ADMINISTRATIVE TRIBUNAL

OF THE

INTERNATIONAL MONETARY FUND

Judgment No. 2024-5

December 30, 2024

"XX", Applicant v. International Monetary Fund, Respondent

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(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 Application brought against the International Monetary Fund ("Respondent" or "Fund") by "XX",[1] a staff member of the Fund. Applicant was represented 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 Mr. Mark Racic, Senior 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 the requirement of EBAP/86/169 to complete six years of Board service to maintain the higher grade and salary was wrongfully applied to her. Applicant submits that she was unfairly denied the opportunity to use annual leave accrued during Board service to be bridged to the six-year mark and alleges that the then Director of the Human Resources Department ("HRD") should have made an exception to the six-year rule in Applicant's favor when she returned to Fund staff. Applicant argues, alternatively, that she did meet the requirement of six years of "continuous service" with the Board, based on the totality of her career. Applicant additionally contends that the six-year requirement of EBAP/86/169 is itself an unfair rule.

3. Respondent initially responded to the Application with a Motion for Summary Dismissal, asserting that the Tribunal lacked jurisdiction *ratione temporis*. In its Judgment on admissibility, the Tribunal denied the Motion, concluding that Respondent had not shown that the Application was "clearly inadmissible," in terms of Rule XII of the Tribunal's Rules of Procedure, for lack of timeliness. The Tribunal decided that whether Applicant brings her case as a "member of the staff" (pursuant to Article II(2)(c)(i) of the Statute) or as a "current or former assistant to an Executive

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[1] Applicant's request for anonymity was granted at an earlier stage of the proceedings. *See "XX", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2024-2 (June 7, 2024), para. 32.

Director" (pursuant to Article II(2)(c)(ii) of the Statute), the Application meets the threshold of admissibility.[2]

4. In its pleadings on the merits, Respondent submits that Applicant was not wrongfully denied the opportunity to retain her Board grade and salary when she transferred to Fund staff in 2021, for the following reasons: Applicant did not meet the requirement of six years of "continuous service" with the Board, as prescribed by EBAP/86/169, to return to Fund staff at her Board grade; Applicant was not unfairly denied the opportunity to meet that requirement by the ED's (or the then HRD Director's) denial of her leave requests; the then HRD Director did not abuse her discretion in declining to make an exception in Applicant's case to the six-year requirement; and the rule itself is not unfair. Respondent additionally contends that the then HRD Director did not take any challengeable administrative act, and that any challenge to the six-year requirement of EBAP/86/169, a 1986 Board decision, is precluded by Article XX of the Tribunal's Statute, which bars challenges to decisions that were taken before the Statute's effective date of October 15, 1992.

FACTUAL BACKGROUND

5. The key facts, some of which are disputed between the parties, may be summarized as follows.

A. Separate employment frameworks for Fund staff and Board staff; rights of Board Assistants to return to Fund employment

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") which, in setting out the rules for Board staff, states: "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.'"[3]

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";[4] 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,"[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

[2] *Id.*, para. 83.

[3] OED Handbook, Part IV.B.1.

[4] *Id.*, Part IV.B.2.

[5] *Id.*, Part IV.B.5.

'grandfathered' in accordance with the provisions approved at Executive Board Meeting 86/16 (1/30/86)."[6] The OED Handbook provisions governing transfer of Assistants from Board staff to Fund staff reflect the Board decisions found in EBAP/86/169.[7]

8. The OED Handbook further provides: "An appointment to the regular staff under Section B.6.1 shall be effected without a break in service, and all accrued benefits shall be retained provided that they do not exceed those of the regular staff."[8] Additionally, "Executive Directors shall approve leave for their own Advisors/[A]ssistants."[9]

B. Applicant's employment history prior to May 2021

(1) Applicant's initial contractual employment with the Fund, followed by transfer to Board staff (2007-2014)

9. Applicant began her employment with the Fund in 2007, initially as a contractual employee on the Fund staff. On June 12, 2008, Applicant transferred to Board staff, where she served as a Grade A6 Administrative Assistant to an ED until her transfer back to Fund staff on May 13, 2014.

(2) Applicant's return to Fund staff (2014-2015)

10. When Applicant returned to Fund staff in 2014, she was one-month short of six years' service with the Board. She was permitted to retain her Grade A6 upon transfer to Fund staff. The accompanying entry on Applicant's "Chron" sheet noted an "Interdepartmental Transfer (Grandfathered)."

11. Respondent states that the reason Applicant was permitted to retain her Board grade during her 2014-2015 Fund employment was because the 2014 transfer had been undertaken as a result of "extraordinary efforts to protect [Applicant] from a harmful situation in the then [ED] office environment, based on a perceived duty of care among senior Fund staff." Applicant has referred to that earlier working situation as a hostile work environment from which the Fund removed her for her protection.

(3) Applicant's further appointment to Board staff (2015–2021)

12. Effective September 1, 2015, Applicant transferred back to Board staff. Applicant's new appointment was as an Administrative Assistant to a different ED, at Grade A7.

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[6] *Id.*, Part IV.B.6.1.

[7] "Grading of Secretarial and Clerical Assistants – Staff Employment Rights," EBAP/86/169 (July 11, 1986).

[8] OED Handbook, Part IV.B.7.

[9] *Id.*, Part IV.F.2.

13. Applicant's "change in appointment status, effective September 1, 2015, from that of a regular staff member" was confirmed to her by letter from an official of the Fund's HRD. 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."

14. Notably, the letter associated with Applicant's September 1, 2015, transfer to Board staff was dated April 20, 2016. Applicant's countersignature also bears the date April 20, 2016, and in the oral proceedings Applicant's counsel asserted that the letter had not been received by Applicant until some six months after the transfer that it recorded.

15. 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 for whom Applicant had been working was succeeded by a new ED.

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

16. On May 10, 2021, the new ED told Applicant that he had decided to terminate her appointment. An e-mail of the same date from the ED to Applicant (with the subject line "Recent meeting and decision") memorialized the decision in part as follows:

> As we had the chance to discuss a little while ago, it is regrettable that the work situation evolved to a point in which the decision to relinquish you from your duties at the office had to be taken. Such decision was not taken lightly. It was grounded on careful assessment of your performance over the period I have been here as Executive Director.

17. In Applicant's Amended Statement of Grievance, which she has incorporated by reference in the Application, she refers to a "virtual meeting" with the ED of May 10, 2021. Applicant further states: "[She] had scheduled a vacation for the period of May 17-31, 2021. [The ED] later accepted to keep her employed until her vacation ended." Applicant explains: "This is the reason [Applicant's] [HRD] contract for her return to the Fund staff was dated June 1, 2021. . . . In light of the termination and vacation, [the ED] extended [Applicant]'s [ED office] employment until the end of her vacation by converting her vacation leave." In Applicant's July 6, 2021, e-mail to the then HRD Director (*see below*), Applicant stated that she was "removed from my duties . . . by the Executive Director precisely four days before taking an approved annual leave. It is only upon my return from vacation that I was informed that because I was lacking three months to reach six years in OED [Office of Executive Directors], I would have to sign a contract with [HRD] at grade 6."

18. Respondent has commented on these events as follows: "[A]fter the May 10 communication of his decision to terminate Applicant, and despite being under no obligation to do so, [the ED] nevertheless approved Applicant's request for two weeks of leave, from May 17-31, 2021."

19. Although the parties characterize the events following May 10, 2021 somewhat differently, it is not disputed that Applicant's Board appointment concluded on May 31, 2021, and her transfer to Fund staff took effect the following day. The terms upon which Applicant re-entered the staff of the Fund give rise to the controversy in this case.

20. By letter of June 3, 2021, an HRD official 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."

21. 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 (and associated salary) upon her return to Fund staff.

22. In accordance with the statement in the letter of June 3, 2021 that Applicant's "transfer to the staff is governed under EBAP/86/169, paragraph 2(b),"[10] Applicant experienced an immediate reduction of her grade from Grade A8 to Grade A6, as well as a reduction of her salary to the highest available salary for Grade A6. Applicant submits that, as a consequence of the transfer to Fund staff, her salary decreased by 7.5 percent and that only in 2024 did her salary return to its 2021 level via annual increases, while she remained at Grade A6.

D. Applicant's post-termination requests to use accrued annual leave to bridge her to six years of Board service

(1) Applicant's requests to the ED

23. 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. . . .

[10] EBAP/86/169, paragraph 2(b) provides: "A regular staff member who receives an appointment as a Secretary or Clerical Assistant [in an Executive Director's office] is entitled upon the expiration of the appointment to resume regular employment status with the Fund at his or her former grade and the salary within that grade which is closest to the one received as a Secretarial or Clerical Assistant. This procedure will be followed except in cases covered in (c) below."

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.

24. 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] . . . .
>
> . . . .
>
> From the date of my termination announcement until the return from my trip last week, I had not been informed about any implications regarding my termination date. Otherwise, I would have already requested vacation as it happens in any contract termination.
>
> 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. . . .
>
> So, once again, I respectfully come to resubmit my request with . . . clarification . . . .[11]

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,

[11] In this communication, Applicant refers to requesting the use of 67 days of accrued annual leave. In her other communications of record, and in her Tribunal pleadings, Applicant refers to 65 days. The Tribunal therefore refers to 65 days in considering the issues of the case.

therefore, kindly request that any new request on the subject be made to the SEC and HRD.

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

25. 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." Applicant stated: "Had I known the implications of my let go from [the ED's office] I would definitely have presented a three-month vacation request at the separation meeting with [the ED]. However, no information was disclosed to me at that time about the grade implications of leaving OED three months short of six years."

26. According to Applicant's account, the then HRD Director denied the leave request orally at the meeting, allegedly for the following 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 fulfill Applicant's request.

27. Two days later, 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."

28. 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 "to use a portion of my accrued days of annual leave (exactly 65 days from the total 120 days accrued at the time) to complete my sixth year, as required by EBAP/86/169." Applicant disputed any allegation of poor performance, and asserted a lack of opportunity to know the facts that had been presented against her. Applicant further asserted that other Assistants had been granted three months' bridging leave by EDs to reach the six-year mark before termination, and she 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

29. 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.

30. On March 25, 2022, Respondent filed a Motion to Dismiss the Grievance, raising arguments similar to those later raised in its Motion for Summary Dismissal before the Tribunal. On April 25, 2022, Applicant filed a Partial Opposition to the Motion to Dismiss the Grievance.

31. On May 11, 2022, the Grievance Committee granted the Fund's 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

32. 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.

33. As noted above, Respondent initially responded to the Application with a Motion for Summary Dismissal. Following the exchange of pleadings prescribed by Rule XII of the Tribunal's Rules of Procedure, on June 7, 2024, the Tribunal denied the Motion, and the pleadings on the merits resumed.[12]

34. On July 26, 2024, Respondent filed its Answer. On September 3, 2024, Applicant submitted her Reply. Respondent's Rejoinder was filed on October 9, 2024.

35. On November 11, 2024, the Tribunal held oral proceedings, limited to the oral arguments of counsel in the case.

36. On November 19, 2024, Applicant filed a Supplemental Request for Costs. Respondent filed its Response to Applicant's Supplemental Request for Costs on November 26, 2024.

A. Applicant's requests for the production of documents

(1) The requests for the production of documents made in the Application

37. Pursuant to Rule XVII of the Tribunal's Rules of Procedure, in her Application, Applicant made two requests for the production of documents, to which Respondent responded in its Answer.

[12] *See "XX" (Admissibility of the Application)*, paras. 86-87.

38. Applicant's Document Request No. 1 sought:

> [A]ll communications between, or other documents produced by, [the ED], [the then HRD Director], and any other Board or HRD staff member, concerning [Applicant]'s conversion to the Fund's staff, her new terms of appointment, and her efforts to maintain her Board grade and salary[.]

Respondent opposed Applicant's Document Request No. 1 on a number of grounds, including that Applicant had failed to provide reasons in support of the request and that the request was overly broad.

39. Applicant's Document Request No. 2 sought:

> [A]n anonymized list of all assistants who have transferred from the Board to the Fund, or *vice versa*, since 2014, along with their (a) years of Board service immediately preceding their transfer; (b) their immediately preceding, and first post-transfer, grades and salaries, and (c) fulsomely explanatory notes.

Respondent responded to Applicant's Document Request No. 2 by attaching to its Answer a table it had compiled, which it stated "provides substantially the relevant, nonprivileged information that is sought within Applicant's overbroad and improper request." Respondent asserted that the document request was now "moot."

40. The Tribunal denied both of Applicant's Document Requests for the reasons indicated below, and the parties were so notified on August 15, 2024.

41. As to Applicant's Document Request No. 1, the Tribunal noted that, contrary to Rule XVII(1) of the Tribunal's Rules of Procedure, Applicant had failed to supply any clear explanation of how the requested documents would substantiate the allegations she raised in her Application.[13] The omission to provide reasons for the request was compounded by the broad scope of Applicant's request—in terms of materials, persons, and time span—so as to render the request "unduly burdensome" within the meaning of Rule XVII(2) of the Tribunal's Rules of Procedure.

42. As to Applicant's Document Request No. 2, the Tribunal concluded that it had been substantially satisfied by the document annexed to the Answer. Although the annex did not disclose actual grades or salaries, it revealed, where applicable, the number of grade levels moved and the percentage changes in salaries. One column supplied brief comments on the circumstances of the transfers that were said to have been governed by EBAP/86/169.

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[13] *See* "*TT", Applicant v. International Monetary Fund, Respondent ("TT")*, IMFAT Judgment No. 2022-1 (June 30, 2022), para. 14.

(2) Applicant's request for reconsideration

43. In her Reply on the merits, Applicant made a request for reconsideration of the Tribunal's Decisions on the production of documents. In its Rejoinder, Respondent opposed that request.

44. The Tribunal denied Applicant's request for reconsideration of its Decisions on document production, for the following reasons. The Tribunal does not ordinarily entertain a unilateral request for reconsideration of a decision to deny a request for production of documents and, in the instant case, Respondent stated that it did not join in Applicant's request. The Tribunal found that Applicant had not brought to light any reason to deviate in this case from its usual practice not to reconsider its decisions. As for the request that Applicant had made for "negative inferences [to] be drawn against the Fund wherever it has failed to present the requested evidence to support an assertion," the Tribunal concluded that such request was inapposite, given that the Tribunal had not decided that Respondent had failed to present any requested evidence. The parties were notified of the Tribunal's decision on October 16, 2024.

B. Applicant's request for oral proceedings

45. Article XII of the Tribunal's Statute provides that the Tribunal "shall decide in each case whether oral proceedings are warranted." Rule XIII(1) of the Tribunal's Rules of Procedure states in part: "Oral proceedings shall be held if, on its own initiative or at the request of a party and following an opportunity for the opposing party to present its views . . . , the Tribunal deems such proceedings useful."

46. In her Application, Applicant made a request for "an oral hearing of the counsel in this case, as well as of any witness whom the Tribunal wishes to question." In her Reply, Applicant requested to call the following individuals as "fact-witnesses": (i) the relevant Executive Director; (ii) the HRD Director (preferably the former HRD Director, or otherwise the current HRD Director); and (iii) Applicant herself. In its Answer and Rejoinder, Respondent objected to Applicant's request for an oral hearing, on the ground that "the written record is sufficient to resolve the legal issues in question, and that a hearing would therefore not be useful."

47. As presently formulated, Rule XIII of the Tribunal's Rules of Procedure foresees three possibilities with respect to oral proceedings, namely, the Tribunal may decide an application on the basis of: (a) the written pleadings alone; (b) the written pleadings and the oral arguments of parties and counsel; or (c) the written pleadings, oral arguments, and the hearing of witnesses. The Tribunal recalls that "when it revised its Rules of Procedure in 2004, changing the standard for holding oral proceedings from 'necessary' to 'useful' and adding a provision permitting the Tribunal to limit oral proceedings to the oral arguments of parties' counsel, it did so with a view towards making the possibility of holding oral proceedings more likely, while underscoring the value of conducting such proceedings for purposes of addressing questions of law."[14] In the present case, the Tribunal decided it would find it beneficial to hold oral proceedings to hear counsel's

[14] *Id.*, para. 28.

oral arguments "for the purposes of clarifying legal issues and providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record."[15]

48. As to Applicant's request for the examination of witnesses, the Tribunal observed that Applicant had not asserted what evidence she sought to adduce from the proposed witnesses or why the Tribunal should consider the written evidentiary record of the case not to be adequate.[16] For these reasons, the Tribunal decided that the oral proceedings in the case would be limited to the oral arguments of counsel, without any witness examination. Having earlier granted Applicant's request for anonymity,[17] the Tribunal further decided that the hearing would be "held in private" in accordance with Rule XIII(1) of the Tribunal's Rules of Procedure.

49. The parties were so notified on October 16, 2024, and the oral arguments of parties' counsel were heard on November 11, 2024. The Tribunal found the oral proceedings useful in eluciding the issues of the case.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

A. Applicant's principal contentions

50. The principal arguments presented by Applicant in her written and oral pleadings may be summarized as follows:

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.

2. 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.

3. 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.

4. 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 to retain her Board grade and salary.

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[15] *See Ms. "PP", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-1 (May 20, 2021), para. 25 (and cases cited therein).

[16] *See* Rule XIII(6) of the Tribunal's Rules of Procedure, which provides: "The Tribunal may limit oral proceedings to the oral arguments of the parties and their counsel or representatives where it considers the written evidentiary record to be adequate."

[17] *See "XX" (Admissibility of the Application)*, para. 32.

5. The then HRD Director took an administrative act when she decided the terms on which Applicant would rejoin the Fund staff.

6. Applicant's Board service was "continuous" and far surpassed six years, with only a single brief involuntary break in service in 2014-2015. Applicant's 65-day gap at the end of her Board service is *de minimis*.

7. EBAP/86/169 "severely penalizes employees who transfer from the Executive Board's staff to the regular Fund staff before completing six (6) full years of continuous Board service." The rule was unfairly interpreted and applied in Applicant's case.

8. 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(4) of its Statute, if it concludes that the Application is well-founded in whole or in part.

B. Respondent's principal contentions

51. The principal arguments presented by Respondent in its written and oral pleadings may be summarized as follows:

1. Applicant did not meet the requirement of six years of "continuous service" with the Board as prescribed by EBAP/86/169 to maintain her Board grade upon transfer to Fund staff in 2021.

2. The governing rules, as set out in the OED Handbook, grant EDs broad discretion to make employment decisions in their offices, including to terminate an Assistant's employment and to grant or refuse leave requests.

3. Employment decisions taken by EDs are subject to only limited review by the Tribunal.

4. The decisions of the ED that Applicant seeks to challenge were considered and rational decisions and were taken in the lawful exercise of the ED's discretion.

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

6. The then HRD Director had no authority to instruct the ED to extend Applicant's employment as Board staff.

7. The then HRD Director's noninterference with the straightforward application of EBAP/86/169 was not a challengeable administrative act.

8. If Applicant's challenge to any inaction on the part of the then HRD Director is admissible, then that inaction arose after Applicant rejoined Fund staff and it represented the lawful exercise of the then HRD Director's discretionary authority.

9. Applicant offers no evidence to overcome the presumption of legitimacy of the then HRD Director's refusal to grant exception to the governing rule set out in EBAP/86/169. Applicant was treated in the same way as other employees similarly situated in relation to her return from Board staff to Fund staff, and she presents no evidence of discrimination.

10. Article XX of the Tribunal's Statute, which precludes challenges to administrative acts pre-dating the entry into force of the Tribunal's Statute, bars any challenge by Applicant to EBAP/86/169.

11. If the Tribunal decides that it has jurisdiction over a regulatory challenge in this case, it should uphold EBAP/86/169 as a reasonable exercise of the Board's policy-making discretion.

CONSIDERATION OF THE ISSUES

52. The principal question on the merits is whether the Fund wrongfully denied Applicant the opportunity to retain her Board grade and salary when she transferred to Fund staff in 2021. That question must be considered from several vantage points, in the light of the arguments of the parties.

53. As the Tribunal explained in its Judgment on admissibility, the separate employment frameworks applicable to Board staff and to Fund staff are reflected in the jurisdictional provisions of the Tribunal's Statute. Accordingly, the Tribunal will first consider Applicant's challenges to decisions of the ED, which arise under Article II(2)(c)(ii) of the Tribunal's Statute from Applicant's status as a "current or former assistant to an Executive Director." Second, the Tribunal will consider Applicant's challenges to decisions of HRD (including those of the then HRD

Director), which arise under Article II(2)(c)(i) of the Tribunal's Statute from Applicant's status as a "member of the staff."

54. Thereafter, the Tribunal will address the question of whether Applicant has raised an admissible challenge to a "regulatory decision" of the Fund, that is, to the rule governing assistants' transfers from Board staff to Fund staff. Finally, the Tribunal will consider whether Applicant's re-entry to Fund staff was undertaken fully in accordance with principles of fair treatment.

A. Applicant's challenges to decisions of the ED

(1) Does Applicant challenge the ED's decision to terminate her Board employment?

55. The Tribunal must consider at the outset the question of what decision or decisions of the ED Applicant challenges by her Application. The Judgment on admissibility left open the possibility that Applicant raised challenges to two decisions of the ED: (a) to terminate Applicant's Board employment effective May 31, 2021; and (b) to deny Applicant's post-termination requests for extension of her Board employment, through the use of accrued annual leave, to meet the six-year requirement of EBAP/86/169. Respondent, at the admissibility stage, had asserted that the ED's decision to terminate Applicant's appointment was the only challengeable administrative act—an approach that the Tribunal rejected.[18]

56. In her Application, Applicant asserts that her "pre-transfer career injuries are not before the Tribunal" and that she "espouses only her right to maintain her professional standing when transferring in essentially the same role from the Board staff to the Fund staff." Notably, Applicant's requests for relief do not include reinstatement to Board staff; instead, they assume her continued employment on Fund staff. In the oral proceedings, Applicant's counsel confirmed that Applicant does not challenge the termination of her Board appointment.

57. Accordingly, although Respondent has sought to show that the termination decision represented a lawful exercise of managerial discretion, that question is not before the Tribunal. Applicant does not challenge the ED's decision to terminate her Board employment. Rather, the decisions she challenges relate to the consequences of that termination upon her grade and salary under the law of the Fund.

58. In their pleadings on the merits, both parties acknowledge that Applicant does challenge the ED's decision to deny her post-termination requests for extension of her Board employment, through the use of accrued annual leave, so as to meet the six-year requirement of EBAP/86/169 for maintaining her Board grade and salary. That question will be considered below. To decide that challenge, the Tribunal first must decide what standard of review to apply when it considers a challenge to an employment decision taken by an ED.

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[18] *"XX" (Admissibility of the Application)*, paras. 44-45.

(2) What standard of review shall the Tribunal apply in deciding a challenge to an employment decision taken by an ED?

59. The question of what standard of review shall apply when the Tribunal considers a challenge to an employment decision taken by an ED is one of first impression for the Tribunal because the principal means by which applications reach the Tribunal is via Article II(2)(c)(i) of its Statute. The instant case is the first in which the Tribunal's jurisdiction *ratione personae* is founded, in part, on Article II(2)(c)(ii).

60. As the Tribunal observed in its Judgment on admissibility, the legislative history of Article II(2)(c)(ii) explains that the purpose of granting jurisdiction over "any current or former assistant to an Executive Director" is to provide recourse to the Tribunal for Board employees who otherwise would not have any forum for the resolution of their employment disputes because

> . . . *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.[19]

The legislative history further states that, in deciding challenges to individual decisions arising under Article II(2)(c)(ii),

> . . . *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.[20]

61. In her Application, Applicant asserts that "[t]he fact that the Tribunal's door is explicitly thrown open to Board assistants dispels the 'common wisdom' that insists on their peonage." Applicant accordingly contends that the jurisdictional grant of Article II(2)(c)(ii) of the Tribunal's Statute invites the Tribunal "to explicitly affirm the rightful application to Board assistants of the tenets of international administrative law prohibiting arbitrary, capricious and discriminatory treatment, and forbidding abuses of discretion . . . ."

62. Applicant additionally points to the provision of the Commentary on the Statute stating that the internal law of the Fund includes "both formal, or written, sources . . . and unwritten

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[19] *Id.*, para. 51, quoting "Establishment of an Administrative Tribunal for the Fund—Review of the Draft Statute," EBAP/92/126 (July 20, 1992), p. 9. (Emphasis added.)

[20] *Id.* (Emphasis added.) (Footnote omitted, referencing termination provisions of the OED Handbook.)

sources."[21] Furthermore, Article III of the Tribunal's Statute provides that "[i]n deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts." As explained in the Commentary on the Statute, such principles "are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the Fund."[22] As Applicant notes, these are principles that the Tribunal itself has reaffirmed in its jurisprudence.

63. Respondent, for its part, asserts that an employment decision taken by an ED is "subject to only limited review by the Tribunal." Notably, in both its written and oral pleadings, Respondent cites the section of the Commentary on the Statute on which the Tribunal consistently has relied in respect of its "review of individual decisions involving the exercise of managerial discretion,"[23] that is, decisions taken in the administration of the staff under the authority of the Managing Director (rather than the Board). Such discretionary decisions cannot be overturned unless they are shown to be "arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."[24]

64. Respondent also refers to the Tribunal's Judgment in *Ms. "J"*, [25] in which the Tribunal elaborated its standard of review as follows: "The degree of deference—or depth of scrutiny—may vary according to the nature of the decision under review, the grounds upon which it is contested, and the authority or expertise that has been vested in the original decision maker."[26] In its pleadings, Respondent invokes the nature of the authority that has been vested in EDs to make employment decisions for their offices. Respondent states: "[I]t is evident from the choice of language—'at any time and for any reason the Executive Director considers sufficient'—that the Board intended to grant Executive Directors the broadest possible discretion to manage their offices."[27] Additionally, the EDs' discretionary authority in managing employment matters is not constrained by detailed written rules, for example, in the area of performance assessment. This stands in contrast to the regulatory framework governing staff members of the Fund. Given the broad authority that the Board has vested in EDs to take personnel decisions for their offices, Respondent urges the Tribunal to apply a corresponding degree of deference in scrutinizing those decisions.

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[21] Commentary on the Statute, p. 17.

[22] *Id.*, p. 18.

[23] *Id.*, p. 19.

[24] *Id*.

[25] *Ms. "J", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2003-1 (September 30, 2003).

[26] *Id.*, para. 99.

[27] Quoting the OED Handbook regarding the termination of Assistants.

65. Having considered the views of the parties, and in the light of the legislative history and Commentary on the Statute, the Tribunal concludes as follows. In reviewing challenges to employment decisions taken by EDs—that is, challenges arising pursuant to Article II(2)(c)(ii) of the Tribunal's Statute—the Tribunal will take account of the distinct employment framework that governs Board staff, while at the same time applying generally recognized principles of international civil service law.

(3) Did the ED abuse his discretion in denying Applicant's post-termination requests to use accrued annual leave to bridge her to six years of Board service?

66. Applying this standard of review, the Tribunal considers whether the ED abused his discretion in denying Applicant's post-termination requests to use her accrued annual leave to extend the period of her Board employment to complete six years of Board service in order to trigger the application of EBAP/86/169, paragraph 2(c),[28] which would have allowed her to maintain her Board grade and salary for a two-year period following her return to Fund staff.

67. It is recalled that when Applicant raised a request by e-mail to the ED on June 9, 2021, and renewed that request on June 11, 2021, the ED communicated to her that the termination decision was final and that it would not be appropriate for him to expend the budget of the ED's office for Applicant to take her accrued leave to meet the six-year threshold. He suggested that she might contact the Secretary's Department of the Fund or HRD.

68. Applicant submits that the ED's invocation of budgetary considerations in denying her request was "entirely specious, arbitrary and capricious" because "her leave had already been earned, vested and paid for by [the ED's office], and was simply waiting to be converted to cash during her leave (via continuing paychecks)." Applicant argues that permitting her to utilize her accrued leave to satisfy the six-year requirement would not have had any budgetary impact on the ED's office. In the oral proceedings, Applicant sought to make the case that the ED had illegitimately placed budgetary considerations above Applicant's welfare. Applicant has also asserted that similar requests were granted by the ED for the benefit of other assistants.

69. Respondent, for its part, contends that the ED did not abuse his discretion in deciding to deny Applicant's requests for extension of her Board employment through the use of accrued annual leave. In Respondent's view, the ED's decision was a considered and rational one and was not improperly motivated. Respondent additionally notes that the ED explained his reasoning to Applicant in writing, in which he referred to the proper use of the office's budget to support the work of member countries. In the oral proceedings, Respondent underscored that the ED was concerned about using the resources of his office in a manner that would not have brought a

[28] EBAP/86/169, paragraph 2(c), provides: "A Secretarial or Clerical Assistant who has completed six years of continuous service in an Executive Director's office, any service in the first or the last month being considered a complete month, as such an assistant and whose appointment is terminated, shall be entitled to a regular staff appointment as follows: For two years from the date of that appointment, the individual's grade and salary will be 'grandfathered' in accordance with the provisions approved at Executive Board Meeting 86/16 (1/30/86) for staff whose positions had been downgraded under the job grading exercise. . . ."

corresponding benefit, following the decision to terminate Applicant's employment. For these reasons, Respondent submits that Applicant has not shown that the decision of the ED was arbitrary, capricious or otherwise an abuse of discretion.

70. The record shows that Applicant attempted to renegotiate with the ED the timing of her separation from Board staff so that she could utilize accrued annual leave in the amount of 65 days to meet the six-year threshold for maintaining her Board grade and salary upon re-entry to Fund staff. Applicant does not deny, however, that this effort was not undertaken until after the effective date of her transfer to Fund staff on June 1, 2021. Accordingly, Applicant has not provided any ground for the Tribunal to conclude that the ED would have had the authority to approve her leave requests, given that her employment relationship with the ED's office had already been severed.

71. Applying the standard of review for individual decisions taken in the exercise of managerial discretion, in the context of the broad authority vested in EDs to make employment decisions for their offices, the Tribunal concludes as follows. Applicant has not shown that the ED had authority to grant Applicant's leave requests after her Board appointment had ceased. Nor has Applicant shown that the ED had any obligation to reverse the termination decision for the purpose of granting those requests. Although Applicant has asserted that other assistants benefited from similar accommodations by the ED, she has not provided evidence to support such assertion. Additionally, although the parties disagree as to what budgetary impact Applicant's proposed use of accrued leave might have had on the resources of the ED's office, this dispute is of no moment, given that Applicant's transfer to Fund staff had already taken effect by the time she made the leave requests to the ED. At that stage, any accommodation would have been outside of the ED's reach, given the separate employment frameworks governing Board staff and Fund staff.[29] The Fund's rules further provided for Applicant to carry her leave balance with her when she transferred to Fund staff.[30]

72. The Tribunal accordingly concludes that Applicant has not shown that the ED abused his discretion when he denied Applicant's post-termination requests for extension of her Board employment, through the use of accrued annual leave, to meet the six-year requirement of EBAP/86/169. Applicant has not shown that the ED's decision was arbitrary, capricious or otherwise an abuse of discretionary authority.

B. Applicant's challenges to decisions of HRD and of the then HRD Director

73. Applicant has emphasized in her written and oral pleadings that the focus of her complaint concerns the decisions of HRD (and of the then HRD Director) that determined that she would not retain her Board grade and salary when she returned to Fund staff in 2021. Applicant asserts: (a) HRD erred in construing the terms of EBAP/86/169 to conclude that Applicant had not completed six years of "continuous service" with the Board prior to her 2021 transfer to Fund staff; (b) the then HRD Director abused her discretion in denying Applicant's post-termination requests to use

[29] *See* OED Handbook, Part IV.F.2 ("Executive Directors shall approve leave for their own Advisors/[A]ssistants.").

[30] *See Id.*, Part IV.B.7.

accrued annual leave to bridge her to six years of Board service; and (c) the then HRD Director abused her discretion in declining to make an exception in Applicant's case to the six-year requirement of EBAP/86/169 to maintain her Board grade and salary.

74. Respondent, for its part, has raised objections to the admissibility of Applicant's various challenges to decisions of HRD and of the then HRD Director. In the alternative, Respondent contends that Applicant's arguments should fail on the merits.

(1) Did HRD err in construing the terms of EBAP/86/169 to conclude that Applicant had not completed six years of "continuous service" with the Board prior to her 2021 transfer to Fund staff?

75. Among Applicant's contentions is that HRD erred in construing the terms of EBAP/86/169 to conclude that she had not completed six years of "continuous service" with the Board by May 31, 2021. When Applicant returned to Fund staff on June 1, 2021, the letter recording that transfer advised that her re-entry was governed by EBAP/86/169, paragraph 2(b), which allows for resumption of employment on Fund staff at the assistant's former Fund grade and at the salary within that grade closest to the one received during Board service. If Applicant had been deemed to have completed six years of service, her transfer would have been governed by EBAP/86/169, paragraph 2(c), which would have permitted Applicant to retain for two years her Board-acquired grade and salary.

76. Respondent asserts that the setting of Applicant's grade and salary was "automatic" by operation of EBAP/86/169, paragraph 2(b). On this basis, Respondent contends that, in contesting her grade and salary on return to Fund staff, Applicant does not raise an admissible challenge to an "administrative act" of the Fund.

77. In the Tribunal's view, Respondent's argument that the setting of Applicant's grade and salary was "automatic" is properly understood as a defense on the merits of the complaint rather than as an objection to its admissibility. This is because the application of the Fund's law to the facts of an individual case is quintessentially an "administrative act" of the Fund, reviewable by this Tribunal. It is a "decision taken in the administration of the staff of the Fund" in terms of Article II of the Tribunal's Statute. In particular, a challenge to the application of rules or practices governing the determination of grade and salary in an individual case constitutes an admissible complaint.[31] When HRD determined that Applicant had not met the requirement of six years of "continuous service" with the Board to retain (for two years) her Board grade and salary upon re-entry to Fund staff, HRD took an individual decision pursuant to a regulatory decision. The Tribunal accordingly concludes that Applicant has raised an admissible challenge to the interpretation and application of EBAP/86/169 in the circumstances of her case.

[31] *See, e.g., Mr. M. D'Aoust, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1996-1 (April 2, 1996), para. 35; *Ms. C. O'Connor (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2011-1 (March 16, 2011), para. 82.

78. Turning to the merits of Applicant's challenge, the question is whether Applicant has shown that HRD erred in construing the terms of EBAP/86/169 when it decided that Applicant had not completed six years of "continuous service" with the Board. Applicant made that argument for the first time in her Reply and pursued this theory in the oral proceedings. In the Reply, Applicant states that she had "served the Board for a total of 13 years, with only a single brief and involuntary break in service." That break in service entailed her transfer to Fund staff for sixteen months during 2014-2015 as part of what the Fund has explained were "extraordinary efforts to protect [Applicant] from a harmful situation in the then [ED] office environment, based on a perceived duty of care among senior Fund staff." In the oral proceedings, Applicant characterized these events as a "preservative" move that concluded once the situation in the ED's office had resolved. Applicant contends that her "involuntary" assignment to Fund staff in 2014-2015 should not have had adverse consequences in calculating her years of "continuous service" with the Board for purposes of EBAP/86/169.

79. The argument Applicant presents in her Reply runs counter to the assertions she made earlier in the Tribunal proceedings. For example, the opening paragraph of the Application states that Applicant is "seeking relief in connection with the wrongful and intentional blockage of [Applicant]'s requests, to an Executive Director and to the [then] HRD Director, to apply 65 of her 120 days of accrued leave *in order to satisfy the time-in-service requirement set by . . . EBAP/86/169*." (Emphasis added.) Further, Applicant frames her requests for relief to include "[c]onversion of 65 days of [Applicant's] unused annual Board leave . . . , with the result that she satisfies the six year requirement of EBAP/86/169." Applicant also complains in her Application of the "method by which the harm was inflicted – *e.g.* termination from Board service *falling just shy of the known six (6) year threshold*, followed by a refusal of commonly granted assistance to help her pass that threshold." (Emphasis added.)

80. Applicant's argument in her later pleadings that she had, in fact, met the six-year "continuous service" requirement of EBAP/86/169 may also be contrasted with her contemporaneous communications with the ED and the then HRD Director in the summer of 2021. In those communications, Applicant sought to extend her Board appointment, via the use of 65 days of accrued annual leave, for the stated purpose of bridging her to the six-year mark.

81. Thus, Applicant has consistently and repeatedly referred to her failure to meet EBAP/86/169's six-year requirement of "continuous service" with the Board. Moreover, there is no evidence that Applicant ever requested of the then HRD Director that the requirements of EBAP/86/169 be construed in the manner that she now urges.

82. Respondent opposes Applicant's newfound construction of EBAP/86/169's six-year "continuous service" requirement, asserting that her career history does not meet the plain meaning of the rule. In Respondent's estimation, the rule requiring "continuous" Board service means that there will have been no interruption in Board service—whether voluntary or involuntary—in reaching the six-year threshold. Respondent accordingly submits that HRD did not err in construing EBAP/86/169 in the circumstances of Applicant's case.

83. With regard to Applicant's argument that she had already met the six-year requirement of EBAP/86/169 at the time that her Board service was terminated on May 31, 2021, the Tribunal

concludes that Applicant has not established that HRD erred in construing the rule in the manner that it did, given the text of that rule and in the absence of having been presented with any argument to the contrary. Applicant has not established that HRD's determination that she failed to meet the six-year requirement of EBAP/86/169 when she transferred to Fund staff represented an error of law.

84. Applicant makes several additional arguments in support of the contention that she had fulfilled six years of continuous Board service. She alleges that the ED failed to give her 60 days' notice of her termination, which she asserts was required by the governing rule. Respondent counters that, by the terms of the rule that Applicant invokes, "[t]he notice period will cease upon the effective date of an OED Employee's subsequent . . . appointment or reassignment to the Fund staff . . . ."[32] The Tribunal concludes that given that the "notice" period ended upon the commencement of Applicant's employment on Fund staff, Applicant has not shown that a 60-day notice period should have been counted as part of her "continuous service" with the Board. Nor is the Tribunal persuaded by Applicant's further arguments: that the 65 days she lacked to meet the six-year mark at the end of her 2015-2021 Board service should be disregarded as *de minimis* in the light of the totality of her career; or that the Fund should have "interpreted the silence in EBAP/86/169 regarding leave as counting the accrued Board leave toward the six (6) year hurdle." Applicant points to no obligation of the Fund to have exercised its discretion in the manner she suggests.

85. For the foregoing reasons, the Tribunal concludes that Applicant has not shown that HRD erred in construing the terms of EBAP/86/169 to determine that Applicant had not completed six years of "continuous service" with the Board prior to her 2021 transfer to Fund staff.

(2) Did the then HRD Director abuse her discretion in denying Applicant's post-termination requests to use accrued annual leave to bridge her to six years of Board service?

86. It is recalled that, following Applicant's unsuccessful requests to the ED in June 2021 to use 65 days of accrued annual leave to bridge her to six years of Board service, Applicant raised the same request to the then HRD Director on July 6, 2021, with a follow-up communication of July 27, 2021. This effort also failed to yield the response Applicant was seeking.

87. Applicant contends that the then HRD Director's denial of her request was improperly motivated. In particular, Applicant alleges that the then HRD Director was influenced in her decisions concerning the terms of Applicant's re-entry to Fund staff by the ED's view of Applicant's performance, which had not been tested under the performance assessment standards applicable to Fund staff. Applicant asserts that the then HRD Director's decision was motivated by a "desire to support [the ED]'s intention to stiff [Applicant] out of six (6) years of Board service because of her alleged supposed 'poor performance,' and despite her highly praised work with [the

[32] Termination of the Employment of Senior Advisors, Advisors, and Assistants to Executive Directors, EBAM/13/5 (June 28, 2013), para. 6; OED Handbook, Part III.E.6.

ED's office]." Applicant also asserts that the then HRD Director "was entirely capable of approving [Applicant's] request *sua sponte*. She simply refused to do so."

88. Respondent, for its part, submits that the then HRD Director had no authority to instruct the ED to extend Applicant's employment as Board staff. Respondent contends that the then HRD Director was not authorized to overrule either the ED's decision terminating Applicant's employment or his decision denying her leave requests.

89. Given the Fund's governance structure, the Tribunal concludes that Applicant has not shown that the then HRD Director (who serves under the authority of the Managing Director) had authority to require the ED (a member of the Executive Board) to grant Applicant's request to use her accrued annual leave to extend her Board appointment. Moreover, as concluded above, the ED did not have authority to grant such requests once Applicant's employment with the ED's office had ceased on May 31, 2021; Applicant did not make her requests to the then HRD Director until more than a month later. As for the contention that the then HRD Director could herself have extended Applicant's Board employment, that argument must also fail. Only the ED could take a termination decision, or grant a leave request, for an assistant in his office.

90. In short, Applicant's requests to the then HRD Director to use 65 days of accrued annual leave to meet the six-year requirement of EBAP/86/169 mirrored the requests she had made to the ED. Just as the ED did not have the authority to approve Applicant's leave requests after her employment with the ED's office had terminated, so too the then HRD Director did not have authority to grant such requests following Applicant's re-entry to Fund staff.

91. For these reasons, the Tribunal concludes that Applicant has not shown that the then HRD Director abused her discretion in denying Applicant's post-termination requests to use accrued annual leave to bridge her to six years of continuous Board service.

(3) Did the then HRD Director abuse her discretion in declining to make an exception in Applicant's case to the six-year requirement of EBAP/86/169?

92. Having concluded (a) that HRD did not err in construing the terms of EBAP/86/169 to determine that Applicant had not completed six years of "continuous service" with the Board prior to her 2021 transfer to Fund staff, and (b) that the then HRD Director did not abuse her discretion in denying Applicant's post-termination requests to use accrued annual leave to bridge her to six years of Board service, the following question remains: did the then HRD Director abuse her discretion in declining to make an exception in Applicant's case to the six-year requirement of EBAP/86/169 so that Applicant might retain her Board grade and salary upon re-entry to Fund staff in 2021?

93. The Tribunal observed in its admissibility Judgment that Applicant's theory of the case includes that the then HRD Director 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.[33] Applicant argues that despite the terms of the six-year rule, the Fund has long had a practice of permitting reintegration of Board staff into Fund staff "under bespoke arrangements that preserve their grade and salary." Applicant also cites her own reintegration on Fund staff in 2014 as an example of an exception being made to the six-year rule.

94. Applicant further submits that the then HRD Director should have been flexible about Applicant's re-entry date, given that her transfer to Fund staff was not occasioned by a particular need on the part of the Fund but rather by the termination of her appointment with the Board. In the circumstances, Applicant contends that the Fund "had no good reason" to deny her request.

95. In its Answer on the merits, Respondent renews the assertion it made at the admissibility stage that the then HRD Director's engagement with Applicant following termination of her Board appointment did not amount to an "administrative act" in terms of Article II of the Tribunal's Statute: "[T]he mere fact that the [then] HRD Director compassionately engaged with Applicant to discuss her situation does not constitute an adverse employment decision." Furthermore, Respondent submits that "[t]he omission to act . . . cannot constitute a challengeable decision unless the omission amounts to an exercise of authority under an applicable rule."

96. Respondent's position is that the then HRD Director's noninterference with the "straightforward application" of EBAP/86/169, paragraph 2(b), is not challengeable as an "administrative act" of the Fund. This stance is similar to the argument Respondent has made that the operation of the rule was "automatic." Both of these arguments, however, go to the merits of the dispute rather than to its admissibility.

97. Applicant sought out a remedy with the then HRD Director—via an e-mail message and meeting of July 6, 2021—for what she considered to be unfair treatment in regard to her grade and salary, in the light of what she asserted was the Fund's practice in similar circumstances. The then HRD Director, after meeting with Applicant, declined to act in response. The Tribunal concludes that, in the circumstances, the then HRD Director's omission to fulfill Applicant's request constituted an "administrative act" of the Fund for purposes of crossing the threshold of admissibility.

98. As to the merits, Respondent states that if the Tribunal finds that Applicant's challenges to decisions of the then HRD Director are admissible, those actions represented a correct application of the governing law without improper motivation or bias. Respondent also submits that deference to managerial discretion is at its height when exceptional treatment is sought in the context of a rule having no provision for exception. Respondent contends that the then HRD Director's decision not to take exceptional action in favor of Applicant was reasonable and within the ambit of the Fund's managerial discretion.

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[33] *"XX" (Admissibility of the Application)*, para. 45.

99. Although Respondent acknowledges that an exception had been made to EBAP/86/169 in Applicant's favor earlier in her career, it states that the circumstances of Applicant's 2014 transfer from Board staff to Fund staff were "materially different" from the circumstances of 2021. In the earlier instance, Applicant is said to have "benefited from extraordinary efforts to protect her from a harmful situation in the then [ED] office environment, based on a perceived duty of care among senior Fund staff." Respondent states that Applicant has not raised any similar circumstances in connection with her re-entry to Fund staff in 2021. Furthermore, Respondent maintains that Applicant has not been treated differently from similarly situated employees, citing the table it submitted in response to Applicant's Document Request No. 2.

100. The question is whether Applicant has shown that the decision to return her to Fund staff at her prior Fund grade was arbitrary, capricious or discriminatory. Applicant asserts that, 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 in a manner that preserves their Board grade and salary. Applicant, however, has failed to provide evidence to show that she was treated differently from other assistants who were deemed not to have completed the six-year requirement. Furthermore, it appears that the earlier exception made on Applicant's behalf was made in circumstances materially different from those presented in 2021.

101. The Tribunal accordingly concludes that Applicant has not shown that the then HRD Director abused her discretion in declining to make an exception in Applicant's case to the six-year requirement of EBAP/86/169.

C. Has Applicant raised an admissible challenge to a "regulatory decision" of the Fund?

102. In its admissibility Judgment, the Tribunal expressly left open the question of whether Applicant has raised an admissible challenge to a "regulatory decision"[34] of the Fund.[35] That question is now considered.

(1) Does Applicant challenge EBAP/86/169 or any part thereof?

103. The parties do not dispute that the individual decision that Applicant challenges was taken pursuant to a regulatory decision. Applicant has variously argued that she challenges as unfair the regulatory decision itself and/or its application and implementation in her case.

104. Applicant refers to EBAP/86/169 as "an arbitrary and unconscionable rule." It is clear, however, that she does not challenge EBAP/86/169 *in toto*. The Tribunal has observed that "Applicant does not request annulment of the rule [EBAP/86/169]; rather she seeks to avail herself

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[34] Article II(2)(b) of the Tribunal's Statute defines "regulatory decision" 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."

[35] *"XX" (Admissibility of the Application)*, para. 82.

of its benefits."[36] The Tribunal further observes that Applicant has already availed herself of the primary benefit afforded by EBAP/86/169, that is, to be able to return to Fund staff upon termination of an appointment as an assistant to an ED.

105. A secondary benefit accrues to those assistants who have completed six years or more of continuous Board service; those individuals may retain their Board grade and salary for two years following their reintegration into Fund staff. Applicant appears to challenge the six-year continuous service requirement of EBAP/86/169, on which basis she was returned to her earlier Fund grade of A6, effective June 1, 2021.

106. Applicant submits that the six-year continuous service requirement of EBAP/86/169 "severely penalizes employees who transfer from the Executive Board's staff to the regular Fund staff before completing six (6) full years of continuous Board service." According to Applicant, "[t]his makes Board service an extreme gamble." She refers to the six-year requirement of EBAP/86/169 as a "forced trade," providing "temporary security in [the staff member's] employment, in return for a chunk of [their] salary." Applicant further contends that the six-year requirement is a "random test lacking any connection with proper Fund business purposes."

107. 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."

108. Having reviewed Applicant's arguments and the Fund's response, the Tribunal concludes that Applicant is contesting the six-year rule itself, along with its implementation in her own case. For these reasons, the Tribunal concludes that Applicant seeks to challenge the six-year continuous service requirement of EBAP/86/169 as a "regulatory decision" of the Fund.

(2) Does Article XX of the Tribunal's Statute bar a challenge to the six-year continuous service requirement of EBAP/86/169?

109. Respondent contends that insofar as Applicant raises a challenge to the six-year continuous service requirement of EBAP/86/169, a rule adopted by the Board in 1986, that challenge is precluded by Article XX of the Tribunal's Statute, which bars challenges to decisions that were taken before the Statute's effective date of October 15, 1992.

110. Article VI(2) of the Tribunal's Statute provides that "the illegality of a regulatory decision may be asserted at any time in support of an admissible application challenging the legality of an individual decision taken pursuant to such regulatory decision." It is not disputed that the individual decision in Applicant's case—to return her to Grade A6 upon her transfer to Fund staff in 2021—was taken pursuant to the six-year rule of EBAP/86/169. The Tribunal has concluded above that Applicant's challenge to the individual decision is admissible.

[36] *Id.*, para. 80.

111. Article VI(2) of the Tribunal's Statute is, however, "subject to the provisions of Article XX."[37] The Tribunal's jurisprudence shows that "a current complaint about a rule which came into force before October 15, 1992 is not sufficient to give rise to jurisdiction which otherwise is absent."[38] Accordingly, the "general proviso [of Article VI(2) of the Statute] is subject to the *lex specialis* of Article XX."[39]

112. Applicant seeks to challenge the six-year continuous service requirement of EBAP/86/169. The parties do not dispute that this requirement has been part of EBAP/86/169 since its inception in 1986. Nor has Applicant advanced any evidence that the rule has been the subject of review or revision within the period of the Tribunal's jurisdiction.[40] To the contrary, Applicant emphasizes that the six-year rule has stood unchanged since its adoption.

113. For the foregoing reasons, the Tribunal concludes that insofar as Applicant seeks to challenge the regulatory decision requiring six years of continuous Board service in order for a staff member to maintain, for two years, their Board-acquired grade and salary, that challenge is barred by Article XX of the Tribunal's Statute.

D. Was Applicant's re-entry to Fund staff undertaken fully in accordance with principles of fair treatment?

114. The Tribunal has concluded above that neither the ED nor the then HRD Director abused their discretion in denying Applicant's requests to use accrued annual leave to extend her appointment on Board staff to meet the six-year requirement of EBAP/86/169. Given that Applicant made these requests following the termination of her Board appointment, she has not shown that either official had the authority to grant her requests or that they abused any discretion they might have had to do so. Nor has Applicant established that the Fund abused its discretion in construing the terms of EBAP/86/169 to conclude that she had not completed six years of "continuous service" with the Board by May 31, 2021, or in declining to make an exception in her favor to the six-year rule. Insofar as Applicant seeks to challenge the underlying rule, that claim is barred by Article XX of the Tribunal's Statute.

115. A further question arises from the facts and arguments of this case: was Applicant's re-entry to Fund staff undertaken fully in accordance with principles of fair treatment?

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[37] Commentary on the Statute, p. 25. *See also Mr. R. Niebuhr, Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2013-2 (March 12, 2013), para. 78 ("Article VI, Section 2, is, however, subject to the constraint of Article XX.").

[38] *Ms. "S", Applicant v. International Monetary Fund, Respondent,* IMFAT Judgment No. 1995-1 (May 5, 1995), para. 21.

[39] *Id.,* para. 22.

[40] *See Ms. "G", Applicant and Mr. "H", Intervenor v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2002-3 (December 18, 2002), para. 72.

116. The issue of fair treatment arises in this case from the coexistence of the separate frameworks that regulate the employment of personnel serving the Board and of those serving under the authority of the Managing Director, in the context of a staff member transferring between the two regimes. The separate employment frameworks are in some respects discordant, including that OED employees are not subject to a formal performance management system such as applies to Fund staff, and that an ED may terminate an assistant's employment "at any time and for any reason the Executive Director considers sufficient."[41]

117. An analogous discordance arose in *Sachdev*,[42] in which the Tribunal recognized that the office in which an applicant was employed was a "joint undertaking of the Fund and the World Bank." The Tribunal held that it was "understandable that the Fund may not have followed every provision of its written law in carrying out—together with the World Bank—the selection process for the head of that Office." At the same time, the Tribunal concluded that "any process devised must comply with generally recognized principles of international administrative law, which would require those procedures to be fair and reasonable."[43] The Tribunal's findings in *Sachdev* "reveal[ed] an accumulation of failures of requisite managerial pro-activeness. These failures evidence[d] a degree of indifference to Applicant inconsistent with fundamental fairness to staff."[44] In drawing these conclusions, the Tribunal underscored that a fundamental expectation of fair treatment inheres in serving as a staff member of the Fund. That expectation governed even where the impugned decision was the non-selection of the Fund staff member for a joint Fund/Bank position as part of a process that was not regulated exclusively by the Fund's own rules.

118. Likewise, in the present case, Applicant's expectation of fair treatment is grounded in her status as a staff member of the Fund, even while serving as an assistant to an ED. In taking the "administrative act" of transferring Applicant from the legal regime governing Board staff to that governing Fund staff, and in determining her grade and salary upon re-entry, the Fund had an obligation to treat Applicant in accordance with the fair and reasonable procedures to which staff members of the Fund are entitled.

119. When Applicant returned to Fund staff in 2021 as the result of the termination of her Board employment, she was confronted with the "uneasy fit" [45] between the two employment frameworks. Re-entry to Fund staff from Board staff is not an ordinary "transfer" in the sense of a transfer between departments of the Fund. It represents a shift from one employment regime to another and includes the proviso that the staff member's grade and salary are subject to diminution

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[41] OED Handbook, Part IV.B.2.

[42] *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent* IMFAT Judgment No. 2012-1 (March 6, 2012).

[43] *Id.*, para. 110.

[44] *Id.*, para. 253.

[45] *See Mr. "OO", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2019-2 (December 17, 2019), paras. 131, 197, 212, 219.

when Board service falls short of six years. The application of the six-year rule may be especially harsh when, as in Applicant's case, the staff member is nearing the six-year mark. That employee's expectations of continuity of grade and salary will be heightened as compared with the expectations of an employee whose appointment on Board staff has been of a briefer duration. In the instant case, Applicant's expectations may also have been shaped by the unusual course of events in 2014-2015 when, just short of six years' employment with the Board, Applicant had been permitted to maintain her Board grade and salary upon transfer to Fund staff.

120. In assessing Applicant's treatment in relation to her re-entry to Fund staff, it is also pertinent to recall that Board assistants may be terminated not only at any time and for any reason that the ED considers sufficient, but they may be terminated essentially without notice—as long as they are returned to Fund staff. Although the OED Handbook prescribes a 60-day notice period in cases of termination, that "notice" period "will cease upon the effective date of an OED Employee's subsequent . . . appointment or reassignment to the Fund staff . . . ."[46]

121. As Applicant's case illustrates, the abrupt transfer from Board staff to Fund staff may have harsh consequences. For this reason, the Tribunal considers that coordination and consultation are required to ensure that such a transfer is taken in accordance with principles of fair treatment. This coordination should include ensuring—before the transfer becomes effective and the gate has closed behind them—that the staff member is fully apprised of the potential consequences of the transfer upon their grade and salary, in the light of the Fund's calculation of their years of "continuous service" with the Board, so that the staff member is not taken by surprise. Furthermore, the staff member should be afforded the opportunity to seek accommodations—in ways that are fair to the Board, the Fund, and the staff member—in relation to any potentially harsh consequences of the change in employment status.

122. The Tribunal accordingly concludes that the Fund had a responsibility to engage proactively with Applicant to seek possible approaches to cushioning the effects of her abrupt change in employment status from Board to Fund staff, especially as her Board service was approaching the six-year threshold. Had such proactive engagement taken place, Applicant would have been able to explore whether budgetary arrangements might have been coordinated between the Board and the Fund to allow her to expend her accrued annual leave to meet the six-year requirement prior to the transfer's becoming effective. Likewise, Applicant would have had the opportunity to raise the circumstances of her 2014-2015 employment on Fund staff in connection with the calculation of the length of her "continuous service" with the Board.

123. It is true that Applicant herself might have raised requests with the ED during the period between May 10, 2021, when she was notified of her termination, and May 31, 2021, when her Board employment ceased at the conclusion of planned annual leave. Applicant asserts, however, that she was unaware until she arrived on Fund staff on June 1, 2021, of the consequences of the transfer upon her grade and salary. In any event, the record does not disclose that any proactive

[46] Termination of the Employment of Senior Advisors, Advisors, and Assistants to Executive Directors, EBAM/13/5 (June 28, 2013), para. 6; OED Handbook, Part III.E.6.

effort was made by officials of either the Board or the Fund to consider with Applicant the consequences of the transfer or any approach, such as her expenditure of accrued annual leave, that might have allowed for Applicant's transfer to proceed under less severe terms.

124. The Tribunal additionally takes note of irregularities that appear to have marked Applicant's series of transfers between Fund staff and Board staff. These include that the Fund has been unable to provide an explanation (including in the oral proceedings) for why the letter associated with Applicant's September 1, 2015 transfer to Board staff, following her sixteen-month period on Fund staff in 2014-2015, was not issued until April 20, 2016. The letter's delay raises a question of the adequacy of the notice Applicant received of the Fund's position as to the consequences of any future return to Fund staff. The Tribunal also takes note of the informality of the document, namely, the email of May 10, 2021, that appears to have served as the written notification contemplated by OED Handbook, Part III.E.4,[47] which is to specify the final date of Board employment.

125. The fairness of the rule permitting EDs to terminate the employment of their office assistants is not before the Tribunal. What is at issue are the consequences to Applicant of the implementation of that rule in the circumstances of her case. The prerogative that the Board has granted itself to terminate the employment of assistants "at any time and for any reason that the Executive Director considers sufficient" does not absolve the Fund from responsibility for the fair treatment of staff members affected by such decisions. To the contrary, it is entirely consistent with the opportunity that EBAP/86/169 affords Board staff to return to Fund staff that the re-entry of these employees shall be taken fully in accordance with the principles of fair treatment to which Fund staff are entitled.

126. In this case, the Fund fell short of its obligation of fair treatment by failing to undertake the "requisite managerial pro-activeness"[48] to ensure—before Applicant's transfer became effective—that she was fully aware of the consequences of her re-entry to Fund staff and that she had been given an opportunity to seek accommodation, for example, by expending her accrued annual leave so as to meet the six-year mark. The outcome of that consultation may have remained unsatisfactory to Applicant, but Fund officials, with authority to take such decisions, should have had the opportunity to consider Applicant's requests before the transfer became effective.

127. The Tribunal concludes as follows. The Fund was not obliged to construe the governing rule EBAP/86/169 to conclude that Applicant had met the six-year "continuous service" requirement. Nor was it required to make an exception in Applicant's favor to the application of that rule. It was, however, required to engage proactively with Applicant to consider the effect of the transfer on the terms and conditions of her employment and to provide her the opportunity to raise with human resources officials of both the Board and the Fund, possible approaches to

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[47] OED Handbook, Part III.E.4 (Requirement for Written Notice of Termination), provides: "In all cases of termination, the Executive Director shall give notice to the OED Employee in writing, with a copy to the Secretary, specifying the final date of service for the OED Employee."

[48] *Sachdev*, para. 253.

mitigate any adverse impact of her transfer. For this lapse of fair treatment, Applicant is entitled to relief.

CONCLUSIONS OF THE TRIBUNAL

128. For the reasons elaborated above, the Tribunal concludes that Applicant has not shown that the Fund abused its discretion in denying her the opportunity to retain her Board grade and salary when she transferred to Fund staff in 2021. Nonetheless, the Tribunal finds that Applicant's re-entry to Fund staff was not undertaken fully in accordance with principles of fair treatment.

REMEDIES

129. The Tribunal's remedial authority in respect of challenges to individual decisions is found in Article XIV(1) of the Tribunal's Statute, which provides:

> If the Tribunal concludes that an application challenging the legality of an individual decision is well-founded, it shall prescribe the rescission of such decision and all other measures, whether involving the payment of money or otherwise, required to correct the effects of that decision.

130. The Tribunal has interpreted its remedial powers to encompass the "'. . . authority to reject an [a]pplication challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision.'"[49] On this basis, the Tribunal has awarded "compensation for intangible injury to correct the effects of procedural failure in the taking of a sustainable decision."[50]

131. In the present case, the Tribunal has concluded that although Applicant has not shown that the Fund abused its discretion in denying her the opportunity to retain her Board grade and salary when she re-entered Fund staff in 2021, that decision was not taken fully in accordance with principles of fair treatment. This failure warrants compensation for intangible injury.

A. Monetary compensation for intangible injury

132. Intangible injury ordinarily arises when the Fund "fails through inaction to discharge a duty imposed by its written law or by general principles of international administrative law, such as the

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[49] *Id.*, para. 255, quoting *Ms. "C", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44.

[50] *Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 444 and note 59; "*WW", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2024-1 (February 12, 2024), para. 302.

obligation to take decisions in accordance with fair and reasonable procedures."[51] By its nature, intangible injury will be difficult to quantify. The Tribunal's approach in such cases is to "identify the injury and assess its nature and severity, giving due weight to factors that may either aggravate or mitigate the degree of harm to the applicant."[52]

133. In the present case, the nature of the injury was the failure of the Fund to afford Applicant a fair opportunity, before the cessation of her Board employment, to explore options to mitigate the effects of the termination and transfer upon her grade and salary under the law of the Fund. In this regard, Fund officials displayed a "degree of indifference to Applicant inconsistent with fundamental fairness to staff."[53] Although Applicant took a period of annual leave before the termination's effective date in which she might have been able to raise requests, the Fund itself failed to engage proactively with Applicant, in light of the discordance between the employment regimes governing Board staff and Fund staff. The record also raises questions as to the adequacy of the notice provided to Applicant concerning the effect of the governing rules.

134. At the same time, in assessing the severity of the harm, the Tribunal is mindful that Applicant has received the primary benefit of EBAP/86/169, that is, Applicant has been able to resume employment as a Fund staff member following the termination of her Board employment. The unfair treatment that the Tribunal has found in this case relates to a secondary benefit of EBAP/86/169, which is to retain one's Board grade and salary (for two years) following return to Fund staff—a benefit that is afforded only to those employees who have completed six years of "continuous service" with the Board.

135. Having regard for these factors, the Tribunal sets the compensation to correct the effects of the intangible injury consequent to the Fund's failure to treat Applicant fairly in relation to her 2021 re-entry to Fund staff at $20,000.

B. Legal fees and costs

136. As part of the Tribunal's remedial authority, Article XIV(4) of the Tribunal's Statute provides for the award of legal fees and costs as follows:

> If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Fund, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

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[51] *Ms. "NN", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2017-2 (December 11, 2017), para. 144, quoting *Ms. "GG" (No. 2)*, para. 445; *Mr. "OO"*, para. 216.

[52] *Ms. "GG" (No. 2)*, para. 446; "*WW"*, para. 307.

[53] *Sachdev*, para. 253.

137. The parties in this case have been afforded several exchanges on the issue of legal fees and costs, beginning with the admissibility phase of the proceedings.[54] In accordance with Rule IX(5) of the Tribunal's Rules of Procedure, Applicant has submitted with her Reply documentation supporting her fee request, including for those fees that had been incurred at the admissibility stage. That request is considered together with Applicant's Supplemental Request for Costs (with supporting documentation), filed following the oral proceedings. In total, Applicant seeks legal fees and costs in the amount of $37,646.63. Of that total, $4,068.66 represents the amount attributable to the preparation of Applicant's Objection to the Motion for Summary Dismissal. Respondent has presented its views on Applicant's requests for legal fees and costs in its Rejoinder and in its Response to Applicant's Supplemental Request for Costs, as well as at the admissibility phase.

138. In her fee submissions, Applicant emphasizes that her case is "one of first impression, as it presents novel issues pertaining to Board employment, and the transition from Board to Fund employment." Respondent, for its part, underscores that, in the event Applicant were to prevail in part on her Application, the Tribunal should apply a principle of proportionality in determining any fee award.

(1) Principle of proportionality

139. In assessing the quantum of legal fees and costs that it will be "reasonable" for the Fund to be ordered to bear pursuant to Article XIV(4) of the Tribunal's Statute, the Tribunal consistently has applied a "principle of proportionality."[55] This principle is grounded in the statutory language, which recognizes than an application may be well-founded either "in whole or in part" and that legal fees and costs may be either "totally or partially" borne by the Fund. Where, as here, an applicant prevails in part on an application, "a 'measure of proportionality' will apply, based on the degree to which an applicant is successful in the context of [their] total claims."[56] The Tribunal has also stated that it will weigh the "relative centrality and complexity" of the various claims and their ultimate disposition by the Tribunal.[57]

140. In applying the principle of proportionality, the Tribunal may also give consideration to the role played by the record assembled and argued by an applicant's counsel in forming the basis for the Tribunal's conclusions, for example, to support a finding of unfair treatment in the context

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[54] *See "XX" (Admissibility of the Application)*, paras. 28, 88.

[55] "*VV" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2023-4 (December 22, 2023), para. 110.

[56] "*WW"*, para. 318 (internal citations omitted). *See also Ms. "C", Applicant v. International Monetary Fund, Respondent (Interpretation of Judgment No. 1997-1)*, IMFAT Order No. 1997-1 (December 22, 1997), Paragraph Fifth.

[57] "*WW"*, para. 319; *"VV" (No. 2)*, para 110.

of otherwise unsuccessful claims.[58] When determining a fee award, the Tribunal may also weigh the significance of an applicant's pleadings in "rais[ing] for the first time important issues," including "matters of significance not only for [the] [a]pplicant's case but for the institution as a whole."[59]

(a) Award of legal fees and costs regarding the merits phase

141. In the present case, the Tribunal has concluded that although Applicant has not prevailed on her principal claim challenging the grade and salary on which she re-entered Fund staff, she nonetheless has succeeded in demonstrating a failure of fair treatment in relation to that re-entry. Respondent has been ordered to compensate Applicant for intangible injury. The Tribunal considers that the record assembled and argued by Applicant's counsel, in both the written and oral pleadings, formed the basis upon which the Tribunal reached these conclusions and that the case raised issues of first impression at both the admissibility and the merits stages. In the circumstances, the Tribunal awards Applicant 70 percent of her legal fees and costs incurred in pleading her case on the merits.

(b) Award of legal fees and costs regarding the admissibility phase

142. While the Motion for Summary Dismissal was pending, Applicant was asked to submit any request for legal fees and costs incurred in responding to the Motion. Respondent was afforded the opportunity to file a response to Applicant's request. In its admissibility Judgment, the Tribunal decided to defer its decision on legal fees and costs until the merits phase.[60] The Tribunal now addresses this matter.

143. The Tribunal's jurisprudence shows that in applying a principle of proportionality, the Tribunal will take account of an applicant's earlier success in responding to a motion for summary dismissal, filed pursuant to Rule XII of the Tribunal's Rules of Procedure. Thus, when an applicant succeeds in whole or in part on the merits of a case, the Tribunal's award of attorneys' fees will include the sum incurred by the applicant in successfully responding to the summary dismissal motion.[61]

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[58] *Sachdev*, para. 260 (the "record assembled and argued by [a]pplicant's counsel formed the basis upon which the Tribunal" concluded that applicant had demonstrated "significant failures of fair treatment"); *Mr. "F", Applicant v. International Monetary Fund, Respondent (Assessment of compensable legal costs pursuant to Judgment No. 2005-1),* IMFAT Order No. 2005-1 (April 18, 2005), Paragraph Second (record assembled and argued by applicant's counsel was "indispensable to the Tribunal's award to Applicant of substantial relief on other substantial counts").

[59] *Mr. "OO"*, para. 225.

[60] *"XX" (Admissibility of the Application)*, paras. 88-89.

[61] *See Mr. B. Tosko Bello, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2013-2 (March 13, 2013), paras. 101-102; *"VV" (No. 2)*, para. 111.

144. The Tribunal's jurisprudence further shows that a fee award for successfully responding to a motion for summary dismissal is made independently of considerations associated with awarding fees incurred in prevailing on the merits of an application. For this reason, the Tribunal does not exclude the possibility that an award of attorneys' fees for successfully responding to a motion for summary dismissal may be made in the absence of later success on the merits of an application. The Tribunal need not reach that question in the instant case because the Tribunal has found the Application to be "well-founded . . . in part" in the merits phase of the proceedings.

145. In applying the principle of proportionality in this case, the Tribunal awards Applicant the full measure of the legal fees and costs incurred by her in pursuing her successful Objection to the Motion for Summary Dismissal.

(2) Tribunal's conclusions on legal fees and costs

146. Having considered the representations of the parties, and the criteria set out in Article XIV(4) of its Statute, the Tribunal concludes that the Fund shall pay Applicant 70 percent of the legal fees and costs incurred by Applicant in pleading her case on the merits. To the above amount shall be added the full legal fees and costs incurred by Applicant in successfully responding to the Motion for Summary Dismissal. The total sum of legal fees and costs awarded to Applicant is $27,573.24.

DECISION

FOR THESE REASONS

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

1. The Fund's decision to deny "XX" the opportunity to retain her Board grade and salary when she transferred to Fund staff in 2021 is sustained.

2. Nonetheless, "XX"'s re-entry to Fund staff was not undertaken fully in accordance with the principles of fair treatment to which staff members of the Fund are entitled. To correct the effects of that intangible injury, "XX" is awarded compensation in the sum of $20,000.

3. Insofar as "XX" challenges the six-year requirement of EBAP/86/169 as a "regulatory decision" of the Fund, that challenge is inadmissible on the basis of Article XX of the Tribunal's Statute, which bars challenges to decisions pre-dating the Statute's effective date.

4. The Fund shall also pay "XX" 70 percent of the legal fees and costs incurred by "XX" in pleading her case on the merits, plus the full legal fees and costs incurred by "XX" in successfully responding to the Fund's Motion for Summary Dismissal. The total sum of legal fees and costs awarded to "XX" is $27,573.24.

Nassib G. Ziadé, President

Maria Vicien Milburn, Judge

Andrew K.C. Nyirenda, Judge

/s/
Nassib G. Ziadé, President

/s/
Paul Jean Le Cannu, Registrar

Washington, D.C.
December 30, 2024