



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

Judgment No. 2014-UNAT-472



**Nianda-Lusakueno
(Appellant)**
v.
**Secretary General
of the International Civil Aviation Organization
(Respondent)**

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Rosalyn Chapman
Judge Luis María Simón

Case No.: 2013-545

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Appellant: Abdoulaye Diallo

Counsel for Respondent: Christopher M. Petras

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. José Nianda-Lusakueno against the decision taken by the Secretary General of the International Civil Aviation Organization (Secretary General and ICAO, respectively) on 5 August 2013 in respect of ICAO Appeal No. 184. Mr. Nianda-Lusakueno appealed on 12 November 2013 and the Secretary General of ICAO answered on 10 January 2014.

Facts and Procedure

2. Mr. Nianda-Lusakueno joined ICAO in 2003 as a General Service Clerk. His appointment was successively renewed for varying periods of time, which carried him through 31 December 2012.

3. In a letter dated 14 December 2012, the Secretary General of ICAO offered to extend Mr. Nianda-Lusakueno's contract for three months from 1 January 2013 to 31 March 2013. In another letter also dated 14 December 2012, the Director, Bureau of Administration and Services (D/ADB), ICAO, informed Mr. Nianda-Lusakueno that "in accordance with the conditions of [his] appointment, and in particular the ICAO Service Code, Article IX, paragraph 9.14, ... [his] appointment will not be renewed upon its expiry. [His] services will therefore cease on 31 March 2013 at close of business."

4. In an e-mail dated 21 February 2013, the Deputy Director, ADB (DD/ADB), ICAO, informed Mr. Nianda-Lusakueno:

I have reviewed the decision not to extend your contract beyond 31 March, that was communicated in a letter to you dated 14 December 2012. I spoke with your section chief, my colleagues in HR and my Director to understand the background. As a result of these discussions, I have to advise you that the decision not to extend your contract beyond its current expiration date has to stand.

5. In a memorandum dated 12 March 2013, Mr. Nianda-Lusakueno appealed to the Secretary General of ICAO to reconsider the decision taken by the D/ADB on 14 December 2012 to extend his appointment for only three months through 31 March 2013 and, moreover, to consider keeping him on board for nine more years until he reached the early retirement age of 57 "on humanitarian grounds".

6. In a letter dated 19 March 2013 to Mr. Nianda-Lusakueno, the Secretary General of ICAO advised:

I have been informed that the Deputy Director, Human Resources met with you on 16 January 2013 and subsequently reviewed the situation with the Chief, Records and Distribution Management Section and the Director, Bureau of Administration and Services (D/ADB). As a result, an email was sent to you on 21 February 2013 reconfirming the earlier decision that had been communicated to you in D/ADB's letter of 14 December 2012.

The scope of our distribution operations has been substantially reduced and the position occupied by you had to be abolished.

For the above-mentioned reason, the decision not to extend your contract beyond 31 March 2013 is maintained.

7. On 31 March 2013, Mr. Nianda-Lusakueno wrote to the Secretary of ICAO's Advisory Joint Appeals Board (AJAB) to appeal the decision of the Secretary General of ICAO to maintain the decision not to extend his contract beyond 31 March 2013.

8. In a report dated 2 July 2013, the AJAB rejected Mr. Nianda-Lusakueno's appeal as time-barred. The AJAB noted that under ICAO's Staff Rule 111.1, paragraph 5, Mr. Nianda-Lusakueno had 30 calendar days counting from 14 December 2012, the date of notification of the D/ADB's letter, to request the Secretary General to review the contested decision. It concluded that his request should have been sent at the latest by 14 January 2013. However, Mr. Nianda-Lusakueno did not do so until 12 March 2013.¹ The AJAB then reviewed Mr. Nianda-Lusakueno's explanations to see whether there existed exceptional circumstances beyond his control to warrant a waiver of the time limit, but did not find any. The AJAB did not accept Mr. Nianda-Lusakueno's argument that the determining date for him was the date when he received the answer from the DD/ADB on 21 February 2013, which put the deadline for the purpose of appeal as at 20 March 2013. The AJAB opined:

It is not clear to the Board why the Appellant places reliance on DD/HR/ADB's e-mail of 21 February 2013 as a defence against the delay in request the Secretary General to review the administrative decision in question. The e-mail was sent *after the prescribed deadline of 14 January 2013 had elapsed*. The e-mail, therefore, has no relevance to the deadline prescribed in [Staff Rule] 111.1, paragraph 5.²

¹ The request for review that Mr. Nianda-Lusakueno sent to the Office of the Secretary General of ICAO was dated 12 March 2013.

² Bold and italics in original.

9. The AJAB nevertheless found that Mr. Nianda-Lusakueno had relied on the first sentence of Staff Rule 111.1, paragraph 5, that “[a] staff member should, where appropriate, first attempt to resolve any grievance through the channels described in [paragraph] 1 above”, by initiating a series of informal efforts including meetings with ICAO’s Ombudsman, the Legal Counsellor of ICAO and the DD/ADB, before he appealed to the Secretary General on 11 March 2013. “It is likely that the placement of the sentence in question may have served to confuse [Mr. Nianda-Lusakueno].”

10. On 5 August 20013, the Secretary General accepted the AJAB’s recommendation and denied Mr. Nianda-Lusakueno’s request for a waiver of the time limit for the filing of his appeal. Mr. Nianda-Lusakueno contests this decision.

Submissions³

Mr. Nianda-Lusakueno’s Appeal

11. Mr. Nianda-Lusakueno followed Staff Rule 111.1, paragraph 5, and met with ICAO’s Ombudsman, the President of the Staff Association and the DD/ADB in an attempt to informally resolve his grievance. He maintained a continuous dialogue with the Administration in the spirit of Staff Rule 111.1, paragraph 5, which culminated in the decision taken by the DD/ADB on 21 February 2013. During his meeting with the legal officer assigned to assist him, the legal officer, who was a chairman of the AJAB for more than a decade, clearly indicated to Mr. Nianda-Lusakueno that the deadline would be one month after he received the official answer from the DD/ADB on 21 February 2013. Mr. Nianda-Lusakueno acted on the advice of the legal officer and appealed to the Secretary General of ICAO on 11 March 2013.

12. Mr. Nianda-Lusakueno did not ask the AJAB for a waiver of the time limit. Rather, he asked the AJAB to determine the exact deadline in his case. The AJAB erred in subjecting Staff Rule 111.1 to a restrictive interpretation without due regard to the spirit of the law. The AJAB recognized that Staff Rule 111.1 may be confusing for staff members but at the same time refused to consider it as compelling circumstance warranting a conclusion that his appeal was receivable.

³ Both parties make arguments and claims on the merits of the present case. They are not summarized here for the purpose of this appeal.

13. Mr. Nianda-Lusakueno requests that the Appeals Tribunal order that his case be heard by the AJAB on the merits, or that he be reinstated in his former position and be paid the lost earnings and an unspecified amount of compensation for the suffering that he and his family had to endure.

The Secretary General's Answer

14. Mr. Nianda-Lusakueno failed to submit a request for administrative review within the 30-day time limit. As the Appeals Tribunal has no jurisdiction to waive the deadlines for administrative review, his appeal must be denied.

15. The 21 February 2013 e-mail from the DD/ADB to Mr. Nianda-Lusakueno was not a new decision, but a reiteration of the 14 December 2012 decision. Furthermore, it cannot be understood to constitute an extension or waiver, explicit or implied, of the time limits envisaged in Staff Rule 111.1.

16. There is no requirement for a staff member to exhaust the informal administrative remedies before pursuing formal review and appeal. While entertaining the possibility of Mr. Nianda-Lusakueno being confused about informal versus formal review procedures, and recommending that changes be made to Staff Rule 111.1 to clarify this distinction, the AJAB nevertheless rejected such possible confusion as a basis for a waiver of the 30-day time limit and unanimously advised the Secretary General of ICAO not to support Mr. Nianda-Lusakueno's request.

17. As it rejected Mr. Nianda-Lusakueno's appeal *ratione temporis*, the AJAB did not adjudge the substantive issues that he had raised. Consequently, Mr. Nianda-Lusakueno's plea for a decision on the merits is not properly before the Appeals Tribunal. If the Appeals Tribunal were to find Mr. Nianda-Lusakueno's appeal receivable, it should remand the present case to the AJAB for findings and recommendations on the merits.

18. The Secretary General of ICAO requests that the Appeals Tribunal deny the appeal in its entirety.

Considerations

19. Mr. Nianda-Lusakueno joined ICAO in 2003 as a G-3 Shipping Clerk. His appointment was extended until 31 December 2012. On 14 December 2012, he was offered an extension from 1 January to 31 March 2013 and was notified in writing that his appointment would not be renewed beyond 31 March 2013. Thereafter, he met with the DD/ADB on 16 January 2013 and, on 21 February 2013, he received an e-mail confirming the non-renewal.

20. Mr. Nianda-Lusakueno wrote to the Secretary General of ICAO on 12 March 2013 requesting reconsideration of the decision not to renew his appointment.⁴ The Secretary General of ICAO confirmed on 19 March 2013 that the decision would be maintained, since the post was to be abolished.

21. Mr. Nianda-Lusakueno appealed to the AJAB on 31 March 2013. The AJAB Secretary asked on 8 April 2013 to be provided with the letter of 14 December 2012 by the D/ADB and the e-mail of 21 February 2013 by the DD/ADB. These were provided on 23 April 2013.

22. On 22 May 2013, the AJAB Secretary wrote to Mr. Nianda-Lusakueno informing him of the AJAB's preliminary observation that his appeal was *prima facie* time-barred, as Mr. Nianda-Lusakueno had not complied with the 30 calendar days' deadline to request administrative review by the Secretary General of ICAO and filed a request for administrative review on 12 March 2013, instead of by 14 January 2013. Mr. Nianda-Lusakueno was asked to provide relevant information concerning exceptional circumstances warranting a waiver of the time limit.

23. In his response dated 7 June 2013, Mr. Nianda-Lusakueno recounted his meetings with the ICAO officials before he lodged the appeal on 11 March 2013.

24. The AJAB recommended not to waive the time limit but at the same time recommended that the first sentence in Staff Rule 111.1, paragraph 5 be deleted or appended to the end of Staff Rule 111.1, paragraph 1, to clearly distinguish between the informal and formal review procedures. The AJAB sympathized with Mr. Nianda-Lusakuemo that he had relied on the first sentence of Staff Rule 111.1, paragraph 5 that stated that a staff member

⁴ Mr. Nianda-Lusakueno wrote three letters to the Secretary General of ICAO, dated 7 March 2013, 11 March 2013 and 12 March 2013.

should, where appropriate, first attempt to resolve any grievance through the channels [of informal review procedure].

25. But in the instant case, the 30 calendar days' time limit was not complied with for either the formal or the informal review.

26. For this reason, a possible confusion is of no consequence. The jurisprudence of this Tribunal to the effect that "ignorance of the law is no excuse" applies in the present case and, unfortunate as it is, the fact that Mr. Nianda-Lusakueno relied on the informal review procedure does not qualify as "exceptional circumstances" under ICAO's Staff Rule 111.1, paragraph 8.

27. Article 7(3) of the Appeals Tribunal Statute provides, in part, that "[t]he Appeals Tribunal shall not suspend or waive the deadlines for management evaluation". This provision is identical to Article 8(3) of the Statute of the United Nations Dispute Tribunal (UNDT).

28. The administrative review by ICAO is the equivalent of management evaluation under Article 7(3) of the Appeals Tribunal Statute, and Article 7(3) must be interpreted in the same manner as Article 8(3) of the UNDT Statute.

29. This Tribunal has consistently opined that Article 8(3) of the UNDT Statute must be read literally to prohibit the UNDT from waiving the deadlines for seeking management evaluation. Thus, the UNDT has no jurisdiction or competence to waive such deadlines.⁵

30. Thus, the Secretary General's decision accepting the recommendation of the AJAB not to waive the time limit to seek review is affirmed.⁶

Judgment

31. The appeal is dismissed.

⁵ *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376, para. 31, citing *Ajdini v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108; *Trajanovska v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-074; and *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-036.

⁶ *Ib.*, para. 32.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar