

ADMINISTRATIVE TRIBUNAL

Judgement No. 375

Case No. 370: ELLE

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

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Samar Sen, President; Mr. Endre Ustor;  
Mr. Ahmed Osman;

Whereas at the request of Bjorn Jesper Elle, a staff member of the International Civil Aviation Organization, hereinafter referred to as the ICAO, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit to file an application until 31 December 1985;

Whereas in a letter dated 24 December 1985, the Applicant requested the President of the Tribunal to call upon the Respondent under article 10, paragraph 1 of the Rules of the Tribunal to produce additional documents which he deemed essential for the Tribunal's consideration of the case;

Whereas on 31 December 1985, the Applicant filed an application in which he requested the Tribunal:

- "A. To find that the Applicant met the requirements for appointment to the post of Director, Air Transport Bureau (D-2), and was eminently qualified to discharge the functions of the post.
- B. To find that in the process of selecting another person for the post the Respondent applied Assembly resolution A1-8, the relevant regulations in the ICAO Service Code and the rules established by the Council for the appointment of directors in a manner which was incorrect and inconsistent.
- C. To find that in view of resolution A1-8 of the ICAO

Assembly the Respondent's choice for appointing the Director of the Air Transport Bureau was not exclusively limited to those candidates whose names had been selected and retained by the Council's Ad Hoc Commission for Processing of Applications (COPAD).

D. As a preliminary measure, to request the Respondent to produce:

1. Any information and advice submitted by the Respondent to COPAD concerning the candidature of the Applicant;
2. Any information and advice submitted by the Respondent to COPAD concerning the terms of appointment and upper age limits for eligible candidates;
3. The records of the deliberations of COPAD concerning this post;
4. The draft Minutes of the 19th meeting of the 115th Session of the Council on 10 July 1985 concerning appointment of Director of the Air Transport Bureau (final minutes have not been issued).

E. To accept additional submissions from the Applicant within thirty days after he has been advised of the final results of D above.

F. To grant the Applicant extension for thirty days after he has been advised of the final result of D above of his option to request oral proceedings of the Tribunal in this case and the calling of witnesses in accordance with article 8 of the Statute of the Tribunal and Chapter IV of its Rules.

G. To order the Respondent to rescind his administrative decision to disqualify the Applicant from final consideration for the post of Director, Air Transport Bureau, and not to propose his appointment for approval by the President.

H. To order the Respondent to pay the Applicant the equivalent of six months full salary less staff assessment as compensation for moral injury sustained.

I. To order the Respondent to exercise all his powers to instate[sic] the Applicant in the post of Director, Air Transport Bureau.

J. To order reimbursement of expenses reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings.

Should the Respondent decide to exercise the option given to him under article 9.1 of the Statute, or be unable to instate[sic] the Applicant as per I. above within 90 days:

K. To order the Respondent to offer the Applicant separation from service with an indemnity equivalent to the difference between:

1. The salary and pension contributions to which the Applicant would have been entitled if appointed and serving as Director of the Air Transport Bureau for a regular term beginning 10 July 1985; and
2. The salary to the Applicant, and pension fund contributions for him, actually paid for the period 10 July 1985 to the last day of service.

L. To order the Respondent to pay the Applicant the equivalent of six months full salary less staff assessment as compensation for moral injury sustained.

M. To order reimbursement of expenses reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings."

Whereas the Respondent filed his answer with seven of the annexes enclosed in a sealed envelope on 3 March 1986;

Whereas the Respondent, in his answer, requested that these annexes be treated as confidential annexes, only to be considered by the Tribunal in camera, and to remain sealed in the Tribunal's archives after adjudication of the case;

Whereas the Respondent, in his answer, agreed to permit the Applicant to read the confidential annexes at the Headquarters of ICAO after the answer was filed on 3 March 1986;

Whereas the Applicant filed written observations on 27 August 1986;

Whereas the facts in the case are as follows:

The Applicant, a national of Denmark, entered the service of the ICAO on 2 July 1968. He was initially offered a two-year fixed-term appointment at the Principal Officer level, step I, as Chief Economics and Statistics Branch in the Air Transport Bureau at the Headquarters of the ICAO. His appointment was extended for a further fixed-term period of two years and then converted to a permanent appointment effective 8 December 1971.

The record shows that in September 1973, the post of

Director, Air Transport Bureau became vacant and the Secretary-General designated the Applicant to discharge the functions of the post. His functional title was changed to "Acting Director, Air Transport Bureau". The Office of Personnel Services issued a vacancy notice to advertise the post, and on 29 October 1973 the Applicant submitted his candidacy therefor.

On 1 October 1976, the Applicant wrote to the Secretary-General to inform him that he was "confirming" his candidacy for the post of Director, Air Transport Bureau, as submitted on 29 October 1973, "on the understanding that [his] status as a permanent staff member of ICAO at P-0 [Principal Officer] level would be protected during the tenure of the appointment, should [he] be selected for the post".

In a letter dated 10 January 1977, the Secretary-General informed the Applicant that he had decided to appoint Mr. R.A. Bickley, a national of the United Kingdom of Great Britain and Northern Ireland, for the post of Director, Air Transport Bureau, for a period of four years. In addition he stated:

"For a period of over three years you have, with distinction, acted as Director during the time when this post remained unfilled. Your contribution to the Organization's work in that capacity is worthy of the highest praise and deserves our sincere gratitude. I can assure you it is only with the deepest regret that it was not found practicable to accede to the suggestions you made concerning the conditions under which your appointment to the post on a regular basis might eventually be effected."

Mr. Bickley's second term of Office as Director, Air Transport Bureau was due to expire on 8 March 1985. Accordingly, on 25 May 1984, the Administration issued a vacancy notice to seek applicants for the post. The Applicant submitted his candidacy on 4 July 1984.

The Rules and Procedures for the appointment of ICAO staff are embodied in several documents, the most important of which are: ICAO General Assembly resolutions A14-6 of 1962 and A24-20 of 1983, both dealing chiefly with the problems of geographical distribution and of allotment of key posts; ICAO General Assembly resolution A1-8, of 10 May 1984; Procedure for appointment of Directors as adopted by the ICAO Council on 3 April 1981, and the ICAO

Convention, the Service Code and the Staff Rules.

The ICAO Council's Ad Hoc Commission for Processing of Applications, hereinafter referred to as COPAD, conducted a review of all candidates for the post according to the procedure for appointment of Directors adopted by the ICAO Council on 3 April 1981. The procedure requires the Secretary-General to establish "on a preliminary basis, ... two separate lists, one comprising those candidates who in his opinion, on initial examination, meet the requirements specified for the post advertised, the second consisting of the other candidates." The Applicant's name was included in the first list. COPAD conducted the review procedure at several meetings held on 10 April 1985, 1 May 1985, 7 May 1985 and 12 June 1985.

According to the Applicant and confirmed by the Respondent, the Secretary-General informally and verbally asked the Applicant whether he would consider serving as Acting Director, Air Transport Bureau, from December 1985 to August 1987. In a memorandum dated 5 July 1985, addressed to the Secretary-General, the Applicant gave a negative response.

COPAD communicated the results of its review and recommendations regarding candidates for the post to the Secretary-General. The Applicant's name was not included among those recommended. The Secretary-General selected the Director, Air Transport Bureau from among the three persons recommended by COPAD and communicated his decision to the Council.

On 10 July 1985, in an announcement by the Council of ICAO (C-DEC 115/17, 18 & 19) was stated:

"Appointment of Director of the Air Transport Bureau  
(Subject No. 7)

5. The Council noted that the Secretary-General would appoint Mr. V. D. Zubkov (Union of Soviet Socialist Republics) as Director of the Air Transport Bureau, in accordance with the procedure adopted by the Council for appointment of Directors."

On 18 July 1985, the Applicant requested the Secretary-General to "review the administrative procedures followed" and the decision taken to appoint Mr. V. D. Zubkov to the post of Director, Air Transport Bureau. In a reply dated 1 August 1985, the

Secretary-General informed the Applicant that his "choice for appointing the Director of the Air Transport Bureau was exclusively limited to those candidates whose name had been selected and retained by the Commission [COPAD]." Accordingly, the procedures he had followed in the appointment of the Director, Air Transport Bureau, were "in strict compliance with the Rules established by the ICAO Council which [did] not depart from or contravene the spirit of Assembly resolution A1-8 ...". In addition, he stated that he would maintain his decision concerning the appointment of the Director, Air Transport Bureau.

On 6 August 1985, the Applicant requested the Secretary-General's agreement for direct submission of his appeal to the Tribunal. On 8 August 1985, the Secretary-General granted the Applicant's request.

On 31 December 1985, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent did not correctly apply the ICAO Rules and Regulations in force, in order to deny the Applicant's appointment as Director, Air Transport Bureau. The Respondent's contention that the Applicant's age disqualified him from the possibility of such an appointment was an instrument used to impede the appointment and at the same time secure the Applicant's services in the post.

2. Pursuant to article 58 of the Convention on International Civil Aviation, the Council of ICAO has authority over the method of appointment of ICAO staff subject to rules set forth by the General Assembly. General Assembly resolution A1-8 sets forth the criteria for appointment and promotion and provides that appointments of staff, other than the Secretary-General, shall be made by the Secretary-General on the advice of the Appointment and Promotion Board. Appointment and promotion to such senior positions as the ICAO Council may determine, shall be subject to the approval of the President of the Council. COPAD's constitutional power is to elaborate on and add to the Secretary-General's short list and thus ensure that all suitable candidates are considered. COPAD's failure to retain the Applicant's name on the last list was not sufficient

reason for the Respondent to disregard the Applicant's candidacy for the post.

Whereas the Respondent's principal contentions are:

1. The Respondent has fully observed the Applicant's contract of employment and his terms of appointment.

2. Although the Applicant is entitled to apply for a post at a higher level, no staff member has a vested right to a promotion. The Respondent, COPAD and the Council of ICAO duly considered the Applicant's candidacy for the post of Director, Air Transport Bureau, and validly decided to appoint someone other than the Applicant.

3. The application appears to be directed against the decision of a representative body of the ICAO and not against an administrative decision of the Respondent. The Respondent considers that it is questionable whether the Tribunal would accept competence to hear and pass judgement on such application.

The Tribunal, having deliberated from 13 October 1986 to 6 November 1986, now pronounces the following judgement:

I. In his application of 31 December 1985 the Applicant asked that a number of preliminary measures be taken for the production of privileged and confidential documents he considered necessary for pursuing his pleas. Inasmuch as the Applicant was given facilities to consult these documents and he used the information available in them in his written observations in reply to the Respondent's answer, the pleas D, E and F are of little significance and the Tribunal decides to treat them as no longer relevant.

II. The Respondent questions if the Tribunal is competent to receive the application and deal with it, on the ground that the decision of the Secretary-General for appointing Directors of ICAO is governed by the recommendations and procedure laid down by the Council of ICAO, and therefore the Secretary-General's action in this context cannot be considered as an administrative decision upon which the Tribunal could pass judgement. The Applicant takes exception to this attitude and cites article 2 of the Tribunal's

Statute to assert the Tribunal's jurisdiction for examining and pronouncing on the subject-matter of the application.

III. The Tribunal considers that irrespective of the procedure laid down for the appointment of senior officers (Directors, Principal Officers and Representatives at Regional Offices) of the ICAO, the fact remains, and has never been challenged, that all appointments are formally made by the decisions of the Secretary-General and since these decisions clearly fall within the field of administration, an application seeking to impugn any of them comes within the purview of the Tribunal's jurisdiction and competence. The Tribunal is legally concerned with the authority that makes the appointment and not so much with the procedure that finally leads to these appointments. Furthermore, while the Secretary-General is obliged to select one of the candidates recommended by COPAD, the final appointment, subject to certain constraints (i.e. rejection by secret vote of the ICAO Council of the Secretary-General's nominee), is his responsibility.

IV. In the arguments advanced by the Applicant, he relies heavily on the plea that COPAD, by eliminating his name from the list of persons whom the Secretary-General had initially suggested for selection as Director, Air Transport Bureau, was acting improperly and that in the Applicant's view COPAD could only add to (and by implication could not delete or subtract from) the number of persons first approved by the Secretary-General. He further contends that the Secretary-General should not have permitted the elimination of his name by COPAD and should have, instead, restored his name in the final list as he had, in the Applicant's view, every right and indeed duty to do so.

The Tribunal finds nothing in the relevant documents to support or sustain such a theory. In paragraph 6 of a document entitled "Procedures for Appointment of Directors as adopted by the Council on 3 April 1981" attached to the application, it is stated:

"6. Having regard to the requirements of the post and the qualifications of candidates, the Commission [COPAD] will proceed to select the smallest number of candidates it considers qualified to discharge the functions of a particular post of Director." (Emphasis added).



The same document lays down in some detail the procedure to be followed by COPAD and the Secretary-General in recommending candidates and concludes with paragraphs 8 and 9 which read as follows:

- "8. The Secretary-General shall choose, from among the candidates selected by the Commission, the one whom he proposes to appoint to the post in question and shall inform the Council of his choice.
9. Unless the Council expresses disapproval by a secret vote of the majority of its members, the Secretary-General shall, pursuant to the procedure in force, appoint the candidate he has chosen."

Thus the responsibility of COPAD is clearly to produce as short a list as possible and the Tribunal finds nothing irregular in COPAD dropping the Applicant's name from the list of persons it recommended for appointment, and notes that the final list prepared by COPAD is shorter and in some respects different from that initially prepared by the Secretary-General. In the Tribunal's view COPAD carried out its duties fully and correctly.

V. The Applicant contends that the question of his age was used as an unjustified criterion to remove his name from the list of candidates for the final selection. A detailed examination of the evidence before the Tribunal shows that the question of the Applicant reaching the retirement age of 60 in August 1987, (i.e. before the usual end of the normal tenure of three years ending in the middle of 1987) could not have been considered as a definitive and final barrier to his substantive appointment as Director, Air Transport Bureau. The Tribunal notes that the question of age and how it affects senior appointments and/or extension of service of senior officers has not been clearly and formally established by ICAO.

VI. In practice, the Tribunal notes that several exceptions have been made in the application of age-limits (or for that matter, in the tenure of senior appointments for a minimum period of three years or of a maximum period of eight years, with renewal,

extension, etc.)). The Tribunal concludes therefore that if the Applicant had been found otherwise the most suitable candidate available, a way could have been found to appoint him or retain him for such a period as the Secretary-General considered desirable. This view is further reinforced by the fact that the Secretary-General himself, in full knowledge that the Applicant would be reaching the retirement age of 60 in August 1987 (i.e. about a year earlier than the tenure for the job he had applied for) had, nonetheless, included him in his short list. On the other hand, the Applicant's contention that he was excluded on the pretext of age cannot be upheld. He stated, inter- alia in his letter of 5 July 1985 to the Secretary-General:

"It has been suggested to me that there was in fact a desire among COPAD members to see me appointed to the post of D/ATB and that I was disqualified merely on a criterion that a candidate should be able to serve for 3 years before reaching the age of 60."

It is not clear to the Tribunal who made these suggestions to the Applicant. In any event, the records do not corroborate them. The question of age did come up for discussion from time to time but there is nothing to show that it was ever treated as a determining factor. Nor has the Tribunal come across any evidence suggesting that age alone was a dominant factor in excluding names from the Secretary-General's initial list.

VII. The Applicant asserts that by making an oral offer to appoint him as a temporary Director from December 1985 to August 1987, the Secretary-General was in substance admitting that he was the best candidate. The Respondent however asserts that this ad hoc arrangement was suggested, even when the views of COPAD were known about the short list of three names which did not include the Applicant, simply to ensure that the success of the planned Air Transport Conference late in that year was not adversely affected. In any event, the Applicant rejected this offer, even before it had been formally made. In rejecting it the Applicant stated:

"Since my background and my record of 17 years of service in ICAO was well known to COPAD, this decision represents a very clear message to me. It makes it highly unlikely that I

could apply myself to the role of Acting Director with sufficient enthusiasm to provide good leadership and inspiration to the staff of the Bureau. With such a morale problem my serving as Acting Director for any extended period would be painful and hardly in the interest of the Organization".

On an earlier occasion when the post of Director, Air Transport Bureau was expected to be filled in 1977, the Applicant, who was then acting as Director, was willing to fill the vacancy on certain assurances which the Secretary-General was clearly not in a position to give.

If these developments reflect the Applicant's wish to achieve a service career with a full-term Directorship at the end of it; then such a plan would seem to run counter to the established rules and procedures of ICAO for the appointment of senior officers.

VIII. Over the years ICAO has worked for devising a suitable procedure for the recruitment of staff and particularly for the appointment of senior officers (Directors, Principal Officers and Representatives of Regional Offices). As a result of long deliberations spread over nearly two decades, COPAD was established to assist the Secretary-General in selecting a person from a short list of suitable candidates. The Tribunal considers that COPAD weighs and balances all the considerations that should govern the selection of persons for appointment to senior posts - for example, competence, availability, geographical distribution, age, "key posts" and their allotment, the claims of persons already in the service of ICAO. In the determination of the weight to be attached to these factors and their evaluation, the views of COPAD were obviously not identical with those of the Applicant, but COPAD's work could only be open to legal challenge if any evidence of bias, prejudice or lack of due process could be cited. The Tribunal finds no such evidence in this case.

IX. The Tribunal is aware that in the development of the recruitment policy and procedures of ICAO, there have inevitably been instances of inconsistencies, obscurities and ambiguities. For example, in the application of principles of geographical distribution and on the weight to be attached even to a limited

number of "key posts" a degree of flexibility, often open to criticism, has devolved on the Secretary-General. Even in the matter of priority to be attached to persons serving in the ICAO, the relevant regulation was given different interpretation. Regulation 4.5 of the Service Code reads:

"Subject to qualifications and fulfilment of the policy of securing a balanced distribution among nationals of contracting states in the Secretariat, preference in selection shall be given first to staff members of the Organization and secondly to staff members of other International Organizations."

The Applicant claims that this regulation gives absolute priority to serving officers of ICAO while the Respondent holds that it does not apply to senior appointments. The Tribunal considers that regulation 4.5 of the Service Code cannot be construed as conferring an absolute right on the Applicant for appointment to the post of Director, Air Transport Bureau. This is yet one of the factors which should be assumed to have been assessed by COPAD, along with other factors, before it prepared its final list.

X. Similar drawbacks of different interpretations are sometimes unavoidable in a developing situation, but they can form the basis of legal objection only if they come in the way of the main objective of how best to find the most suitable candidate for any senior appointment. This is of course not to say, and far less to tolerate, any deliberate or biased deviation from the established norms, legislative directives or fair practice. The Tribunal does not find that in this case, the Applicant's interests have been adversely affected by any arbitrariness on part of COPAD or the Secretary-General.

XI. The Applicant's disappointment at COPAD eliminating his name from the short list of persons recommended for appointment as Director, Air Transport Bureau is palpable and wholly understandable: the facts that he had acted earlier and entirely satisfactorily for nearly three years in the same post and that he had orally been offered an ad hoc appointment of Director, Air Transport Bureau until retirement can sharpen his disappointment but cannot, in the view of the Tribunal, interfere with the

Secretary-General's duty and discretion in exercising his own option in finding the most suitable candidate from among those recommended by COPAD. It remains only to add that even in the initial list of 4 candidates, the Applicant was only one of them and was therefore liable to be excluded in the final selection. The Tribunal cannot maintain that he, and he alone, was entitled to be appointed to the post because of his highly satisfactory service with ICAO in the past and his claims on other grounds. Such a conclusion will go against the basic criteria to be applied by COPAD and the Secretary-General for finding the most suitable candidate.

XII. For the foregoing reasons, all the pleas of the Applicant must fail. The application is rejected.

(Signatures)

Samar SEN  
President

Endre USTOR  
Member

Ahmed OSMAN  
Member

New York, 6 November 1986

R. Maria VICIEN-MILBURN  
Executive Secretary