ADMINISTRATIVE TRIBUNAL

OF THE

INTERNATIONAL MONETARY FUND

Judgment No. 2025-1

January 21, 2025

"SS" (No. 2), Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)

Office of the Registrar

ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND

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INTRODUCTION

1. The Administrative Tribunal of the International Monetary Fund ("Tribunal"), composed for this case, pursuant to Article VII, Section 4 of the Tribunal's Statute, of Judge Nassib G. Ziadé, President, and Judges Deborah Thomas-Felix and Maria Vicien Milburn, has decided the Motion for Summary Dismissal ("Motion") of a second Application brought against the International Monetary Fund ("Respondent" or "Fund") by "SS", a staff member of the Fund. Applicant was represented in the proceedings by Mr. Adam Augustine Carter, Esq., of The Employment Law Group, PC. Respondent was represented by Mr. Brian Patterson, Assistant General Counsel, and Ms. Cynthia Colaiacovo, Senior Consulting Counsel, of the Administrative Law Unit of the IMF Legal Department.

2. This is Applicant's second Application. In the first application, the Tribunal granted the Fund's request for anonymity for all persons concerned. The considerations that led to the granting of anonymity have not changed, despite Applicant's statement in the Application in the present case that "anonymity is pointless."

3. In the first application, the parties stipulated that Applicant had a hearing impairment constituting a disability within the meaning of the Fund's policy prohibiting disability discrimination and providing for the reasonable accommodation of disabilities within the workplace. Applicant alleged in the first application—with specific examples—that the Fund (a) failed to provide reasonable accommodations for his disability, (b) discriminated against him based on his disability, (c) retaliated against him, (d) subjected him to a pattern of unfair treatment (which the Tribunal addressed within the framework of the Fund's harassment and hostile work environment policies), (e) breached the terms of a partial mediation agreement, and (f) subjected Applicant to procedural unfairness in the administrative review and Grievance Committee proceedings. Applicant's claims in the first application arose during the time period covering October 2, 2017 to October 29, 2018 (the "First Period").

4. In a Judgment dated December 27, 2021,[1] the Tribunal denied the first application on the merits.

5. In the present Application, Applicant again argues that the Fund subjected him to disability discrimination, retaliation, and harassment and a hostile work environment, but states that the facts related to these claims arose during the period covering October 30, 2018 until the end of November 2019 (the "Second Period"). Further, Applicant asserts that his managers abused their discretion regarding publication of a book chapter Applicant was responsible for drafting and that the Fund subjected him to unfair treatment concerning the "internal redress process."

6. The Fund has responded to the Application with a Motion for Summary Dismissal, arguing principally that Applicant's disability discrimination, retaliation, and harassment and hostile work environment claims should be dismissed as *res judicata,* and that one of Applicant's examples of purported retaliation and harassment and hostile work environment (a planned but rescinded transfer to another Division) is moot. The Fund does not explicitly address Applicant's abuse of discretion and unfair treatment claims but states that "[t]he remainder of the case should be dismissed for failure to exhaust administrative remedies." Further, the Fund interprets a request for documents made by Applicant in his Application as a veiled attempt to challenge a 2019 assignment to another Department.

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

FACTUAL BACKGROUND AND CHANNELS OF ADMINISTRATIVE REVIEW

8. Since late 2019, Applicant has served in Department X. Applicant was transferred to Department X as part of the Fund's Mobility Support Program. Immediately prior to joining Department X, Applicant worked in a different Department ("Department Y"). Most of Applicant's complaints center on his Department Y supervisor's treatment of him concerning a moderate to severe hearing impairment with which Applicant was diagnosed in 2015.

9. Prior to the Tribunal rendering its judgment in *"SS"* (involving the First Period), Applicant—on June 27, 2019—submitted a request for administrative review to the Acting Head of Department Y for alleged conduct arising after October 29, 2018. On July 10, 2019, Applicant sent a similar request to the Director of the Human Resources Department ("HRD"). On January 6, 2020, Applicant filed a supplementary request for administrative review with HRD. Applicant

[1] *Mr. "SS", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2021-3 (December 27, 2021).

mainly asserted in his requests that he had been denied reasonable accommodations; had been subjected to discrimination, retaliation, and a hostile work environment; and had suffered career and reputational damage.

10. On August 26, 2019, Applicant filed with the Grievance Committee the same request he had filed on July 10, 2019 with the HRD Director, which the Grievance Committee understood to be a Grievance. He later filed, on May 21, 2020, an "updated second grievance" with the Grievance Committee. Applicant mostly raised the same issues with the Grievance Committee that he had raised in his requests for administrative review.

11. On September 23, 2020, the HRD Deputy Director responded to Applicant's requests for administrative review, concluding that there was no evidence to support Applicant's claims.

12. On December 15, 2020, the Fund filed a Motion to Dismiss Applicant's Grievance. The Fund asserted principally that Applicant's claims were either barred by *res judicata*, were moot, or were inadmissible due to a failure to exhaust administrative remedies. Regarding the Fund's *res judicata* argument—which applied to most of Applicant's claims—the Grievance Committee concluded the following in an April 19, 2021 ruling on the Fund's Motion to Dismiss:

> The Grievance Committee concludes that it will not consider any of Grievant's claims that were decided by Management as a consequence of the hearing in Case No. 2018-04 [the Grievance Committee case that preceded the first application]. However, because this claim preclusion applies only to events arising on or before October 29, 2018, Grievant is free to present all facts arising subsequent to that date and to argue all aspects of Fund law applicable to events post-dating October 29, 2018. The fact that the recommendation and decision in Case No. 2018-04 concluded that Grievant had not proved his claims regarding emergency accommodation, meeting accommodation, office access restrictions and hostile work environment does not compel the conclusion, as the Fund now suggests, that Grievant be barred from trying to prove those claims with respect to events after October 29, 2018.
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> ***
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> The Committee . . . will not permit Grievant to introduce documentary or testimonial evidence relating to the time period prior to October 29, 2018. To the extent that facts in Case No. 2018-04 are relevant as background to the claims being litigated in this second grievance, the Committee will take notice of and consider the record and recommendation in the earlier case. The Committee will permit Grievant to advert in his post-hearing brief to facts in the record of the first grievance, but it will reject any argument that events prior to October 29, 2018 are actionable.

The Grievance Committee's other jurisdictional findings, to the extent applicable, are addressed later in this Judgment.

13. The Grievance Committee thereafter heard Applicant's Grievance over a period of five days in October and November 2021. Sixteen witnesses, including Applicant, testified. The parties agreed to the following statement of issues:

1. Did the Fund violate its obligation under Section 5.1, Chapter 11.01, GAO 11, to ensure that Grievant was not subject to discrimination on account of his disability?

2. Did the Fund violate its obligation under Section 5.3, Chapter 11.01, GAO 11 to provide reasonable accommodation to Grievant for work-related meetings, social events, and shelter-in-place events?

3. Did the Fund violate its obligation under Chapter 11.01 and Chapter 11.03, GAO 11, to ensure that Grievant was not subject to retaliation or reprisal?

4. Did the Fund violate its obligation under Annex 11.01.2, GAO 11, to ensure that Grievant was not subject to harassment or a hostile work environment?

14. In a report dated June 3, 2022, the Grievance Committee rejected Applicant's claims of discrimination, failure to provide reasonable accommodations and retaliation. However, it found that the following actions—while not retaliatory because there was no causal link between the complained of action and a protected activity—constituted harassment or the creation of a hostile work environment: (a) Applicant's planned transfer to another Division over his "express opposition, was carried out in a way that fostered hostility towards him within the Department"; (b) Applicant's supervisor's disparaging comments about Applicant to colleagues in emails and as exemplified by the testimony of a staff member; (c) Applicant's supervisor's marginalization of Applicant from work and excluding him from communications; and (d) Applicant's supervisor's unwillingness to engage directly with Applicant and the supervisor's giving Applicant "the proverbial 'cold shoulder.'"

15. Following a two-day hearing solely on the issue of an appropriate remedy, the Grievance Committee recommended on March 30, 2023 that Applicant be awarded four months' salary for intangible harm. Further, following an exchange of pleadings on the issue of legal fees, the Grievance Committee recommended that Applicant be reimbursed $40,000 for legal fees and expenses. On May 3, 2023, Fund senior management accepted the Grievance Committee's recommendations.

16. In the present Application, Applicant states that the "Decision Being Challenged" is the decision of Fund management to accept the recommendations of the Grievance Committee on his claims. He asserts that "much of the Committee's recommendation[s] was based on several material factual errors, a misunderstanding of [his] legal arguments, and a misapplication of the operative fund policies and decisions of this Tribunal." In particular, Applicant raises the following

claims: (a) disability discrimination (indirect discrimination due to de-activation of the Office Telephone Alert ("OTA") text feature and a failed OTA test, indirect discrimination due to a delay in moving Applicant to a "Suitable Office," discrimination due to failure to implement reasonable accommodations, and discrimination due to failure to ensure accessibility); (b) harassment and hostile work environment (nine different examples, including the rescinded planned transfer of Applicant to a different Division); (c) retaliation (six different examples, including the rescinded planned transfer of Applicant to a different Division); (d) abuse of discretion regarding publication of a book chapter Applicant was responsible for drafting; and (e) unfair treatment concerning the "internal redress process."

PROCEDURE BEFORE THE TRIBUNAL

17. On August 2, 2023, Applicant filed the present Application, which was revised and supplemented at the Registrar's request and transmitted to Respondent on November 2, 2023.

18. On November 17, 2023, the parties were notified of a decision of the President of the Tribunal to grant a Joint Motion by the parties to allow Applicant to file a Supplemental Application on attorney's fees and costs and to stay Respondent's deadline to file its Answer on the Application.

19. On December 4, 2023, Applicant filed a Supplemental Application, which was transmitted to the Fund on December 5, 2023.

20. On December 11, 2023, the parties were notified of a decision by the President of the Tribunal to grant a request made by Respondent for an extension of time to file a Motion for Summary Dismissal ("Motion"). Applicant had filed his non-objection to the request on December 9, 2023.

21. On January 4, 2024, Respondent filed the Motion, which was transmitted to Applicant on January 8, 2024. Also on January 8, 2024, Applicant was instructed to include in an Objection to the Motion for Summary Dismissal ("Objection") any request for legal fees and costs incurred in responding to the Motion.

22. On February 5, 2024, 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 and Supplemental Application.

23. On February 7, 2024, Applicant filed an Objection.

24. On February 12, 2024, the Registrar requested Applicant to clarify annexes to the Objection. On February 14 and 15, 2024, Applicant filed a Supplementation, correcting the annexes. Applicant's Objection was transmitted to Respondent on February 15, 2024.

25. On February 26, 2024, Respondent filed its comments on Applicant's request for costs, which were transmitted to Applicant on February 27, 2024.

SUMMARY OF PARTIES' PRINCIPAL CONTENTIONS

26. The parties' principal contentions as presented by Applicant in his Application and Objection, and by Respondent in its Motion, may be summarized as follows:

A. Applicant's principal contentions on the merits

1. For the period in question (*i.e.,* October 30, 2018 until the end of November 2019), Applicant's managers subjected Applicant—due to his hearing disability—to discrimination, retaliation, and harassment and a hostile work environment. Further, they failed to accommodate his disability.

2. Applicant's managers abused their discretion regarding a book chapter Applicant was responsible for drafting.

3. Applicant was subjected to unfair treatment in the administrative review and Grievance Committee processes.

4. Applicant seeks as relief:

   a. "[S]ignificant monetary damages" to redress (i) the damaging effect that retaliation, discrimination and unfair treatment have had on his career and on his reputation, and (ii) the "substantial reputational losses" he has suffered as a result of finalization of the book chapter he was responsible for drafting and "the fact that it was published over his objection and not as work that reflects his scholarship and level of exactness for documentation of data sources"; and

   b. Attorney's fees and costs.

B. Respondent's principal contentions on admissibility

1. Applicant's claims of disability discrimination, retaliation, and harassment and hostile work environment should be dismissed as *res judicata*. These claims were adjudicated by the Tribunal in its first Judgment. The mere selection of a different time period to reassert the same claims is not a valid circumvention of the principle of *res judicata*.

2. Additionally, Applicant's claim regarding the proposed transfer to a different Division (which is included under Applicant's retaliation and harassment and hostile work environment claims) is moot. The proposed transfer decision was rescinded; consequently, there is no decision that adversely affected Applicant.

3. The "remainder of the case" should be dismissed for failure to exhaust administrative remedies.

4. Applicant's request for documents regarding the 2019 Mobility Support Program exercise is a veiled attempt to litigate a matter that was not challenged within the statutory time limits and through the required channels and should therefore be dismissed.

C. Applicant's principal contentions on admissibility

1. Applicant's claims of disability discrimination are not barred by *res judicata* for the following reasons: (a) there is no overlap between the First and Second Periods with respect to some of Applicant's discrimination claims; (b) for claims where there is an overlap between the two periods, the individual incidents marking a pattern of indirect discrimination are different or are documented differently; (c) there was a Mediation Implementation Agreement and HR guidance on Accommodation of Disabilities that were not considered by the Tribunal in the first case; and (d) Applicant is raising a new lack of accessibility claim for the period covered by the present Application.

2. Applicant's claims of retaliation are not barred by *res judicata* for the following reasons: (a) the adverse actions alleged in the present Application are different than the adverse actions addressed by the Tribunal in the first application, and the time period is different; and (b) Applicant's first case was decided under a version of the Retaliation Policy that has changed.

3. Applicant's claims of harassment and hostile work environment are not barred by *res judicata* because Applicant lists nine documented incidents that do not overlap with the first case.

4. Applicant's claim regarding the proposed, but rescinded, transfer to a different Division is not moot because it is "both an incident under a hostile work environment pattern and an adverse action under a pattern of retaliation."

5. Applicant's remaining claims are admissible.

6. The Fund is incorrect that Applicant's request for the production of documents is an attempt to litigate a matter that was not challenged within the statutory time limits and through the required channels. Applicant is not challenging the decisions on the outcome of the mobility pool exercise as an administrative act adversely affecting him. Rather, Applicant raises a failure of fair process, and he views the outcome of the mobility pool exercise as part of the evidence for reputational damage he suffered from a hostile work environment and retaliation.

CONSIDERATION OF THE ADMISSIBILITY OF THE APPLICATION

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

A. The "clearly inadmissible" standard for summary dismissal

28. Rule XII, para. 1, of the Tribunal's Rules of Procedure provides that "the Tribunal may, on its own initiative or upon a motion by the Fund, decide summarily to dismiss the application if it is clearly inadmissible."

29. The Tribunal has emphasized that "Rule XII sets a high bar for the dismissal of an application prior to a full airing of the merits of a case," with such dismissals intended only for applications that the Tribunal deems "clearly irreceivable or devoid of merit."[2] This high bar "protects applicants against having their right to be heard by the Tribunal being cut off prematurely" and "protects against the risk of the Tribunal's taking an erroneous decision as to admissibility when the pleadings before it have yet to unfold in full."[3] At the same time, the Tribunal has recognized that summary dismissal "provides a mechanism to shorten the proceedings where inadmissibility is clear at the outset, thereby protecting the Tribunal (and the Respondent) from the expenditure of time and resources on matters that have no reasonable ground for advancing beyond the threshold."[4]

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[2] *"VV", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2023-3 (March 30, 2023), para. 35, quoting *Mr. "QQ", Applicant v. International Monetary Fund, Respondent (Motion to Dismiss in Part)*, IMFAT Judgment No. 2020-1 (November 2, 2020), para. 45.

[3] *"VV"*, paras. 36-37, quoting *Mr. "QQ"*, paras. 47-48.

[4] *"VV"*, para. 36, quoting *Mr. "QQ"*, para. 47.

30. As explained above, Respondent's Motion, pursuant to Rule XII of the Tribunal's Rules of Procedure, asks the Tribunal to dismiss the current Application summarily. Each of Respondent's arguments is addressed below.

B. Has Respondent shown that Applicant's discrimination, retaliation and harassment and hostile work environment claims should be dismissed as *res judicata*?

31. The Tribunal has held that a "cardinal principle of judicial review" is the doctrine of *res judicata*, which prevents the re-litigation of claims already adjudicated.[5] The Tribunal has observed that in assessing a claim of *res judicata* as a defense to an application, it will consider the following factors: (a) the claims raised by the applicant in the earlier case; (b) the purpose of the earlier litigation; (c) the legal arguments that were put forward by the parties and considered by the Tribunal in the earlier case; and (d) the Tribunal's decision and its rationale in the earlier judgment.[6]

32. In the present case, Applicant is raising the same general categories of claims as he did in his first application, and the purpose of the previous litigation is essentially the same as the purpose of the present litigation—namely to determine whether Applicant's discrimination, retaliation, and harassment and hostile work environment claims have merit and warrant the payment of compensation. Further, most of the legal arguments on the merits appear to be the same as in the previous case, and the Tribunal in the first case dismissed the application in its entirety. However, while Applicant is raising in the present Application the same *general categories of claims* that he raised in the first application, he now presents, for the most part, different *factual claims* for a different time period and in some instances identifies relevant documents and rules against which his new factual claims should be assessed. Consequently, as is discussed below, the Tribunal concludes that the present Application for the most part does not raise claims that have already been adjudicated.

(1) Is Applicant raising discrimination claims that have already been adjudicated?

33. Applicant argues that *res judicata* is not applicable to his discrimination claims for the following reasons: (a) there is no overlap between the first and second applications regarding some of his discrimination claims; (b) for claims where there is an overlap between the first and second applications, "the individual incidents marking a pattern of indirect discrimination are different or documented differently"; (c) there is HR guidance on "Accommodation of Disabilities" that was not considered by the Tribunal in *"SS"* and which is applicable to the discrimination claims raised

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[5] *Mr. "R" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2004-1 (December 10, 2004), para. 25.

[6] *Id.,* para. 29.

by Applicant in the present Application; (d) there is a "Mediation Implementation Agreement" that is applicable to the discrimination claims raised by Applicant in the present Application; and (e) the Fund has been on notice since August 16, 2018 of a disability accessibility issue but has done nothing to address it.

(a) Is Applicant raising new factual discrimination claims?

34. The discrimination claims raised by Applicant in his first application are different than the discrimination claims he raises in the present Application. In his first application, Applicant made the following arguments:

> The Fund has failed to engage proactively in an effective interactive process to reasonably accommodate Applicant's disability with respect to meetings, events, Book Project deadlines, and building safety arrangements.[7]
>
> The Fund has discriminated against Applicant based on his disability. This includes direct discrimination through disparate treatment on the Book Project; and indirect discrimination through disparate impacts in relation to his FY2018 APR, office location, and safety arrangements.[8]

In the present Application, Applicant raises different examples of purported discrimination arising in the Second Period. The claims raised by Applicant in the present Application consist of the following: (a) indirect discrimination on account of the de-activation of the OTA text feature and a failed OTA test; and (b) indirect discrimination on account of the delay in moving Applicant to a suitable office.

35. These are new factual claims for a period that was not addressed by the Tribunal in the first Application. Accordingly, such claims are not barred by the doctrine of *res judicata*.

(b) For claims where there is an overlap between the First and Second Periods, are the claims admissible?

36. Applicant makes the following specific claims in his Application: (i) the Fund failed to provide proper accommodations during divisional meetings and on a Fund mission; (ii) the Fund failed to provide proper safety arrangements; and (iii) Applicant was unnecessarily exposed to office ambient noise. Each of these claims is addressed in turn.

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[7] *"SS"*, para. 81(1).

[8] *Id.*, para. 81(2).

(i) Alleged failure to provide proper accommodations during meetings, including while on a Fund mission

37. Applicant asserts that the difference between the First and Second Periods is the following: (a) in *"SS"* the Tribunal "did not consider meeting accommodations on Fund missions" (he states that he did not take such missions in the First Period but did in the Second Period); (b) the *"SS"* Judgment did not consider Applicant using a recording device in divisional meetings in the First Period (he states that for the Second Period, his Department "did not allow [him] to use the built-in recording functionalities of his Phonak Roger Pen as an accommodation for his hearing loss and, in addition, appears not to have followed the prescribed procedures for responding to his accommodation request to that effect"); and (c) in the Second Period he provides a "source of evidence that was not considered before, his daily journal."

38. With respect to (a), meeting accommodations on Fund missions, Applicant states that he did not participate in Fund missions during the First Period. He asserts that the Fund failed to provide proper arrangements to accommodate his participation in a mission that took place during the Second Period. This is a new factual assertion that was not addressed by the Tribunal in *"SS"* and can therefore be considered by the Tribunal during the merits phase of the proceedings.

39. As to (b), Applicant asserts that the Tribunal in *"SS"* did not consider his use of a recording device in divisional meetings. In *"SS",* the Tribunal addressed Applicant's use of a *listening pen*. The *"SS"* Judgment mentions that Applicant endorsed the use of a listening pen as a meeting accommodation, and was allowed to use a listening pen at meetings as an accommodation for his hearing disability but generally declined to use his listening pen as proposed. To the extent there is a technical distinction between a recording device and a listening pen and that the alleged new factual claims regarding the recording device pertain to the Second Period, Applicant's claim is not barred by *res judicata*.

40. Lastly, in relation to (c), the new source of evidence (*i.e.,* Applicant's "daily journal"), Applicant refers to Annexes in his Objection. The Annexes referred to by Applicant are e-mails to himself dated from October to December 2018 and from January to July 2019. An e-mail dated October 30, 2018 concerns a meeting that was held on October 29, 2018 (*i.e.,* during the First Period) and therefore will not be considered by the Tribunal because Applicant does not assert that it would shed light on any alleged breach during the Second Period. As to the other e-mails, they do involve the Second Period. They may therefore be considered by the Tribunal during the merits phase of the proceedings to the extent the e-mails are used exclusively to support new factual claims of alleged discrimination arising during the Second Period. This is without prejudice to the Tribunal's determination on the alleged relevance and probative value of the evidence adduced by the parties.

(ii) Alleged failure to provide proper safety arrangements

41. Applicant asserts indirect discrimination due to deactivation of the OTA system. He states that the issue was not raised in the first application because he was not aware at the time that the Fund had de-activated the OTA text feature.

42. Deactivation of the OTA feature is a new factual claim arising in the Second Period that was not addressed by the Tribunal in *"SS"*. It is therefore not barred by *res judicata*.

(iii) Alleged exposure to office ambient noise

43. Applicant asserts that this issue relates to his office being changed in early November 2018 (*i.e.,* during the Second Period) at his request due to ambient noise. He further asserts that the new office location continued to expose him to a level of ambient noise that prevented him from wearing his hearing aids until the early afternoon and that this presented a health risk.

44. Applicant's claim concerning exposure to office ambient noise relates to an office move that occurred during the Second Period. This claim is distinct from the claim in the earlier litigation and is therefore not barred by *res judicata*.

(c) Is there HR guidance on "Accommodation of Disabilities" that is applicable to the discrimination claims raised by Applicant?

45. In *"SS"*, the Tribunal observed that Applicant had invoked procedural standards set out in HR guidance on "Accommodation of Disabilities," which had been published on the Fund's Intranet in September 2018.[9] The Tribunal stated that it would not consider the HR guidance in assessing Applicant's discrimination claim because "HR issued this guidance near the end of the time period of this case, long after Applicant's accommodations plan was in place and under implementation."[10]

46. The HR guidance to which Applicant refers mainly provides guidance to staff with disabilities on how to make requests for accommodations "to enable them to perform the essential functions of their jobs." The document also provides guidance to managers who need support addressing requests for accommodations.

47. Applicant asserts that his supervisor did not follow the HR guidance regarding the new factual claims for the time period that is the subject of the present Application. This provides an

[9] *Id.*, para. 101.

[10] *Id.*

additional basis on which to conclude that the new factual discrimination claims raised by Applicant in the Second Period are not barred by *res judicata*.

(d) Is there a Mediation Implementation Agreement that is applicable to the discrimination claims raised by Applicant?

48. The Tribunal did not consider a March 7, 2019, Mediation Implementation Agreement in its Judgment in *"SS"* because it was only reached several months after the end of the First Period. This is reflected in the *"SS"* Judgment, where the Tribunal observed: "On March 7, 2019, Applicant and the SPM [Senior Personnel Manager] reached a Mediation Implementation Agreement addressing issues regarding safety and security, Department meetings and social events, and the FY2018 APR."[11]

49. The Mediation Implementation Agreement memorializes a meeting that took place to "discuss implementation of items agreed to on May 16, 2018 in [a] mediation agreement dated May 25, 2018." The Agreement sets out an agreed upon action plan, as well as roles and responsibilities, regarding the handling of safety and security issues, departmental meetings and social events, and the FY2018 APR.

50. The Tribunal finds that the possible relevance of the Mediation Implementation Agreement to the new factual discrimination claims raised by Applicant in the Second Period provides a further basis to conclude that such claims are not barred by *res judicata*.

(e) Has the Fund been on notice since August 2018 of an accessibility issue regarding social events?

51. Applicant asserts that the City View Lounge (top floor of HQ2) lacks accessibility for persons with hearing loss who want to attend social events in that venue. He states that the vending machines and ice-making equipment in the room adjacent to the City View Lounge create a structural access barrier for persons using digital hearing aids. He further states that the Fund has been on notice since August 16, 2018, of this issue but has done nothing during the Second Period to address it. To the extent Applicant is alleging that the Fund failed to accommodate his disability at social events that arose during the Second Period, this claim is based on facts that were not litigated in the prior proceedings and therefore is not barred by *res judicata*.

(2) Is Applicant raising retaliation claims that have already been adjudicated?

52. Applicant asserts that his retaliation claims are not barred by *res judicata* for the following two main reasons: (a) the examples of retaliation presented by Applicant for the Second Period are

[11] *Id.*, para. 63, fn. 6.

different than the examples of retaliation presented by Applicant for the First Period; and (b) the Fund's Retaliation Policy has changed.

53. In the first case, Applicant cited events that occurred on March 29, 2018, on June 22, 2018 and on August 16, 2018. In his current Application, Applicant identifies the following different events as being retaliatory: (a) "Reassignment to [another Division] in March 2019"; (b) "Negative Comments from [Applicant's Supervisor] March 22-28, 2019"; (c) "[Supervisor's] Revisions to . . . Book Chapter After June 3, 2019"; (d) "[Applicant's Supervisor's] Withdrawal of [Applicant's] General Delegated Supervisory Authority Over the Book Project in June 2019"; (e) "Negative Comments from [Departmental] Supervisors on July 8-9, 2019"; and (f) "[Supervisor's] Fully Sidelining of [Applicant] as Co-author of the [book] Chapter after July 8, 2019."

54. The Tribunal finds that Applicant's claims of retaliation in this case are based on new events that did not arise during the First Period and which were therefore not addressed by the Tribunal in *"SS"*.

55. Further, the Fund's Retaliation Policy was revised in February 2019—*i.e.,* after the First Period and before any of the events that Applicant claims were retaliatory in the Second Period. The changes were highlighted in an article written by the IMF Legal Department.[12] The article sets out the following summary of the changes:

> As a result of the IMF's review of its retaliation policy, the framework through which retaliation concerns are addressed was strengthened in four key aspects, notably by (i) introducing a clear and broad definition of retaliation and the protected activities to which it relates; (ii) establishing a framework that includes an expedited review process by the IMF Office of Internal Investigations (OII) to address complaints of retaliation; (iii) establishing higher standards of proof when responding to retaliation allegations and (iv) retaining a mandatory duty for managers to resolve or report any ethical concerns.[13]

The article also provides:

> When deciding a dispute over the IMF's response to retaliation allegations as opposed to disciplinary action, the IMF Grievance Committee and Administrative Tribunal will apply their own standards of review. Because the IMF Administrative Tribunal (IMFAT) has not

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[12] *See The Manager's Duty to Resolve or Report Misconduct: The Example of the International Monetary Fund's Retaliation Policy*, Brian Patterson, Pheabe Morris and Brenda Costecalde Orpineda, published in The Role of International Administrative Law at International Organizations, AIIB Yearbook of International Law, Volume 3 (2020), pp. 241-261.

[13] *Id.*, p. 243.

> yet had the occasion to examine retaliation cases under the new retaliation policy, there is no guidance available yet on its application of the Fund's retaliation policy and of the standards of proof.[14]

In *"SS"*, the Tribunal found that the revised version of the Retaliation Policy was not applicable because it came into effect during the Second Period.

56. In light of the above, the Tribunal concludes that Applicant's retaliation claims arising in the Second Period are not barred by *res judicata*.

(3) Is Applicant raising harassment and hostile work environment claims that have already been adjudicated?

57. In *"SS"*, the Tribunal addressed Applicant's claims of unfair treatment within the framework of the Fund's harassment and hostile work environment policies. The Fund argues in the present case that Applicant is essentially raising the same unfair treatment claims that he made in the first application, whereas Applicant asserts that he is raising different claims.

58. The Tribunal in *"SS"* stated the following regarding the unfair treatment claims raised by Applicant:

> Applicant identifies three "dimensions" to his substantive unfair treatment claims: (i) "stereotypes and micro-inequities"; (ii) violation of his "legitimate expectations" with respect to his two book chapters; and (iii) application of an "outdated" Retaliation Policy.[15]

59. In this second Application, Applicant refers to nine incidents which, he asserts, "mark a pattern of unfair treatment with an adverse impact on his successful job performance, career opportunities, or other terms and conditions of employment." The incidents consist of the following:

> 1) [Applicant's Supervisor] Marginalized [Applicant] with Respect to the Finalization of the Book Chapters;
> 2) [Applicant's Supervisor] Marginalized [Applicant] with Respect to the Finalization of the Debt Dataset and the Working Paper Describing the Debt Dataset;
> 3) Marginalization and Undue Influence with Respect to the [book] Chapter – Inappropriate Changes to the June 3, 2019, Version of the [book] Chapter;
> 4) Marginalization with Respect to the Work in the [Department] Division Overall;
> 5) Additional Negative Comments from [Applicant's Supervisor] on March 22, 2019;
> 6) [Applicant's Supervisor's] Disparaging July 9, 2019, e-mail to Professor [A];

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[14] *Id.*, p. 247.

[15] *"SS"*, para. 224.

7) [Applicant's Supervisor's] Cold Shoulder Treatment of [Applicant];
8) Lack of Proper Office Arrangements and Failures to Accommodate; and
9) Reassignment to [another Division in March 2019].

The above alleged incidents dated in 2019 clearly arose after the First Period and therefore are not barred by *res judicata*. Regarding the other alleged, but undated, incidents of unfair treatment listed above, the Tribunal concludes that they also are not barred by *res judicata.* A close review of the pleadings shows that they took place during the Second Period.

(4) Conclusions regarding Applicant's discrimination, retaliation, and harassment and hostile work environment claims

(a) Discrimination claims

60. The new factual discrimination claims that specifically arise during the Second Period are not barred by *res judicata*.

(b) Retaliation claims

61. The retaliation claims raised by Applicant in the present case are based on new events that did not arise during the First Period and which were not addressed by the Tribunal in *"SS"*. Therefore, they are not barred by *res judicata*. The Fund's Retaliation Policy was revised during the Second Period and is applicable to the claims.

(c) Harassment and hostile work environment claims

62. In this second Application, Applicant refers to nine incidents of alleged harassment and hostile work environment (*i.e.,* unfair treatment). These nine incidents are all linked to the Second Period. Accordingly, they as well are not barred by *res judicata*.

C. Is the rescinded decision to reassign Applicant to another Division in 2019 moot?

63. Applicant includes the planned reassignment to another Division in 2019 among his examples of retaliation and harassment and hostile work environment. As explained above, the Fund argues that all of Applicant's retaliation and harassment and hostile work environment claims should be dismissed under the doctrine of *res judicata*. The Fund also argues, however, that Applicant's claim concerning the planned reassignment should be dismissed as moot, asserting that there is no adverse decision that has affected Applicant because the planned reassignment was rescinded.

64. The Tribunal observes that in March 2019, Applicant submitted a request to the Office of Internal Investigations ("OII") for an independent review of a proposal by his Department to reassign him to a different Division. Applicant asserted in his request to OII that the proposed

move was in retaliation for "his requests for reasonable accommodations, including safety arrangements, and for expressing concerns about discrimination and earlier retaliatory actions." The proposed reassignment was put on hold pending OII's review.

65. Pursuant to the Staff Handbook, upon receiving a request for an independent review OII will make a determination whether "there is clear and convincing evidence that the same adverse action would have been taken, for separate and legitimate reasons, even in the absence of the complaint's protected activity."[16] If there is "no clear and convincing evidence to support such a finding, OII will conclude that retaliation has occurred."[17] Applying this standard, OII informed Applicant later in 2019 that it "did not find clear and convincing evidence" that his Department would have proposed reassigning him to the other Division "absent [his] protected activities." In other words, based on OII's conclusion, the proposed reassignment was retaliatory (although the Fund argues that "Management's acceptance of [OII's] recommendation . . . is not an admission that retaliation occurred"). In light of OII's finding, Applicant's managers rescinded the proposed reassignment.

66. The Tribunal finds that while the reassignment decision was rescinded, it may have some present legal effect on Applicant's position. There is still a dispute on this issue between the parties because Applicant seeks monetary damages to address the claimed "damaging effects" of the alleged incidents of retaliation and harassment and hostile work environment (the causes of action under which the rescinded reassignment decision falls).[18]

67. In light of the above, the Tribunal concludes that in the particular circumstances of the present case, Applicant's claim concerning the planned, but rescinded, reassignment to a different Division is not moot.

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[16] Staff Handbook (February 2019 Version), Annex 11.01.6 ("Retaliation Policy"), Section 4.3 ("Access to Information and Standard of Review for OII Independent Review").

[17] *Id.*

[18] *See, e.g., Ms. "GG" (No. 2), Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2015-3 (December 29, 2015), para. 286; and *Mr. M. D'Aoust (No. 2), Applicant v. International Monetary Fund*, *Respondent*, IMFAT Judgment No. 2007-3 (May 22, 2007), para. 66. *See also BE, Applicant v. International Bank for Reconstruction and Development, Respondent*, World Bank Administrative Tribunal ("WBAT"), Judgment No. 407 (2009), para. 25, where the WBAT found that a claim is not considered moot if it presents a justiciable controversy and judicial intervention is necessary to grant effective remedy.

D. Is Applicant's claim that his managers abused their discretion regarding publication of a book chapter admissible?

68. Applicant asserts that his supervisor abused her discretion by making "major revisions" to a draft of a book chapter Applicant was responsible for drafting, and that his Department management abused its discretion in deciding to proceed with publication of the book with the revised chapter. The Fund does not specifically address the abuse of discretion claim in its Motion, but simply states that the "remainder of this case" should be dismissed for failure to exhaust administrative remedies.

69. A review of the record indicates that Applicant did not claim abuse of discretion regarding the book chapter in either his July 10, 2019 request for administrative review or in his January 6, 2020 update to his request for administrative review (but apparently did allude to the issue in an October 15, 2019 meeting Applicant had with his Department Head and the Senior Personnel Officer). Moreover, HRD—in its decision of September 23, 2020 on Applicant's requests for administrative review—understood Applicant's claims concerning the book chapter to fall under the rubric of retaliation (while also stating that edits made to the book chapter were "a reasonable exercise of managerial discretion").

70. In a May 21, 2020 submission to the Grievance Committee, Applicant stated, among his many claims, that his supervisor improperly used her discretionary authority "in the context of the book project," citing several examples. The Fund argued in a December 15, 2020 Motion to Dismiss that the Grievance Committee lacked jurisdiction over this claim. The Grievance Committee concluded that Applicant's complaints regarding the book chapter would only be addressed in the context of his retaliation claims. The Committee's rationale was that Applicant had invoked retaliation both before HRD and the Grievance Committee as a cause of action for his book chapter claims, and that a retaliatory decision would be violative of Fund law.

71. The Tribunal finds that because Applicant's abuse of discretion claim regarding the book chapter was not explicitly addressed on administrative review and was not considered by the Grievance Committee, it is not properly before the Tribunal.[19] In both instances, HRD and the Grievance Committee considered Applicant's complaints about publication of the book chapter to fall more generally under the umbrella of Applicant's retaliation claims. This is a reasonable approach that is also consistent with the claims raised by Applicant before the Tribunal. In this

[19] Article V(1) of the Tribunal's Statute provides that "[w]hen the Fund has established channels of administrative review for the settlement of disputes, an application may be filed with the Tribunal only after the applicant has exhausted all available channels of administrative review." The Tribunal has long recognized the importance of the exhaustion of remedies. *See, e.g., "YY", Applicant v. International Monetary Fund, Respondent (Admissibility of the Application)*, IMFAT Judgment No. 2024-3 (June 7, 2024), para. 75 (and cases cited therein).

regard, Applicant raises a number of claims concerning the book chapter—not only as examples of retaliation, but also as examples of harassment and hostile work environment.

72. Accordingly, the Tribunal concludes that Applicant's claim that his managers abused their discretion regarding publication of the book chapter is inadmissible; however, the Tribunal will consider Applicant's complaints regarding the book chapter under the rubrics of retaliation and harassment and hostile work environment.

E. Is Applicant's claim that he was subjected to unfair treatment in the "internal redress process" properly before the Tribunal?

73. In his Application, Applicant identifies the following instances of purported unfair treatment in the internal redress process: (a) "an unwarranted and prejudicial delay" in the communication to Applicant of Fund management's decision concluding the review conducted by OII; (b) Applicant never received "the text of the October 7, 2019, . . . decision on the outcome of the A15 mobility pool"; (c) the Grievance Committee's procedural rules "are *ad hoc*, unpublished, unknown to staff members and their counsel, and decided at the discretion of the GC's [Grievance Committee's] chairperson"; (d) the Fund "has an unreasonably long grievance procedure"; (e) two sets of Grievance Committee transcripts were not shared with Applicant; and (f) the Grievance Committee's "ruling on medical records from [Applicant's psychiatrist] was inconsistent with U.S. and D.C. law."

74. The Fund does not expressly address this claim. Instead, the Fund asserts that the "remainder of this case" should be dismissed for a failure to exhaust administrative remedies.

75. The Tribunal observes that Applicant is challenging two administrative acts and four elements of the Grievance Committee's review of his case. The two administrative acts consist of the alleged delayed communication to Applicant of Fund management's decision on OII's review, and a purported failure on the part of the Fund to provide Applicant "the text of the October 7, 2019, . . . decision on the outcome of the A15 mobility pool." There is no indication in the record, and Applicant does not contend, that he sought to exhaust administrative remedies on these claims. Accordingly, the Tribunal finds that these two claims are inadmissible.

76. As to the four elements of the Grievance Committee's review of the present case, two are general (complaining about the Committee's rules and the length of the process), and two are more specific to the present case (complaining about the Committee's handling of transcripts and its ruling on medical records). While the Tribunal has consistently held that it does not function as an appellate body to the Grievance Committee, it has also held that it is competent to review the

integrity of the Grievance Committee process.[20] A principal concern of the Tribunal in making this assessment is whether information was purposefully withheld from an applicant, such that the Grievance Committee process "materially impaired the record in an applicant's case."[21]

77. In light of these considerations, any claims raised by Applicant concerning the Grievance Committee process will be reviewed by the Tribunal only to the extent Applicant is asserting that such process materially impaired the record in his case.

F. Is Applicant's request for documents regarding the Mobility Support Program exercise a veiled attempt to litigate a matter that was not challenged within the statutory time limits and through the required channels?

78. Applicant requests in his Application the "text of the October 7, 2019, ICM decision (A15 Mobility Pool) and any documents relating to the motivations or communications of the participating SPMs [Senior Personnel Managers] in the A15 Mobility Pool regarding any of the candidates or the positions offered." The Fund argues that this request is a veiled attempt to "impose liability on the Fund for some perceived flaw in the mobility pool exercise without subjecting his allegations to administrative review and a full hearing before the Grievance Committee."

79. Applicant asserts that the Fund mistakenly suggests that he is seeking to challenge the decisions on the mobility pool outcome as administrative acts adversely affecting him. He states that, instead, he is raising "a failure of fair process that may not warrant the rescission of the decision contested." He further states that he views the outcome of the mobility pool exercise as part of the evidence for the reputational damage he purportedly suffered from a hostile work environment and retaliation.

80. In the particular circumstances of this case, the Tribunal does not see how Applicant's claim of "a failure of fair process" involving an administrative act would not involve a challenge of the administrative act itself. In this case, the decision in question was Applicant's 2019 reassignment to Department X under the Mobility Support Program. Before the Grievance Committee, Applicant twice proposed that this decision be among the issues he could contest: (a) at a pre-hearing conference on June 14, 2021; and (b) in a letter dated June 30, 2021. On each occasion, Applicant's proposal was dismissed on jurisdictional grounds. The Grievance Committee rejected Applicant's argument that he was relieved of his obligation to seek administrative review of the decision (on the purported basis that HRD was involved in the

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[20] *See, e.g., "WW", Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2024-1 (February 12, 2024), para. 293.

[21] *Id.*

reassignment decision), and found that even if his claim could be heard without having sought administrative review, his Grievance was untimely. In this regard, Applicant was informed on October 8, 2019 of the Mobility Support Program reassignment to Department X. He filed his initial Grievance on August 26, 2019, prior to the date the decision was communicated to him, and then filed an updated Grievance on May 22, 2020. The Grievance Committee noted that even if this latter filing could be construed as challenging the reassignment, it "was filed long after the six-month deadline for contesting the [reassignment] decision." The Tribunal, based on a review of the record, agrees with the Grievance Committee's conclusions that Applicant was not relieved of his duty to seek administrative review of the reassignment decision and that even if his claim could be heard absent seeking administrative review, it was untimely.

81. It is the ruling of the Tribunal, based on the above considerations, that Applicant's challenge to the process pertaining to the 2019 mobility exercise is clearly inadmissible.

CONCLUSIONS OF THE TRIBUNAL

82. For the reasons elaborated above and with the exception of the Tribunal's rulings at paragraphs 72, 75 and 81, the Tribunal concludes that Respondent's Motion is denied because it has not met the "high bar" set by Rule XII of the Tribunal's Rules of Procedure for the dismissal of an application before a full exchange of pleadings on the merits.[22]

83. As the filing of the Motion suspended the pleadings on the merits, the Fund's Answer, Applicant's Reply, and the Fund's Rejoinder shall now follow, according to the schedule prescribed by the Tribunal's Rules of Procedure and taking into consideration the conclusions reached by the Tribunal in this Judgment. It is the ruling of the Tribunal that Applicant's pleadings on the merits must be narrowly tailored and relate only to those claims which allegedly arose during the Second Period and have been deemed admissible by the Tribunal. The Tribunal will not consider any factual or legal claims raised by Applicant in connection with the First Period. Neither will it consider any facts from the First Period except to the extent such facts are strictly used as context for the new factual claims arising in the Second Period.

[22] *See* "*VV"*, paras. 35-37.

DECISION

FOR THESE REASONS

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

The Motion for Summary Dismissal of the Application in *"SS" No. 2* is denied, and the pleadings on the merits shall resume taking into consideration the conclusions reached by the Tribunal in this Judgment.

Nassib G. Ziadé, President

Deborah Thomas-Felix, Judge

Maria Vicien Milburn, Judge

/s/
Nassib G. Ziadé, President

/s/
Paul Jean Le Cannu, Registrar

Washington, D.C.
January 21, 2025