Judgement No. 317

(Original: English)

Case No. 302: Cunio — *Against:* **The Secretary-General of the International Civil Aviation Organization**

Request by a staff member of ICAO for rescinding the decision accepting the recommendation of the Advisory Joint Appeals Board which the Applicant claimed was vitiated by procedural irregularities.—Request for preliminary measures: examination of witnesses and production of documents.

The Advisory Joint Appeals Board recommended that the Applicant's claims be rejected and unanimously declared the appeal "frivolous" in the sense of article 7, paragraph 2, of the Tribunal's statute.

*Effects of the unanimous finding by a joint body that the appeal is frivolous.—Judgements No. 288 (*Marrett*) and No. 269 (*Bartel*).—The Tribunal notes rare occurrence of this determination.—The Tribunal held in Judgement No. 288 that it can neither decide on merits nor examine whether the decision declaring the appeal "frivolous" is based on sufficient grounds, but may consider whether the joint body's decision was vitiated by some irregularity.—Applicant's complaints in respect of irregularity of procedure before the Board.—Applicant's exclusion from two of the Board's meetings.—Finding of the Tribunal that the exclusion of the Applicant from the Board, where she was represented by a counsel, did not vitiate the proceedings.—Critical observations of the Tribunal on the exclusion.—The Tribunal believes that such an exclusion from the outset of the proceedings is wrong in principle and can only be contemplated, after due warning, if the Appellant's attitude is disruptive of proceedings.—Failure of the Board to consider evidence relevant to the issue of the Applicant's competence or efficiency, which it is not competent to determine, did not vitiate its proceedings.*

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Herbert Reis; Mr. Roger Pinto;

Whereas at the request of Miss Renée Cunio, a staff member of the International Civil Aviation Organization, hereinafter called ICAO, the Tribunal extended to 30 November 1982 the time-limit for the filing of an application to the Tribunal;

Whereas, on 7 December 1982, the Applicant filed an application the pleas of which read as follows:

"(a) *Preliminary of Provisional Measures*

"The Applicant respectfully requests the Tribunal to order the production by ICAO of all documents, memoranda, notes and files concerning or tangential to the issues and actions appealed to, including but not limited to:

"(i) Applicant's personnel and confidential files;

"(ii) Copies of ICAO Service Code, ICAO General Secretariat Instructions (G.S.I.) and ICAO Staff Notice No. 2475 dated 6 December 1979.

"In addition, the Applicant respectfully requests the Tribunal to order the hearing of the following parties, particularly in view of the factual events (summarized in Annex 6) which followed the filing of Applicant's memorandum of appeal (see Annex 2) on 18 April 1980:

Mr. F. Cordier, the then Chief, Language Branch (C/LAN)

Mr. P. J. Broomfield, Chief, Interpretation, Terminology and Reference Officer (C/ITR)

Mr. M. Olejnikov, Terminology and Reference Officer (TRO)

Mr. R. J. Hiscock, Chief, Management Services Office (C/MSO)

and the Applicant.

"Upon the review of the complete record of evidence, testimony and Annexes herewith, the Applicant respectfully requests the Tribunal to make a determination as to whether these appeals are considered frivolous in the sense of paragraph 3, Article 7 of its Statute.

"(b) *Decision Contended and Rescission Requested*

"The Applicant contends and respectfully requests the Tribunal to rescind under the terms of paragraph 1, Article 9 of its Statute the decision of the Secretary General dated 8 March 1982 (see Annex 5) to accept the recommendations in the Advisory Joint Appeals Body's Opinion No. 68 of 22 [26] February 1982 (see Annex 4) and to reject accordingly Applicant's Appeals No. 64 (see Annex 2).

"(c) *The obligations invoked* are that

"(i) Applicant was not given a proper hearing, the findings and recommendations of the Board being hence vitiated by the non-observance of basic principles of natural justice and procedural irregularities;

"(ii) The case (these appeals) be remanded to the Advisory Joint Appeals Board (AJAB) with appropriate directives to complete the record and comply with the observance of basic principles of natural justice;

". . .

OR

"(iii) The Tribunal may complete the record after appropriate hearings and make the final determination on the merits of the case."

Whereas the Respondent filed his answer on 16 February 1983;

Whereas the Applicant filed written observations on 28 March 1983;

Whereas the President ruled on 26 August 1983 that no oral proceedings should be held in the case;

Whereas the facts relevant to the present proceedings are as follows:

On 19 December 1978 the Applicant, a staff member of ICAO since 5 May 1958 and the holder of a permanent appointment since June 1962, lodged an appeal with the Advisory Joint Appeals Board against a decision of the Secretary General, dated 13 December 1978, not to upgrade the post of Terminology Assistant occupied by the Applicant at the G-6 level in the Interpretation, Terminology and Reference Section of the Language Branch. On 23 May 1980 she lodged a further appeal against a decision of the Secretary-General, dated 6 March 1980, to withhold her annual salary increment which would have normally fallen due on 1 April 1979. The Advisory Joint Appeals Board submitted its Opinion (No. 68) on 26 February 1982. The Board's findings and recommendations read as follows:

"*Findings of the Board*

"61. The Board held a total of eight meetings on this appeal during which full and very careful consideration was given to all its aspects. The Appellant was given every opportunity to present her case, to comment and to have witnesses heard. The Board examined all relevant facets of the case on the basis of the extensive documentation made available, including the Appellant's submission and her personal files, and took into account the evidence given by the various witnesses . . . , all of whom were heard in the presence of the Appellant's representative.

"62. The Appellant's work since joining the Unit in 1969 to 1976 had been generally satisfactory, although there were shortcomings and the Board found ample evidence that these were discussed with her on a timely basis. The Board recognized that after 1976 there had been a marked deterioration in the Appellant's attitude to her work and her colleagues.

"63. The Board noted that the Appellant had been uncooperative and reluctant to perform the normal clerical duties specified in her post description and this situation developed into a severe conflict with her immediate colleagues and superiors following the appointment of Dr. Gatfield as P-3 Terminology Officer (1977). Consequently, her confidential report for 1977 was adverse and her reports for 1978 and 1979 were not much better.

"64. The Board is not in a position to pass judgement on the professional competence or efficiency of a staff member. Nevertheless, while recognizing the efforts made by the Appellant to improve her skills, it appears from her superiors that her language skills were not at the level required by ICAO and there is evidence that the Appellant was so informed. However, it was made clear that the Appellant could perform useful work in the terminology area and C/ITR [Chief, Interpretation, Terminology and Reference Section] and C/LAN [Chief, Language Branch] appeared to be quite open to arranging for the Appellant to perform useful work, but not to the detriment of the normal output of the Unit.

"65. The Appellant has generated considerable correspondence concerning her position and grading in the Terminology Unit over the past ten years. The Board found that in each instance the Appellant's assessment of the appropriate grading was much higher than those of her superiors.

"66. The Board found that the Appellant's increased on-the-job skills had been recognized by the regrading to a G-6, and up to 1979 the Appellant had received consistent salary increments, in line with established procedures.

"67. The Board gained the impression that much patience had been shown towards the Appellant, throughout her employment, and that considerable effort had been made towards accommodating her in endeavouring to ensure that productive work of the Unit was performed.

"68. The Board realized, after evaluating all aspects, that the Appellant's superiors had found it necessary, under the circumstances, to request the Appellant to apply herself to the full range of duties outlined in her post description. In addition, it was also recognized that this could also contribute to improving the working relationships with her colleagues.

"69. With regard to the subsequent correspondence from the Appellant concerning the post grading, the adverse confidential report (1977), and the withholding of the salary increment (1979), the Board considered

the claims made by the Appellant unrealistic in the light of the evidence provided.

"70. The Board found the administration's actions taken in assessing the Appellant's post grading, in appraising the Appellant's work and attitude, and in the decision to withhold the salary increment to be in line with established administrative practices.

"71. The Board found no evidence of prejudice in the actions taken towards the Appellant within the context of her appeal and indeed throughout her employment with ICAO.

"*Recommendations*

"72. The Board, having examined all aspects related to this case, arrived at the following unanimous recommendations on the points raised in the appeal:

"(i) The Board recommends rejection of the Appellant's request to have the adverse confidential report for the period 1 February 1977–31 January 1978 'withdrawn and stricken' from her record. The Board was unable to find any evidence of prejudice or non-observation of established administrative practice, nor any evidence to indicate that an adverse report was not justified. The Board moreover noted that GSI 1.4.2 para. 10 requires confidential reports to be placed on staff members' confidential files and there is no rule providing for the removal of such reports.

"(ii) The Board recommends that the Appellant's request for reconsideration of her application for the post of P-3 Terminology Officer be rejected, as being totally inconsistent with the Organization's provisions for the recruitment and appointment of professional staff as set forth in Article IV, Part III of the ICAO Service Code.

"(iii) The Board considers that the Appellant's post of Terminology Assistant (7311.05) was fairly evaluated and graded at G-6 level by C/MSO [Chief, Management Services Office] in 1978, as outlined in his report, and recommends that the Appellant's request to have the post description amended be rejected. The Board considers that post descriptions, while intended to identify the principal range of duties of a post, do not purport to be an exhaustive listing of such duties. Moreover, the inclusion of the words 'Perform other related duties as assigned' in the Appellant's post description also provides for the performance of tasks other than those specifically listed.

"(iv) In addition, the Board recommends that the request to have the Appellant's post of Terminology Assistant (7311.05) upgraded to a P-1/P-2 level be rejected, as it has seen no evidence that the G-6 grading of this post in unjustified. The Board notes that only the Secretary-General has the discretionary authority to modify the grading of a post and believes that the decision not to upgrade this particular post was not tainted with prejudice nor based on mistaken conclusions drawn from the facts.

"(v) In accordance with its recommendation under (iii) and (iv) the Board recommends that the request for a consequential retroactive adjustment of salary be rejected. The Board is also satisfied that the Appellant did not consistently perform duties at a higher level for any significant period of time such as to justify the granting of an acting salary under the provisions of GSI 1.8.1 paragraph 4. The Appellant apparently did, on occasion, undertake work at a higher level during the period under

consideration, but this was subject to review by her supervisors and apparently often had to be corrected.

"(vi) Regarding the Appellant's appeal against the decision of 1 February 1980 not to grant an assimilation salary increment effective 1 April 1979, namely that salary increment be granted retroactively to 1 April 1979, the Board believes that there was strong evidence that the decision was justified and could not find any evidence that improper administrative procedures were followed in withholding the salary increment. Accordingly, the Board recommends that this request be rejected.

"73. Concerning the Appellant's request to examine those of her confidential reports containing 'notations', the Board agreed that the Appellant's representative be allowed to examine the relevant confidential reports, further to C/PER [Chief, Personnel Branch]'s memorandum to the Appellant on this subject dated 22 October 1981, recognizing that access to these reports is not normally granted to staff members. These reports confirm the existence of shortcomings over the 1969-1976 period which were discussed with the Appellant, as further confirmed by witnesses heard by the Board.

"74. The Board therefore unanimously recommends that the two appeals be rejected. It further believes that any continuation of the appeals at the level of the United Nations Administrative Tribunal would be pointless. The Board therefore unanimously declares this appeal 'frivolous' in the sense of Article VII, paragraph 3 of the Statute of the UN Administrative Tribunal. In so doing, the Board would not wish the Appellant to be in any way offended by its use of the term 'frivolous', which the Board interprets as meaning 'futile', 'not having any basis in facts or in law', and therefore bound to fail before the UN Administrative Tribunal."

On 8 March 1982 the Secretary-General accepted the unanimous recommendation of the Advisory Joint Appeals Board that the two appeals be rejected and on 7 December 1982 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Advisory Joint Appeals Board held hearings without the Applicant being present.

2. The Advisory Joint Appeals Board introduced evidence in the record *ex parte.*

3. The Advisory Joint Appeals Board did not consider relevant evidence.

4. The Advisory Joint Appeals Board disregarded relevant evidence.

5. The Advisory Joint Appeals Board, by its own admission, is not competent to deal with the central issue of this case, i.e. the evaluation of the professional competence and efficiency of the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant's representative was present at all hearings of the Advisory Joint Appeals Board.

2. The Advisory Joint Appeals Board was not competent to consider the substantive question of efficiency and found no evidence that the contested decision had been motivated by prejudice or by some other extraneous factor.

3. The Applicant has produced no evidence that the findings and recommendations of the Advisory Joint Appeals Board have been vitiated by procedural irregularities and that she was prevented from stating her case properly before the Board.

The Tribunal, having deliberated from 7 to 21 October 1983, now pronounces the following judgement:

I. This case once again presents the Tribunal with a report by the Advisory Joint Appeals Board of ICAO unanimously finding that an appeal brought to the Board is frivolous. It will be recalled that article 7, paragraph 3, of the Statute of the Tribunal deals expressly with claims unanimously considered by a joint body to be frivolous, in the following terms:

"In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous."

The Tribunal has been called upon to consider only a very few instances in which a joint body has found that an appeal brought to it is "frivolous" within the meaning of article 7, paragraph 3. The Tribunal believes that this relative infrequency is consistent with the anticipations of those who drafted the Tribunal's Statute.

II. The Tribunal has recently had occasion in Judgement No. 288 (*Marrett*) to describe the scope of its review in the case of an appeal unanimously found to be frivolous. There the Tribunal stated:

"The Tribunal can neither decide on the merits of the case nor examine whether the decision declaring the appeal 'frivolous' is based on sufficient grounds. Nevertheless, the Tribunal has ruled in the Bartel case (Judgement No. 269) that it is not 'precluded from considering whether the joint body's conclusion was vitiated by some irregularity.'" (paragraph I)

III. The Applicant alleges that the proceedings of the Advisory Joint Appeals Board were flawed because the Board excluded her from two of the four meetings at which the Board held oral hearings on her appeal. Her legal representative was invited to attend and in fact attended the two meetings from which she was excluded. These two meetings heard statements by the immediate superiors of the Applicant.

IV. Subject to the cautionary view stated in paragraph VI of this judgement, the Tribunal does not consider that the Board's proceedings were vitiated by any irregularity that may have arisen from limiting participation at the two meetings to the Applicant's counsel. Had the Applicant participated in those two meetings, she could have at best provided information and opinions concerning her competence in her work. However, the Applicant herself has noted in pleadings addressed to this Tribunal that the Board "is not competent to deal with the central issue of this case, i.e. the evaluation of the professional competence and efficiency of the Applicant," and she has correctly cited in this regard ICAO General Secretariat Instruction GSI-1.4.7, paragraph 16, which provides that:

"In the case of a termination or other action on the grounds of inefficiency or relative efficiency, the Board shall not consider the substantive question of efficiency, but only evidence that the decision has been motivated by prejudice or by some other extraneous factor."

Consequently, in view of the fact that the Applicant was represented at the hearings by counsel and since, even if present, the Applicant could only have testified on issues beyond the competence of the Board, the Tribunal concludes that her exclusion from the two meetings was not an irregularity of such a character as to vitiate the proceedings and recommendations of the Board. In any case, the Tribunal has found in the files no evidence that, having been

excluded, the Applicant raised timely objection to her counsel's representing her or to the counsel's ability adequately to represent her.

V. The Tribunal has only rarely considered the sensitive relationship between a staff member and his or her counsel. The Tribunal nevertheless is obliged to express dissatisfaction with regard to the Board's action in excluding the Applicant from the hearings at which her superiors were invited to be present and to make statements on the substance of her appeal. The pleadings show that counsel for the Applicant understood that the Applicant's exclusion was ordered by the Chairman of the Board so as, in the words of the counsel, "to avoid a recriminatory atmosphere." The counsel states: "I consented to this request and so informed Miss Cunio." The Tribunal notes that a parallel declaration by the Board contains no explanation for the exclusion of the Applicant. The Tribunal assumes that the counsel's understanding of the reason for the exclusion is accurate since it has not been called into question.

VI. The Tribunal is constrained to observe that it cannot sanction any practice by which a joint body would act from the beginning of its proceedings to exclude an appellant from meetings convened to hear individuals who may take positions in opposition to those advanced by the appellant. The Tribunal could accept exclusion of an appellant should he or she by misconduct demonstrate that his or her presence was disruptive of the joint body's proceedings; in that case the appellant could be warned, and if, following a warning, the misconduct continued, doubtless the joint body could properly exclude the appellant and admit only his or her counsel. But it is wrong in principle to exclude the staff member from the outset of proceedings.

VII. The Applicant also asserts that the Advisory Joint Appeals Board did not consider relevant evidence. This assertion is inevitably related to her contention that the Board lacks competence to deal with the central issue of this case, which the Applicant rightfully states to be the evaluation of her professional competence and efficiency. The Tribunal has noted, in paragraph IV above, that the Board is not competent to determine inefficiency or relative efficiency. The failure of the Board to consider evidence relevant to the issue of efficiency, if in fact it so failed, was not, in the opinion of the Tribunal, of such a character as to vitiate its proceedings.

VIII. The Tribunal accordingly rejects the Application.

(Signatures)

Samar SEN
Vice-President, presiding

Roger PINTO
Member

Herbert REIS
Member

Jean HARDY
Executive Secretary

New York, 21 October 1983