

ADMINISTRATIVE TRIBUNAL
OF THE
INTERNATIONAL MONETARY FUND

Judgment No. 2022-3

December 22, 2022

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

Office of the Registrar

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INTERNATIONAL MONETARY FUND**

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INTRODUCTION

1. The Administrative Tribunal of the International Monetary Fund (“Tribunal”), composed for this case, pursuant to Article VII, Section 4 of the Tribunal’s Statute, of Judge Nassib G. Ziadé, President, and Judges Deborah Thomas-Felix and Andrew K.C. Nyirenda, has decided the Motion for Summary Dismissal (“Motion”) of the Application brought against the International Monetary Fund (“Respondent” or “Fund”) by “UU”, a staff member of the Fund. Applicant was represented by Messrs. Alex Haines and Jeremy Scott-Joynt, Outer Temple Chambers. Respondent was represented by Ms. Pheabe Morris, Senior Counsel, and Ms. Tuuli Mooney-Schindler, Counsel, in the Administrative Law Unit of the IMF Legal Department.

2. In his Application, Applicant contests the denial of his request to be reclassified from a Fungible Macroeconomist (“FM”) to a Financial Sector Expert (“FSE”). He acknowledges that he has not pursued remedies before the Grievance Committee, but argues that the Tribunal has jurisdiction over the matter because “the decision challenged herein is in truth a regulatory one.” He further argues that the matter involves not only a regulatory decision but also an individual one. In this respect, Applicant seeks, among other remedies, “specific performance in the form of the reclassification he has sought.”

3. In response, the Fund filed a Motion for Summary Dismissal of the Application on the grounds of failure to exhaust administrative remedies and failure to challenge the contested decision in a timely manner. The Fund asserts that the decision to deny the Applicant’s request for reclassification was based on a practice that did not rise to the level of a regulation.

4. A Motion for Summary Dismissal suspends the period for answering the Application until the Tribunal decides the Motion. Accordingly, in its deliberation on the Motion, the Tribunal is limited to the question of the admissibility of the Application.

FACTUAL BACKGROUND

5. Applicant joined the Fund in 2000. He is classified as an FM for purposes of the Fund’s Mobility Support Program, which means that he is required to change departments within the Fund every seven years.

6. Applicant states that on three separate occasions he has requested his reclassification from FM to FSE in light of his desire to remain in his current Department: once in 2019, when he was approaching seven consecutive years in the Department; once in 2020; and most recently on

January 12, 2021. Of the three requests, only the request of January 12, 2021, and a denial of July 1, 2021, are fully documented.

CHANNELS OF ADMINISTRATIVE REVIEW

7. On July 15, 2021, Applicant requested Administrative Review of the July 1, 2021 decision. Applicant's request was rejected by an Administrative Review decision dated March 8, 2022.

8. The decision (Administrative Review) concluded that Applicant had twice previously (in 2019 and 2020) requested the same reclassification and that his 2021 request for Administrative Review was therefore untimely, stating: "The time limits for requesting an administrative review of a decision are not extended by repeating a request or requesting reconsideration or clarification." The Administrative Review decision nonetheless examined the merits of the denial of Applicant's request for reclassification, finding it reasonable and based on "established parameters."

9. Applicant was informed in the Administrative Review decision of his right to file a Grievance with the Fund's Grievance Committee, and also that the Fund may contest the Grievance Committee's jurisdiction on grounds of timeliness. Applicant did not file a Grievance; instead, he chose to bypass the Grievance Committee and filed an Application directly to the Tribunal.

PROCEDURE BEFORE THE TRIBUNAL

10. On May 5, 2022, Applicant filed an Application with the Administrative Tribunal. The Application was supplemented, pursuant to Rule VII, para. 6, of the Tribunal's Rules of Procedure, on May 16, 2022 and transmitted to Respondent on the same day. On May 20, 2022, pursuant to Rule IV, paragraph (f), of the Tribunal's Rules of Procedure, the Registrar circulated within the Fund a notice summarizing the issues raised in the Application.

11. On June 15, 2022, pursuant to Rule XII, para. 2, of the Tribunal's Rules of Procedure,¹ Respondent filed a Motion for Summary Dismissal of the Application. The Motion was transmitted

¹ Rule XII provides, in relevant part, the following:

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.

...

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.

to Applicant on the following day. On July 14, 2022, pursuant to Rule XII, para. 5, of the Tribunal’s Rules of Procedure, Applicant filed an Objection to the Motion, which was transmitted to Respondent.

A. Applicant’s Request for Anonymity

12. In his Application, Applicant requested anonymity pursuant to Rule XXII² of the Tribunal’s Rules of Procedure, stating that “[a]nonymity will not adversely affect the Respondent in any way.” Respondent opposed Applicant’s request for anonymity on the basis that Applicant had not provided “good cause” to support his request as required by Rule XXII. Applicant argued that his request for anonymity was justified because the merits of the case would relate to Applicant’s “purported absence of . . . strong performance” – which was one of the criteria used to deny Applicant’s request for reclassification. Applicant asserts that “a dispute at the heart of the case” involves his performance and that privacy concerns therefore warrant that his request for anonymity be granted.

13. 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.” The 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, e.g., Ms. “AA”, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 13. One of the exceptions is to protect candor in the performance assessment process. This exception was first reflected in *Mr. “HH,” Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-4 (October 9, 2013), para. 43, where the applicant challenged a performance-based decision not to convert his fixed-term appointment to an open-ended appointment, and it has been extended to other circumstances in which an applicant’s professional competencies are at issue.

...

8. There shall be no further pleadings in respect of a motion for summary dismissal unless the President so requests.

² Rule XXII provides, in relevant part, the following:

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.

...

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.

14. The Tribunal finds that there is sufficient justification to grant Applicant's request for anonymity, as the case is one in which an applicant's professional competencies are at issue. The request for anonymity is granted.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS RELATING TO THE MOTION FOR SUMMARY DISMISSAL

A. Respondent's principal contentions on admissibility

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

1. Applicant is challenging an individual decision and is therefore required to exhaust internal remedies before the Grievance Committee, even if he is also challenging a purported regulatory decision;
2. The reclassification practice Applicant challenges is not in fact a regulation and the Administrative Review response did not constitute a regulatory decision;
3. The duration of a practice has no bearing on whether the practice becomes a regulatory decision;
4. The existence of a gap in the Fund's written regulations is not grounds for the exercise of direct review by the Tribunal;
5. Assuming that Applicant is only challenging a regulatory decision, the Application is untimely because Applicant knew of the reclassification practice (the purported "regulation") as early as 2019 and as late as 2020, and failed to challenge it in a timely manner; and
6. The request for Administrative Review was untimely because the individual decision denying Applicant's request for reclassification was taken as early as 2019 and no later than 2020.

B. Applicant's principal contentions on admissibility

16. The principal jurisdictional arguments presented by Applicant in his Application and in his Objection to the Motion for Summary Dismissal may be summarized as follows:

1. The Tribunal has jurisdiction *ratione materiae* because "the decision challenged herein is in truth a regulatory one";
2. The Tribunal has jurisdiction *ratione temporis* because the Application was filed within three months of the Administrative Review decision, which defined reclassification criteria for the first time and constituted both a regulatory and an individual decision; and

3. No formal reclassification decisions were made in 2019 or 2020 because there were no written determinations nor any explanations of the rationale for the decisions.

CONSIDERATION OF THE ADMISSIBILITY OF THE APPLICATION

17. Pursuant to Article II, Section 1(a), of its Statute, the Tribunal is competent to pass judgment upon any application submitted by a staff member challenging the legality of an administrative act adversely affecting him or her. The expression “administrative act” is defined as “any individual or regulatory decision taken in the administration of the staff of the Fund.” (*See* Article II, Section 2(a) of the Statute.) “Regulatory decision,” in turn, is defined as “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.” (*See* Article II, Section 2(b) of the Statute.) The Commentary³ on Article II, Section 2, explains that “the tribunal would have jurisdiction to review regulatory decisions, either directly or in the context of a review of an individual decision based on the regulatory decision.”

18. However, while the Tribunal is competent to pass judgment on both individual and regulatory decisions taken in the administration of the staff of the Fund, there are certain requirements that must be satisfied in advance of submitting an application with the Tribunal. The requirements vary, depending on whether the application challenges an individual decision, a regulatory decision, or both.

19. First, with respect to a challenge of an individual decision, an application must be filed with the Tribunal within three months after all available channels of administrative review have been exhausted or, in the absence of such channels, within three months after the notification of the decision. (*See* Article V and Article VI, Section 1 of the Statute.) The Commentary on Article V states that “[t]he exhaustion requirement is imposed by the statutes of all major administrative tribunals, presumably for the reason that the tribunal is intended as the forum of last resort after all other channels of recourse have been attempted by the staff member, and the administration has had a full opportunity to assess a complaint in order to determine whether corrective measures are appropriate.” Further, as the Tribunal observed in *Estate of Mr. “D”, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 66, “[t]he requirement for exhaustion of remedies serves the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication.” *See also Ms. “Y”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1998-1 (December 18, 1998), para. 42, where the Tribunal held that “recourse to the Grievance Committee would have the advantage of producing a detailed factual and legal record which is of great assistance to consideration of a case by the Administrative Tribunal”; and *Ms. C. O’Connor, Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2010-1 (February 8, 2010), para. 34. In

³ 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 Reports of the Executive Board to the Board of Governors on Amendments to the Statute of the Administrative Tribunal for the International Monetary Fund (2009 and 2020).

the instant case, there is no evidence that all available channels of administrative review have been exhausted before this Application was made to the Tribunal, contrary to Article V and Article VI, Section 1 of the Statute.

20. Second, regarding a challenge solely to a regulatory decision, an application may be filed directly with the Tribunal, within three months after the announcement or effective date of the decision, whichever is later. (*See* Article VI, Section 2 of the Statute.) The Commentary on Article VI, Section 2, explains that it is useful to permit direct review by the Tribunal within this time period, because this could expedite the resolution of issues involving the regulation before there would be “considerable reliance on, or implementation of, the contested decision.”

21. Lastly, with respect to a challenge to both an individual decision and a regulatory decision, the Statute provides that a regulatory decision may be challenged at any time in the context of an application challenging an individual decision that was taken pursuant to the regulation; however, in such cases, the application must be “admissible.” (*See* Article VI, Section 2 of the Statute.) Further, the Commentary on Article VI, Section 2, makes the following important clarification in cases involving both grounds:

In cases involving both types of grounds, the requirements of the tribunal statute regarding exhaustion of remedies and the statute of limitations should be understood as follows. The Grievance Committee would first hear the case and dispose of the issues over which it had jurisdiction (i.e., whether the decision at issue involved a correct interpretation or application of the Fund’s rules). If the Grievance Committee rejected his case, the staff member could then proceed to the tribunal. At that time, it would be open to him to raise, as grounds for review, not only the issues that were before the Grievance Committee but also, if appropriate, the legality of the underlying regulatory decision, regardless of whether more than three months had passed since the individual decision at issue had been taken. In essence, the pursuit of administrative remedies as to the issue of interpretation or application would suspend the time period for seeking review of the decision on grounds for which no administrative review is available.

22. Applicant asserts that he is challenging a regulatory decision. However, he further expressly states that this matter involves not only a regulatory decision but also an individual one and adds that the Administrative Review decision “comprise[d] both a regulatory and individual decision which should be considered together.” In this regard, Applicant makes arguments on the merits challenging the decision to deny his request for reclassification, and seeks “specific performance in the form of the reclassification he has sought,” among other reliefs.

CONCLUSIONS OF THE TRIBUNAL

23. Respondent contends that Applicant does not contest a regulatory decision at all but only an individual decision, to which he has failed to launch a timely challenge. The Tribunal does not need to determine these questions to dispose of the pending Motion. What is clear and dispositive

is that Applicant's case is not admissible for review because, even if he does challenge a regulatory decision, he does so in the context of a challenge to an individual decision and such a decision must be first pursued at the Grievance Committee.

24. Considering the above, even assuming that the Administrative Review request against the reclassification decision, an individual decision, was timely filed and that the criteria used to deny Applicant's reclassification request constituted a regulatory decision (matters over which the Tribunal has not ruled), Applicant himself confirms that he is challenging both decisions before the Tribunal. Therefore, pursuant to Article VI, Section 2, of the Statute and its Commentary, the Grievance Committee is the proper forum to hear the case first and to dispose of the issues over which it has jurisdiction.

25. Accordingly, the Motion for Summary Dismissal is granted to the extent that it seeks dismissal of the Application for failure to exhaust all available channels of administrative review as required by Article V of the Tribunal's Statute, and the Application is dismissed.

DECISION

FOR THESE REASONS

The Administrative Tribunal of the International Monetary Fund unanimously decides that:
the Motion for Summary Dismissal is granted; and
the Application of “UU” is dismissed.

Nassib G. Ziadé, President

Deborah Thomas-Felix, Judge

Andrew K.C. Nyirenda, Judge

_____/s/
Nassib G. Ziadé, President

_____/s/
Celia Goldman, Registrar

Washington, D.C.
December 22, 2022