ADMINISTRATIVE TRIBUNAL

OF THE

INTERNATIONAL MONETARY FUND

Judgment No. 2024-2

June 7, 2024

"XX", Applicant v. International Monetary Fund, Respondent
(Admissibility of the Application)

Office of the Registrar

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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 Maria Vicien Milburn 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 "XX", a staff member of the Fund. Applicant was represented in the proceedings by Messrs. Peter C. Hansen, J. Michael King, and Francis E. Waliczek, Law Offices of Peter C. Hansen, LLC. Respondent was represented by Mr. Erik Plith, Senior Counsel, and Ms. Tuuli Mooney-Schindler, Counsel, in the Administrative Law Unit of the IMF Legal Department.

2. Applicant challenges as arbitrary and capricious the terms of her employment upon her return to Fund staff following service with the IMF Executive Board ("Board") as an Assistant to an IMF Executive Director ("ED"). Applicant resumed Grade A6 status on the Fund staff, rather than retaining the Grade A8 attained during her employment with the Board. Applicant alleges that a requirement to complete six years of Board service to maintain the higher grade and salary was wrongfully applied to her, and that she was unfairly denied the opportunity to use annual leave accrued during Board service to be bridged to the six-year mark.

3. Respondent has responded to the Application with a Motion for Summary Dismissal on the ground that the Tribunal lacks jurisdiction *ratione temporis* over the Application.

4. A Motion for Summary Dismissal suspends the period for answering the Application until the Tribunal decides the Motion. Accordingly, at this stage, the case before the Tribunal is limited to the question of the admissibility of the Application.

FACTUAL BACKGROUND

5. In setting out the factual background, the Tribunal notes that because the pleadings on the merits have been suspended until the Tribunal decides the Motion, Respondent's version of the facts has yet to be presented fully to the Tribunal. The key facts relevant to the consideration of the Motion may be summarized as follows.

A. Separate employment frameworks for Fund staff and Board staff

6. This case arises in the context of the separate employment frameworks that govern "Fund staff"—who work under the direction of the Fund's Managing Director—and "Board staff"—who

serve the EDs. This differentiation is made clear by the Handbook on Executive Board Matters ("OED Handbook"), governing Administrative Assistants to EDs, which states at Part IV.B.1: "In the Rules and Regulations, Administrative Orders and other decisions, Advisors and Assistants to Executive Directors shall not be included in the term 'staff members.'"

7. The salient features of this bifurcated employment regime include: (a) "an Executive Director may terminate the appointment of an Advisor/Assistant at any time and for any reason the Executive Director considers sufficient" (OED Handbook, Part IV.B.2); and (b) "[a] regular staff member who receives an appointment as an Administrative or Staff Assistant to an Executive Director is entitled upon the expiration of the appointment to resume regular employment status with the Fund at his or her former grade" (OED Handbook, Part IV.B.5), unless he or she "has completed six years of continuous service" as an Administrative or Staff Assistant to an Executive Director, in which case "[f]or two years from the date of the appointment [to regular employment status], the individual's grade and salary will be 'grandfathered' in accordance with the provisions approved at Executive Board Meeting 86/16 (1/30/86)" (OED Handbook, Part IV.B.6.1).

8. As will be considered below, the separate frameworks governing employment of Fund staff and Board staff are reflected in the jurisdictional provisions of the Tribunal's Statute. These differences are key to the present dispute concerning the admissibility of the Application.

B. Applicant's initial contractual employment with the Fund; transfer to Board staff; and return to Fund staff (2007–2014)

9. Applicant began her employment with the Fund in 2007, initially as a contractual employee on the Fund staff. In 2008, Applicant transferred to Board staff, where she served as a Grade A6 Administrative Assistant to an ED until 2014.

10. In 2014, Applicant returned to Fund staff, while retaining her Grade level of A6.

C. Applicant's second appointment to Board staff (2015–2021)

11. Effective September 1, 2015, Applicant transferred again, moving from Fund staff to Board staff, taking up an appointment as a Grade A7 Administrative Assistant to a different ED.

12. Applicant's "change in appointment status, effective September 1, 2015, from that of a regular staff member" was confirmed to her by letter from the Fund's Human Resources Department ("HRD"). The letter was dated April 20, 2016, and countersigned by Applicant on the same date. Citing and enclosing EBAP/86/169 (July 11, 1986), the letter referred to Applicant's entitlement to resume employment on the Fund staff in the event of termination of her Board employment:

> As an Administrative Assistant to an Executive Director, you will be subject to present and future administrative regulations for the governance of such employees.

> In accordance with the rules governing Administrative Assistants to Executive Directors, your appointment may be terminated at any time at the request of the Executive Director.
>
> If your appointment is terminated by the Executive Director, you will be entitled to resume your regular employment status in the Fund. Your reinstatement to regular employment status would be at your former grade and at a salary within that grade closest to the one you received as an Administrative Assistant. *Alternatively, if at the time of your return to the staff, you have held the position of Administrative Assistant in the Executive Director's office for a period of six or more years, you may opt to have your grade and salary "grandfathered" for a period of two years in accordance with the provisions approved at Executive Board Meeting 86/16 (January 30, 198[6]) for staff whose positions had been downgraded under the job grading exercise*. Following this two-year "grandfathering" period, if you have not been assigned to an appropriately graded position, you will revert to Grade A06. I would draw your attention to *EBAP/86/169* (July 11, 1986) on staff employment rights for Secretarial and Clerical Assistants, which sets out the rules applicable to the re-employment of Administrative Assistants to Executive Directors.

(Emphasis added.) The letter identified a contact person in HRD for "any questions on issues relating to re-employment rights in general or your own situation in particular."

13. On July 1, 2019, while continuing to serve as an Administrative Assistant to the ED, Applicant was promoted to Grade A8. In December 2019, the ED under whom Applicant had been serving was succeeded by a new ED.

D. Termination of Applicant's Board appointment (May 31, 2021) and return to Fund staff (June 1, 2021)

14. On May 10, 2021, the new ED notified Applicant that he had decided to terminate her appointment effective May 31, 2021. This decision was communicated in person, followed by an e-mail stating that the decision "was not taken lightly" and "was grounded on careful assessment of [Applicant's] performance."

15. The terms upon which Applicant returned to the staff of the Fund in 2021 give rise to the controversy in this case. By letter of June 3, 2021, HRD advised Applicant of her "transfer to the regular staff of the Fund" at Grade A6, effective June 1, 2021:

> In accordance with the rules governing the staff employment rights of Administrative Assistants to Executive Directors, this is to advise you of your transfer to the regular staff of the Fund on a full-time basis, effective June 1, 2021, as an Administrative Assistant, Grade A06 . . . . Your transfer to the staff is governed under EBAP/86/169, paragraph 2(b), which provides

> additional information on staff employment rights for Assistants to Executive Directors.
>
> As a regular staff member of the Fund, you will be subject to present and future administrative regulations for the governance of such staff.

This letter, like the earlier letter issued in connection with Applicant's 2015 transfer to Board staff, identified a contact person in HRD for "any questions on issues relating to re-employment rights in general or your own situation in particular."

16. Applicant signed her acceptance of "this change in appointment status" more than a month later, on July 8, 2021, following her unsuccessful efforts to extend the period of her Board service to meet the six-year requirement of EBAP/86/169, so as to retain her Grade A8 upon return to Fund staff.

E. Applicant's efforts to extend to six years the period of her Board employment through requests for "bridging leave"

(1) Applicant's requests to the ED

17. On June 9, 2021, Applicant wrote to the ED, seeking approval to use her accrued annual leave to extend her appointment in the ED's office to September 2, 2021, thereby bridging her to six years of Board service:

> . . . I have only now been informed that because I have 3 months to complete my 6-year period [in the ED's office], I would be penalized and have my grade downgraded, from grade 8 to grade 6, implying a catastrophic impact on my future salary and pension.
>
> Therefore, I would greatly appreciate it if you would allow me to administratively remain [in the ED's Office] while on annual leave until September 2, 2021. This would be the time needed to make 6 years and avoid the penalty. . . .

The ED replied on the next day, as follows:

> Unfortunately, this decision has already been irrevocably made and cannot be reversed. Fulfilling your request would represent an improper use of the office's budget, which should support the work on behalf of member countries.
>
> Sorry, we won't be able to fulfill your request.

18. On June 11, 2021, Applicant again wrote to the ED:

> I understand that your decision to terminate my duties [in the ED's Office] is irrevocable. However, I feel compelled to clarify my request: I requested vacation days, but precisely 67 days, which were acquired directly proportional to the days I worked [in the ED's Office] . . . .
>
> . . . .
>
> There is no legal or administrative impediment on the part of the IMF. It is just required [that] the authorization of the Executive Director for vacation . . . be given before the dismissal, which . . . date would be September 2, 2021. The entire transfer takes longer than expected, and now it would still be possible to complete the procedures after receiving your approval. . . .

The ED responded on the same day, again declining to grant Applicant's request:

> I understand your concern, but, as I've already said, I don't see how I can help you within what I consider to be the rules of good management of the office's resources (budget). *Thus, I suggest that you discuss the matter with SEC [Secretary's Department] and HRD, seeking with them other alternative solutions that do not involve the [ED's Office]. I would, therefore, kindly request that any new request on the subject be made to the SEC and HRD.*

(Emphasis added.)

(2) Applicant's requests to the then HRD Director

19. On July 6, 2021, Applicant met with the then HRD Director. On the same date and in advance of their meeting, Applicant communicated in writing to the then HRD Director "a summary of my case, which relates to the use of my cumulated annual leave until September 2, 2021 in order to avoid being downgraded from grade 8 to grade 6." According to Applicant's account, the then HRD Director denied the leave request orally at their meeting, for three stated reasons: (i) Applicant's alleged poor performance in the opinion of the ED; (ii) Applicant's returning for a second round of help after HRD had made a previous exception to let her circumvent the six-year rule for purposes of her first period of Board service from June 2008 to May 2014; and (iii) Applicant's options to have taken her annual leave during her Board service or carry over unused leave to another Fund department. The parties do not dispute that the then HRD Director did not take any action in response to Applicant's request.

20. As noted, on July 8, 2021, Applicant signed the letter accepting her transfer to Fund staff at Grade A6, effective June 1, 2021. Applicant asserts that she "signed her backdated . . . contract under duress, as it was the only way to preserve her employment with the Fund staff, and was required of her under crash circumstances."

21. On July 27, 2021, Applicant sent another e-mail to the then HRD Director, contesting what she described as the reasons given at their meeting of July 6, 2021, for not granting her request.

Applicant disputed any allegation of poor performance; cited other Assistants who had been granted three months' bridging leave by the ED to reach the six-year mark before termination; and argued that the options of either using her accrued annual leave or cashing it out at a subsequently reduced salary were inadequate. Applicant further stated that on "July 23, 2021[,] I received my first paycheck with the reduced salary. It was a shock, sort of a 'wake up call' for the situation that was imposed on me after so many years of hard work." Recognizing that the then HRD Director would soon be retiring, Applicant "request[ed] . . . that this message be included in my permanent file as an account of my view regarding this unfortunate situation in case it is needed in the future."

PROCEDURAL HISTORY

22. On January 6, 2022, Applicant filed a "placeholder" Grievance with the Fund's Grievance Committee, followed on February 14, 2022, by an Amended Statement of Grievance. Applicant has incorporated by reference the Amended Statement of Grievance into the Application before the Tribunal.

23. On March 25, 2022, Respondent filed a Motion to Dismiss the Grievance, raising arguments similar to those now raised before the Tribunal, including that assistants to EDs are not staff members for purposes of the Grievance Committee's jurisdiction; that Applicant was out of time to challenge the ED's decision to terminate her employment; and that neither the letter from HRD informing Applicant of the terms of her return to Fund staff nor Applicant's subsequent engagement on the issue with the then HRD Director amounted to a grievable decision.

24. On April 25, 2022, Applicant filed a Partial Opposition to the Motion to Dismiss, in which she stated that the "entire reason" for filing the Grievance was to "satisfy the 'exhaustion of internal remedies' requirement for passing the Tribunal's threshold." Applicant also referred to a *lacuna* "leaving Board-level staff confused as to how to proceed, and those who straddle both spheres—like [Applicant]—completely unguided and uncertain as to where to start," noting that her case "spans the divide erected between the Board and the 'regular' staff."

25. On May 11, 2022, the Grievance Committee granted the Motion to Dismiss the Grievance, on the ground that the Grievance failed to allege that Applicant was adversely affected by a decision that was "inconsistent with Fund regulations governing personnel and their conditions of service" (Staff Handbook, Ch. 11.03, Section 5.6) as required for the Grievance Committee to exercise jurisdiction.

PROCEDURE BEFORE THE TRIBUNAL

26. On August 11, 2022, Applicant filed an Application with the Tribunal. On August 23, 2022, the Application was supplemented at the request of the Registrar, in accordance with Rule VII(6) of the Tribunal's Rules of Procedure, and was transmitted to Respondent on the following day. On September 6, 2022, 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.

27. On September 23, 2022, pursuant to Rule XII[1] of the Tribunal's Rules of Procedure, Respondent filed its Motion for Summary Dismissal ("Motion") of the Application. On October 24, 2022, Applicant responded with an Objection ("Objection") to the Motion.

28. On January 8, 2024, the Tribunal requested that Applicant submit any request for legal fees and costs incurred in responding to the Motion, along with supporting documentation. Applicant filed her Request on January 16, 2024. On January 24, 2024, Respondent submitted responsive Comments.

29. Also on January 8, 2024, the Tribunal notified the parties of its decisions on Applicant's preliminary requests. These decisions are elaborated below.

A. Applicant's request for anonymity

30. Pursuant to Rule XXII of the Tribunal's Rules of Procedure, in her Application, Applicant requested that her name not be made public in the Tribunal's Judgment. In its Motion, Respondent opposed the request.

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[1] Rule XII (Summary Dismissal) provides:

> 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.

31. The Tribunal may grant a request for anonymity on a showing of "good cause." (Rule XXII(4).) The Tribunal's jurisprudence has evolved since the adoption of Rule XXII in 2004, when the granting of anonymity was closely associated with issues of an applicant's health, family relations, or allegations of misconduct. *See generally Ms. "AA", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2006-5 (November 27, 2006), para. 14. More recently, the Tribunal's practice has been to extend anonymity, when requested, to cases in which evidence to be brought out in the judgment relates to the applicant's job performance as assessed or perceived by managers. *See, e.g., Ms. "NN", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2017-2 (December 11, 2017), para. 29 (where although annual performance assessment was not at issue, managers' perception of applicant's performance was a key factual element underpinning issues of the case).

32. In the instant case, elements of the factual record, as developed to date, make reference to Applicant's work performance. For that reason, the Tribunal has granted Applicant's request that her name not be made public in this Judgment.

33. Although affording Applicant anonymity for the reason stated above, the Tribunal does not accept as ground for anonymity Applicant's unsubstantiated assertion of fear of retaliation for pursuing her case in the Tribunal. *See Mr. "QQ", Applicant v. International Monetary Fund, Respondent (Motion to Dismiss in Part)*, IMFAT Judgment No. 2020-1 (November 2, 2020), para. 13 (reaffirming that a '"bare assertion that adverse employment consequences may result from publication of an applicant's name does not, of itself, form a basis for granting a request for anonymity,'" while also confirming that the "Fund's robust enforcement of the anti-retaliation provisions of its internal law remains essential to the integrity of the dispute resolution process").

B. Applicant's requests for production of documents

34. Pursuant to Rule XVII of the Tribunal's Rules of Procedure, in her Application, Applicant made requests for production of documents. Respondent did not respond in its Motion to those requests, and Applicant did not address them in her Objection.

35. The Tribunal considered that the disposition of Applicant's requests for documents was not necessary to the determination of the pending Motion, and Applicant had not so argued. Accordingly, the Tribunal has deferred its decision on Applicant's requests for the production of documents until the merits phase of the proceedings.

C. Applicant's request for oral proceedings

36. Pursuant to Rule XIII of the Tribunal's Rules of Procedure, in her Application, Applicant requested oral proceedings, including "an oral hearing of the counsel in this case, as well as of any witness whom the Tribunal wishes to question." Respondent did not respond in its Motion to the request, and Applicant did not address it in her Objection.

37. In the absence of a request for oral argument on the question of summary dismissal, the Tribunal decided that oral proceedings would not be held at the admissibility stage, as it did not

deem such proceedings useful to its disposition of the Motion. The Tribunal accordingly has deferred until the merits phase its decision on Applicant's request for oral proceedings.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

38. The parties' principal arguments as presented by Applicant in her Application and her Objection to the Motion, and by Respondent in its Motion, may be summarized as follows.

A. Applicant's contentions on the merits

1. In returning to Fund staff after nearly six years on Board staff, Applicant should have been able to maintain her Board grade and salary. Applicant was subjected to an individual decision and an outdated rule that severely penalizes those who return to Fund service before completing six full years of Board employment.

2. Despite the terms of the six-year rule, the Fund has long had a practice of permitting reintegration of Board staff with less than six years' service into Fund staff on bespoke arrangements that preserve their Board grade and salary.

3. Both the ED and the then HRD Director acted arbitrarily, capriciously, and vindictively in refusing Applicant's requests to use leave accrued during her Board service to meet the six-year mark for retaining her Board grade and salary.

4. Applicant seeks as relief:

    a. conversion of 65 days of Applicant's unused annual Board leave (to cover the period June 1 – September 1, 2021) to satisfy the six-year requirement of EBAP/86/169;

    b. rescission of Applicant's existing Fund staff contract and terms of reference, and replacement by a new, backdated Fund staff contract allowing Applicant retroactively to: (i) maintain her employment as a Grade A8 employee; (ii) receive the same salary she did prior to returning to the staff of the Fund; and (iii) receive the full pension credit and rights she would have received before the downgrade;

    c. three years' salary as moral and intangible damages;

    d. all retroactive salary increases and benefits to which Applicant would have been entitled had her grade and salary not been reduced; and

    e. legal fees and costs, which the Tribunal may award, in accordance with Article XIV, Section 4, of the Tribunal's Statute, if it concludes that the Application is well-founded in whole or in part.

B. Respondent's contentions on admissibility

1. Applicant failed to file her Application within the statutory time limit, that is, three months from the termination decision made by the ED. The Tribunal accordingly lacks jurisdiction *ratione temporis* over the Application.

2. Assistants to EDs have direct recourse to the Tribunal because there are no available channels of administrative review to exhaust.

3. There was no uncertainty about the proper venue for Applicant's complaints. It was incumbent on Applicant to know and to follow the dispute resolution procedures applicable under her employment framework.

4. Filing a complaint with the wrong forum does not extend the time limit for submitting an application to the Tribunal. Thus, Applicant's misdirection of her complaint to the Grievance Committee does not relieve her of the requirement to file a timely Tribunal application. Further, the Grievance Committee's dismissal of Applicant's Grievance for lack of jurisdiction does not give rise to a new administrative decision from which Applicant can file a timely challenge before the Tribunal.

5. The letter from HRD informing Applicant of the terms of her return to Fund staff effective June 1, 2021, was not an administrative act subject to challenge.

6. Applicant's efforts to seek reconsideration by the ED of the termination date of her Board appointment does not give rise to a new and timely challenge.

7. The then HRD Director's engagement with Applicant following termination of her Board appointment was not an administrative act subject to challenge.

8. Article XX of the Tribunal's Statute, which precludes challenges to administrative acts pre-dating the entry in force of the Tribunal's Statute, bars any challenge to the 1986 Board decision governing the transfer of Board Administrative Assistants to Fund staff positions.

C. Applicant's contentions on admissibility

1. The Tribunal has jurisdiction *ratione temporis* over the Application because Applicant timely challenged the terms of her post-termination transfer to Fund staff, a challenge that implicates managers at both the Board and staff levels.

2. Rather than seek relief as Board staff, Applicant has "opted to litigate as a Fund staff member because she is currently employed by the Fund staff and the final decisions (in every sense) with regard to her transfer terms—including her thwarted effort to use earned leave to meet the EBAP's unconscionable six (6) year mark—were taken by Fund-staff management."

3. Applicant timely filed her Grievance six months from the then HRD Director's July 6, 2021, refusal to allow Applicant to use her accrued leave to meet the requirement of six years of Board service to retain her Board grade and salary. Applicant filed her Application with the Tribunal within three months from the Grievance Committee's dismissal of the Grievance.

4. Even if Applicant had been required to file her complaint as Board staff, exceptional circumstances justify the timing of her Tribunal Application. She had reason to believe that the ED was not the final decision-maker and that she could resort to the then HRD Director.

5. Exceptional circumstances also include that the Fund's "disjointed dispute resolution eco-system" does not address disputes arising in the course of transition between Board staff and Fund staff.

6. The Fund's theory that EBAP/86/169 is immune to challenge on the basis of Article XX of the Tribunal's Statute is "tenuous at best." Moreover, the discretionary authority applied by Board-staff and Fund-staff managers in implementing the EBAP is entirely reviewable. Additionally, the EBAP is "long overdue for formal revocation based on desuetude and the fact that the conditions behind its adoption have not pertained for decades." The EBAP may be "curtailed *de facto*, and flagged for formal retraction," through review of Board and Fund management's discretionary implementation of the rule and a Tribunal finding that "circumventions must be granted whenever possible."

CONSIDERATION OF THE ADMISSIBILITY OF THE APPLICATION

39. A motion for summary dismissal presents one principal issue for decision: Is the application "clearly inadmissible" in terms of Rule XII of the Tribunal's Rules of Procedure?

A. The "clearly inadmissible" standard for summary dismissal

40. The Tribunal has observed that "Rule XII sets a high bar for the dismissal of an application prior to a full airing of the merits of a case. . . . [O]nly an application that is 'clearly inadmissible' (Rule XII(1)) will be summarily dismissed." *Mr. "QQ",* para. 45. The "legislative history associated with Article X(2)(d) suggests that the drafters of the Statute sought to provide for dismissal at the threshold only of applications that the Tribunal deemed to be clearly irreceivable or devoid of merit." *Id.*, referencing Commentary on the Statute, note 21.

41. The Tribunal has further observed: "By setting a high bar for the summary dismissal of applications, the Rule protects applicants against having their right to be heard by the Tribunal being cut off prematurely." *Mr. "QQ"*, para. 47. At the same time, the Rule "provides a mechanism to shorten the proceedings where inadmissibility is clear at the outset, thereby protecting the Tribunal (and the Respondent) from the expenditure of time and resources on matters that have no reasonable ground for advancing beyond the threshold." *Id.*

42. It is also significant that the "clearly inadmissible" standard "protects against the risk of the Tribunal's taking an erroneous decision as to admissibility when the pleadings before it have yet to unfold in full." *Id.*, para. 48. The Rule is designed to facilitate dismissal of an application only when that disposition is "clear" to the Tribunal prior to the full exchange of pleadings on the merits.

B. Has Respondent shown that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis*?

43. Respondent's argument that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis* may be summarized as follows: The Application is cognizable only as a challenge to a decision of an ED. Thus, Applicant would have access to the Tribunal pursuant to Article II, Section 2(c)(ii), of the Tribunal's Statute, which grants the Tribunal jurisdiction *ratione personae* over "any current or former assistant to an Executive Director." The Fund has not provided any channels of administrative review to be exhausted in cases brought by assistants to EDs. Therefore, in accordance with Article VI, Section 1, of the Tribunal's Statute, the Application should have been filed with the Tribunal within three months of the ED's decision to terminate Applicant's Board appointment. The letter from HRD informing Applicant of her grade and salary on return to Fund staff was not an "administrative act" for purposes of the Tribunal's Statute. Nor can Applicant contest the refusals of the ED or the then HRD Director to grant "bridging leave" to extend Applicant's Board service to six years. Finally, the Grievance Committee's decision dismissing Applicant's Grievance for lack of jurisdiction was not a new administrative decision subject to challenge.

44. Respondent's argument takes as its starting point that the only administrative act challenged—or challengeable—by Applicant is the decision of the ED to terminate her employment effective May 31, 2021. The Tribunal begins by interrogating that premise.

45. The argument that the ED's termination decision is the only "administrative act" (Statute, Article II) at issue in the case reflects Respondent's theory on the merits, which is that Applicant's grade and salary on re-entering Fund staff from June 1, 2021, was determined automatically by the ED's termination decision. For purposes of considering a motion for summary dismissal, however, the Tribunal must also take account of Applicant's theory of the case on the merits. Applicant's theory of the case includes: (a) that HRD had discretion to vary the terms of Applicant's re-entry to Fund staff, irrespective of Applicant's not having completed six years of Board service, and (b) that either the ED or the then HRD Director could have acceded to Applicant's requests to extend the period of her Board service so that she would meet the six-year mark.

46. Given these competing theories on the merits of the case, the Tribunal considers—for purposes of deciding whether the Application is "clearly inadmissible"—that while the ED's termination decision gave rise to subsequent acts, that decision may not necessarily have determined those acts. The Tribunal understands that Applicant's plea is that the subsequent acts were separate "administrative acts" that "adversely affected" her within the meaning of the Statute and were not pre-determined by the termination decision.

47. Furthermore, Applicant submits that (at least some of) the acts she seeks to challenge bring her Application within the Tribunal's jurisdiction *ratione personae* in terms of Article II, Section 2(c)(i)—rather than Article II, Section 2(c)(ii)—of the Tribunal's Statute, that is, that she comes before the Tribunal as Fund staff rather than as Board staff. Applicant also refers to her "hybrid status and claims" and to her concern for "falling between chairs," given that the dispute relates to her transition from one employment regime to the other.

48. Applicant's invocation of Article II, Section 2(c)(i), as the basis for the Tribunal's jurisdiction *ratione personae* in her case is key to her argument that the Application is not "clearly inadmissible" for lack of jurisdiction *ratione temporis*. This is because Applicant's route to the Tribunal, and the timeliness of her efforts at recourse, depend upon which prong of the Tribunal's jurisdiction *ratione personae* governs.

(1) May the Tribunal exercise jurisdiction *ratione personae* in this case on the basis of Article II, Section 2(c)(i), of the Statute?

49. Article II, Section 1, of the Tribunal's Statute provides, in pertinent part, that the "Tribunal shall be competent to pass judgment upon any application":

> a. by a member of the staff challenging the legality of an administrative act adversely affecting him; . . .
> . . . .

Article II, Section 2(c), further states that, for purposes of the Statute, "the expression 'member of the staff' shall mean":

> (i) any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff;
>
> (ii) any current or former assistant to an Executive Director; and
>
> (iii) any successor in interest to a deceased member of the staff as defined in (i) or (ii) above to the extent that he is entitled to assert a right of such staff member against the Fund.

50. The principal means by which applications reach the Tribunal is Article II, Section 2(c)(i). The instant case is the first in which the Tribunal has been presented with an assertion that its jurisdiction *ratione personae* is based not on Section 2(c)(i) but rather on Section 2(c)(ii), an assertion Respondent raises in seeking to dismiss the Application summarily. The Tribunal accordingly explores briefly the history and meaning of this statutory provision.

51. The legislative history of Article II, Section 2(c)(ii), explains that in granting jurisdiction over "any current or former assistant to an Executive Director," the provision's purpose is to

provide recourse to those employees who otherwise would not have any forum for the resolution of their employment disputes:

> With respect to assistants to Executive Directors (i.e., persons employed on the recommendation of an Executive Director to assist him in a clerical, technical or secretarial capacity), these individuals are employees of the Fund but are not considered staff members. Unlike contractual employees, however, they have not been provided with the right of recourse to arbitration in the event of a dispute with the Fund. Therefore, it is considered appropriate to give assistants to Executive Directors recourse to the tribunal.

("Establishment of an Administrative Tribunal for the Fund—Review of the Draft Statute," EBAP/92/126 (July 20, 1992), p. 9.) The legislative history also refers to the "special legal framework" applicable to assistants to Executive Directors:

> In reviewing the legality of individual decisions taken with respect to assistants to Executive Directors, the tribunal would have to take into account the special legal framework applicable to this category of employee. For example, assistants receive comparable treatment to staff in certain respects, such as eligibility for benefits; in other respects, their rights are different from those enjoyed by regular staff members. [footnote omitted, referencing termination provisions of OED Handbook]

Id.

52. Respondent's argument that the Tribunal's jurisdiction *ratione personae* in this case may be based solely on Article II, Section 2(c)(ii), reflects a literal reading of that provision, together with a limited conception of the subject matter of Applicant's complaint. While it is true that Applicant is a "current or former assistant to an Executive Director," Applicant likewise is a "person whose current or former letter of appointment . . . provides that [s]he shall be a member of the staff."

53. In the circumstances, to determine whether it may exercise jurisdiction *ratione personae* pursuant to Article II, Section 2(c)(i), the Tribunal must look to the *ratione materiae* that comprises the instant controversy. The Tribunal's jurisprudence has long recognized that its jurisdiction *ratione personae* and jurisdiction *ratione materiae* are "closely intertwined." *Mr. "A", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1999-1 (August 12, 1999), para. 51. Therefore, in identifying whether a particular prong of its jurisdiction *ratione personae* applies, the Tribunal will consider what "administrative act" or acts an applicant seeks to challenge.

54. The Tribunal observes that Applicant in this case seeks to challenge decisions taken by different decision-makers, including those serving under the authority of the Fund's Managing Director and affecting Applicant in her capacity as Fund staff. In her Application, Applicant identifies these decisions as "*[i]nter alia*, refusal of [the] Fund to maintain [Applicant's] grade and salary when she transferred from the Board to the regular Fund staff, including through arbitrary

and capricious official refusals to allow her to use 65 days of accrued leave to meet a six (6) year threshold allegedly required for her to maintain her professional standing." (Notably, Respondent recognizes in its Motion that "Applicant challenges the terms of her transfer to staff as of June 1, 2021, following the termination of her appointment as an Administrative Assistant to an Executive Director"; nonetheless, it identifies the ED's termination decision as the contested administrative act for purposes of determining the category of the Tribunal's jurisdiction *ratione personae*.)

55. In resolving the question of whether it may exercise jurisdiction *ratione personae* in this case on the basis of Article II, Section 2(c)(i), of the Statute, the Tribunal takes account of the following factors.

56. First, Article II, Section 2(c)(ii), is a narrowly drawn provision that covers only a small swath of individuals for whom no other avenue of recourse for employment disputes is provided. The legislative history indicates that the scope of the Tribunal's jurisdiction *ratione materiae* in cases arising under Article II, Section 2(c)(ii), may be circumscribed consistent with that narrow purpose: "In reviewing the legality of individual decisions taken with respect to assistants to Executive Directors, the tribunal would have to take into account the special legal framework applicable to this category of employee." ("Establishment of an Administrative Tribunal for the Fund—Review of the Draft Statute," EBAP/92/126 (July 20, 1992), p. 9.)[2] Accordingly, were the Tribunal to limit the scope of its jurisdiction *ratione personae* in this case to that granted by Article II, Section 2(c)(ii), it might not be able to reach significant questions raised by the Application. This is because Applicant's complaint largely concerns itself not with acts that affected her as Board staff but rather with acts that affect her as Fund staff following the conclusion of her Board appointment.

57. Second, while Article II, Section 2(c)(ii), is narrowly tailored to respond to a gap in the Fund's dispute resolution apparatus, Section 2(c)(i), by contrast, is of wider reach, as demonstrated by the Tribunal's jurisprudence. The jurisprudence shows that among the circumstances in which the Tribunal may exercise its jurisdiction *ratione personae* in terms of Article II, Section 2(c)(i), are when the challenged act affects an applicant as a staff member, even if the act was taken before the applicant became a staff member.

58. In *Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1996-1 (April 2, 1996), a staff member challenged, as applied in his case, the differing methods by which the Fund formulated incoming salaries for economist v. non-economist staff. The Tribunal considered that the contested decision setting the applicant's salary, although taken prior to his becoming a staff member, "thereupon and thereafter affected him as a member of the staff." *Id.*, para. 10. This fact provided the Tribunal with jurisdiction *ratione personae*, pursuant to Article II, Section 2(c)(i), over the complaint. The Tribunal later commented: "[A]t the

[2] The Tribunal notes—but need not resolve in the context of deciding whether Respondent has shown that the Application is "clearly inadmissible"—the question of how this prong of the Tribunal's jurisdiction *ratione personae* is to be reconciled with the general definition of the Tribunal's jurisdiction *ratione materiae*, which permits challenges to the legality of an "administrative act," defined as "any individual or regulatory decision *taken in the administration of the staff of the Fund*." (Article II, Section 2(a).) (Emphasis added.)

time of the act complained of, i.e., the decision to offer him a particular grade and salary, he was not yet a staff member," but "once [he] accepted the offer and thereby became a member of the staff, the grade and salary under which he was employed were determined by that offer." *Mr. "A"*, paras. 54-55 ("decisions taken by the Fund preliminary to an applicant's becoming a staff member may indeed be within the Tribunal's competence *ratione materiae* as long as the challenged act affects the adversely affected individual in his capacity as a member of the staff."). So too here, the ED's decision to terminate Applicant's Board appointment affected her thereafter as a member of Fund staff, in the determination of her grade and salary.

59. The decisions Applicant seeks to challenge affect her in her capacity as a Fund staff member by determining her grade and salary upon re-entry to Fund staff. For these reasons, the Tribunal concludes that the Application cannot, as the Fund submits, be categorized as one that solely raises a challenge by a "current or former assistant to an Executive Director." Rather, the Tribunal may exercise jurisdiction *ratione personae* in this case on the basis of Article II, Section 2(c)(i), of its Statute.

(2) The timeliness of Applicant's filing with the Tribunal

60. Having concluded that the Tribunal's jurisdiction *ratione personae* may be based on Article II, Section 2(c)(i), of the Statute, the Tribunal now returns to the overarching question raised by the Motion, that is, whether Respondent has shown that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis*.

61. In order to answer that question, the Tribunal must take account of an essential distinction between Article II, Section 2(c)(i) and Section 2(c)(ii), of its Statute, which is that a "person whose current or former letter of appointment . . . provides that he shall be a member of the staff" serves under the authority of the Fund's Managing Director, whereas a "current or former assistant to an Executive Director" serves under the authority of an ED. An applicant raising a claim in the latter capacity does not have access to the Fund's Grievance Committee or its underlying administrative review processes because the Grievance Committee is advisory to Fund Management. Hence, Article VI, Section 1, of the Tribunal's Statute, which requires the filing of an application within three months "after all available channels of administrative review have been exhausted, or, in the absence of such channels, after the notification of the decision," requires a "current or former assistant to an Executive Director" to file a Tribunal application within three months of the notification of the contested decision. By contrast, a "person whose current or former letter of appointment . . . provides that he shall be a member of the staff" must first exhaust available review channels and then file an application with the Tribunal within three months thereof.

62. Respondent contends that the Application was out of time irrespective of whether Applicant was required to have first filed a Grievance with the Grievance Committee (which Respondent considers lacked jurisdiction over the complaint) or an application directly with the Tribunal (which Respondent contends had exclusive jurisdiction to consider Applicant's claims). The Tribunal addresses each of these contentions below.

(a) Insofar as the Tribunal's jurisdiction *ratione personae* may be based on Article II, Section 2(c)(i), of the Statute, has Respondent shown that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis?*

63. The rules governing the Fund's dispute resolution system require that a staff member seeking review by the Grievance Committee of a decision affecting the staff member's work or career, which has been taken at the level of the HRD Director, must file a Grievance within six months from the later of the date of the challenged decision or of its communication to the staff member. (Staff Handbook, Ch. 11.03, Section 4.7.)

64. Applicant filed her Grievance with the Fund's Grievance Committee on January 6, 2022. That filing was made six months after the July 6, 2021, meeting at which Applicant asserts that the then HRD Director denied Applicant's request to use leave accrued during her Board service to meet the six-year rule of EBAP/86/169. If the period for filing with the Grievance Committee is reckoned from the date of that meeting, then the Grievance was timely. The Tribunal observes that the record is not entirely clear, however, and Applicant does not assert, that the then HRD Director communicated to Applicant any written decision on her request.

65. If the period for filing Applicant's Grievance is reckoned instead from the effective date of her June 1, 2021, re-entry to the staff of the Fund on the terms that she now contests before the Tribunal, then the Grievance was filed beyond the six-month deadline.

66. The importance of timely exhaustion of available review channels is well established in the Tribunal's jurisprudence. *See "VV", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2023-3 (March 30, 2023), para. 70. "'Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors—when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment.'" *Mr. "QQ" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2022-2 (October 25, 2022), para. 50 (internal citations omitted).

67. Article VI, Section 3, of the Tribunal's Statute provides: "In exceptional circumstances, the Tribunal may decide at any time, if it considers the delay justified, to waive the time limits prescribed under Sections 1 or 2 of this Article in order to receive an application that would otherwise be inadmissible."

68. In parallel with that statutory provision, the Tribunal has explained that it has "authority to consider the presence and impact of exceptional circumstances at . . . anterior stages" of the dispute resolution process because "the recourse procedures of the Fund are meant to be complementary and effective" and are "designed to afford remedies where merited, not to debar them." *Estate of Mr. "D", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2001-1 (March 30, 2001), para. 102.

69. The Tribunal has also recognized that "in view of the importance of exhaustion of administrative remedies and of adherence to time limits in legal processes," internal review requirements "should not be lightly dispensed with and 'exceptional circumstances' should not

easily be found." *Estate of Mr. "D"*, para. 104. In assessing potential exceptional circumstances, the Tribunal will consider the "extent and nature of the delay, as well as the purposes intended to be served by the requirement for exhaustion of administrative remedies." *Id.*, para. 108. Those purposes are to "provid[e] opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication." *Id.*, para. 66.

70. The Tribunal observes that the "extent . . . of the delay" in the filing of the Grievance, if reckoned from Applicant's June 1, 2021, re-entry to Fund staff on terms that she seeks to challenge before the Tribunal, amounted to little more than one month beyond the time limit. As to the "nature of the delay," the Tribunal chiefly identifies the complications consequent to the Fund's bifurcated approach to resolving disputes arising from Board staff employment in contrast to Fund staff employment—in the singular context of a dispute centering on an applicant's entitlements in moving between the two employment regimes. Navigating the Fund's system for the resolution of employment disputes in these novel circumstances presented an exceptional circumstance that reasonably excuses Applicant's moderate delay in filing her Grievance.

71. In permitting the consideration of exceptional circumstances at the internal review stage, the Tribunal has recognized: "If the Tribunal were to be precluded from identifying error in anterior stages of those procedures, recourse to it would be blocked and an applicant unjustly left without recourse." *Estate of Mr. "D"*, para. 102. These considerations are particularly pertinent in the circumstances of the instant case, which raises questions of first impression concerning the dispute resolution process. In identifying "exceptional circumstances" here, the Tribunal remains mindful of the singular context of the instant case and of the fundamental importance of meeting governing time limits.

72. Following the filing of the Grievance and a motion to dismiss by Respondent, the Grievance Committee dismissed the Grievance for lack of jurisdiction. Accordingly, Applicant has exhausted all available channels of administrative review as required by Article V, Section 1, of the Tribunal's Statute. In compliance with Article VI, Section 1, of the Tribunal's Statute, Applicant filed her Application three months thereafter.

73. The Tribunal accordingly concludes that insofar as the Tribunal's jurisdiction *ratione personae* may be based on Article II, Section 2(c)(i), of the Statute, Respondent has not shown that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis*.

(b) Insofar as the Tribunal's jurisdiction *ratione personae* may be based on Article II, Section 2(c)(ii), of the Statute, has Respondent shown that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis?*

74. Article VI, Section 1, of the Tribunal's Statute requires that when the Fund has not established any channels of review to exhaust, an application must be filed with the Tribunal within three months after the notification of the contested decision. Respondent submits that "the relevant decision to determine timeliness before the Tribunal is . . . the termination decision by [the ED]." That decision was notified to Applicant on May 10, 2021, and became effective on May 31, 2021.

75. As observed above, Respondent's approach reflects a particular view on the merits of the dispute, which the Tribunal is not in a position to decide at this stage of the proceedings. Nonetheless, the Tribunal considers that to the extent its jurisdiction *ratione personae* in this case may be based on Article II, Section 2(c)(ii), of the Statute, that is, as an application brought by a "current or former assistant to an Executive Director," then the Application should have been filed three months from May 31, 2021. Instead, the Application was filed more than a year later on August 11, 2022, following the dismissal of Applicant's Grievance.

76. In considering the question of timeliness in this case, the Tribunal takes account in particular of the Fund's communications to Applicant, which may reasonably have led her to seek review as Fund staff by filing a Grievance, rather than pursuing direct review by the Tribunal as Board staff. It is recalled that when Applicant transferred from Fund staff to Board staff in 2015—and then back to Fund staff in 2021—the letters from HRD advising Applicant of these changes in her employment status each identified a contact person in HRD for "any questions on issues relating to re-employment rights in general or your own situation in particular." These communications may have suggested that an issue concerning the terms of Applicant's re-entry to Fund staff was a matter for resolution by HRD. Furthermore, the ED, in his e-mail to Applicant of June 11, 2021, denying her request for "bridging leave," wrote as follows: "I suggest that you discuss the matter with SEC [Secretary's Department] and HRD, seeking with them other alternative solutions that do not involve the [ED's Office]. I would, therefore, kindly request that any new request on the subject be made to the SEC and HRD." Additionally, according to Applicant, when she consulted with the then HRD Director, that official raised an issue with Applicant concerning her alleged job performance while serving under the ED.

77. In these circumstances, the Tribunal considers that Applicant's decision to file a Grievance with the Fund's Grievance Committee—rather than to present her complaint directly to the Tribunal—"evidenced a good faith effort at seeking review, especially in light of the Fund's communications and Applicant's theory of the case." *Mr. A. Billmeier, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2010-3 (February 9, 2010), para. 69. This was an exceptional circumstance that reasonably excused the delay in Applicant's filing with the Tribunal.

78. The Tribunal accordingly concludes that insofar as the Tribunal's jurisdiction *ratione personae* may be based on Article II, Section 2(c)(ii), of the Statute, Respondent has not shown that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis*.

(3) Possible challenge to "regulatory decision"

79. Finally, the Tribunal notes that Respondent, in its Motion, refers to "veiled challenges" raised by Applicant to EBAP/86/169, the 1986 Board decision that set the six-year threshold for a former assistant to an ED to retain their grade level upon return to Fund staff. Respondent seeks to insulate that "regulatory decision" from challenge, citing Article XX of the Tribunal's Statute, which bars challenges to administrative acts pre-dating the October 15, 1992, entry in force of the Tribunal's Statute.

80. In her pleadings, Applicant refers to EBAP/86/169 as "an arbitrary and unconscionable rule" that may be "curtailed *de facto*" by review of its implementation. Applicant emphasizes that what she challenges is the "interpretation and application" of the rule in the circumstances of her case. The Tribunal observes that Applicant does not request annulment of the rule; rather she seeks to avail herself of its benefits.

81. Respondent, for its part, submits that Applicant is "dissatisfied with the *proper* application of this policy, which can only be construed as a regulatory challenge to the Board's 1986 decision." (Emphasis added.) Respondent's approach to the issue is again premised on its view that the setting of Applicant's grade and salary upon return to Fund staff was determined automatically by operation of EBAP/86/169. As noted above, that question goes to the merits of the dispute.

82. The Tribunal has concluded that Respondent has not shown that the Application is "clearly inadmissible" in respect of the "individual decisions" that Applicant seeks to challenge. The case accordingly will proceed to the merits phase. In the circumstances, the Tribunal considers that it would be premature for it to decide at this stage whether the Application raises an admissible challenge to a "regulatory decision."

CONCLUSIONS OF THE TRIBUNAL

83. For the foregoing reasons, the Tribunal concludes that Respondent has not shown that the Application is "clearly inadmissible" for lack of jurisdiction *ratione temporis*. This is so whether the Tribunal were to exercise its jurisdiction *ratione personae* on the basis of Article II, Section 2(c)(i) or on the basis of Article II, Section 2(c)(ii), of its Statute.

84. The Tribunal further observes that the differences between the parties concerning the admissibility of the Application reflect fundamentally different theories on the merits of the case. The Tribunal may not resolve such differences by way of a ruling on a motion for summary dismissal.

85. For these reasons, and having regard for the protections that Rule XII affords "applicants against having their right to be heard by the Tribunal being cut off prematurely" and against the "risk of the Tribunal's taking an erroneous decision as to admissibility when the pleadings before it have yet to unfold in full," *Mr. "QQ"*, paras. 47-48, the Tribunal concludes that Respondent has failed to meet the high bar of showing that the Application is "clearly inadmissible" in terms of Rule XII of the Tribunal's Rules of Procedure

86. Accordingly, the Motion for Summary Dismissal is denied.

87. As the filing of the Motion suspended the pleadings on the merits, the Fund's Answer, Applicant's Reply, and the Fund's Rejoinder shall now follow, according to the schedule prescribed by the Tribunal's Rules of Procedure.

LEGAL FEES AND COSTS

88. As noted above at paragraph 28, Applicant submitted her Request for Costs on January 16, 2024. Respondent filed responsive Comments on January 24, 2024.

89. The Tribunal has decided to defer its decision on legal fees and costs until the merits phase of the proceedings.

DECISION

FOR THESE REASONS

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

The Motion for Summary Dismissal of the Application of "XX" is denied, and the pleadings on the merits shall resume.

Nassib G. Ziadé, President

Maria Vicien Milburn, Judge

Andrew K.C. Nyirenda, Judge

/s/
Nassib G. Ziadé, President

/s/
Celia Goldman, Registrar

Washington, D.C.
June 7, 2024