

REGISTRY'S SUMMARY<sup>1</sup>: *Elkjaer et al., Applicants v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-4 (December 28, 2021)

DIRECT CHALLENGE TO "REGULATORY DECISION" – "FUNDAMENTAL AND ESSENTIAL" CONDITIONS OF EMPLOYMENT – "RULES-BASED" COMPENSATION SYSTEM – MEDICAL BENEFITS PLAN (MBP) – CONSULTATION WITH KEY STAKEHOLDERS – AMICUS CURIAE – ORAL PROCEEDINGS OPEN TO ALL INTERESTED PERSONS

Applicants, four staff members of the Fund who also served as principals of the Staff Association Committee (SAC), challenged the decision of the Fund's Executive Board, effective May 1, 2020, to increase the FY2021 annual contribution rate for participants in the Medical Benefits Plan (MBP or Plan) by 3.6 percent, which was a rate of increase greater than that of the structural salary scale for the same year of 2.7 percent. Applicants brought their case pursuant to Article VI(2) of the Tribunal's Statute, which provides for direct challenges to "regulatory decisions," that is, rules of the Fund concerning terms and conditions of staff employment. Representatives of the IMF Retirees Association (IMFRA) requested and were granted the opportunity to communicate views to the Tribunal as Amicus Curiae in support of the Applications, in accordance with Rule XV of the Tribunal's Rules of Procedure.

The case was the first in which the Tribunal held oral proceedings "open to all interested persons," as contemplated by the Tribunal's Statute (Article XII) and Rules of Procedure (Rule XIII). (Earlier cases involving oral proceedings had been "held in private," as authorized by the Statute and Rules, to protect the privacy of individuals.) Given that the Tribunal's session was to be held "by electronic means" (Statute, Article XI) in light of the ongoing COVID-19 pandemic, and that the case affected Fund staff and retirees generally, the Tribunal decided that all Fund staff and retirees would be invited as "interested persons" to view the virtual proceedings in real time through the Fund's videoconferencing platform. Some 250 Fund staff and retirees viewed some or all of the proceedings. Additional staff members and retirees have been able to access a recording of the proceedings by request to the Registrar. Additionally, in connection with holding oral proceedings "open to all interested persons" in a case challenging a "regulatory decision," the Tribunal—on an exceptional basis—granted Applicants' request (to which the Fund did not object) to make accessible to Fund staff and retirees the parties' written submissions in the case.

The Tribunal considered the issues raised by the Applications as follows.

The Tribunal began by considering whether, as Applicants asserted, a rule had been established by "formal commitment" or "longstanding practice" of the Fund, that the increase in annual MBP contribution rates was not to exceed the adjustment to the structural salary

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<sup>1</sup> 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](http://www.imf.org/tribunal).

scale for a given year. The Tribunal concluded that a 2008 Board decision did not establish such a rule. Rather, that decision represented a limited delegation of the Executive Board's authority to the Managing Director to increase MBP contribution rates annually. There was nothing in the 2008 decision, said the Tribunal, to suggest that the Executive Board intended to constrain its own authority to determine contribution rate increases in a manner *not* based on the percentage structural adjustment to staff compensation. The Tribunal also noted that the Board Paper underpinning the Executive Board's 2008 decision expressly stated that the new funding framework would pre-announce annual adjustments to the MBP contribution rate in line with the structural salary increase "at a minimum," not as a ceiling. Accordingly, the Tribunal found unconvincing Applicants' contention that the 2008 Board decision constituted a "formal commitment" by the Executive Board to constrain its own authority to vary MBP contribution rates.

The Tribunal also found unpersuasive Applicants' argument that the Fund had established by "longstanding practice" a rule capping MBP contribution rate increases by the adjustment to the structural salary scale. The Tribunal observed that although in most years between 2008 and 2020 increases in MBP contribution rates matched the annual adjustment to the salary structure, there was no evidence to suggest that the Fund considered itself to be legally obliged to limit increases to the MBP contribution rate in that manner. The Tribunal referred to its jurisprudence holding that "the integration of practice into the conditions of employment is 'limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation.'" (Para. 93, citations omitted.) There was no such evidence here.

Having concluded that Applicants had not shown that there was a rule of the Fund capping the MBP contribution rate increase by the structural salary adjustment, the Tribunal next considered whether that meant that the Fund had violated a "fundamental and essential" condition of Applicants' employment to maintain a "rules-based" compensation system. The Tribunal initially observed that the Fund's commitment to a "rules-based" compensation system was focused primarily on salary structure determination, and that the "rules-based" system included "some scope for management and the Executive Board to exercise judgment within defined parameters, in setting salary levels." (Para. 101, citation omitted.) The Tribunal nonetheless accepted, for purposes of the Judgment, that a "rules-based" compensation scheme applied as well to other employment benefits, including the MBP. In the case of the MBP, those rules are found primarily in the Plan itself. The Plan, by its terms, permitted the Fund as employer to vary contribution rates. The Tribunal noted that "provision for the exercise of discretion within a system does not invalidate the system," (Para. 103, citations omitted) and that the exercise of the Fund's discretionary authority is regulated by constraints against its abuse, as the Commentary on the Statute, p. 19, makes clear. That discretion, said the Tribunal, did not mean that the Plan was not "rules-based" or that the contested decision setting the FY2021 MBP contribution rate contravened the Fund's

obligation to maintain a “rules-based” compensation system as a “fundamental and essential” condition of employment.

Given the Tribunal’s conclusion that the rate of the MBP contribution increase was not insulated from unilateral amendment as a “fundamental and essential” condition of employment, the Tribunal next considered whether the Fund had abused the discretion it had open to it to amend non-fundamental terms and conditions of employment. Applicants alleged that the Fund had failed to base its FY2021 MBP contribution rate increase decision on an appropriate consideration of the relevant facts, including exploring alternative options. Having reviewed the extensive record of the case, the Tribunal concluded that the decision Applicants challenged was taken on the basis of the relevant facts available to the Fund at the time, including actuarial reports concerning the financial experience and projections for the Plan. The Tribunal also observed, first, that the impact of the FY2021 MBP contribution rate increase on staff members was not substantial, and second, that alternatives available to the Fund that Applicants mentioned might have been far more substantial in their impact, for example, by reducing the benefit structure of the MBP. The decision was a reasonable one in the light of those facts, concluded the Tribunal. The Tribunal cited its jurisprudence establishing that the Fund’s policy-making discretion extends to making choices between more than one reasonable alternative.

Lastly, the Tribunal considered Applicants’ contention that the challenged decision was not taken in accordance with fair and reasonable procedures, including meaningful consultation with key stakeholders. It was not disputed that the Fund had provided both SAC and IMFRA with the opportunity, albeit with a short turnaround time, to comment on the proposed approach to the MBP contribution rate for FY2021, and that SAC had raised concerns in that exchange.

The Tribunal noted that Management’s paper (EBAP/20/32) to the Board, recommending the MBP rate increase, gave no indication of SAC’s objections to the proposed policy change. “It would have been good practice,” said the Tribunal, “for Management to have informed the Executive Board that the SAC (and IMFRA) had been consulted on the proposals in the Board Paper and had raised concerns.” (Para. 127) The Tribunal went on to conclude:

Yet, the fact that Management did not do so, did not constitute a bar to the SAC and IMFRA informing the Executive Board themselves of their dissatisfaction with the recommendations. Given that the SAC and IMFRA could have approached the Board, but failed to do so, the Tribunal cannot conclude that the Fund failed to act in accordance with fair procedures when it did not draw their concerns about the proposals to the

Executive Board's attention. Responsibility for meaningful consultation rests with both sides. (*Id.*)

On balance, the Tribunal decided that the Fund did not abuse its discretion in taking the FY2021 MBP contribution rate decision for failure to engage in meaningful consultation with key stakeholders. "Although that consultation might have been more extensive," said the Tribunal, "Applicants have not established that the Fund's conduct with regard to the consultations represented an abuse of discretion." (Para. 128.) The Tribunal, however, did express its concern that neither Management nor the SAC brought the issue of their disagreement to the Board's attention: "When decisions come before the Board relating to staff employment, compensation and benefits, the Board's decision-making process will benefit from being fully informed of the views of all key stakeholders." (*Id.*)

In sum, the Tribunal concluded that the Fund did not violate a "fundamental and essential" condition of Applicants' employment or abuse the discretionary authority it had open to it in setting the FY2021 MBP contribution rate. Accordingly, the Applications were denied.