
ADMINISTRATIVE TRIBUNAL

Judgement No. 810

Case No. 915: PURIFOY

Against: The Secretary General of
the International Civil
Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, Vice-President, presiding;
Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Franklin D. Purifoy, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal until 31 December 1995 and 31 March 1996;

Whereas, on 13 March 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"1. ... to reverse the decision of the Secretary General, ICAO, in not agreeing with the ICAO Advisory Joint Appeals Board's findings and recommendation regarding compensation.

... (i.e. salary, post adjustment, transitional allowance, hardship, non-removal less assessment) for the period of the contract remaining as from the date of termination, less the sums already paid following termination.

Calculation basis: From 01 July 1991 through 31 December 1991
Amount: US\$35,353.86

2. ... [to] consider the request of remedies for settlement of my appeal, to the ICAO Joint Appeals Board, for reinstatement of my employment with ICAO to a position of equal status and salary including benefits (...)

[Payment of] [c]ompensation net remuneration (i.e. salary, post adjustment, transitional allowance, hardship, non-removal less assessment, less pension fund contributions) for the period from the date of termination, less the sums already paid following termination, to the date of settlement of this appeal plus retirement benefits.

Calculation basis: From 01 July 1991 through 31 March 1996
Amount: US\$359,774.88."

Whereas the Respondent filed his answer on 19 July 1996;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, entered the service of ICAO on 25 April 1989, on a one year appointment, as Senior Adviser - Airways Engineering (AE), in ICAO's Technical Assistance Programme in Jeddah, Saudi Arabia, at level 5, step X. The Applicant's appointment was first extended through 24 April 1991 and, then, through 31 December 1991.

Prior to his recruitment by ICAO, the Applicant had served for eight years in Saudi Arabia with the Federal Aviation Administration (FAA) of the United States of America. In order to accept the post with ICAO, the Applicant had to retire from the FAA.

The Saudi Arabian authorities approved the Applicant's candidature for the post on 14 January 1989; the Director General, AE, Presidency of Civil Aviation (PCA), Saudi Arabia, noted, on the same date, that the Applicant satisfied "all the technical requirements for our requested Senior ICAO Adviser position. Please proceed with the necessary recruitment."

Prior to the signature of the Applicant's appointment, on 27 January 1989, the Chief, Field Recruitment Unit, wrote to the Applicant that "subject therefore to formal approval and agreement,

FAA release or your confirmation, you intend [to] retire from FAA in order [to] accept this offer for ICAO[;] we intend [to] offer you this post for an initial period of one year at level five, step ten ..."

On 3 March 1989, the Secretary General offered the Applicant the post of Senior Adviser - Airways Engineering (Saudi Arabia), "subject to the conditions of service set out in the ICAO Field Service Staff Rules and as amended from time to time." The appointment was to be for a period of one year from the effective date, and it was stated that the agreement "may be terminated prior to its expiration by either party in accordance with Field Service Staff Rules 9.3 to 9.7 inclusive and 6.10 which are attached."

Field Service Staff Rule (FSSR) 9.4, headed "Termination of Appointment", reads as follows:

"The appointment of a staff member may be terminated by the Secretary General prior to its expiration ... if, in the opinion of the Secretary General:

...

- (d) The termination of the staff member's appointment would be in the interest of the Organization, or is caused by reasons beyond the Organization's control."

FSSR 9.7 also provides for the payment of certain indemnities in cases of termination "otherwise than by the application of a disciplinary measure."

The letter dated 3 March 1989, offering the Applicant an appointment with ICAO, noted that:

"The Organization reserves the right to transfer you to any other post or duty station in Saudi Arabia or to any other Project in another territory, or to the Headquarters of this Organization, according to the requirements of the Technical Assistance Programme."

The Applicant entered the service of ICAO on 25 April 1989. In a Probationary Period Evaluation prepared and signed in August 1989, the Director General, AE/PCA, rated the Applicant's overall performance as satisfactory, and recommended the continuation of his service.

On 5 December 1989, the Applicant's contract was extended from 25 April 1990 through 24 April 1991, the terms and conditions set out in the Letter of Appointment dated 3 March 1989 remaining unchanged.

On 18 February 1990, the Director General, AE/PCA, received a letter from the Director, Maintenance Engineering Division, ICAO, praising the Applicant's performance. The Director General, AE/PCA, forwarded this letter to the Applicant, adding, "Excellent work ..., I am glad that my faith in you has shown such loyal reaction and rewards ..." On 30 September 1990, the Director General, AE/PCA, wrote to the Applicant, praising his "dedication and diligence" and thanking him for his "high standard of performance".

On 17 January 1991, the Applicant was offered another contract extension, through 31 December 1991, with the "terms and conditions as set forth in [the] Letter of Appointment dated 5 December 1989 remain[ing] unchanged." The Applicant accepted the offer on 2 February 1991.

On 21 May 1991, the Director General, AE/PCA, wrote to the Acting Project Manager, ICAO, in Jeddah, as follows:

"Effective immediately, you are kindly requested to terminate [the Applicant] in Senior Advisor position.

You are kindly requested to provide this Directorate with resume for suitable backfill as soon as possible."

This memorandum was forwarded on the same day to the Director, TCB, by an ICAO Administrative Officer in Jeddah, who advised the former that he "[would] give [the Applicant] 30 days' notice unless you

have other suggestions/instructions. For details you may wish to call me ..."

Also on 21 May 1991, the Personnel Officer, Field Personnel Administration Unit, advised the Payroll and Separation Payments Officer that the Applicant's contract would be terminated in late June 1991, and that all payments should be withheld until further notice.

On 29 May 1991, the Director, TCB, sent a memorandum to the Secretary General, stating as follows:

"This submission recommends that you exercise your authority to terminate the appointment of [the Applicant] for reasons beyond the Organization's control.

...

[The Applicant] ... was selected for this position on request of the PCA of Saudi Arabia, as he was known for his previous service with ICAO in Saudi between 1976-80 and 1981-85. His performance was always satisfactory.

Unexpectedly, ... we received a message from the Acting Pro[gramme] Cord[Coordinator] transmitting the letter ... from the Director General, Airways Engineering, requesting immediate termination of [the Applicant]'s service. It is difficult to know the real reasons for such a request as [the Director General, Airways Engineering, PCA] himself in January 1989 ... requested that [the Applicant] be appointed to the above-refer[enced] post.

...

Notwithstanding the above, we have no choice but to comply with the request of the [Director General, AE/PCA] in Saudi Arabia and terminate the contract of [the Applicant] under the provisions of FSSR 9.4(d) for reasons beyond the Organization's control.

[The Applicant] is entitled to one month notice and termination indemnities in an amount equivalent to six weeks' salary (approx. USD6000)."

On 31 May 1991, the Secretary General made a notation on the memorandum cited above, agreeing that the Applicant's "contract be terminated as proposed."

The Acting Project Manager wrote to the Applicant on 1 June 1991, informing him as follows:

"On behalf of the Secretary General, this is to notify you that your services [are] being terminated for reasons beyond the Secretary General's control, within thirty (30) days from your receipt of this notification.

As a consequence ..., you will receive indemnities to include six (6) weeks' salary ..."

On 7 June 1991, the Applicant wrote to the Secretary General requesting a review of the decision to terminate his contract.

The Applicant separated from service on 30 June 1991.

In a letter dated 8 July 1991, the Chief, Field Personnel Section, wrote to the Applicant, as follows:

"We regret the special circumstances which prompted your termination from service ... As you know, the Government has the prerogative to request our Organization to terminate the services of our staff members serving in its country. We had no alternative than to comply with the Government's request.

If you so desire, we shall retain your name on our roster of candidates and shall contact you should a suitable vacancy become available."

On 26 September 1991, the Secretary General informed the Applicant as follows:

"This is to acknowledge receipt of your letters dated 7 June and 22 August 1991 respectively, ...

... [T]he decision to terminate your appointment was approved ... following a request dated 21 May 1991 from the Director General, Airways Engineering ... Thus the termination of your appointment was in strict compliance with the provisions of rule 9.4(d) of the [FSSR] and was 'caused by reasons beyond the Organization's control.' Therefore, I maintain the previous decision to terminate your appointment."

On 8 October 1991, the Applicant wrote to the Secretary General appealing the decision to terminate his appointment. This letter was forwarded to the Secretary, Advisory Joint Appeals Board (AJAB). The AJAB adopted its report on 20 June 1995. Its findings and conclusions read, inter alia, as follows:

"67. It is incumbent on the Board to examine whether, in the particular circumstances, the decision to terminate the Appellant's appointment 'by reasons beyond the Organization's control' was properly taken. The United Nations Administrative Tribunal (UNAT) in its Judgement No. 113 (Coll) examined the question of termination in the interest of the Organization and stated:

'III. In previous judgements the Tribunal has acknowledged that the right to end a contract "in the interest of the Organization" confers on the Secretary General a discretionary power in the matter of termination.

Nevertheless, the Tribunal has recognized that the exercise of this discretionary power should conform to certain general principles (Judgements Nos. 18, 27, 43-45, 48-50, 54).

In Judgement No. 54 (Mauch, para. 5) the Tribunal stated: "While the measure of power here was intended to be left completely within the discretion of the Secretary General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration of the rights of the staff member involved."

68. Although the grounds given by the Secretary General for premature termination of the contract was different in this case, viz., for reasons beyond the Organization's control, the Board is of the opinion that the same general principles apply.

69. The Board notes that no reason was given for the request for immediate termination of the Appellant's service and that there is no documented evidence that any formal attempt was made, on behalf of ICAO, to determine the reason.

Consequently, the Board holds that the termination cannot, in any real sense, be considered 'in the interest of the Organization' nor 'caused by reasons beyond the Organization's control'.

70. The evidence shows that the Organization did not consider that it has any option but to comply with the request from the Government. In this regard, the Board recalls its previous Opinion (No. 29) in Coll, ...

...

It is the Board's opinion that in cases such as the one under consideration, reasonable efforts must be made by the Organization to determine the cause of the request for termination, and it must use its good offices to ensure that the rights and interests of both the Government and the staff member are respected. It is not necessary in this case to determine the responsibility, if any, of the Organization to the staff member if the Government persists in requesting the termination because the evidence shows that no effort was made by the Organization to question the Government, to seek any explanations, or to try to resolve any problems or difficulties between the Government and an ICAO staff member. The Board finds that this omission incurs the Organization's responsibility.

71. Furthermore, the UNAT, in its Judgement No. 149 (Mirza) clearly stated that it 'regards as an essential requirement of due process that a fixed-term appointment may be terminated before the expiry of the term for cause but not arbitrarily, by giving a month's notice.' It is not sufficient in the Board's view to treat the simple request by the Government as constituting cause; it is the reasons for the request by the Government which led to the termination and the resort to FSSR 9.4(d) which might show cause.

72. Based on the documentary evidence, the Board also finds that no formal efforts were made to find alternate employment for the Appellant.

CONCLUSIONS

73. Having considered the merits of this case, and the exceptional circumstances associated herewith, the Board unanimously recommends that inasmuch as the reinstatement of the Appellant is impossible in the circumstances, he should be awarded a sum equivalent to his net remuneration (i.e.

base salary and post adjustment) for the period of the contract remaining as from the date of termination, less the sums already paid following the termination.

74. The Board believes that the obligations of the Organization to the Appellant would be discharged by the payment of this award and makes no other recommendations in this case."

On 28 July 1995, the Secretary of the AJAB transmitted to the Applicant a copy of the Secretary General's decision, dated 26 July 1995, on the AJAB's report:

"I regret that I do not agree with the Board's findings and conclusions ..."

On 13 March 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's appointment was terminated for reasons unrelated to his performance.
2. The Respondent made no attempt to ascertain the reasons for the Saudi Arabian Government's request for termination or to find the Applicant alternative employment.
3. Since the circumstances surrounding the Applicant's initial employment with ICAO led him to an expectation of continued employment, he is entitled to reinstatement and compensation.

Whereas the Respondent's principal contentions are:

1. The Applicant's employment was properly terminated in accordance with FSSR 9.4.
2. The Applicant did not have a reasonable expectation of continued employment based on the express terms of his employment contract with ICAO.

The Tribunal, having deliberated from 3 to 25 July 1997, now pronounces the following judgement:

I. The Tribunal must first determine whether the decision to terminate the Applicant's appointment was legitimately for "reasons beyond the Organization's control." In making this determination, the Tribunal recalls that its jurisprudence concerning the Secretary General's discretion holds that:

"[the exercise of discretion by the Secretary General] would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved." (Judgement No. 54, Mauch (1954)).

II. The Tribunal recognizes that, although the Applicant's employment contract was concluded between him and the Organization, its validity was contingent upon continued acceptance of the Applicant's services by the Saudi Arabian Government. The Saudi Arabian Government had consented to the Applicant's recruitment and was responsible for funding his post. There is no evidence showing any formal or serious attempt by ICAO to determine why the Saudi Arabian authorities unexpectedly requested the Applicant's termination. This request should have been viewed by the Organization as unusual, since there is much evidence that the Saudi Arabian Government appreciated the Applicant's work in previous years.

III. The Tribunal finds that if ICAO had made serious efforts to ascertain the reason for the request for the Applicant's termination, and the Saudi Arabian authorities had insisted on dispensing with the Applicant's services, the Tribunal could

conclude that the termination was indeed "caused by reasons beyond the Organization's control" and that the Respondent had acted with "good faith" and "due consideration for the rights of the staff member involved." (Cf. Judgement No. 54, Mauch (1954)). However, in the absence of any formal, continuing and serious attempts to discover the reasons behind the Saudi Arabian Government's request, the Tribunal cannot establish that FSSR 9.4(d) was properly applied.

In view of the above, the Tribunal holds that the Applicant is entitled to some compensation.

IV. The Tribunal now considers the Applicant's claim that he is entitled to remuneration to 31 March 1996. The Tribunal notes that such a claim presupposes that the Applicant's contract would have been extended until that date. However, the Applicant's contract was subject to FSSR 2.2(d), which provides that "[a]n appointment shall in no case carry any expectation of, nor imply any right to, such extension ..."

The Tribunal notes that where a letter of appointment does not carry any expectation of renewal, the Applicant can have no legal expectation that his contract will be renewed. (Judgement No. 178, Surina (1973)). The Tribunal recalls its holding that "the Applicant could have no legal expectation for extension of his appointment after the expiration of his final fixed-term contract" despite his long-term service with the Organization. (Cf. Judgement No. 305, Jabbour (1983)).

V. While the Applicant may have hoped that his contract would be extended beyond its initial period, the Organization did nothing to create a legal expectancy that it would be renewed beyond 31 December 1991. Neither the Saudi Arabian Government nor the Respondent acted in such a way as to lead the Applicant reasonably to believe that his contract would be extended beyond its expiration. Therefore, the Tribunal concludes that the Applicant's

claim for remuneration for a further period, through 31 March 1996, cannot be sustained.

VI. Based on the foregoing, the Tribunal finds that the Applicant is entitled to receive a sum equivalent to his net base salary and post adjustment for the unexpired period of his contract, less the sums already paid following his termination.

VII. Accordingly, the Tribunal:

(1) Orders the Respondent to pay to the Applicant six months of his net base salary at the rate in effect on the date of his separation from service, and post-adjustment, less the amounts already paid on the termination of his appointment;

(2) Rejects all other claims.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary