure to respond appropriately may be, and in Applicant's case were, addressed as a matter of alleged discrimination).

Applicant also presented complaints regarding his accommodations and management of his main work project in terms of breach of his partial mediation agreement with the Fund. While the Tribunal had not previously addressed claims of breach of a mediation agreement, the Tribunal has stressed the importance of enforcing negotiated agreements between staff and the Fund. In this instance, the Tribunal found that Applicant failed to show that the Fund had violated any provision of the plain text of the partial mediation agreement.

Finally, the Tribunal considered Applicant's claims that he was subjected to a pattern of stereotyping and other substantive unfair treatment, as well as procedural unfairness in the Administrative Review and Grievance Committee proceedings. The Tribunal found no merit to these claims and thus no compensable harm.

Accordingly, the Application of Mr. "SS" was denied.