



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

Judgment No. 2020-UNAT-1034

**Ahmed El Sehemawi
(Appellant)**
v.
**Secretary-General
of the International Civil Aviation Organization
(Respondent)**

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2019-1332
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. El Sehemawi:	Self-represented
Counsel for ICAO Secretary General:	Christopher M. Petras

JUDGE SABINE KNIERIM, PRESIDING.

1. Mr. El Sehemawi, a staff member of the International Civil Aviation Organization (ICAO), has appealed against the decision of the Secretary-General of the ICAO to concur in the findings of the Advisory Joint Appeals Board (AJAB) that Mr. El Sehemawi had not identified an administrative decision which is capable of being reviewed. For the reasons laid down below, we remand the case to the AJAB.

Facts and Procedure

2. On 23 November 2018, Mr. El Sehemawi (Chief, Arabic Translation Section), was advised by his supervisor, Deputy Director, Languages and Publications, that an Ethics Officer had informed him that allegations of harassment had been lodged against him (Mr. El Sehemawi) by three staff members. On 26 November 2018, Mr. Sehemawi met with the Ethics Officer who addressed the allegations as well as matters relating to “outsourcing.” This meeting was followed by exchanges of e-mails between Mr. El Sehemawi and the Ethics Officer in which the former provided information sought by the latter. The last such e-mail was on 12 December 2018.

3. On 5 February 2019, Mr. El Sehemawi sent an e-mail to the Ethics Officer requesting an update on the matter. On the same day, the Ethics Officer replied indicating that a timeline could not be given, and that it would likely take more than three months for the matter to be resolved.

4. On 6 March 2019, in an e-mail to the Ethics Officer, Mr. El Sehemawi, pointing out that it had already been four months since the allegation of harassment had been raised against him, raised *inter alia* two questions: a) whether there actually was an allegation of misconduct against him in the matter of translation contracts, and if so what did such allegation pertain to; and b) in light of ICAO’s s Personnel Instruction PI/1.6 titled “Procedures in relation to the ICAO Framework on Ethics” (PI/1.6), paragraph 1.11 (on Preliminary Review), whether the Ethics Officer would inform him of her decision whether to close the matter or to refer it for investigation.

5. On 7 March 2019, by return e-mail, the Ethics Officer informed Mr. El Sehemawi as follows:

The matter is still under preliminary assessment. The preliminary assessment will be concluded on 16 April [delayed subsequently to 30 April 2019], after which time I will be in a position to inform you if it has been closed or otherwise. The “report” that you make

reference to in paragraph 3 of your email is an investigation report. The matter has not been investigated, and as such there is no investigation report. If the matter proceeds to an investigation you will be informed of the allegations and terms of reference for the investigation. Following the investigation, you will be provided with a copy of the investigation report and afforded an opportunity to respond.

6. On 28 March 2019, by way of a letter, the Secretary-General of the ICAO informed Mr. El Sehemawi *inter alia* as follows:

It should be noted that in accordance with the ICAO Framework on Ethics, the Ethics Officer has, in fact, undertaken a preliminary review of the allegations made against you of harassment and of irregularities in the outsourcing of translation work, which allegations she informed you of during your 26 November 2018 meeting with her, and that she also advised you by email on 7 March 2019, that the preliminary review of the aforementioned allegations is expected to be concluded on 16 April 2019.

It is further observed that Section 1.4 of Personnel Instruction PI/1.6 provides that within 30 calendar days of reporting alleged misconduct to the Ethics Officer, the staff member making the report will normally be notified of the Ethics Officer's decision to pursue to close the matter. However, once the decision to pursue the matter has been made, the rules neither impose a deadline nor afford a staff member, whether it's the staff member making the report or the staff member that is subject of an allegation, the right to demand a [certain date] for the Ethics Officer's preliminary review to be concluded.

Lastly, with regard to your claim that the Ethics Officer failed to disclose the nature of any other allegations against you, I refer you to Section 1.7 of Personnel Instruction PI/1.6, whereby staff members alleged to have committed misconduct are to be notified of the allegations only after referral of the matter for investigation, and note that no allegations against you are currently the subject of an investigation.

As you have not identified an administrative decision within the meaning of Staff Regulation 11.1, I must reject your request for review at this time."

7. On 26 April 2019, Mr. El Sehemawi submitted an appeal to AJAB and contested a decision taken on 6 March 2019, namely the Ethics Officer's decision to fail "to address allegations of misconduct in a timely manner" and to fail "to disclose the nature of any other allegations made against [him]."

8. In its 23 May 2019 "interim report" the AJAB came to the conclusion that it was not competent to deal with the appeal as Mr. El Sehemawi had not identified an administrative decision *vis-a-vis* the actions taken by the Ethics Officer. In this context, the AJAB relied on the

Appeals Tribunal's Judgment No. 2016-UNAT-673 and ICAO's rules on the roles, responsibilities and actions of Ethics Officers in the United Nations System.

9. On 31 July, the Secretary-General of the ICAO issued the following "decision":

I have carefully considered the views of the Advisory Joint Appeals Board as to its competence in the matter of Appeal No. 198, which were provided in the form of an interim report, in accordance with Staff Rule S/R 111.1, paragraph 12, and I concur in the findings of the Board to the effect that the staff member has not identified an administrative decision within the meaning of Staff Regulation 11.1, which is capable of being reviewed.

On the foregoing basis, I accept the Board's conclusion that it is not competent to deal with the appeal filed by Mr. El Sehemawi.

10. Mr. El Sehemawi was notified of this decision on 8 August 2019, and filed his appeal to the Appeals Tribunal on 5 November 2019.

Submissions

Mr. El Sehemawi's Appeal

11. Mr. El Sehemawi contends that the AJAB failed to exercise jurisdiction vested in it, and erred on a question of law by considering that he had not identified an administrative decision that may be reviewed. Failure to consider the actions and omissions of the Ethics Officer as administrative decisions is akin to opening the door to abnormally lengthy, and potentially limitless, timelines for processing allegations of misconduct, causing the erosion of a staff member's right to due process and fundamental justice, and denying them justice by not allowing their cases to be heard within a reasonable amount of time.

12. Further, Mr. El Sehemawi claims there is an error of fact contained in the Secretary-General of the ICAO's letter concerning the conclusion of the preliminary review phase in relation to the allegations of harassment, and an error in ICAO's rules and regulations due to nonalignment of provisions, as stated in paragraph 4.16 of the AJAB's interim report.

13. Mr. El Sehemawi requests that the Appeals Tribunal order the AJAB to hear and decide his case on the merits. He asks that the case regarding allegations of harassment be dismissed, in the absence of any evidence supporting such allegations, and that any case against him related to outsourcing, if such a case exists, also be dismissed, as he was never informed of the existence of

such allegations. Finally, Mr. El Sehemawi requests compensation for the moral, reputational and other damages he suffered as a result of the extreme delays in conducting a preliminary review of his case and his abrupt removal from the function of Acting Head, Documents Management and Outsourcing.

The Secretary-General of the ICAO's Answer

14. The Secretary-General of the ICAO is of the view that no errors were made in the present case, and that the AJAB and the Secretary-General of the ICAO correctly found that the AJAB was not competent to deal with Mr. El Sehemawi's appeal as he had not identified an administrative decision.

Considerations

15. In its interim report, the AJAB found that it was not competent to deal with Mr. El Sehemawi's appeal as he had not identified an administrative decision *vis-a-vis* the actions taken by the Ethics Officer. We note that before the AJAB, Mr. El Sehemawi challenged, the Ethics Officer's decision to fail to address allegations of misconduct in a timely manner and to fail to disclose the nature of any other allegations made against him, and that such (in)actions usually cannot be viewed as administrative decisions because they lack any direct and final legal effect.

16. However, we have to remand the case because the process before the AJAB does not comply with the requirements of Article 2(10) of the Appeals Tribunal's Statute which provides:

The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special agreement shall also contain other provisions required for

the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity. Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

17. The agreement between the United Nations and the ICAO concluded in December 2009/January 2010 states that the ICAO utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law.

18. Analyzing ICAO's relevant legal and administrative provisions, we find that the AJAB's interim report does not conform to the requirements of Article 2(10) of our Statute and the agreement between the United Nations and ICAO.

19. Staff Regulation 11.2 in the ICAO Service Code reads:

The Secretary-General shall establish rules providing for the aforesaid review, which rules shall include provision for an Advisory Joint Appeals Board that is established as a neutral first instance process that will submit its findings and recommendations to the Secretary-General for his decision. Subject to the provisions of Regulation 11.5 of this Article, such decision of the Secretary General shall be final.

20. And Staff Rule 111.1 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 specified in 18 below.

... After full consideration, the Board shall, by a majority vote, adopt and submit a report to the Secretary General. The report should include a summary of the case and the recommendations of the Board with the result of the vote on each of the recommendations. Any member of the Board may have a dissenting opinion included in the report. The report shall be considered as constituting a written record of the proceedings and a written decision providing reasons, fact and law and will include the Board's recommendation.

... The decision taken by the Secretary General, after the Board has forwarded its report, shall be notified to the staff member together with a copy of the Board's report not later than 15 working days after receipt by the Secretary General of the Board's report. Except in disciplinary cases, a copy of the communication will also be transmitted to the Executive Committee of the Staff Association.

21. Based on this legal framework, it is clear that the AJAB's interim report is not a "decision" but simply submits the views of the AJAB to the Secretary-General of the ICAO. Under Staff Regulation 11.2 and Staff Rule 111.1 paras. 12, 18 and 21, the AJAB will submit only "findings and recommendations" to the Secretary-General who will then take the final "decision". The fact that, under ICAO's Staff Regulations and Rules, the AJAB was established and is considered as a neutral first instance process, does not bind the Appeals Tribunal. In reality, at ICAO, there is no neutral first instance process including a decision. The AJAB is a neutral institution but does not issue a decision. The Secretary-General of the ICAO, who issues the contested decision, is not neutral, but a party of the litigation. As this Tribunal already stated in *Sheffer, Dispert & Hoe and Spinardi*¹ under such circumstances we are not satisfied that the essential elements of a neutral first instance process are present to have constituted a decision that could be appealed to the Appeals Tribunal.

22. Therefore, the case has to be remanded to the AJAB under Article 2(10) of the Appeals Tribunal Statute for a decision which is binding on the parties and which also constitutes the neutral first instance process that produces a decision with reasons, a statement of the relevant facts, and the relevant law.

23. Such a remand will also allow the AJAB to examine whether the matter has become moot. It seems that an Investigations Committee has never been established. We note, further, that the Secretary-General of the ICAO has alleged in his answer to Mr. El Sehemawi's appeal that the preliminary review was completed on 30 April 2019. Mr. El Sehemawi, on the other hand, has submitted on appeal that the preliminary review was still open (on 5 November 2019 when he filed his appeal). An explanation for these different statements could be that the Ethic Officer closed the matter on 30 April 2019, but Mr. El Sehemawi was never informed of this decision.

¹ See *Dispert & Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-958; *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957; *Sheffer v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-949.

Judgment

24. The case is remanded to the Advisory Joint Appeals Board.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Knierim, Presiding
Hamburg, Germany

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 11th day of August 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar