



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

Judgment No. 2015-UNAT-499

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

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Rosalyn Chapman
Judge Mary Faherty

Case No.: 2014-568

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Mr. Fedorchenko: Self-represented

Counsel for Secretary General of ICAO: Christopher M. Petras

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Alexander Fedorchenko against a decision taken by the Secretary General of the International Civil Aviation Organization (ICAO) on 27 November 2013 adopting the recommendation of ICAO's Advisory Joint Appeals Board (AJAB) to reject Mr. Fedorchenko's appeal to the AJAB as not receivable.

Facts and Procedure

2. At the material time, Mr. Fedorchenko was Chief of the Russian Translation Section, Languages and Publications Branch, Administration and Services Bureau of ICAO, on secondment from the Secretariat of the United Nations.

3. In November 2011, a translator/reviser, an editorial assistant and a secretary, all of who worked within the Russian Translation Section, filed separate complaints of harassment with the Secretary General of ICAO against Mr. Fedorchenko. The Secretary General of ICAO responded in early December 2011 by authorizing a review and investigation to be undertaken by the new Ethics Officer who was to start in January 2012.

4. In a memorandum dated 14 March 2012, the new Ethics Officer reported to the Secretary General of ICAO that he had received a formal complaint of harassment from the translator/reviser, who had earlier complained to the Secretary General. The Ethics Officer stated that he had met with the translator/reviser and the translator/reviser's case appeared to be a "marginal case". However, as there was "supporting and corroborating testimony from witnesses [...] this does normally constitute a prima facie case for pursuing the allegation to investigation". The Ethics Officer proposed a single investigation into the three complaints for the purpose of "a more efficient and cost effective investigation". He also proposed the terms of reference for such an investigation. On 15 March 2012, the Secretary General of ICAO approved the recommendations of the Ethics Officer.

5. In a memorandum dated 20 March 2012, the Ethics Officer advised Mr. Fedorchenko of the three complaints of harassment his named colleagues had filed against him, the gist of the complaints and the commencement of his investigation into each of them. He also

informed Mr. Fedorchenko that the actual investigation would be undertaken by an external party.

6. In a memorandum dated 29 October 2012, the Ethics Officer advised the Secretary General of ICAO that the investigation had been completed. He reported:

The investigator has concluded that in all three cases the underlying facts as presented by the complainants were *not* sufficient to substantiate an accusation of harassment, as defined by the ICAO regulations (and as guided by the agreed investigation criteria). That is to say, sufficient evidence was not presented to conclude that Mr. Fedorchenko had exhibited behaviour that was humiliating, intimidating or abusive. The investigator, did, however, also find that all three claimants genuinely felt harassed and that none of the complaints was “vexatious”.¹

He explained that the investigation had taken longer than expected to complete, partly due to “accreditation difficulties” for the external investigator and partly because it “involved three separate but linked cases and a need to constantly allow review time for all concerned at several stages in the investigation”. In light of the investigative findings, the Ethics Officer recommended:

- i. That none of the three cases against Mr. Fedorchenko be pursued any further.
- ii. That the Ethics Officer inform Mr. Fedorchenko and each of the three reporting staff members of the decision not to proceed with the case.
- iii. That the Ethics Officer and [the Director of the Administration and Services Bureau] look into the possibility of making conflict resolution courses available to all staff, perhaps through the iLearn platform, so that future PACE recommendations for such training can be actioned.

7. On 29 October 2012, the Secretary General of ICAO endorsed all three recommendations from the Ethics Officer.

8. In a memorandum dated 30 October 2012, the Ethics Officer informed Mr. Fedorchenko of the completion of the investigation, its findings and the decision of the Secretary General of ICAO not to pursue the three complaints of harassment against him any further. He also informed Mr. Fedorchenko that “[i]n accordance with ICAO procedures no record of the investigation or the allegations will be placed on [his] personnel file”.

¹ Emphasis in original.

9. Mr. Fedorchenko ended his secondment with ICAO effective 31 October 2012.

10. In a memorandum dated 20 November 2012, Mr. Fedorchenko requested that the Secretary General of ICAO pay him 14 months of salary as “material compensation for the long extreme mental distress, anguish, anxiety, physical and moral suffering as a result of the groundless and unjustified actions and decisions by the ICAO Administration” in the form of “the seven-month long process of the investigation of spurious allegations against [him]”. Mr. Fedorchenko stated that the investigation “lacked the legitimacy and procedural ethics”, during which he “was denied due process and subjected to unfair and biased treatment in complete contravention of the established standards of ICAO and of the UN common system for investigations”. Mr. Fedorchenko also stated that as a result of the investigation he “experienced severe mental distress and anguish, accompanied by anxiety. ... [His] family members also suffered because they shared [his] painful experience at ICAO.” On 21 December 2012, Mr. Fedorchenko sent the Secretary General of ICAO a reminder memorandum.

11. In a letter dated 7 January 2013, the Secretary General of ICAO advised Mr. Fedorchenko that he was not able to accept his request for review or provide an award of compensation as “there has been no administrative decision which can be the starting point of a cause of action under Staff Regulation 11.1”.

12. In a memorandum dated 20 January 2013 to the Secretary General of ICAO, Mr. Fedorchenko “request[ed] a formal review” of the decision embodied in his 7 January 2013 letter. Not having heard from the Secretary General of ICAO, on 28 February 2013, Mr. Fedorchenko sought the agreement of the Secretary General of ICAO to submit his case directly to the Appeals Tribunal. There was no response to this proposal.

13. On 17 March 2013, Mr. Fedorchenko lodged an appeal with the AJAB against “the decision by the ICAO Secretary General in his letter to me, dated January 7, 2013, not to accept my request for review and/[or] an award of compensation”. According to ICAO, there was no Respondent’s Reply to Mr. Fedorchenko’s appeal to the AJAB.

14. In an interim report dated 22 November 2013, the AJAB concluded that it was not competent to deal with the appeal filed by Mr. Fedorchenko. It noted, *inter alia*, the Appeals Tribunal Judgment in *Nwuke*,² in which this Tribunal held that the Administration's decision not to investigate a complaint of discrimination filed by a staff member may be examined by the Dispute Tribunal as it was covered by the Secretary-General's Bulletin ST/SGB/2008/5 entitled "Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority". However, the AJAB was of the view that "[t]he ICAO Rules and Regulations *do not* contain a provision analogous to ST/SGB/2008/5, [...] that would permit an 'alleged offender' who has 'grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper', to appeal".³ In the view of the AJAB, the complaints of harassment had been investigated, a final decision had been taken and "the matter closed".

15. On 27 November 2013, the Secretary General of ICAO approved the AJAB's conclusions. By letter dated 3 December 2013, Mr. Fedorchenko was notified of that decision.

16. On 22 January 2014, Mr. Fedorchenko appealed to the Appeals Tribunal the decision taken by the Secretary General of ICAO to approve the AJAB conclusions.

17. Also on 22 January 2014, Mr. Fedorchenko filed a motion for confidentiality. He requested that he be permitted to submit his medical information "only [...] for the eyes of UNAT, and not to ICAO or third parties". He also requested that his identity be kept "confidential and anonymous in any eventual decisions by the Appeals Tribunal". On 31 January 2014, ICAO filed comments on Mr. Fedorchenko's motion for confidentiality. The parties were subsequently informed that Mr. Fedorchenko's motion for confidentiality and the Respondent's comments thereon would be added to the case file and decided by the Panel deliberating on the merits of the case.

18. On 17 March 2014, ICAO filed with the Appeals Tribunal an answer to Mr. Fedorchenko's appeal.

² *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099.

³ Emphasis in original.

19. On 24 April 2014, Mr. Fedorchenko filed another motion requesting that the Appeals Tribunal issue an order not to notify the Respondent of the filing of his medical records and not to disclose his medical records to ICAO. The Respondent submitted observations on that motion. By Order No. 190 (2014), this Tribunal granted Mr. Fedorchenko's motion in part. It ordered that Mr. Fedorchenko be allowed to file his medical record under seal. However, it also ordered that a designated representative of the Respondent would have the right to review the medical record on the premises of the Appeals Tribunal in the presence of a staff member of the Registry.

Submissions

Mr. Fedorchenko's Appeal

20. The AJAB erred in law in declaring itself not competent to review his appeal. By so doing, the AJAB "denied [him] his contractual entitlements, his right to due process and his right to appeal the abuses [sic] of authority by the Secretary General" of ICAO. It also demonstrated an imputed or apparent bias.

21. Mr. Fedorchenko had presented documented evidence, which neither the Secretary General of ICAO nor the AJAB disputed, showing aggravated breaches of his substantive entitlements and due process rights resulting from the "illegal and protracted investigation". Those breaches were of a fundamental nature and caused him physical and psychological damage as well as moral injury. They are subject to judicial review.

22. ICAO is part of the United Nations common system; the norms and principles of the United Nations Charter in general, and ST/SGB/2008/5 in particular, are fully applicable to Mr. Fedorchenko and should be respected and observed by ICAO though it is a specialized agency. The lack of a provision analogous to ST/SGB/2008/5 for ICAO cannot be used as a reason to grant ICAO a special right.

23. Mr. Fedorchenko requests that this Tribunal not remand the present case to the AJAB because of his lack of confidence in ICAO's justice system and its imputed or apparent bias. He also requests that this Tribunal award him 14 months' base salary as material compensation for the damage to his physical and psychological health and well-being and ten months' base salary in compensation for moral injury.

ICAO's Answer

24. Mr. Fedorchenko has failed to demonstrate that the Secretary General of ICAO erred in law in endorsing the AJAB's conclusion that it was not competent to deal with his appeal.

25. Mr. Fedorchenko has also failed to identify an administrative decision that he was contesting. After he had been informed of the decision by the Secretary General of ICAO not to pursue the case and to close the matter, Mr. Fedorchenko raised a bald demand for compensation and subsequently morphed that demand into a "request for review" of a non-existing decision and appealed to the AJAB and now to this Tribunal. It should be noted that Mr. Fedorchenko's appeal to the AJAB failed to comply with not only the requirement of identifying an administrative decision but also the 30-day time limit prescribed in ICAO's Staff Rule 111.1. It was thus non-receivable *ratione materiae* and *ratione temporis*.

26. Contrary to Mr. Fedorchenko's assertion, the bulletins including ST/SGB/2008/5 issued by the Secretary-General of the United Nations are internal United Nations documents; as a rule, they are not applicable to separately administered organs and programmes of the United Nations, much less to the United Nations specialized agencies such as ICAO.

27. Consistent with *Williams*,⁴ the Appeals Tribunal lacks jurisdiction or competence to address the merits of the substantive claims where matters were never adjudged by the AJAB. Accordingly, Mr. Fedorchenko's plea for a decision on the merits is not properly before the Appeals Tribunal. As Mr. Fedorchenko's appeal is not receivable *ratione materiae* and *ratione temporis*, it would not be appropriate to remand his case to the AJAB. In this regard, the Respondent notes Mr. Fedorchenko's request that his case not be remanded to the AJAB.

28. The Respondent requests that this Tribunal enter a final judgment denying Mr. Fedorchenko's appeal in its entirety.

Considerations

29. Mr. Fedorchenko has not provided persuasive reasons for maintaining confidentiality of his case, so his petition in this regard is not granted. As stated in *Pirnea*,

⁴ *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376.

[...] one of the purposes or goals of the new system for the administration of justice is to assure that the judgments of the Appeals Tribunal are published and made available to the Organization's staff and the general public. Public dissemination of the appellate judgments helps to assure there is transparency in the operations of the Appeals Tribunal. It also means, sometimes fortunately and other times unfortunately, that the conduct of individuals who are identified in the published decisions, whether they are parties or not, becomes part of the public purview.

... this Tribunal has determined that “[t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability”. And [the Applicant] has not shown any “greater need than any other litigant for confidentiality”. Staff members challenge many types of employment-related decisions before the internal justice system. Some of these decisions pertain to personal matters, such as disability or illness, and others pertain to the staff member's performance - and even to claims of serious misconduct. If confidentiality attached to the staff member's identity in each case, there would be no transparency regarding the operations of the Organization, which would be contrary to one of the General Assembly's purposes and goals for the internal justice system. [The Applicant] was not charged with misconduct or any wrongdoing; his fixed-term appointment was not renewed. His discomfort with having his name attached to the Judgment is not grounds to grant his motion.⁵

30. The Appeals Tribunal holds that a decision not to review the closure of an investigation which has been impugned by a staff member as procedurally or substantively irregular is a decision which affects a staff member's legal rights; it thus constitutes an administrative decision subject to judicial review, because its particular scope can impact the terms of service and standing of the staff member. The circumstances of the present case fulfil the requirements contemplated by the jurisprudence of this Tribunal to qualify certain administrative acts or omissions as administrative decisions.⁶

31. On 29 October 2012, the Secretary General of ICAO endorsed the recommendations of the Ethics Officer upon the completion of the investigation and decided not to pursue the complaints of harassment against Mr. Fedorchenko any further, since the findings were not sufficient to substantiate the accusations, despite the fact that the claims were not considered vexatious.

⁵ *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-456, paras. 18 and 20 (internal citations omitted).

⁶ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

32. Once informed of the outcome of this investigation, Mr. Fedorchenko, who had been subject to it, could of course concur with the closure (without any record on his personnel file). However, that does not preclude him from requesting review of the proceedings for irregularities.

33. The Administration has the duty to conduct investigations into the alleged conduct of staff members in certain cases in compliance with the respective applicable norms. This does not imply, however, that the regularity of the closed proceedings cannot be examined, when challenged by any staff member whose rights were allegedly violated during the proceedings.

34. Therefore, the negative answer of the Secretary General of ICAO to Mr. Fedorchenko's appeal of 20 November 2012, which set forth what Mr. Fedorchenko considered as irregularities of the closed investigation in breach of his rights, and sought compensation, constituted an administrative decision not to review the alleged irregularities or award any compensation.

35. Mr. Fedorchenko went on to request administrative review of that response, but the AJAB recommended and the Secretary General of ICAO decided that his application was not receivable *ratione materiae*.

36. The Appeals Tribunal holds that the specific provisions of ICAO's personnel instruction applicable to the present case should have led to a different conclusion.

37. Personnel Instruction PI/1.6 (Staff Regulation 1.6 and Annex I to the ICAO Service Code) sets forth the procedures for addressing misconduct in ICAO. Article 1.10 therein states that the closure of an investigation must be reported to the "staff member alleged to have committed misconduct and the reporting person". Article 1.12 further states:

The staff member shall have the right to a review by the Secretary General of the latter's decision and to lodge an appeal against the result of such review if not satisfied therewith, in accordance with Article XI of the ICAO Service Code and Staff Rule 111.1.

38. In our view, the above-quoted provision expressly provides for the review of the decision to close an investigation into alleged misconduct and thereafter for the filing of an appeal against that decision, as there is no limitation in the text as to which individual referenced in Article 1.10 may seek such review.

39. Furthermore, Mr. Fedorchenko's submission was timely submitted to the AJAB. It is noted that the AJAB did not address any time limit issue, which the Respondent now raises on appeal. It was receivable and should have been considered on the merits.

40. As this did not happen, in accordance with Article 2(3) of our Statute, the Appeals Tribunal will annul the impugned decision and remand Mr. Fedorchenko's case to the AJAB for examination on the merits.

41. We find the parties' requests not to remand the case to the AJAB to be unsubstantiated. Consequently, they are denied. In a two-tier system of judicial review, the first stage must be completed before the merits may be addressed on appeal as provided for in the above-quoted statutory provision.

Judgment

42. The appeal is allowed in part and the case is remanded to the AJAB for consideration on the merits.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Faherty

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar