



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

Judgment No. 2018-UNAT-867

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Dimitrios Raikos
Judge Sabine Knierim

Case No: 2018-1159

Date: 26 October 2018

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Christopher M. Petras

JUDGE RICHARD LUSSICK, 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 22 December 2017 to accept the unanimous recommendation of the Advisory Joint Appeals Board (AJAB or Board) of ICAO that Mr. Fedorchenko's application be rejected. Mr. Fedorchenko filed the appeal on 7 March 2018, and the Secretary General of ICAO filed her answer on 18 May 2018.

Facts and Procedure

2. Between 1 July 2009 and 31 October 2012, Mr. Fedorchenko worked for ICAO as Chief of the Russian Translation Section, Languages and Publications Branch, Administration and Services Bureau, on secondment from the Secretariat of the United Nations.

3. In November 2011, Mr. AZ, a translator/reviser, Ms. GF, an editorial assistant and Ms. EG, a secretary, all working for the Russian Translation Section, filed separate complaints of harassment against Mr. Fedorchenko, accusing Mr. Fedorchenko of "aggressive and unprofessional behavior", "abusive behaviour, words and repeatedly hostile and defamatory actions", and "abusive and humiliating behaviour". According to those complainants, Mr. Fedorchenko's behaviour created a stressful working environment for them and affected their health.

4. On Ms. GF's harassment complaint dated 16 November 2011, the ICAO Secretary General wrote a note instructing the Director of the Bureau of Administration and Services (ADB) to initiate an investigation into Ms. GF's complaint.

5. On Ms. EG's harassment complaint dated 30 November 2011, the ICAO Secretary General wrote a note directing the Ethics Officer to investigate Ms. EG's complaint.

6. The ICAO Secretary General separately wrote to Ms. GF on 1 December 2011 and to Ms. EG on 5 December 2011, informing both that he took their harassment complaints seriously and that he had authorized a "review and investigation" of their complaints to be undertaken by the new Ethics Officer, who was to report for duty in January 2012.

7. On 24 February 2012, the Ethics Officer reported to the ICAO Secretary General the completion of his preliminary review of the harassment complaints from Ms. GF and Ms. EG. On the basis of his preliminary review, the Ethics Officer recommended that both cases be pursued to formal investigation to be conducted by an external investigator, who would report to the Ethics Officer. In an inter-office memorandum dated 14 March 2012, the Ethics Officer recommended that Mr. AZ's harassment complaint also be referred for formal investigation. He further recommended that Mr. AZ's case be combined with the cases of Ms. GF and Ms. EG so that a single investigator could investigate the three linked cases at the same time, for the purpose of efficiency and cost saving. The Ethics Officer also proposed the draft terms of reference for such an investigation. On 15 March 2012, the ICAO Secretary General approved the recommendations of the Ethics Officer.

8. In a memorandum dated 20 March 2012, the Ethics Officer advised Mr. Fedorchenko of the harassment complaints that Mr. AZ, Ms. GF and Ms. EG had separately filed against him, provided a brief summary of each of the complaints, and noted the commencement of the Ethics Officer's investigation into each of them. He also informed Mr. Fedorchenko that the actual investigation would be undertaken by an external party in accordance with paragraph 3.5.2 of ICAO's Personnel Instruction PI/1.6 titled "Procedures in relation to the ICAO Framework on Ethics" (PI/1.6). Under cover of a memorandum dated 25 April 2012, the Ethics Officer transmitted to Mr. Fedorchenko "all relevant documentation connected to the allegations" made by the three complainants "in order to ensure transparency in the investigation process".

9. On 18 May 2012, Mr. Espínola, the investigator appointed to investigate the three complaints of harassment, wrote to invite Mr. Fedorchenko to submit any comments or explanations that he may want to make concerning the veracity of the harassment complaints made against him, together with any evidence and names of relevant witnesses that he may wish to present. In that connection, Mr. Espínola stated that the three complainants had not presented any names of witnesses.

10. Mr. Fedorchenko responded later that, in his view, Mr. Espínola's investigation was "fundamentally flawed" and his request that Mr. Fedorchenko submit the names of witnesses "simply ma[de] no sense", as he "cannot present evidence pertaining to events which never occurred". Mr. Fedorchenko also pointed out that the Ethics Officer had failed to accord

him the equal right to be interviewed as the “alleged perpetrator”, in violation of paragraph 1.4 of PI/1.6.

11. ICAO subsequently designated a counsel to assist Mr. Fedorchenko during the investigation. While Mr. Fedorchenko raised certain procedural objections about the conduct of the investigation, he provided responses to the harassment complaints filed by the three complainants. The complainants were then invited to comment on the evidence Mr. Fedorchenko had presented in his responses. Their comments were in turn forwarded to Mr. Fedorchenko for his comments.

12. In three memoranda all dated 26 October 2012 to the Ethics Officer, the investigator reported his investigative findings and recommendations in respect of the harassment complaints filed by Mr. AZ, Ms. GF and Ms. EG. The investigator determined that the separate allegations of harassment against Mr. Fedrochenko were not substantiated, though they were not vexatious, as those complaints were linked to work performance and other work-related issues and had been disposed of pursuant to the appropriate administrative proceedings. The investigator therefore recommended that the allegations of harassment against Mr. Fedorchenko be dismissed for lack of sufficient evidence.

13. In a memorandum dated 29 October 2012, the Ethics Officer advised the ICAO Secretary General of the completion of the investigation into the three harassment complaints against Mr. Fedorchenko. He reported that ICAO had taken administrative action during 2011 to address the immediate concerns of the complainants, notably by removing Ms. GF and Ms. EG from the direct supervision of Mr. Fedorchenko in February 2011.¹ In light of the investigative findings, the Ethics Officer recommended, *inter alia*, that none of the three cases against Mr. Fedorchenko be pursued any further, and that Mr. Fedorchenko and the three complainants be advised of the decision not to proceed with the case. Those recommendations were endorsed by the ICAO Secretary General on the same day.

14. 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 ICAO Secretary General not to pursue the three complaints of harassment against him. He

¹ In this connection, it should be noted that Mr. AZ retired from ICAO at the end of March 2012.

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”.

15. Mr. Fedorchenko completed his secondment with ICAO effective 31 October 2012.

16. In a memorandum dated 20 November 2012, Mr. Fedorchenko requested that the ICAO Secretary General 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.”

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

18. In a memorandum dated 20 January 2013, Mr. Fedorchenko “request[ed] a formal review” of the decision embodied in the ICAO Secretary General’s letter of 7 January 2013. There was no response to Mr. Fedorchenko’s request.

19. On 17 March 2013, Mr. Fedorchenko lodged an appeal with the AJAB against the decision by the ICAO Secretary General not to accept his request for review and an award of compensation.

20. In its report dated 22 November 2013, the AJAB concluded that Mr. Fedorchenko’s appeal was not receivable *ratione materiae* and that it was not competent to deal with his appeal. The AJAB was of the view that the ICAO Regulations and Rules did not permit Mr. Fedorchenko as an alleged offender to appeal any procedural irregularity that allegedly took place during a closed investigation. The AJAB recommended that Mr. Fedorchenko’s

appeal be rejected as not receivable. The ICAO Secretary General adopted the AJAB's recommendation. Mr. Fedorchenko subsequently appealed to the Appeals Tribunal.

21. In Judgment No. 2015-UNAT-499 issued on 17 April 2015, the Appeals Tribunal allowed Mr. Fedorchenko's appeal, in part, by annulling the ICAO Secretary General's decision and remanding the case to the AJAB for consideration on the merits. The Appeals Tribunal considered that the decision not to review the closure of the investigation that Mr. Fedorchenko impugned as procedurally irregular was a decision subject to judicial review as it affected his legal rights as a staff member. Therefore, his appeal "was receivable and should have been considered on the merits".² The Appeals Tribunal noted that, contrary to the decision by the ICAO Secretary General, Article 1.12 of PI/I.6 expressly provided 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 Mr. Fedorchenko had done.

22. On 6 May 2015, Mr. Fedorchenko filed two applications with the Appeals Tribunal in respect of Judgment No. 2015-UNAT-499: one for correction of judgment and the other for interpretation of judgment. In Judgment No. 2015-UNAT-567 issued 20 August 2015, the Appeals Tribunal dismissed Mr. Fedorchenko's applications. It also denied the ICAO Secretary General's request for costs of USD 500 for each of the applications that Mr. Fedorchenko had filed.

23. On 12 October 2015, Mr. Fedorchenko wrote to the ICAO Secretary General for information about when the AJAB planned to consider his appeal on the merits in compliance with the remand order of the Appeals Tribunal. On 19 November 2015, the Secretary of the AJAB informed Mr. Fedorchenko that, pursuant to ICAO Staff Rule 111.1 (3), the AJAB gave priority to appeals against summary dismissal, termination, suspension without pay, or transfer without the consent of the staff member, etc., and that it would consider the non-priority appeals such as Mr. Fedorchenko's in the chronological order in which they were received. The Secretary of AJAB advised Mr. Fedorchenko that there were four such appeals filed in 2012 that needed to be resolved before the AJAB could consider his case.

² *Fedorchenko v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2015-UNAT-499, para. 39.

24. On 22 March 2017, the AJAB advised Mr. Fedorchenko of its initiation to hear his appeal on 13 April 2017 and informed him of the composition of the AJAB panel for his case. He also advised Mr. Fedorchenko that the ICAO Secretary General's comments on his appeal would be transmitted to him as soon as received. E-mail exchanges ensued between the AJAB and Mr. Fedorchenko regarding the nature of the hearing, the date on which the ICAO Secretary General's comments could be made available to Mr. Fedorchenko, the suitability of an AJAB member to sit on his panel, the format of his participation at the hearing and the availability of a counsel to assist him in the AJAB proceedings. Mr. Fedorchenko accepted 13 April 2017 to be the AJAB hearing date for his appeal.

25. On 12 April 2017, Mr. Fedorchenko filed an addendum to his appeal with the AJAB. He informed the AJAB that the addendum "concludes [his] presentation to the session of [the AJAB to be held] on April 13, 2017".

26. In Opinion No. 140 dated 15 December 2017, the AJAB unanimously recommended that Mr. Fedorchenko's appeal be rejected in its entirety. The AJAB examined the investigation proceedings for any alleged irregularities grouped under ten sub-headings as gleaned from Mr. Fedorchenko's request for compensation of 20 November 2012 and his statement of appeal of 17 March 2013. It made a total of 36 findings in respect of Mr. Fedorchenko's allegations about the Ethics Officer, the preliminary review, the right of the alleged perpetrator, the terms of reference of the investigation, and the investigation itself. In 34 of them, the AJAB concluded that Mr. Fedorchenko's allegations of procedural irregularities were either "incorrect and without merit", "misplaced", or "unfounded in fact and not supported by the record". The AJAB found that, contrary to Mr. Fedorchenko's assertions, he had been advised of the details of the alleged acts of misconduct that had been under investigation and the investigation process and had, moreover, been provided with the relevant documentation during the investigation proceedings.

27. However, in Findings Nos. 19 and 20, the AJAB found that Mr. Fedorchenko had not been informed of the terms of reference for investigation in violation of paragraph 1.5 of PI/1.6.³ Nonetheless, the AJAB noted that "under the investigation process, the terms of reference are **not required** to be 'presented' or otherwise handed over to a staff member

³ Paragraph 1.5 of PI/1.6 reads, in part: "The reporting person and the staff member alleged to have committed misconduct shall be informed of the investigation and the respective terms of reference."

under investigation”, and “even though [Mr. Fedorchenko] was not informed of the terms of reference ..., such lack of communication was **not prejudicial** to him”.⁴

28. On 22 December 2017, the ICAO Secretary General accepted the findings of the AJAB. This is the subject of the instant appeal. As noted above, Mr. Fedorchenko appealed on 7 March 2018, and the ICAO Secretary General answered on 18 May 2018.

29. Also on 18 May 2018, the ICAO Secretary General filed a motion to dismiss Mr. Fedorchenko’s claims impugning the AJAB’s functioning as the neutral first instance process. The ICAO Secretary General maintained that Mr. Fedorchenko’s attacks on the fairness and neutrality of the AJAB were “ill-contrived and meritless” and an “affront” to the earnestness of the ICAO first-instance proceedings. His appeal on that basis should therefore be dismissed. Moreover, his pre-hearing communications with the AJAB which Mr. Fedorchenko used as the basis for his fresh claims in the present appeal impugning the AJAB were inadmissible, because they were known to him at the time of the 13 April 2017 AJAB hearing and could have been presented to the AJAB. However, he did not include those pre-hearing communications or raise those issues in his submissions to the AJAB. In his response, Mr. Fedorchenko contended that the ICAO Secretary General’s motion was “totally misguided, without any merit whatsoever”, as he did not appeal the AJAB’s bias. According to Mr. Fedorchenko, his appeal was directed only at the ICAO Secretary General’s decision to accept the AJAB Opinion No. 140, and he only wanted the Appeals Tribunal to take note that the AJAB had failed to act as a neutral first instance.

30. During the preparations of the background documentation for review by the Panel seized of the present case, on 28 August 2018, the Registry sent an e-mail to the Representative of the ICAO Secretary General, copying Mr. Fedorchenko, requesting the production of two documents that the AJAB referred to in its Opinion No. 140, namely, i) the ICAO Draft Investigation Standards and Procedures; and ii) the ICAO Framework on Ethics. On 29 August 2018, the Representative of the ICAO Secretary General provided the two requested documents to the Registry of the Appeals Tribunal, copying Mr. Fedorchenko.

31. On 3 September 2018, Mr. Fedorchenko filed a motion questioning the relevance of the ICAO Draft Investigation Standards and Procedures dated April 2014 when the issues related to his case arose in 2011 and 2012. He therefore requested that the Appeals Tribunal

⁴ Bold in original.

strike the 2014 document from the body of the evidence before it. The ICAO Secretary General did not respond to Mr. Fedorchenko's 3 September 2018 motion.

Submissions

Mr. Fedorchenko's Appeal

32. The AJAB's Opinion No. 140 contains multiple errors in fact and law, making it defective and unreasonable, and the said errors vitiated the decision taken by the ICAO Secretary General endorsing the AJAB recommendation.

33. The AJAB erroneously admitted, and relied on, eight previously undisclosed documents submitted by the ICAO Secretary General in 2017 in violation of the established jurisprudence on evidence. Those materials were related to the disciplinary process against Mr. Fedorchenko in 2012 and should have been disclosed to him. One of them was a memorandum dated 24 February 2012 from the Ethics Officer to the ICAO Secretary General.⁵ Mr. Fedorchenko has reasons to believe that the said memorandum was fabricated *post facto* and backdated, because, at a meeting on 12 April 2012, he asked the Ethics Officer if he had conducted a preliminary review of the harassment complaints, and the Ethics Officer answered that "it was being done as they spoke". If the 24 February 2012 memorandum had been in existence and at the disposal of the ICAO Secretary General, it was not presented to Mr. Fedorchenko or the AJAB at the time of the initial trial in 2013. Likewise, the three interoffice memoranda all dated 26 October 2012 from the Investigator to the Ethics Officer, which were submitted by the ICAO Secretary General to the AJAB in 2017, were not presented to Mr. Fedorchenko or the AJAB in 2013. The failure to communicate the previously undisclosed documentary evidence to Mr. Fedorchenko kept him in the dark about the detailed charges and the terms of reference for the investigation. It also drew the investigation out for more than seven months in contravention of PI/1.6.

34. The AJAB failed to recognize the irregularity in the fact that the ICAO Secretary General had authorized an investigation against Mr. Fedorchenko on 16 November 2011 and 2 December 2011, before the ICAO Framework on Ethics became effective on 1 January 2012. The ICAO Secretary General made the decision to commence a disciplinary process in the form of an investigation against Mr. Fedorchenko on the basis of the complaints filed by

⁵ For a summary of the 24 February 2012 memorandum, see paragraph 7 above.

Ms. GF and Ms. EG, without awaiting the result of a preliminary review as required by paragraph 1.4 of PI/1.6. The decision to initiate an investigation rendered the preliminary review a “trivial formality”. The investigation began as part of the disciplinary process long before Mr. Fedorchenko was informed of the charges against him, as embodied in the “charge letter” of 20 March 2012. By so doing, the ICAO Secretary General abused his authority, violated Mr. Fedorchenko’s presumption of innocence, breached the latter’s due process rights and besmirched his professional reputation.

35. The AJAB failed to consider the numerous procedural irregularities during the period from November 2011, when the complaints of harassment were filed, to October 2012, when the investigator completed his investigation. His right to legal assistance in his defense, a presumption of innocence and a fair and speedy process was not respected.

36. The AJAB erroneously considered that the burden of proof was on Mr. Fedorchenko to substantiate his statement that the Ethics Officer was negligent in establishing the veracity and the credibility of the complaints of harassment against him.

37. The AJAB failed to take into account Mr. Fedorchenko’s medical records as the direct evidence of harm and sufferance resulting from the actions of the ICAO Secretary General from November 2011 to October 2012.

38. The AJAB erred in not awarding Mr. Fedorchenko compensation for pecuniary and non-pecuniary damages.

39. Mr. Fedorchenko requests that the Appeals Tribunal award him material damages in the amount of 14 months’ net base salary and moral damages in the amount of 10 months’ new base salary in effect in 2012.

The ICAO Secretary General’s Answer

40. Mr. Fedorchenko’s contention that the AJAB erred by admitting certain documents submitted as attachments to the ICAO Secretary General’s comments is without merit. Under ICAO Staff Rule 111.1(10), the ICAO Secretary General’s comments and related documents are distributed only after the scheduling of the hearing of the appeal. However, in 2013, the AJAB considered the issue of its own competence to deal with Mr. Fedorchenko’s appeal *sua sponte* on the basis of his submission, and there was no

hearing scheduled. Consequently, there was no requirement for the ICAO Secretary General to furnish comments and/or any related documents to the AJAB or Mr. Fedorchenko at that time. Indeed, the first and only hearing by the AJAB of Mr. Fedorchenko's appeal took place on 13 April 2017. For the purpose of the 2017 hearing, the ICAO Secretary General submitted her comments, including the eight documents, to the AJAB and, through the AJAB, to Mr. Fedorchenko.

41. Mr. Fedorchenko's claim that the AJAB created barriers to justice and was biased against him in preventing him from availing himself of the newly disclosed evidence is also without merit. In fact, Mr. Fedorchenko was prevented by ICAO Staff Rule 111.1(5) from bypassing the mandatory step of the ICAO Secretary General's review in the first instance procedure as well as from introducing new substantive claims at the AJAB that had not been the subject of a request for such review.

42. Contrary to Mr. Fedorchenko's assertion, in the present case, the parties did not stipulate to a list of agreed facts. There is no rule requiring the AJAB to establish a list of agreed facts at Mr. Fedorchenko's behest.

43. Mr. Fedorchenko's claim that the AJAB erred in its evaluation of his damages by failing to consider the medical records that he had submitted to the Appeals Tribunal "under seal" is equally "without merit, frivolous, vexatious or unreasonable". He never offered those medical records for admission into the evidentiary record of his appeal before the AJAB or made them available for review by the AJAB. It should be noted in this regard that while the Appeals Tribunal ordered the medical records that Mr. Fedorchenko had filed be kept under seal subject to review by a representative of the ICAO Secretary General, and in that case on the premises of the Registry of the Appeals Tribunal in the presence of a Registry staff member, no representative of the ICAO Secretary General exercised that limited right, as they were immaterial. It should also be noted that Mr. Fedorchenko did not submit the medical records to the AJAB, after his case had been remanded by the Appeals Tribunal.

44. Mr. Fedorchenko has failed to demonstrate any error in fact or in law relative to the AJAB's 36 findings after the AJAB had considered the entire evidence and carefully weighed the evidence in light of the arguments made by Mr. Fedorchenko challenging the investigation into the harassment complaints made against him. Having affirmatively chosen

not to participate in the AJAB proceedings, in person or through counsel, Mr. Fedorchenko essentially seeks to relitigate his case on the merits before the Appeals Tribunal.

45. The ICAO Secretary General requests that the Appeals Tribunal dismiss the present appeal in its entirety and affirm the decision of the ICAO Secretary General in light of the AJAB's recommendation in Opinion No. 140.

Considerations

ICAO Secretary General's Motion to Dismiss Mr. Fedorchenko's Claims "Impugning the ICAO Advisory Joint Appeals Board's Functioning as the 'Neutral First Instance Process' Provided for in Article 2(6) of the UN-ICAO UNAT Agreement"

46. It is not appropriate to adjudicate the ICAO Secretary General's submissions at this stage. The issues raised in the motion will be decided when the Appeals Tribunal has considered the whole of the evidence in the appeal. The motion is dismissed.

Mr. Fedorchenko's Motion Concerning the Relevance of the ICAO "Draft Investigation Standards and Procedures" Dated April 2014 in the Present Case

47. Mr. Fedorchenko moves the Appeals Tribunal to strike ICAO's "Draft Investigation Standards and Procedures" dated April 2014 as irrelevant. This document was included in the reasoning of several of the findings of the AJAB in its Opinion No. 140. We find that it is relevant and admissible. The weight to be attached to it is a matter for the Appeals Tribunal. The motion is dismissed.

The Appeal

48. In his case before the AJAB, Mr. Fedorchenko sought "material compensation ... for grave and lasting damage to his physical and psychological health in the amount of fourteen months of his base salary in 2012 and compensation for his moral injury in the amount of ten months of his base salary in 2012". He alleged that such complaints were caused by irregularities in the investigation process following upon the allegations of harassment made against him by three ICAO staff members.

49. The investigation resulted in a decision by the ICAO Secretary General not to pursue the allegations any further. The ICAO Secretary General also decided that no record of the investigation or the allegations would be placed on Mr. Fedorchenko's personnel file. Thus, he suffered no prejudice as a result of that decision. Nevertheless, he claimed compensation for moral damages resulting from alleged irregularities in the investigation.

50. The hearing before the AJAB took place on 13 April 2017 in the absence of Mr. Fedorchenko. He had previously been advised by the Secretary of the AJAB of his right to present his appeal in person. He had also been advised that the Board would consider an adjournment if he needed more time to prepare his case. A day before the scheduled hearing, he e-mailed a document to the Board entitled "Addendum to the Appeal No. 183 before the [AJAB]", and indicated that it would conclude his presentation to the Board.

51. At the beginning of the AJAB proceedings, it was recorded that Mr. Fedorchenko had declined to appear in person, or by phone, or to have a representative present his case on his behalf. It was also recorded that Mr. Fedorchenko did not request a postponement of the hearing.

52. We have perused the AJAB Opinion No. 140, in which it painstakingly examined 10 "irregularities" alleged by Mr. Fedorchenko. It made 36 detailed findings, all adverse to Mr. Fedorchenko, except for a finding that he had not been informed of the terms of reference of the investigation, but that this was not prejudicial to him.⁶ We find that the Board gave a very thorough, fair and informed consideration of Mr. Fedorchenko's case. Bearing in mind that the AJAB has broad discretion to determine the admissibility of any evidence and the weight to be attached thereto,⁷ we do not find any error in its consideration and assessment of the evidence. In our view, its findings, each of which the AJAB supported with the applicable facts and/or law, cannot be faulted.

53. We reject Mr. Fedorenko's submission that the AJAB erroneously admitted eight previously undisclosed documents which were submitted with the ICAO Secretary General's comments for the 13 April 2017 AJAB hearing of his appeal. Mr. Fedorenko argues that the documents should have been made available to the AJAB and himself in 2013 at the time of

⁶ AJAB Opinion No. 140, paras. 6.52 and 6.55.

⁷ *Diallo v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2014-UNAT-430, para. 23.

his “initial trial”. We find that no such obligation arose at that time. The “initial trial” dealt with the issue of the competence of the Board to hear his appeal and, in fact, was not a trial. The issue was decided by the Board *sua sponte* as a preliminary issue pursuant to ICAO Staff Rule 111.1(12), which provides: “Any question as to the competence of the Board to deal with a particular case shall be decided by the Board as a preliminary issue, and the Board shall submit its views in the matter to the Secretary General either as an interim report or as a part of the report” to be submitted to the ICAO Secretary General after full consideration. No requirement arose for the ICAO Secretary General to provide comments concerning the appeal and any submissions related thereto until the 2017 trial, which dealt with the merits of the appeal. Staff Rule 111.1(10) was complied with as regards the 2017 hearing, in that the ICAO Secretary General’s comments and related documents were distributed after the scheduling of the hearing of the appeal.

54. ICAO Staff Rule 111.1(10) provides:

The Secretary of the Board shall transmit to the members of the Board the letter of appeal and shall also notify the staff member of the names of the members of the Board by whom the appeal will be considered and the date fixed for the hearing, which shall not be less than two weeks after the receipt by the Secretary of the Board of the letter of appeal. The staff member shall also be given a copy of the comments by the Secretary-General on the letter of appeal and any submissions related thereto. The comments shall be provided after due consultation with the Board as to the date of the hearing of the appeal.

55. Mr. Fedorenko’s argument is therefore without merit. We note that he voluntarily absented himself from the hearing, at which he could have voiced any objection he might have had to the admission of the documents.

56. Mr. Fedorenko’s appeal also impugns the conduct of the AJAB as a neutral first instance process. He claims that the AJAB “created barriers for justice, which were biased against [him]”. This claim could have been raised before the AJAB since it is based on electronic correspondence which pre-dates the AJAB hearing. It cannot now be introduced for the first time on appeal for consideration by the Appeals Tribunal.⁸ Furthermore, the

⁸ *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790; *Buff v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-639; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547.

evidence on which the claim is based is not admissible as it was known to Mr. Fedorchenko and should have been presented at the level of the AJAB. Such evidence is thus excluded by Article 2(5) of the Appeals Tribunal Statute, which provides that in exceptional circumstances, where it is determined that the facts are likely to be established with documentary evidence, including written testimony, the Appeals Tribunal may receive such additional evidence on appeal. However, the Appeals Tribunal will not admit evidence that was known to Mr. Fedorchenko and could have been presented to the AJAB.⁹

57. Furthermore, not only did Mr. Fedorchenko fail to raise this issue in his submissions to the AJAB, but he chose not to attend, or be represented at, the hearing, where he could have submitted the issue to the AJAB. He will not be permitted to present it to this Tribunal.

58. We also reject Mr. Fedorchenko's submission that the AJAB was mistaken in considering that the burden of proof was upon him to substantiate his statement that the Ethics Officer was negligent in establishing the veracity and credibility of the complaints of harassment against him. He bases this submission on the case of *Liyanarachchige*,¹⁰ in which the Appeals Tribunal held that the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. The Appeals Tribunal in that case was simply reiterating the burden of proof principle that the party making an allegation of misconduct or inappropriate conduct carries the burden to prove it. It is quite illogical for Mr. Fedorchenko to argue that this principle does not apply to his allegation that the Ethics Officer was negligent in his duties.

59. We have considered all of the grounds of Mr. Fedorchenko's appeal and find that they are entirely without merit.

60. Particularly frivolous is his submission that the AJAB failed to take into account his medical records, when the record shows that he had never offered those records in evidence to the AJAB and had in fact taken positive steps to conceal them from the ICAO Secretary General. On 24 April 2014, he filed a motion to the Appeals Tribunal requesting that he be allowed to file his medical records with the Appeals Tribunal but "not to notify the other party of the filing of [his] medical records and not to disclose the whole of [his] medical records to the

⁹ *Siciliano v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2016-UNAT-702.

¹⁰ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-87.

ICAO". His request was granted in part and he was "allowed to file his medical record under seal; and ... a designated representative of the [ICAO] Secretary General shall 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 of the Appeals Tribunal."¹¹ At the hearing before the AJAB three years later, Mr. Fedorchenko never offered those medical records in evidence to the AJAB.

61. We find that Mr. Fedorchenko has not demonstrated any error of law or manifestly unreasonable factual findings on the part of the AJAB.

62. We affirm the AJAB's conclusion that there was no legal basis for awarding Mr. Fedorchenko compensation due to the absence of actual prejudice. The Appeals Tribunal held in *Wishah* that compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair.¹² There are no legal grounds that can justify such an award when no actual prejudice was found.¹³

63. The appeal fails.

¹¹ The only issue before the Appeals Tribunal at the time was the issue of receivability. This was dealt with by the Appeals Tribunal in its Judgment No. 2015-UNAT-499; the appeal was filed on 22 January 2014 and the outcome of the Judgment was announced on 26 February 2015 and the Judgment was issued on 17 April 2015.

¹² *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537.

¹³ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-697; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518/Corr.1; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114.

Judgment

64. The appeal is dismissed and the decision of the ICAO Secretary General dated 22 December 2017 to accept the unanimous recommendation of the AJAB in Appeal No. 183 (Opinion No. 140) is affirmed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar