



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

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Judgment No. 2024-UNAT-1484

**Kamini Devi Balram**  
**(Respondent/Applicant and**  
**Appellant on Cross-Appeal)**  
**v.**  
**Secretary General**  
**of the International Civil Aviation Organization**  
**(Appellant/Respondent and**  
**Respondent on Cross-Appeal)**

**JUDGMENT**

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Before:	Judge Katharine Mary Savage, Presiding Judge Gao Xiaoli Judge Graeme Colgan
Case No.:	2023-1865
Date of Decision:	25 October 2024
Date of Publication:	20 November 2024
Registrar:	Juliet E. Johnson

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Counsel for Ms. Balram: George Irving

Counsel for Secretary General: Christopher M. Petras

**JUDGE KATHARINE MARY SAVAGE, PRESIDING.**

1. Ms. Kamini Devi Balram, a staff member of the International Civil Aviation Organization (ICAO), contested a decision not to appoint her to the position of Deputy Director, D-1, Human Resources, Bureau of Administration and Services (DD/ADB-HR), ICAO (Post) (contested decision).
2. By Decision No. ICAO/2023/004 (impugned Decision),<sup>1</sup> the Appeals Board of ICAO (Appeals Board) rescinded the contested decision, awarded compensation in lieu of rescission and dismissed on the merits Ms. Balram's other requests for compensation.
3. The Secretary General of ICAO lodged an appeal of the impugned Decision with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). Ms. Balram lodged a cross-appeal.
4. For the reasons set out below, the Appeals Tribunal grants the appeal, dismisses the cross-appeal, and reverses the impugned Decision.

**Facts and Procedure<sup>2</sup>**

5. On 25 October 2019, ICAO advertised the Vacancy Notice for the Post.<sup>3</sup>
6. On 20 December 2019, Ms. Balram applied for the Post.<sup>4</sup> Twenty-one candidates, including Ms. Balram were given a written test.<sup>5</sup>
7. On 5 March 2020, a Panel of Directors (Panel) interviewed six candidates, including Ms. Balram.<sup>6</sup> On the same day, in line with the practice for the appointment of all posts at the level of D-1 and D-2, the Secretary General undertook independent and separate interviews with each of the candidates. On 7 March 2020, the candidates undertook an assessment by Saville and Holdsworth Limited, a company that had been carrying out competency assessments for ICAO since 2013 (Assessment Centre). Ms. Balram was ranked sixth in the assessment. The Panel

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<sup>1</sup> *Kamini D. Balram v. Secretary General of the International Aviation Organization*, Decision dated 17 July 2023.

<sup>2</sup> Summarized from the impugned Decision as relevant to the appeal.

<sup>3</sup> Impugned Decision, para. 7.2.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, para. 7.3.

<sup>6</sup> *Ibid.*

recommended that four external candidates be advanced for presentation to the Human Resources Committee (HRC). Ms. Balram was not one of those candidates.

8. On 10 March 2020 the Secretary General approved the four external candidates as recommended by the Panel, adding Ms. Balram as an internal staff member to the final shortlist.<sup>7</sup> The Secretary General noted that the reason for doing so was based on Ms. Balram’s “experiences and performance as HR coordinator during D/ADB’s [Director of the Bureau of Administration and Services] absence since April 2019”. The Secretary General stated that she had “consulted the shortlisted candidates with the Council President [President of the Council of ICAO (Council)]”.

9. On 17 April 2020, the HRC examined the selection process, reviewing the five shortlisted candidates for the Post and agreeing that they all be retained for further consideration.<sup>8</sup>

10. On 23 June 2020, in a detailed Inter-Office Memorandum, the Secretary General requested the approval of the President for the appointment of Ms. Balram to the Post.<sup>9</sup> The Secretary General stated:

I recognize that the candidate’s interview with the Panel of Directors and her assessment by the external consulting firm in the recruitment process were not strong, in contrast to the good written test. However, please note that I also met and discussed individually with all shortlisted candidates, as is my customary practice for all senior management recruitment processes, and Ms[.] Balram showed a very good performance in my assessment. I further wish to stress that the candidate has proven her value as ICAO staff member over many years, as also confirmed in her PACE reports, and she did an excellent job in coordinating HR activities in the absence of the Director ADB since April 2019. The decision to promote Ms[.] Balram will without doubt further motivate the candidate and will avoid any risk of discouragement or potential dysfunction in the HR area.

Even though the decision on this matter rests with the Secretary General, subject to your approval, I shared my intention to appoint Ms[.] Balram in a meeting with all Directors. Some Directors highlighted a few areas for further development that should be appropriately addressed with Ms[.] Balram if selected, and the Directors subsequently expressed support for my appointment decision.

In view of the above, I believe that Ms[.] Kamini Balram is the most suitable among the shortlisted candidates for the position of Deputy Director ADB/HR in consideration of the

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<sup>7</sup> *Ibid.*, para. 7.4.

<sup>8</sup> *Ibid.*, para. 7.5.

<sup>9</sup> *Ibid.*, para. 7.6.

current situation. I am fully confident that my decision will serve the best interest of the organisation for the benefit of its staff and members Member States.

11. On 9 July 2020, the President took the contested decision.<sup>10</sup> In the President's Memorandum, he denied the Secretary General's request, providing the following reasons:

You may recall that we discussed this issue approximately 2 months ago and at that time, I provided you with my advice. Meanwhile, I have carefully reviewed the considerations contained in your memorandum and wish to offer the following further observations.

Your views (...) are based on a contingent situation, mainly the current financial situation, which is, of course, very important and must be acknowledged, and the need to support the senior management turnover, which will be completed in approximately the next six months.

Still, the main driver for this appointment as for any other appointment is the recruitment process.

Of course, I value your personal assessment of the candidate. Unfortunately, however, the candidate that you proposed to appoint as Deputy Director Human Resources did not emerge from the recruitment process as properly qualified for the post.

In fact, the candidate was negatively assessed by the interview panel and was not initially "shortlisted", as you informed me at the time, and was the weakest candidate following the test of the Assessment Centre. All of the other five candidates interviewed by the panel and subsequently tested by the Assessment Centre performed better.

I wish to underline that the Deputy Director Human Resources' duties and responsibilities, as outlined in the Vacancy Notice, are crucial for the future of the organisation. In particular, the Vacancy [N]otice states that the Deputy Director HR "provides leadership in change management initiatives to ensure efficiency and effectiveness of the Organisation". As I have mentioned several times, our organisation needs to undertake a process of modernization with the objective to enhance efficiency and effectiveness. Effective Human Resource management is critical in this context.

On the contrary, based on the overall assessment, the candidate that you propose demonstrated serious weaknesses in the areas of vision and other critical competenc[i]es. An appointment based on contingent justifications, would therefore prevent our Organisation to have a deputy director human resource selected on the basis of a strategic vision for the management of ICAO and could ultimately be detrimental to the organisation in the long term.

Consequently, I cannot support your proposal and invite you to consider alternatives emerging from the recruitment process.

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<sup>10</sup> *Ibid.*, para. 7.7.

Lastly I wish to emphasize that in future, all vacancies should be clearly budgeted prior to being advertised. While COVID 19 has had consequences on the financial situation of ICAO, the fact that this position was not budgeted at all (regular budget or other source of funding) is not a good practice and must be avoided.

12. While formal exchanges were taking place between the Secretary General and the President, Ms. Balram also had a number of exchanges with them both.<sup>11</sup>

13. On 13 July 2020, Ms. Balram was informed of the contested decision.<sup>12</sup> She was told that the President had based his decision on the views of the Panel members and on the outcome of the Assessment Centre test. She was asked whether she would accept an acting appointment to the Post, as the President had advised that he would approve such an acting appointment. She did not accept this offer.

14. On 16 July 2020, Ms. Balram received a telephone call from the President during which he provided feedback.<sup>13</sup> The President shared his view that there had been anomalies in the selection process, upon which he did not elaborate, and thus he was not able to support the Secretary General's proposal. The President stated that the primary reason for his refusal was the result of the assessment carried out by the Assessment Centre and "formal and informal" discussions with the Panel members and other individuals whom he did not identify.

15. In response to the Memorandum of the President, on 17 July 2020, the Secretary General requested that the President reconsider his decision.<sup>14</sup> The Secretary General reiterated the consideration in support of appointing Ms. Balram and, referring to the Secretary General's Charter Letter,<sup>15</sup> noted that:

(...) the organisation will undergo a major turnover in senior management positions in the near future and will rely on comprehensive institutional knowledge and sustainability in crucial positions. (...) Your decision not to support my appointment of Ms. Balram will have a negative impact on the work of the Secretariat, including on immediately ongoing change initiatives and restructuring efforts of human resources in ADB, as well as on medium and long term plans to increase the efficiency and effectiveness of ICAO.

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<sup>11</sup> *Ibid.*, para. 7.8.

<sup>12</sup> *Ibid.*, para. 7.9.

<sup>13</sup> *Ibid.*, para. 7.10.

<sup>14</sup> *Ibid.*, para. 7.11.

<sup>15</sup> The Charter Letter from the Council dated 5 April 2018, the terms of which were binding upon the Secretary General, included the direction that particular focus should be on "recruitment based on competency with due consideration of gender balance and equitable geographic representation" (*ibid.*, para. 7.12).

16. By memorandum of 22 July 2020, the President reiterated his refusal to approve the appointment of Ms. Balram to the Post and noted that the circumstances of the recruitment process raised “serious questions on the implementation of the recruitment procedures with regard to fair treatment of all candidates, the overall transparency of the recruitment process” and could ultimately generate reputational risks to the Organization.<sup>16</sup>

17. On 27 July 2020, in response to Ms. Balram’s e-mail of 26 July 2020, the President wrote:<sup>17</sup>

I wish to clarify that my decision is based exclusively on the outcome of the recruitment process, as reported in related documents, and on discussions held with the Secretary General and with some of the members of the interview panel. It is not based in any way on supposed discussions with “other individuals” as reported in your message.

18. On 31 July 2020, Ms. Balram was informed that the Secretary General had decided to discontinue the recruitment process for “administrative reasons” and that the Post would be re-advertised.<sup>18</sup>

19. On 6 August 2020, Ms. Balram filed a Request for Administrative Review by the Secretary General (RAR).<sup>19</sup>

20. On 8 September 2020, in response to the RAR, the Secretary General stated that the President’s disapproval to appoint Ms. Balram had been a lawful exercise of the discretion conferred upon him.<sup>20</sup>

21. On 1 October 2020, Ms. Balram filed the appeal challenging the contested decision.<sup>21</sup> Following the abolishment of the former Advisory Joint Appeals Board in 2021, the case was transferred to the Appeals Board.

22. On 6 March 2023, the Secretary General submitted comments on the appeal before the Appeals Board.

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<sup>16</sup> Impugned Decision, para. 7.13.

<sup>17</sup> *Ibid.*, paras. 7.14-7.15.

<sup>18</sup> *Ibid.*, para. 7.16.

<sup>19</sup> *Ibid.*, para. 7.18.

<sup>20</sup> *Ibid.*, para. 7.19.

<sup>21</sup> *Ibid.*, paras. 3.5 and 6.1. Ms. Balram’s appeal against the contested decision before the Appeals Board is referred to as “application” in the impugned Decision.

*The impugned Decision*

23. By Decision No. ICAO/2023/004 dated 17 July 2023, the Appeals Board rescinded the contested decision; awarded compensation in lieu of rescission, calculated as the difference between Ms. Balram's salary and benefits on 1 October 2020 and the D-1 salary and benefits for the Post, including the pension contribution, which should be paid to her as a cash sum, as if she had held the Post from 1 October 2020 until the date on which the candidate selected for the re-advertised Post (Selected Candidate) reported to take up duties; made orders with regard to the interest applicable to the damages; and dismissed the requests for compensation for loss of income and loss of opportunity, damage to professional reputation and moral harm.

24. The Appeals Board held that the President had effectively conducted his own selection for the Post and had substantially negated the selection process, which had constituted a substantial procedural breach or irregularity.<sup>22</sup>

25. The Appeals Board noted that the HRC, which was a Committee of the Council, had found that Ms. Balram should proceed in the selection process together with the four candidates recommended by the Panel.<sup>23</sup> It is apparent that the President formed a view that there were external candidates who were better fitted to the Post. The regulations expressly permit giving preference to internal candidates. The Secretary General was transparent about the inclusion of Ms. Balram in the list of candidates for consideration by the HRC. Fairness is a matter of process. The role of the President was not to review the "fairness and transparency" of the outcome. His error of acting beyond its powers alone is sufficient to set aside the contested decision.

26. The Appeals Board found that the President had fallen into further error by consulting with the Panel members, which he did not mention in his memoranda but admitted to in his 27 July 2020 e-mail to Ms. Balram.<sup>24</sup> Seeking the opinions of the individual Panel members was inappropriate and they also were not authorized, individually or collectively, to give advice to the President.

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<sup>22</sup> Impugned Decision, paras. 12.15-12.22 and 13.2.

<sup>23</sup> *Ibid.*, paras. 12.23-12.27.

<sup>24</sup> *Ibid.*, paras. 12.27-.

27. The Appeals Board concluded that the President had not acted within the limits of the power of approval and had applied a test which had not been provided for.<sup>25</sup> Ms. Balram has demonstrated by clear and convincing evidence that she was denied a fair chance of promotion.

28. Turning to the remedies, the Appeals Board noted that granting approval to Ms. Balram's appointment to the Post was a decision reserved for the President and that it had no authority to make such a decision.<sup>26</sup> The fact that the Post was subsequently re-advertised and she had the opportunity to reapply and to be appointed upon such application, has the effect of limiting the sum awarded as an alternative to rescission. There is no evidence in respect of the damage to Ms. Balram's reputation or in respect of the moral damages claimed.

#### *Procedure before the Appeals Tribunal*

29. On 17 July 2023, the Secretary General filed an appeal of the impugned Decision with the Appeals Tribunal, to which Ms. Balram filed an answer on 4 December 2023.

30. On 4 December 2023, Ms. Balram filed a cross-appeal, to which the Secretary General filed an answer on 24 January 2024.

### **Submissions**

#### **The Secretary General's Appeal**

31. The Secretary General requests the Appeals Tribunal to overturn the impugned Decision, reinstate the President's disapproval of Ms. Balram's appointment and reverse the award of compensation.

32. The Secretary General argues that the Appeals Board erred in law by concluding that the contested decision was beyond the President's powers. The ICAO Staff Regulations (ICAO Service Code) unquestionably give the President "veto" power.<sup>27</sup>

33. The Secretary General submits that, having recognized that the President had the authority and discretion to approve or reject D-2 and D-1 candidates, the Appeals Board erred in law by concluding that with no criteria provided, the power appeared to be arbitrary and effectively

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<sup>25</sup> *Ibid.*, paras. 13.1-13.3.

<sup>26</sup> *Ibid.*, paras. 16.3-16.5.

<sup>27</sup> Doc 7350/9. The Secretary General cites *Cherif v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2011-UNAT-165.



impossible to review. It has never been in dispute that the President's decision is a reviewable administrative decision. As such, the President was not "unfettered" in its exercise but was required to exercise his discretion in making administrative decisions reasonably and properly, and considering all relevant considerations.

34. The Secretary General contends that the President acted reasonably and the contested decision has a rational basis. The President acted properly and duly recorded an understandable statement of the reasons for the contested decision, safeguarding Ms. Balram's rights to appeal. The President took into account all relevant considerations. The conclusion of the Appeals Board that the President could not act in a manner which would negate the rights and obligations of the Secretary General was erroneous.

35. The Secretary General contends that although the President may have erred in discussing the matter with some members of the Panel, the evidence establishes that these discussions did not materially influence the outcome of the process, as is confirmed by his 9 and 22 July 2020 correspondence. The fact that the President shared the information with Ms. Balram shows the integrity of the contested decision.

### **Ms. Balram's Answer**

36. Ms. Balram requests the Appeals Tribunal to dismiss the appeal.

37. She submits that *Cherif* reflects the past context of the President's role.<sup>28</sup> The President is bound to act within the parameters established by the Council. The President is not mandated to perform an independent or unofficial assessment of the candidates based on private exchanges, nor engage in discussions with any of the candidates and, in doing so, the President disrespected Ms. Balram's dignity. The contested decision was therefore contended to be both secretive and arbitrary.

38. Ms. Balram avers that the Secretary General's statement, originally made by the President, that the Post was not budgeted and its financial viability was presented in the framework of an organizational restructuring compatible only with the appointment of Ms. Balram is factually incorrect and that no evidence is adduced in support thereof. Some of the Panel's concerns with regard to Ms. Balram were misplaced and subjective, involved

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<sup>28</sup> *Cherif* Judgment, *op. cit.*

extraneous considerations and bias cannot be ruled out. Any discussion of the candidates between the President and the Panel is in violation of the Secretary General's role. The Panel appears to have been in an implied conflict of interest when it worked to undermine the Secretary General's conclusion.

### **Ms. Balram's Cross-Appeal**

39. Ms. Balram requests the Appeals Tribunal to revise the amount of compensation awarded<sup>29</sup> and order compensation for abuse of process by the Secretary General before the Appeals Board and payment of further legal costs in the amount of USD 5,000 for the additional litigation resulting from the Secretary General's appeal before the Appeals Tribunal.

40. Ms. Balram argues that compensation in lieu of rescission should have been set in accordance with the principle of placing the staff member in the position he or she would have been if not for the breach. Ms. Balram could have been appointed to the Post with effect from July 2020 for a term of four years. Therefore, the period underlying the compensation should be extended from 1 October 2020 up to and until 30 June 2024. Moreover, as she was approaching the end of her career, this lost opportunity was likely the only one she had in the Organization.

41. Ms. Balram submits that the Appeals Board did not address the damage to her professional reputation and the impugned Decision omitted as evidence the Secretary General's 19 April 2023 decision to remove her from her post. Her treatment by the President demonstrated little regard for her rights and caused her reputational harm and damage to *dignitas*.

42. Ms. Balram contends that the long delay in the Appeals Board receiving the Organization's comments was inordinate and prejudicial to her case and reflected disregard for its Rules of Procedure. The Secretary General's comments on the appeal were received by the Appeals Board two years and five months after she submitted her appeal.

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<sup>29</sup> Ms. Balram appears to request the Appeals Tribunal to increase the amount of compensation in lieu of rescission and to award compensation for loss of income and loss of opportunity, damage to professional reputation and moral harm.

43. Lastly, Ms. Balram submits that the payment of further legal costs should be awarded in light of the Appeals Board’s recommendation for an *ex gratia* payment for the expenses of the litigation caused by the Organization’s lack of clarity and transparency.

### **The Secretary General’s Answer to the Cross-Appeal**

44. The Secretary General requests the Appeals Tribunal to dismiss the cross-appeal.

45. The Secretary General argues that Ms. Balram’s cross-appeal has failed to establish how the Appeals Board erred on a question of law or fact. The supposition that she would have been appointed to the Post from 1 October 2020 up to and until 30 June 2024 is highly speculative. Contrary to her assertion, the Appeals Board duly considered her claim for compensation for harm to her professional reputation. Her assertion that the impugned Decision “omits” evidence of her 19 April 2023 redeployment within ICAO is false. The Appeals Board duly considered the evidence and found it irrelevant.

46. The Secretary General submits that Ms. Balram’s request for compensation for abuse of process is without merit. ICAO suspended its process in response to *El Sehemawi* and put in place a new legal framework for a neutral first instance process.<sup>30</sup> Applying the 60-day time limit for the submission of a reply would be retroactive application of law. Moreover, Ms. Balram did not raise the issue at the first instance.

47. The Secretary General contends that further legal costs of USD 5,000 are unsubstantiated. The Secretary General did not manifestly abuse the proceedings of the Appeals Tribunal. Ms. Balram has not submitted any proof of legal costs incurred or paid.

### **Considerations**

48. The Administration of ICAO has broad discretion in matters of staff selection,<sup>31</sup> with the appointment and promotion of staff members to be undertaken on a competitive basis. The paramount consideration in the appointment and promotion of staff is “the necessity for securing the highest standards of efficiency, competence and integrity”.<sup>32</sup>

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<sup>30</sup> *El Sehemawi v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2020-UNAT-1034. The Secretary General cites Rule 9 of the Appeals Board Rules of Procedure.

<sup>31</sup> *RoseMarie Hefberger v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2023-UNAT-1374, paras. 79-80 and 83.

<sup>32</sup> ICAO Staff Regulation 4.1.

49. Article IV of the ICAO Service Code provides that in making staff appointments the Secretary General is required to act with the advice and assistance of the Panel of Directors for D-1 posts<sup>33</sup> and following a review undertaken by a Committee established by the Council.<sup>34</sup> Following the Panel's report and the Committee's review, the Secretary General takes a decision including regarding the type and duration of the contract.<sup>35</sup> The Secretary General must inform the President of the Council of the decision taken and request the President's approval when appointing a person to a D-1 post;<sup>36</sup> and, where the President disapproves of the candidate chosen by the Secretary General, the Secretary General:<sup>37</sup>

(...) shall choose another candidate from the final shortlist, obtain the written approval of the President of the Council, and report the decision as described in paragraph 14 above. Alternatively, the Secretary General may decide to readvertise the post following the procedures contained in this Annex for the selection of D-1 posts, and to inform the Council accordingly.

50. An administrative decision not to appoint, promote or transfer can be challenged on review on the grounds that the Administration has not acted fairly, justly or transparently.<sup>38</sup> In undertaking such a review, this Tribunal is required to assess whether the applicable Regulations and Rules have been applied in a fair, transparent and non-discriminatory manner. It is not the Tribunals' role to substitute their decisions for that of the Administration.<sup>39</sup> If the Administration is able to show that the staff member's candidature was given full and fair consideration, the burden of proof shifts to the staff member who must show through clear and convincing evidence that the Administration has not acted fairly, justly or transparently in taking its decision.<sup>40</sup>

51. A rebuttable presumption exists that official acts have been regularly performed. This means in the current matter that because the Administration of ICAO was able, at least minimally, to show that Ms. Balram's candidature was given full and fair consideration, the presumption stood satisfied. The burden of proof then shifted to Ms. Balram who had to show

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<sup>33</sup> ICAO Staff Regulation 4.10 and 4.11.

<sup>34</sup> ICAO Staff Regulation 4.12 and 4.13.

<sup>35</sup> ICAO Staff Regulation 4.19.

<sup>36</sup> ICAO Staff Regulation 4.22. *See also Cherif Judgment, op. cit.*, paras. 2 and 24.

<sup>37</sup> Paragraph 15 of Annex IV to the ICAO Service Code.

<sup>38</sup> *Heftberger Judgment, op. cit.*, para. 83.

<sup>39</sup> *Dube v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-674, para. 38 (internal citation omitted).

<sup>40</sup> *Ibid.*, para. 40 (internal citation omitted).

through clear and convincing evidence that she had been denied a fair chance of promotion, *inter alia* due to the Administration not having acted fairly, justly or transparently, or having committed a breach of procedure, displayed bias or taken irrelevant material into account and ignored relevant material.<sup>41</sup>

52. There is no dispute that the Secretary General was required to obtain the approval of the President when hiring a D-1 level employee. Such limitation on the Secretary General's authority to appoint employees is one which falls within the power of the Council to determine as part of the rules and procedure relating to appointment or promotion.<sup>42</sup>

53. The reasons provided by the President for his decision not to support the appointment of Ms. Balram were expressed in his letter of 9 July 2020 as being that:

(a) the Secretary General had taken the decision to appoint her based on a contingent situation, being mainly the current financial situation and "the need to support the senior management turnover, which will be completed in approximately the next six months", while the main driver for the appointment should be the recruitment process;

(b) Ms. Balram "did not emerge from the recruitment process as properly qualified for the post" but was "negatively assessed by the interview panel" and was not initially shortlisted and was the weakest candidate following the Assessment Centre test;

(c) all of the other five candidates interviewed by the Panel and subsequently tested by the Assessment Centre performed better than Ms. Balram;

(d) the duties and responsibilities of the Post are crucial for the future of the Organization, with the Vacancy Notice stating that the Deputy Director HR "provides leadership in change management initiatives to ensure efficiency and effectiveness of the Organisation" at a time when effective Human Resource management is critical to a process of modernization to enhance efficiency and effectiveness; and

(e) the overall assessment of Ms. Balram demonstrated serious weaknesses in the areas of vision and other critical competences and her appointment "based on contingent justifications, would therefore prevent our Organisation to have a deputy director human

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<sup>41</sup> See *Heftberger Judgment, op. cit.*, paras. 80 and 83.

<sup>42</sup> *Cherif Judgment, op. cit.*, paras. 2 and 24.

resource selected on the basis of a strategic vision for the management of ICAO and could ultimately be detrimental to the organisation in the long term”.

54. Consequently, the Secretary General was invited by the President “to consider alternatives emerging from the recruitment process”.

55. The Appeals Board found that the President had acted beyond his powers and applied a test which had not been provided for in reviewing the “fairness and transparency” of the outcome of the selection process. The President was found to have committed a substantial procedural breach or irregularity in undertaking his own process and ignoring the regulations which permitted giving preference to internal candidates. In addition, he was found to have erred in inappropriately consulting with Panel members, who were not authorized to give advice to the President.

56. The ICAO Service Code gives the President a veto power, in the sense that he is granted the authority and discretion to approve or reject D-1 and D-2 candidates.<sup>43</sup> This power is not unfettered and must be exercised reasonably and rationally, having regard to all relevant considerations.

57. It was apparent that the President had regard to relevant considerations in taking the decision that he did. Ms. Balram had been included in the process as an internal staff member but was negatively assessed during the interview by the Panel and the Assessment Centre, with the four other candidates having interviewed and tested better than she had. The President had regard to this weak performance during the interview and testing processes and appropriately considered that the position required leadership in change management at a critical time for ICAO which was modernizing and seeking to enhance its efficiency and effectiveness. Regard was had to the fact that Ms. Balram had demonstrated serious weaknesses in areas of vision and other competencies which were critical skills for ICAO. Her appointment by the Secretary General was noted to have been in response to the financial situation and the need to support senior management turnover. The President considered that appointing Ms. Balram could be detrimental to the Organization.

58. In taking the decision that he did, the President exercised the power vested in him reasonably and rationally, after having taken regard of all relevant considerations. He did not, contrary to what the Appeals Board found, simply prefer external candidates over Ms. Balram, but provided his reasons for rejecting her appointment which accorded with the facts. The finding of the Appeals Board that the President acted beyond his powers in effectively negating the selection

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<sup>43</sup> *Ibid.*

process and conducting his own process is not borne out by the facts or the material that had been placed before him. The President was entitled to apply his mind to the process which had been undertaken and have regard to material and relevant considerations in taking his decision. The conclusion of the Appeals Board that the President could not act in a manner which would negate the rights and obligations of the Secretary General was erroneous and does not accord with the applicable regulations.

59. Although the President discussed the matter with some members of the Panel, the evidence shows that these discussions did not influence the outcome of the process, as is confirmed by his 9 and 22 July 2020 correspondence and we are satisfied that the fact that the President shared information with Ms. Balram, rather than undermine the process, gave credence to the integrity of the decision taken. No basis exists to support the allegation that the President was biased nor are we satisfied that the facts showed that a reasonable apprehension of bias could be found to exist on the part of the President. A mere allegation of bias does not amount to proof of bias. Following the President's refusal to approve the appointment of Ms. Balram, the Secretary General, as she was entitled to do, decided to discontinue the recruitment process for "administrative reasons" and to readvertise the Post.

60. Having regard to all of these considerations, we find that the facts show that Ms. Balram's candidature was given full and fair consideration, and there is no support for the contention that ICAO had not acted fairly, justly or transparently in taking the contested decision. The appeal must therefore succeed.

#### *Cross-appeal*

61. In her cross-appeal, Ms. Balram requests that this Tribunal revise the amount of compensation awarded on the basis that she would have been appointed to the Post effective 1 October 2020 and served in the Post until 30 June 2024. The Secretary General disputes this claim as speculative and notes that the Appeals Board considered Ms. Balram's claim for compensation for harm to her professional reputation. Also disputed is her assertion that the Appeals Board omitted evidence of her 19 April 2023 redeployment within ICAO. While Ms. Balram seeks compensation for abuse of process by the Secretary General before the Appeals Board, the Secretary General contends that the ICAO suspended its process in response to *El Sehemawi* and put in place a new legal framework for a neutral first instance process;<sup>44</sup> and that applying

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<sup>44</sup> *El Sehemawi* Judgment, *op. cit.*

the 60-day time limit for the submission of a reply would be retroactive application of law. We accept the contentions of the Secretary General in this regard.

62. We therefore do not find that Ms. Balram is entitled to compensation in lieu of rescission, nor are we satisfied that it has been proven that her professional reputation has been damaged or that she has made out a case to justify the award of moral damages. We are satisfied that regard was had for her rights, dignity and reputation. Furthermore, we are not satisfied that the delay in the Appeals Board receiving the Organization's comments caused prejudice.

#### *Costs*

63. As to the payment of a further amount of USD 5,000 in legal costs on appeal sought by Ms. Balram, we reiterate that Article 9(2) of the UNAT Statute allows this Tribunal to award costs against a party that has manifestly abused the appeals process. Such an order is rarely made and usually only after the party has been fairly warned of that consequence if the party's abuse of process continues.<sup>45</sup> Since there is no abuse, let alone a manifest abuse, by the Secretary General of the appeals process in any way, there exists no basis on which to award costs against the Secretary General in this matter.<sup>46</sup>

#### *Conclusion*

64. For all of these reasons, the appeal therefore succeeds and the impugned Decision of the Appeals Board is rescinded. The cross-appeal is dismissed. No award of costs is made.

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<sup>45</sup> *Gautam Mukhopadhyay v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1306, para. 68.

<sup>46</sup> *See Muindi v. Secretary-General of the International Maritime Organization*, Judgment No. 2017-UNAT-782, para. 58.



**Judgment**

65. The Secretary General's appeal is granted, Ms. Balram's cross-appeal is dismissed, and the ICAO Appeals Board's Decision No. ICAO/2023/004 of 17 July 2023 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 25<sup>th</sup> day of October 2024 in New York, United States.

*(Signed)*

Judge Savage, Presiding

*(Signed)*

Judge Gao

*(Signed)*

Judge Colgan

Judgment published and entered into the Register on this 20<sup>th</sup> day of November 2024 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar