




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No 2011-247



**Ortiz
(Appellant)
v.
The Secretary General of the International Civil Aviation
Organization
(Respondent)**

JUDGMENT

Before: Judge Jean Courtial, Presiding
Judge Luis María Simón
Judge Inés Weinberg de Roca

Judgment No.: 2012-TANU-231

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Christopher M. Petras

JUDGE JEAN COURTIAL, Presiding

Synopsis

1. This case raised the question of what judicial control the United Nations Appeals Tribunal (Appeals Tribunal) should have over appeals lodged by International Civil Aviation Organization (ICAO) staff members since the entry into force of the Agreement between the United Nations and ICAO extending the jurisdiction of the United Nations Appeals Tribunal to ICAO in respect of appeals pleading failure to comply with the conditions of service or the employment contract of ICAO staff members and the corresponding alteration of that Organization's Staff Regulations (hereinafter referred to by its title: "*Service Code*").

2. In this respect, the Appeals Tribunal judged that it was called upon to examine an appeal against the final decision taken by the Secretary-General of ICAO upon completion of the proceedings at first instance, and that it had to take into account the conclusions and recommendations of the Advisory Joint Appeals Board (AJAB) and the reasons for which, in this case, the Secretary-General had departed from them. In general, evidence other than that submitted to AJAB should not be necessary.

3. Nevertheless, it should be borne in mind that, even in a case like this one, where AJAB has fulfilled its task carefully and impartially, the appeal is directed against an administrative decision taken by an executive authority, and not against a judgment delivered by a professional and independent court of first instance determining the issue itself through its decision.

4. Consequently, the Statute of the Appeals Tribunal only applies to such an appeal insofar as and on condition that its provisions are compatible with the judgment on an appeal directed against a decision taken by an executive authority.

5. On the substance, having carefully examined the background documents upon which AJAB based its appraisal of the case, the Appeals Tribunal found itself convinced neither by the motives given in the disputed decision not to follow its conclusions and recommendations nor by the line of argument in defence. It judged that the Appellant had grounds for relying on the support of AJAB's conclusions and was therefore entitled to request that those conclusions be confirmed. The Secretary-General's disputed decision is rescinded, as is the termination decision. ICAO is sentenced to pay compensation equivalent to nine months' net base salary at the rate in effect as of 1 October 2010, along with interest at the US Prime Rate.

Facts and Procedure

6. Mr. Ortiz was appointed to ICAO on 1 October 2009 under a three-year contract as a Technical Officer, Airworthiness, Flight Safety Section, in the Air Navigation Bureau at the P-4 Level. Mr. Ortiz's contract contained a clause making his appointment conditional on a one-year probationary period.

7. On 26 August 2010, the Chief, Flight Operations Section (Chief) and the Chief, Staff Services Section, met Mr. Ortiz and informed him that he would not complete his probationary period successfully. Consequently, he was notified of the decision to terminate his appointment in a letter dated 1 September 2010.

8. On 7 September 2010, Mr. Ortiz asked the Secretary-General to reconsider this decision. Having heard nothing from the Secretary-General, Mr. Ortiz lodged an appeal with AJAB on 23 September 2010. In a letter dated 29 September 2010, Mr. Ortiz was informed of the Secretary-General's decision to uphold the termination of his appointment.

9. On 3 May 2011, AJAB delivered its conclusions, whereby, as well as making recommendations regarding enforcement of Staff Rules, it advocated payment of nine months' net base salary to Mr. Ortiz. On 5 July 2011, the Secretary-General informed Mr. Ortiz that he would not follow all AJAB's recommendations and that, "in the spirit of compromise", he wished to pay Mr. Ortiz three months' net base salary.

10. On 18 August 2011, Mr. Ortiz lodged an appeal with the United Nations Appeals Tribunal against the Secretary-General's decision. On 21 October 2011, the Secretary-General filed his answer.

11. On 4 November 2011, Mr. Ortiz filed a motion for the Authorization to File Supplement to Appellant's Appeal and the Secretary-General filed his answer opposing the motion on 15 November 2011.

Submissions

Mr. Ortiz's Appeal

12. Mr. Ortiz maintains that the Secretary-General of ICAO did not exercise his authority correctly, and overstepped it, by not giving him the opportunity to improve his performance. Furthermore, Mr. Ortiz contends that ICAO did not follow the *Service Code* and the relevant guidelines.

13. Mr. Ortiz notes that the Secretary-General approves AJAB's finding that he [the Secretary-General] had not obtained the written approval of the President of the Council (President) before deciding on his dismissal, as required by Staff Regulation 4.11 of Article IV of the *Service Code*. Conversely, Mr. Ortiz notes that the President ratified the decision to terminate his contract on 24 September 2010, whereas he had been notified of his dismissal 23 days earlier, on 1 September 2010.

14. Mr. Ortiz maintains that the Secretary-General provides no valid reason for not having followed AJAB's recommendations. Mr. Ortiz also maintains that the Secretary-General had been informed by the Director of the Legal Bureau that the President's approval had to be obtained when the decision to dismiss him was being taken, i.e. at the end of August/ beginning of September.

15. Mr. Ortiz maintains that he deplores the Secretary-General's conclusion in which he asserts that all the objectives of a staff member do not necessarily need to be alluded to in the guidelines laid down in the "*Performance and Competence Enhancement Report*" (hereinafter referred to as "*PACE Report*"). This position contradicts not only the guidelines for informing the appraisal report, but also Rule 112.4 of the Staff Rules. Mr. Ortiz further contends that the Secretary-General infringes this rule by maintaining that he can appraise a member of staff at any time.

16. Mr. Ortiz submits that that the Administration statement that there were delays in processing his PACE report is not sustainable as the Organization "owes it to its employees, especially probationers, to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal"¹. Mr. Ortiz also submits that in *Appellant* the former Administrative Tribunal held that "[i]f the basis of the non-renewal is bad performance, management is under an obligation to demonstrate that the performance was properly evaluated and that a staff member received the guidance and care due especially to a new recruit"².

17. Mr. Ortiz also maintains that, by not informing him in a timely manner, contrary to usual practice and to ILOAT³ precedent, of his unsatisfactory performance prior to the meeting of 26 August 2010, the Secretary-General did not allow him the opportunity to respond to any doubts the Administration may have had about his performance.

18. Mr. Ortiz maintains that the Administration's allegations regarding his writing skills were not justified since they did not take into account several other reports written by him which had been judged

¹ ILOAT Judgment No. 2529 (2006), para.15.

² Former United Nations Administrative Tribunal Judgment No. 1416 (2008), para. VII.

³ See ILOAT Judgments No. 2414 (2005) and No. 2529 (2006).

very satisfactory. Furthermore, Mr. Ortiz maintains that there is no written record about him that mentions comments about his performance prior to the memorandum of 31 August 2010, and it is not sufficient to argue that he was notified of this through undocumented verbal warnings.

19. Mr. Ortiz maintains that, by setting out the objectives for him to achieve in the 2010 appraisal report in June 2010, i.e. six months after the due date, the Administration did not clearly fix the criteria for appraisal of his performance. Furthermore, Mr. Ortiz remarks that he thought all his shortcomings, particularly with regard to his writing skills, which he had been prepared to remedy, were no longer a problem. Mr. Ortiz adds that, whereas he had had a conversation to discuss and comment upon his appraisal report for 2009, no such procedure had been undertaken regarding his 2010 performance.

20. Mr. Ortiz asks the Appeals Tribunal to rescind the Secretary-General's decision and, in accordance with AJAB's recommendations, order that nine months' net base salary be paid. Mr. Ortiz also requests that all erroneous information be erased from his personal file and that he receive compensation for the costs incurred in the procedure.

Secretary-General's Answer

21. The Secretary-General maintains that AJAB committed an error in considering that the performance appraisal in the *PACE Report* is the only way for the Administration to appraise a staff member during his probationary period, disregarding both Staff Regulation 4.11 of Article IV of the ICAO *Service Code* and the Administration's discretionary powers. The Secretary-General contends that he has the power to terminate a staff member's appointment in the course of his probationary period if his performance is not satisfactory, subject to providing a month's notice.

22. The Secretary-General maintains that the courts considered that the very essence of a probationary period is to enable the Organization to gauge whether the probationer corresponds to its specific requirements. Consequently, the Secretary-General maintains that the AJAB Opinion that the appraisal report should be completed prior to being able to terminate a staff member's appointment during his probationary period, invalidates his power to terminate a probationer's appointment.

23. Consequently, the Secretary-General maintains that the true question before the Appeals Tribunal is not to know whether the guidelines for completing the *PACE Report* were properly followed, but rather to know whether any action undertaken by the Administration allowed the Appellant a procedure observing the basic rules and procedural guarantees required for the termination of a probationer's appointment, as set out in Staff Regulation 4.11 of Article IV of the *Service Code*. The Secretary-General submits that the

Appeals Tribunal has held that while its “authority is not unfettered”⁴ it has “broad discretionary authority to terminate the appointment of such staff during the probationary period”.⁵ Consequently, the Secretary-General submits that it substantially complied with the requirements for the termination of Mr. Ortiz and that the issue before the Tribunal is whether or not the final decision of terminating Mr. Ortiz’s employment was justifiable.

24. Consequently, the Secretary-General maintains that, despite the problems encountered during the appraisal, there was no obligation to complete Mr. Ortiz’s *PACE Report* before the end of the probation period. And, more important still, the Secretary-General contends that, although the Administration did not entirely observe the rules for terminating a staff member’s appointment during his probationary period, there is no proof that the Administration acted in bad faith.

25. The Secretary-General maintains that not only did the Chief meet Mr. Ortiz on several occasions to discuss his performance, but the latter was also given guidance as to the conduct he should adopt, and it is specifically indicated in his appraisal report that he needed to improve his editing skills. The Secretary-General also contends that, regardless of the fact that AJAB was wrong in stating that Mr. Ortiz needed to be informed of the problems regarding his performance, the facts clearly show that Mr. Ortiz was warned on at least five occasions. The Secretary-General thus contends that the file clearly shows that the decision to terminate Mr. Ortiz’s probationary period was based purely on his unsatisfactory performance, and not on other external criteria.

26. The Secretary-General concedes that Staff Regulation 4.11 of Article IV of the *Service Code* can be interpreted as stipulating that the Secretary-General should have obtained the written approval of the President of the Council to terminate Mr. Ortiz’s probationary period before the beginning of the procedure. Nevertheless, the Secretary-General points out that the measures were taken in good faith and that the Administration did in fact obtain written approval before the termination was put into practice, and thus did observe the requirements stipulated in Staff Regulation 4.11 of Article IV of the *Service Code*.

27. The Secretary-General asks the Appeals Tribunal to reject Mr. Ortiz’s request for the payment of nine months’ net base salary. Should the Tribunal consider that Mr. Ortiz has grounds for obtaining compensation, the Secretary-General asks that it be limited to not more than one month net base salary.

⁴ *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

⁵ *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

Mr. Ortiz's Motion for authorization to File Supplement to Appellant's Appeal

28. On 4 November 2011, Mr. Ortiz filed a request to submit a further statement based on evidence that had recently come to light, raising questions as to whether the decision not to prolong the probationary period, thus depriving him of the opportunity to respond to his performance issues, was based on improper motives and a lack of good faith.

Secretary-General's answer to the Motion for Authorization to File Supplement to Appellant's Appeal

29. The Secretary-General opposes Mr. Ortiz's request and maintains that the latter, in raising facts that have already been put before AJAB, has not identified exceptional circumstances which would justify the further filing of additional evidence or that would be likely to help the Appeals Tribunal.

Considerations

30. An appeal has been brought before the Appeals Tribunal opposing the decision whereby the Secretary-General of ICAO ruled on Mr. Ortiz's complaint against his decision of 1 September 2010 to dismiss him as of 30 September 2010.

31. The Secretary-General decided not to follow entirely AJAB's Opinion No. 125, which had unanimously concluded that the Administration had failed to apply various norms and had breached Mr. Ortiz's rights by deciding to terminate his employment. AJAB had recommended that ICAO pay the Appellant compensation equivalent to nine month's net base salary at the rate in effect as of 1 October 2010. The Secretary-General has only accepted in his decision, notified to Mr. Ortiz on 5 July 2011, to pay Mr. Ortiz three months' net base salary at the rate in effect as of 1 October 2010 as a compensation.

Regarding Judicial Review by the Appeals Tribunal of the Disputed Decision

32. Under the provisions of Article XI of ICAO's *Service Code*, amended so as to be made compatible with the Agreement between the United Nations and ICAO, extending the jurisdiction of the United Nations Appeals Tribunal to ICAO in respect of appeals pleading failure to comply with ICAO staff members' employment or contract conditions, AJAB was set up as a guarantor of the neutrality of a first-instance procedure in the framework of which it has to submit its conclusions and recommendations to the Secretary-General so that he can take his decision on the complaint made by a staff member or former staff

member disputing an administrative decision against which is adduced failure to comply with either the stipulations of the employment contract or the provisions of ICAO's *Service Code*, or else the established administrative modes of action, insofar as they unfavourably affect the situation of the party concerned.

33. As a result of the foregoing, an appeal has been referred to the Appeals Tribunal, not directly against the original administrative decision, but against the final decision taken by the Secretary-General upon completion of the first-instance procedure. It is the Tribunal's business to deliberate upon AJAB's conclusions and recommendations and the reasons for which, as it turned out, the Secretary-General departed from them. There should normally be no need for any other evidence than that submitted to AJAB.

34. Nevertheless, it should be borne in mind that, even in a case like this, in which AJAB carried out its task carefully and impartially, the appeal is directed against an administrative decision, taken by an executive authority, and not against a judgment delivered by a professional, independent court of first instance deciding on the issue itself.

35. Therefore, the Appeals Tribunal's Statute is only applicable to such an appeal insofar as, and on condition that, its provisions are compatible with the judgment of an appeal directed against a decision taken by an executive authority.

On the Substance

36. AJAB based itself on a combination of Staff Regulation 4.11 of the *Service Code* and 109.6 of the Staff Rules in force at the material time, which it read correctly to reach the conclusion that a probationer's performance was deemed to be inadequate if either his conduct or his performance in the tasks assigned to him, or both, were unsatisfactory.

37. Those provisions leave the administrative authority a wide margin of discretion. However, its discretionary power is not unlimited. It must act in good faith and with respect for procedural rules. As a general rule, its decisions must not rest upon misguided, flawed or wrongful grounds.⁶

38. Staff Regulation 4.11 stipulated that appointments to posts in the "Professional" category, such as Mr. Ortiz's to a P-4 grade post, included a probationary period of one year, during which, if the services of the staff member were not satisfactory, the appointment could be terminated by one month's notice in

⁶ *Asaad v. Commissioner General of United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-TANU-021, para.11.

writing or salary in lieu thereof. In the present instance, in which the decision had been taken to terminate the appointment prior to the conclusion of the one-year period, Staff Regulation 4.11 also stipulated that the Secretary-General should obtain the written approval of the President of the Council.

39. In its Opinion No. 125, AJAB noted that the President's approval had not been sought when the decision had been taken to terminate the appointment of the Appellant on 1 September 2010, but that it had been given only on 24 September 2010, after the Secretary-General had confirmed the termination. The Secretary-General acknowledges this in his final decision. He only qualifies AJAB's conclusion by pointing out that the President of the Council did ratify the initial decision.

40. Before this Tribunal, the Respondent concedes that the President's approval should have been obtained prior to notifying the staff member of the termination of his appointment, but he adds that he acted in good faith and that he complied with Staff Regulation 4.11 on the substance, by obtaining the approval before the actual date of termination.

41. We accept the argument that, since the President's approval was finally given before the termination had actually been put into effect, it can be considered as having ratified the initially flawed termination decision. However, the ratification only took effect on the date when it took place, i.e. 24 September 2010. The month's notice, or the salary in lieu thereof, should have commenced on that date. As that was not the case, we must conclude that the Secretary-General did not observe the termination procedure and that Mr. Ortiz is entitled to claim compensation to that extent.

42. Still with regard to the procedure followed by the Administration, AJAB deemed that Mr. Ortiz had been dismissed without having been given the opportunity to submit his comments (*Finding No. 10*). According to AJAB, it was only on 2 September 2010, the following day, that the report on the basis of which the termination of his appointment was pronounced was communicated to him. In the disputed decision, the Secretary-General challenges these findings. He maintains that the staff member had numerous opportunities to submit his comments. In his appeal, the Appellant asserts that, even if he met with his supervisors, they did not make it clear to him that his conduct and his performance were unsatisfactory and that his probationary period was in jeopardy.

43. We note that the file does not contain any evidence likely to counteract AJAB's findings.

44. As ILOAT expressed it in its Judgment No. 152 (1970), in a reasoning with which we concur: "Although the termination of a probationer's appointment for unsatisfactory performance is not in itself a disciplinary measure, it is nevertheless a measure affecting the staff member individually and cannot

therefore legitimately be taken until he has been informed of the Organization's intention to terminate him and has had an opportunity of submitting his observations".

45. It follows from the above that the Administration did not observe the probationer's rights and thus took a decision tainted with irregularity.

46. AJAB deemed that the Administration had not set the staff member clear objectives right from the beginning of the probationary period (*Finding No. 2*), that it had not observed the Performance and Competency Enhancement Report (*Findings Nos. 3 and 4*), that it had not appraised his performance over a major part of his probationary period (*Finding No. 9*), that it had not particularly drawn his attention to the fact that his job was in jeopardy (*Finding No. 8*), and that contradictory statements, both verbal and written, made with regard to the Appellant's behaviour, indicated that that the Administration had acted in an arbitrary manner (*Finding No.12*).

47. Having carefully examined the documentary evidence upon which AJAB had based its appraisal of the facts, we are convinced neither by the grounds given in the disputed decision not to follow its conclusions and recommendations nor by the arguments in defence. We think the Appellant has grounds for acting on the basis of AJAB's conclusions (*Findings Nos. 2,3,4, 8,9 and 12*) and that he is thus entitled to request that those conclusions be confirmed.

48. The above considerations indicate that the Secretary-General's disputed decision should be rescinded and that the termination decision, the unlawful nature of which is evidenced by the foregoing, should also be rescinded.

49. Under the provisions of Article 9, paragraph 1, of its Statute, the Appeals Tribunal has to set an amount of compensation as an alternative to rescission of the contested administrative decision. We hereby order, within the compass of the Appellant's conclusions, payment of compensation equivalent to nine months' net base salary at the rate in effect as of 1 October 2010, along with interest at US Prime Rate on the date on which the principal is due, and running from that date (1 October 2010) until the date of payment of the compensation.

50. The Appellant's other conclusions, which are not directed against the challenged decision, are hereby rejected.

Judgment

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51. The Secretary-General's challenged decision, notified to Mr. Ortiz on 5 July 2011, is hereby rescinded.

52. The administrative decision of termination is hereby rescinded. As an alternative to rescission, the Appeals Tribunal orders payment of compensation equivalent to nine months' net base salary at the rate in effect as of 1 October 2010, along with interest at US Prime Rate on the date on which the principal is due, and running from that date (1 October 2010) until the date of payment of the compensation.

53. This Judgment shall be implemented within a period of 60 days as from the date on which the original in French was notified to the Respondent. If it is not implemented within that period of 60 days, the US Prime Rate shall be increased by 5 per cent from the date of expiry of the 60-day period until the actual date of payment of the compensation.

Original and Authoritative Version: French

Done this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Simón

(Signed)

Judge Weinberg de Roca

Entered in the Register of the Court on this 12th day of September 2012, in New York, United States.

(Signed)

Weicheng Lin, Registrar
