Judgement No. 280

(Original: English)

Case No. 209:
Bérubé

Against: **The Secretary General of the International Civil Aviation Organization**

Granting of a permanent appointment at the G-5 level cancelling and superseding a permanent appointment at the G-7 level.

Consideration of the procedure followed to terminate the appointment at the G-7 level.—Threat of discharge accompanied by an offer of re-engagement at a lower level.—Requirement that the Respondent conduct a due investigation.—Failure of the Respondent to comply with that requirement.—Since the procedural deficiencies did not invalidate the decision to terminate the appointment, the Tribunal declines to order reinstatement of the Applicant at the G-7 level.—Award of compensation to the Applicant in the amount of 4,000 Canadian dollars.

Examination of the validity of the new contract at the G-5 level.—Absence of duress or undue influence.—Validity of the contract.

Question of the Applicant's retirement benefit.—Order to the Respondent to reimburse the Applicant the difference, with interest, between the contributions she actually made and those she would have made if she had remained at the top step of the G-5 level for the period of her service above the G-5 level.

The other claims are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Francisco A. Forteza, Vice-President; Mr. Arnold Kean;

Whereas on 21 October 1976 Fleurette Bérubé, a staff member of the International Civil Aviation Organization, hereinafter called ICAO, filed an application in which she requested the Tribunal to rescind a decision by the Respondent agreeing with the finding of the Advisory Joint Appeals Board that the appeal was not properly receivable;

Whereas the Tribunal, by its Judgement No. 221 rendered on 21 April 1977, ordered:

"(1) that the Secretary General's decision on 29 July 1976 accepting Opinion No. 58 of the Advisory Joint Appeals Board be rescinded; and

"(2) that the case be remanded for a decision on merits, it being understood that the parties may, if they so wish, agree to direct submission of the case to the Tribunal under Article 7, paragraph 1 of its Statute."

Whereas on 6 March 1980 the Advisory Joint Appeals Board, having considered the case on merits, gave its Opinion (No. 61), the concluding section of which read as follows:

"*Conclusions and recommendations of the Board*

"Having considered the case on merits, the Board unanimously concludes that:

"(*a*) there is ample evidence to support the Secretary General's decision to terminate the Appellant's employment at G-7 level and to offer her the alternatives of:

"(i) termination by mutual agreement with 9 months indemnity; or

"(ii) reassignment at the top of the G-5 scale to a post to be created (the latter alternative having been accepted by the Appellant, with the contract duly signed on 11 February 1976);

"(*b*) the available evidence does not support the implied assertion that termination of the Appellant's contract was based on prejudice or some other extraneous factor;

"(*c*) the evidence presented does not support the assertion that duress occurred, nor that the Appellant had insufficient information available to her on which to base her decision to enter into the new contract (including information on pension matters);

"(*d*) the administrative decision taken by the Secretary General on 10 February 1976 observed the provisions of the ICAO Service Code and GSIs and was in accordance with proper administrative practice;

"(*e*) the Appellant is not entitled to restitution of lost salary, including interest at the prevailing rates, seniority and other privileges as claimed;

"(*f*) the Appellant should not be re-established at her former top step of level G-7;

"(*g*) the appeal is without foundation and the Board accordingly recommends that it should be dismissed.

"The Board suggests however that the Secretary General might wish to consider an *ex gratia* payment to the Appellant, with appropriate interest, to compensate her for the payments made by her to the pension plan in excess of those she would have paid had she remained at the top step of G-5 level, for the period of her service above the G-5 level.";

Whereas, on 9 June 1980, the Respondent agreed with the unanimous conclusions and recommendations of the Board and rejected the suggestion made by the Board in the last paragraph of its Opinion;

Whereas, on 2 September 1980, the Applicant filed an application on merits in which she requested the Tribunal:

"1. to hold oral proceedings under Article 15 of the Rules of the Tribunal;

"2. to provide me with competent Counsel under Chapter III, Article 13 of the Rules of the Tribunal;

"3. to rescind the Respondent's decision of 9 June 1980;

"4. to declare that the Applicant was the victim of non-observance of established administrative practices in such a way as adversely to affect her career;

"5. to re-establish the Applicant at her former top step of level G-7;

"6. to reimburse her loss of salary, including interest at the prevailing rates, seniority and all other privileges for the period during which the improper administrative decision was enforced.

"Note: The matter of interest is of particular importance in this case, given the extremely long period of time that the Applicant has been subjected to the decision of the Secretary General, against which the appeal was lodged. Evidence of the

difficulties in bringing the appeal to decision is presented in the correspondence . . ."

Whereas the Respondent filed his answer on 8 December 1980;

Whereas, on 4 September 1981 the Applicant filed written observations in which she requested the Tribunal:

"1. to find that the procedure resulting in Applicant's demotion from level G-7 to G-5

"(*a*) involved duress and undue influence;

"(*b*) did not conform to the provisions of the ICAO Service Code and General Secretariat Instructions (GSI) and to established administrative practice.

"2. to order

"(*a*) reinstatement of Applicant into level G-7, step VI;

"(*b*) payment to Applicant of the difference in salary between level G-5, step VI, and level G-7, step VI, retroactive to 1 March 1976;

"(*c*) adjustment of contributions to Applicant's pension account, retroactive to 1 March 1976, so as to reinstate her pension entitlements at level G-7, step VI;

"(*d*) payment to Applicant of interest on (*b*), above, for the period for which Tribunal finds Applicant to be entitled to such interest.

"Applicant requests to be granted an oral hearing in view of the complex nature of, and the time which has elapsed since the events that resulted in, the present case."

Whereas the Applicant submitted additional documents on 23 September 1981;

Whereas the Tribunal heard the parties at a public session held on 23 September 1981;

Whereas the facts in the case are set forth in Judgement No. 221.

Whereas the Applicant's principal contentions are:

1. The Applicant signed the new G-5 contract in a situation involving duress and undue influence.

2. The Applicant did not understand until some time after she had signed the new contract that (*a*) despite her decade-long contribution to the Pension Fund at the G-7 level she would thenceforth be entitled to a pension at the G-5 level only and (*b*) the sums she had contributed, corresponding to the difference between a contribution at the G-5 and at the G-7 level, would be lost to her.

3. The Applicant was being made to pay the bill for an administrative and personality situation which had not been created by her, which it was beyond her power to rectify and which was finally resolved not by merely separating the Applicant and her direct supervisor by transferring her but rather by placing the entire blame on her and wrongfully demoting her by two levels.

4. The Applicant was downgraded by means of an informal termination procedure which undermines the entire concept of permanent appointments and violated the Applicant's individual rights as to her own contractual status.

Whereas the Respondent's principal contentions are:

1. The question of duress was thoroughly considered by the Advisory Joint Appeals Board in 1976 and again in 1980 and no evidence of any duress was ever found.

2. Far from being a timid and overwhelmed person who has been living for years in stress and distress, as claimed in the application, the Applicant possesses a very strong and determined personality and has always been perfectly capable of asserting most vigorously her true or alleged rights.

3. Any conclusion that the Respondent failed to explain to the Applicant her rights under the Service Code would be quite unfounded. The Applicant freely accepted the new appointment after having had full opportunity to consult several people. Her statement that nobody explained to her all the implications of the new contract is totally unfounded. The implications of the new appointment for her pension rights, in particular, were clearly explained to the Applicant.

4. The Applicant's request to be paid a G-7 salary for duties of a particularly light G-5 is fanciful. Her claim for reimbursement "including interest at the prevailing rates" is equally fanciful since the Respondent is in no way responsible for the delays in the hearing before the Advisory Joint Appeals Board.

The Tribunal, having deliberated from 23 September to 9 October 1981, now pronounces the following judgement:

I. In her written observations, the Applicant submitted final pleas which are reproduced in the first part of this judgement.

II. The Tribunal must first consider whether the procedure followed in terminating the Applicant's contract of employment at G-7 level was in conformity with the applicable requirements.

III. The letter of 10 February 1976 purports to be an offer of a new contract at G-5 level which would cancel and supersede the Applicant's existing contract at G-7 level. On its face, the offer was open to rejection by the Applicant. That the Respondent was contemplating the possibility of her discharge under either paragraph 4, Article V, Part III (for unsatisfactory services) or Article IX, Part III (as a disciplinary measure) of the ICAO Service Code was apparent from the Respondent's memorandum of 2 October 1975 to the Applicant, which informed her that he had appointed Mr. R. G. Pouliot as an investigator in accordance with paragraph 4, Article V, Part III of the Service Code, a paragraph concerned with discharge by notice in writing after due investigation. The Tribunal notes that under paragraph 6 of that article, the conditions of notice, investigation and report applicable to discharge under paragraph 4 are also applicable to discharge for misconduct or inattention to duties.

IV. As far as concerns discharge as a disciplinary measure, although the Notice of Personnel Action in respect of the Applicant, signed by the Chief of the Personnel Branch and dated 11 February 1976, refers to the Applicant as being "re-graded", there is no provision in the Service Code for re-grading or demotion as a disciplinary measure. Consequently, what was contemplated must have been a discharge for unsatisfactory services.

V. The Applicant was not in fact discharged, but the Tribunal is satisfied that, in all the circumstances, the treatment accorded to her amounted to a threat of discharge accompanied by an offer of re-engagement at a lower level. Although she had not seen the investigator's report, it must have been evident to her that discharge was the alternative

to acceptance of a post at G-5 level. An offer of a post at a lower level, unless requested by the employee, is not normally made by an employer unless the alternative is that of discharge.

VI. The question therefore arises whether the Respondent, in deciding that, failing acceptance of the offer, the Applicant would be discharged, followed the procedure required by the Service Code. In the Tribunal's view, under Article V, paragraph 4, referred to above, the Respondent was precluded from deciding that discharge was to be the alternative to acceptance of a new contract at G-5 level, unless the requirement of "due investigation" was first complied with.

VII. To judge from his report, Mr. Pouliot, the appointed investigator, made a great effort to be thorough and to be fair to the Applicant. However, "due investigation", in the view of the Tribunal, required that the Applicant should have been confronted with the report and given a reasonable opportunity to comment on it before the Secretary General reached his decision. This is particularly so because Mr. Pouliot took into consideration new evidence of which the Applicant did not learn until she had accepted the offer of re-appointment at G-5 level. Mr. Pouliot had in fact sought the opinions of the Applicant's subordinates and new staff (paragraphs 40 and 42 of the report), all of whom were evidently questioned in the absence of the Applicant.

VIII. It therefore appears to the Tribunal that the requirement of "due investigation" was not complied with because the Applicant was not shown Mr. Pouliot's report and had no opportunity to comment on it before the Respondent reached his decision. The Tribunal also notes that the adverse report of 1972 was not shown to the Applicant, contrary to GSI 1-4-2.

IX. However, the Tribunal observes that the substance of the complaints against the Applicant had been known to her for several years and that she had commented on a number of adverse reports. The Secretary General himself communicated orally to her the substance of the adverse report of 1972. In respect of the substance of the complaints against the Applicant as to the unsatisfactory quality of her services, the Tribunal cannot substitute its opinion for that of the Respondent.

X. In the present case as in the *Restrepo* case (Judgement No. 131, para. V), the procedural deficiencies did not invalidate the termination of the contract. The Tribunal therefore declines to order reinstatement of the Applicant to G-7 level. However, in view of the procedural deficiencies referred to above, and considering the unusual and unsatisfactory method by which the Respondent effected the Applicant's demotion by writing to her that her appointment at G-5 level cancelled and superseded the previous appointment, the Tribunal decides that the Applicant is entitled to compensation and fixes the amount of compensation at 4,000 Canadian dollars.

XI. The Tribunal must now examine the validity of the new contract at G-5 level. The Tribunal does not consider that the new contract was vitiated by duress or undue influence, as alleged by the Applicant. It is true that at the time she signed the contract she may have been under stress from personal difficulties, but this does not in itself vitiate the contract.

XII. The Tribunal is also satisfied that an officer of the ICAO Legal Bureau, acting officially in giving legal advice to staff members, gave the Applicant an explanation of the effect the new contract would have on her income and pension rights.

XIII. Accordingly, the new contract must be regarded as valid and subsisting.

XIV. The Tribunal observes that the letter of 10 February 1976 provides that "by accepting this appointment you will renounce all benefits and rights under your present appointment except those resulting from length of service".

It follows that in calculating the Applicant's retirement pension, all her years of service will be counted. However, the amount of the pension will normally be calculated by reference to the salary of the last three years of service.

The Tribunal notes that during the years in which the Applicant was at level G-7, her contributions to the Pension Fund were based on the salary of that level. If the Respondent had terminated her G-7 contract on 10 February 1976 without proposing a new contract, the Applicant would have been entitled to the repayment of her own contributions on the basis of Article 32 of the Pension Fund Regulations.

Inasmuch as the contributions she made at G-7 level cannot lead to the award of a pension based on a G-7 salary, a right to reimbursement must be accorded to the Applicant to the extent that her contributions have exceeded those which would have been payable by her by reason of a contract at G-5 level.

The Tribunal accordingly decides that the Applicant should be reimbursed the difference between the contributions she actually made and those she would have made had she remained at the top step of G-5 level, for the period of her service above G-5 level. On this sum the Respondent should, if the Applicant is to receive fair restitution, pay interest.

XV. For the foregoing reasons, the Tribunal orders that the Respondent pay to the Applicant:

(1) 4,000 Canadian dollars as compensation;

(2) a sum equal to the total of the excess of the contributions made by the Applicant to the United Nations Joint Staff Pension Fund for the period of her service above G-5 level over the contributions she would have made for that period, had she remained at the top step of G-5 level; and

(3) interest on the sum referred to in (2) above at the rate of 12 per cent per annum from 1 March 1976 to the date on which that sum is paid.

All other claims of the Applicant are rejected.

(Signatures)

Suzanne BASTID
President

Arnold KEAN
Member

Francisco A. FORTEZA
Vice-President

Jean HARDY
Executive Secretary

New York, 9 October 1981