



Judgment No. 2018-UNAT-867



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

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. Fedorchenko 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(h)-19.8efmgrochenko werev1qfdons of Tw [(e08 Tc .190

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

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.

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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

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 General⁵. 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,

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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, 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

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

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

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

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 26