Judgement No. 269

(Original: English)

Case No. 259: Bartel

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

Request for rescission of termination of service by mutual agreement.

Question whether the Applicant's personnel file should be communicated to him.—Decision of the Tribunal that no useful purpose would be served by communicating the file to the Applicant.

Unanimous ruling of the Advisory Joint Appeals Board that the appeal was frivolous.—Article 7, paragraph 3, of the Statute of the Tribunal.—Competence of the Tribunal to consider whether the joint body's conclusion was vitiated by some irregularity.—Consideration of the Applicant's allegations.—Application not receivable.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Francisco A. Forteza, Vice-President, presiding; Mr. Samar Sen; Mr. Arnold Kean;

Whereas, on 22 January 1981, Richard Charles Bartel, a former staff member of the International Civil Aviation Organization, hereinafter called ICAO, filed an application the pleas of which read:

"*Preliminary or Provisional Measures:*

"(*a*) The Applicant hereby requests the Tribunal to Order the production of all documents, notes, and memoranda/files relating to this appeal from the International Civil Aviation Organization and the ICAO Secretary General, including but not limited to:

"I. The Applicant's Personnel and Confidential files;

"II. The files, notes, correspondence, and memoranda concerning or tangential to the issues herein which are or have been in the possession of:

"(i) the International Civil Aviation Organization;

"(ii) the ICAO Secretariat;

"(iii) the Representative of the United States of America to the International Civil Aviation Organization;

"(iv) the personal or official cognizance of Mr. Deterich Puetter (ICAO C/PEL/TRG), and Mr. Boyd Ferris (ICAO C/FL), Mr. Ian Suren (ICAO C/PEL/TRG), and Mr. Duane Freer (ICAO D/ANB), and ICAO Chief, Personnel;

"III. The recently pending Appeal of Mr. John Marrett before the ICAO Advisory Joint Appeals Board; Mr. Marrett acted as a member of the Board hearing the appeal herein contested;

"IV. Copies of the ICAO Service Code (Annex 4) and ICAO General Secretariat Instructions (GSI Annex 5), as requested through the Executive Secretary of the Tribunal herein at I.4.

"Upon review of the complete record herein and requested, the Applicant requests the Tribunal to request the hearing of Witnesses as follows:

"V. (i) Secretary General Yves Lambert, International Civil Aviation Organization;

"(ii) Mr. Duane Freer, Director, Air Navigation Bureau, International Civil Aviation Organization;

"(iii) Mr. H. Ittah, ICAO General Staff;

"(iv) Mr. Deterich Puetter, former Chief, Personnel Licensing and Training Practices Section, ICAO;

"(v) Chief, Personnel, ICAO;

"(vi) Mr. John Marrett, ICAO;

"(vii) Mr. O. Fritsch, ICAO;

"(viii) Editor, ICAO "Bulletin", ICAO Public Information Office;

"(ix) Chief, ICAO Public Information (C/PIO), 1979.

"Upon review of the complete record of evidence, testimony and Annexes, the Applicant requests that the Tribunal rule that these contested actions are not frivolous and are received for additional hearing and judgement by the Tribunal as a whole or preferably sequentially bound in two parts, considering the issue of the certificate of services co-jointly.

"(*b*) Decisions Contested and Rescissions Requested

"The Applicant contests and requests rescission of the following Decisions:

"I. Decision of the Secretary General, ICAO, dated 28 October 1980, refusing a Certificate of Satisfactory Services and Conduct;

"II. Decision of the Secretary General, ICAO, dated 28 October 1980, implementing a separation/termination notified in writing by Notice of Personnel Action on 18 December 1979, and to deny due process of investigation, finding and official review relative to the component/contributing actions and administrative decisions leading to separation/termination;

"III. Decision of Secretariat supervisory staff to initiate coercive administrative adverse actions and confidential reports without due process of the mandated/contractual System of Confidential Staff Reports, review or response of the Applicant, or regard for established administrative practices/procedures (*see Annex 4, III.V.5, and Annex 5, 1.4.2, 1.4.5, 1.4.6*) (non-observance of contract of employment), and the Decisions of Secretariat staff to continue such breach of contract after specific protest from the Applicant;

"IV. Decision of the Secretary General, ICAO, to deny compensation and/or injury sustained by the denial of due process, breach of contract, and termination. The Tribunal is requested to award compensation for the remaining uncompleted contracted service in net base salary (24 months) of $40,418 U.S., plus injury sustained by the Applicant/resulting costs incurred by him in preparation and presentation of this Application and of his preceeding submissions to the Advisory Joint Appeals Board of ICAO, including postage, transportation, and housing.

"The Applicant requests the Tribunal to Order that the following actions be taken:

"V. A Certificate of Satisfactory Services and Conduct be issued by the Secretary General, ICAO, dated 15 January 1980, and covering the entire period of employment, in accordance with the ICAO Service Code, III.V.9. (Annex 4) and thereby requested by the Applicant on 21 December 1979 (Annex 20), requested in review on 24 February 1980 (Annex 7), and appeal made to the Advisory Joint Appeals Board of ICAO on 19 March 1980 (Annex 8);

"VI. Positive action be taken and confirmed by the Secretary General, ICAO, to remove and/or rescind any and all adverse memoranda, notes, reports, records, or files from the Organization's records, files, or/and premises, as effective upon each document's date of creation;

"VII. An investigation be undertaken by the International Civil Service Commission to determine the extent of any adverse communication which may have been accomplished by the ICAO or its staff (either as a ministerial act or discretionary or personal act) prior to or after termination which has or would (by a reasonable man's interpretation) cause injury to employment or re-employment prospects or conditions, particularly with the Government of the United States, Jamaica, or the FAO, or other private employer; the Applicant has specific evidence to offer;

"VIII. If the Secretary General decides to avail himself of the option given to him under Article 9 (1) of the Statute of the Tribunal, payment of compensation as requested in IV. above and for additional injury which may have resulted from adverse actions submitted under VII. above (the amount set upon report under VII. above, application by the Applicant, and at the discretion of the Tribunal);

"IX. Rescission and cancellation of ICAO Personnel Actions 132/92024 and 132/92034 (Annex 9) effecting termination, resulting from the denial of due process (*see Annex 4, III.V.5, and Annex 5, 1.4.2, 1.4.5, 1.4.6*), fair and reasonable procedure, and inadequate and erroneous information relied upon by the Advisory Joint Appeals Board and the Secretary General (ref: Judgement No. 138, *Peynado;* Judgement No. 123, *Roy*), or the full compensation finally computed from IV, VII, and VIII above (Judgement No. 68, *Bulsara,* Judgement No. 92, *Higgins*);

"X. Rescission of the recommendation and process of the ICAO Advisory Joint Appeals Board, should the Tribunal find that the then pending personal appeal of Board member Marrett before the Board had tainted that Board's or that Member's judgement or capability for independent judgement;

"XI. An investigation and finding be made by the International Civil Aviation Organization as to the origin of adverse verbal references by ICAO staff members Ferris and Puetter to a private investigator on 21 April 1980 (see Annex 13, particularly as to whether or not these adverse references were made as personal discretionary acts (outside their scopes of employment) or were made as ministerial acts as ICAO officials during duty hours and from ICAO facilities; failing such investigation and finding by ICAO, the Applicant requests the Tribunal to make such an investigation and finding based upon the evidence and testimony developed;

"XII. An investigation and finding be made by the International Civil Service Commission and/or Food & Agriculture Organization, as to whether adverse references originating with ICAO or ICAO staff members, has affected the selection process for ICAO vacancies TA-79-127, TA 78/10, PC 28/79, PC 34/79, or FAO 884-AFP, or to re-employment position or grade level with the Government of the United States of America;

"XIII. The Applicant be reinstated by the Respondent into a position of equivalent grade, pay, and status, upon rescission requested in IX above, in good standing;

"(*c*) The Obligations Invoked by the Applicant

"I. ((*b*) (I, V above): Issue of a Certificate of Satisfactory Services and Conduct:

". . .

"It is thereby contended by the Applicant that the ICAO has an obligation to issue to him a certificate of satisfactory services and conduct, as requested in II (*b*) I herein, due to the complete lack of any notice or evidence of unsatisfactory services or conduct, the denial of due process, and the issue of false and misleading statements to the Applicant to induce an agreement for a termination which, in itself, is not provided for in the ICAO Service Code or Contract of Employment for term-appointment Staff (see Annex 4, par. III.V.10.4).

". . .

II. Separation/Termination of 14 January 1980

". . .

"It is the position of the Applicant that termination cannot be sustained and rescission is requested.

". . .

"(*d*) Amount of Compensation/Indemnity Claimed

"See (*b*) IV, VII, & VIII on pages 5 & 6 herein above.

"(*e*) Other Relief

"It is requested that the proceedings of the Tribunal and the evidence herein developed be held privately in accordance with Article 8 of the Statute;

"It is requested that the Tribunal award travel and lodging expenses to the Applicant related to the full presentation of the Application, and to his representative and/or counsel."

Whereas the Respondent, in his answer filed on 10 February 1981, stated that the application was not receivable in accordance with article 7, paragraph 3, of the Statute of the Tribunal;

Whereas, on 12 March 1981, the Applicant filed written observations which, on the question of receivability, read in part as follows:

"The Applicant strongly contends that neither the issues nor the Appeals are frivolous, and has petitioned the Tribunal in his Application to make a Decision in this matter as a Preliminary or Provisional measure in accordance with Article 2, para. 3, of the Statute, Article 9 of the Statute, and Article 7, paras. 3(*a*) & (*b*), Articles 18, 23, & 26 of the Rules, and Article 6 of the Statute.

"In further support of the Applicant's contention that the Appeals and Application are receivable, the Applicant requests the Tribunal issue Decision(s) on the following, pursuant to proceedings conducted before the Tribunal on the following issues:

"(*a*) As requested in the Application, decide as a Preliminary or Provisional measure, in view of the evidence to date and through requested hearing of witnesses and further production of documents and testimony, that the issues and/or Appeals/Application are not frivolous;

"(*b*) Decide that the Application is receivable notwithstanding the recommendation of the joint appeals body, in view of the following:

"(i) The ICAO joint appeals body accepted *ex parte* evidence into proceedings on 19 June 1980, which constituted a Confidential Staff Report subject to administrative due process which should have been accomplished prior to any Review by the Secretary General and Appeal before the joint body;

"(ii) The ICAO joint appeals body considered the Confidential Staff Report, which has never before been communicated to the Applicant, to be material in its analysis and conclusions and recommendations, without communication, response/rebuttal, administrative process, or required Review by the Secretary General, thus creating harmful error and irreparably tainting its recommendation(s) to the Secretary General;

"(iii) The Tribunal has decided through Judgement in various cases that the recommendation(s) of a joint appeals body cannot be given binding force upon a Secretary General or the process before the Tribunal.

" . . .

"Thus, if the recommendations of the joint appeals bodies are not binding upon a Secretary General or the Tribunal's Decisions or process, then judicial equity requires that such recommendation(s) cannot adversely affect an Applicant's access to due process before the Tribunal, particularly where the Applicant has alleged harmful error by the joint appeals body which subsequently induced a similar decision

by the Secretary General based upon such defective process; and where there is outstanding an allegation that prior decisions and investigation by the Secretary General were taken or not taken for specious or untruthful reasons as would connote a lack of good faith or due consideration. (see Judgement 54, *Mauch*, and Judgement 138, *Peynado*).

"It is requested that this particular issue be decided by the Tribunal under powers granted in Articles 2, 6, 7, and/or 9 of the Statute, . . . "

Whereas, on 13 April 1981, the Tribunal asked the Respondent to produce the Applicant's personnel and Advisory Joint Appeals Board files and asked the Applicant whether he would consent under article 10.2 of the Rules to the Tribunal's not communicating these files to him;

Whereas the Applicant submitted an additional written statement on 21 April 1981;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 15 January 1979 under an appointment for three years, including a probationary period of one year, as a Technical Officer, Personnel Licensing and Training Practices Section, Flight Branch, Air Navigation Bureau. The appointment carried no expectancy of renewal upon expiry and was subject to the provisions of the ICAO Service Code. On 3 October 1979 the Secretary General sent him the following letter:

"I refer to recent discussions regarding the question of possible termination of your services by mutual agreement, and I am pleased to advise you that I am prepared to arrange for such termination on the following conditions:

"1. The effective date of termination shall be Monday, 14 January 1980, close of business. The effective date shall, should you so wish, be advanced to an earlier date, provided you give me, in writing, advance notice of at least 30 calendar days of your desire to do so.

"2. Your terminal entitlements (cash commutation of accrued annual leave, repatriation grant) shall be calculated as of the effective date of termination and shall be payable on that date. In accordance with the provisions of paragraph 14, Article V, Part III, of the Service Code, there shall be no entitlement to a repatriation grant if your termination takes place prior to 14 January 1980, i.e., prior to *completion* of one year of service.

"3. Subject to the provisions of GSI 1.5.1 and GSI 1.6.2, you shall be entitled to payment of travel and removal of furniture and effects from Montreal to Cornwells Heights, Pennsylvania.

"4. On the effective date of your termination you will receive (in addition to terminal payments due to you) a terminal indemnity equal to three months of your pensionable remuneration, less staff assessment as provided for in Paragraph 10.1, Article V, Part III, of the Service Code.

"5. On termination you will receive, if you so request, a certificate of service in accordance with paragraph 9, Article V, Part III, of the Service Code.

"If the above conditions are agreeable to you, will you please sign and return to me the attached copy of this letter to signify your acceptance of this mutual agreement to terminate your services."

On the same day the Chief of the Personnel Branch issued to the Applicant a certificate of service stating:

> "In response to your request I wish to advise you that between the date of commencement of your services with the Organization, 15 January 1979, and the date of issue of this letter, our records show no adverse report."

On 5 October 1979 the Applicant accepted the agreement to terminate his services. On 21 December 1979, in a memorandum addressed to the Chief of the Personnel Branch, the Applicant requested a certificate dated 14 January 1980 attesting to the nature of his duties, length of service, quality of work, and conduct; he suggested the following wording:

> "Mr. Bartel has served as Technical Officer, P-4, in the ICAO Personnel Licensing and Training Practices Section from 15 January 1979 thru 14 January 1980, thus satisfactorily completing one year of service. Our records show no adverse report on quality of work (services) or conduct."

By a letter dated 14 January 1980 the Applicant requested the Secretary General to conduct an investigation of the circumstances and conditions relating to the agreement for termination of his services. On 4 February 1980 the Secretary General sent to the Applicant a certificate of service the text of which was identical to that of the first certificate, but dated 14 January 1980, noting in a covering letter that this text had been mutually agreed before the Applicant had signed the letter terminating his ICAO service; with regard to the Applicant's letter of 14 January 1980, the Secretary General merely stated:

> " . . . your services with ICAO were terminated by mutual agreement under the terms set forth in my letter to you dated 3 October 1979, which you freely accepted by signing and returning a copy of my letter on 5 October 1979."

On 11 February 1980 the Applicant lodged with the Advisory Joint Appeals Board an appeal against the termination of his services. On 24 February 1980 the Applicant requested the Secretary General to review the text of the certificate. On 10 March 1980 the Chief of the Personnel Branch replied that if the Applicant had found the text unsatisfactory, the time to have raised the matter was in October 1979; he added:

> "Nevertheless, I am enclosing another certificate. This certificate contains the mutually agreed text that 'our records show no adverse report'. This is a complete and comprehensive statement, and should not disturb you in any way. To this mutually agreed text, I have added the first part of the text suggested in your letter of 21 December, namely, 'Mr. Bartel has served as Technical Officer, P-4, in the ICAO Personnel Licensing and Training Practices Section from 15 January 1979 through 14 January 1980.'
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> "Since both parts of the text of the attached certificate were either agreed to or drafted by you, I am confident that this certificate will meet your needs, and that this matter is now closed."

On 19 March 1980 the Applicant lodged with the Advisory Joint Appeals Board an appeal against the decision taken with respect to his request for the issuance of a certificate of satisfactory services and conduct during his employment with ICAO. The Advisory Joint Appeals Board gave its Opinion (No. 64) on 20 October 1980. The Board's findings and recommendation read as follows:

"*Findings*

"The Board was unable to find any evidence of decisions or actions which were contrary to the Service Code or General Secretariat Instructions of the Organization, or which constituted non-observance of established administrative practices or policy in such a way as to adversely affect the Appellant. The Board is satisfied that the decisions and actions taken were not motivated by any bias or prejudice, but were based on objective assessments of the Appellant's performance and conduct during the period of his employment. In the judgement of the Board, the Appellant has been treated generously by the Secretary General, who had the option to terminate the Appellant's employment under the provisions governing probation (Service Code, Part III, Article IV, paragraph 5). The Board notes that the Appellant participated of his own free will and accord in negotiations which led to the development of the terms and conditions of termination by mutual agreement, offered to him by the Secretary General. The Board finds that by agreeing to those terms and conditions the Appellant waived any entitlement or claim other than those specifically mentioned in the letter of mutual agreement. The Board is satisfied that the Appellant did so in full cognizance of the facts and consequences, and was not subjected to any kind of duress or compulsion. The Board notes that in the case of both termination by mutual agreement and termination during probationary period, a procedure of investigation is not required.

"The Board does not agree that the procedure called for in GSI 1.4.2 is the only course of action permissible in the event of termination of a staff member's services during the probationary period, and finds the course of action taken in the Appellant's case correct.

"The Board notes that the certificate of service was part of the mutual agreement arrived at between the parties although the letter of agreement did not specify the text of such a certificate but referred to paragraph 9, Article V, Part III, of the Service Code only. The Board observes that under this paragraph the Organization is not obligated to issue a certificate favorable to a staff member leaving its service. In addition, the Board accepts the evidence it received that the text of the certificate issued had previously been agreed by the Appellant as satisfactory to him; it included the statement 'Our records during that period show no adverse reports' and those words had indeed been one of the Appellant's conditions for his acceptance of the mutual agreement. The evidence adduced before the Board showed that although this statement was not strictly in accordance with the facts, the Organization found it possible and acceptable to issue such a statement in its desire to achieve a mutual separation agreement. The Board considers that any statement or suggestion in a certificate of service that the Appellant's services had been satisfactory would have been then, and would now be, improper and therefore unacceptable to the Organization.

"25. *Recommendation*

"The Board recommends unanimously that the appeals dated 11 February 1980 and 19 March 1980 be rejected as unfounded in fact and in law.

"With reference to paragraph 3 of Article 7 of the Statute of the United Nations Administrative Tribunal, the Board rules unanimously that both appeals are frivolous."

On 28 October 1980 the Secretary General agreed with the unanimous recommendation of the Board and noted the unanimous ruling of the Board that both appeals were frivolous. On 22 January 1981 the Applicant filed the application referred to earlier.

The Tribunal, having deliberated from 27 April to 8 May 1981, now pronounces the following judgement:

I. The Tribunal was obliged to examine for the first time the interpretation of article 7.3 of its Statute in respect of an appeal which the joint appeals body had unanimously declared frivolous in its entirety. Neither the Statute nor the Rules of the Tribunal prescribe the procedure to be followed in this respect, but the Tribunal takes note of article 27 of the Rules which enables it to deal by its own decision with matters not expressly provided for in the Rules. Prior to its consideration of the case, the Tribunal, in a memorandum of 13 April 1981, requested the Respondent to send the Applicant's personnel file, also the file of the Advisory Joint Appeals Board, and asked the Applicant whether he would consent, under article 10.2 of the Rules, to the Tribunal's not communicating these files to him. The Applicant has acknowledged receipt of the memorandum but has not replied. The Tribunal, having later found nothing in the files which is relevant to its decision on the present application and taking into account the provisions of article 27 of the Rules, considers that no useful purpose would be served in the present case by communicating the files to the Applicant.

II. The Advisory Joint Appeals Board's Opinion No. 64 states in paragraph 25 that:

> ". . . the Board rules unanimously that both *appeals* are frivolous." [Emphasis added.]

Article 7.3 of the Tribunal's Statute reads:

> "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." [Emphasis added.]
>
> ("Dans le cas et dans la mesure où les recommendations faites par l'organisme paritaire et acceptées par le Secrétaire général ne font pas droit à la *demande* du requérant, la *requête* est recevable, sauf si l'organisme paritaire estime à l'unanimité qu'*elle* est futile." [Emphasis added.]

In the English text, the pronoun "it" can refer only to the "application". In the French text it is possible to argue that "elle" refers to "demande", though this is not clear. In any event, the Tribunal has consistently proceeded on the basis that for the purposes of article 7.3 of its Statute "application" and "appeal" are synonymous (Judgements No. 62, paragraph I; No. 122, paragraph I; and No. 159, paragraph III). Indeed, this is the only interpretation which gives the paragraph a workable meaning since the joint body can only consider the "appeal" before it.

III. The Tribunal takes the view that even where the joint body unanimously concluded that an appeal was frivolous, the Tribunal is not precluded from considering whether the joint body's conclusion was vitiated by some irregularity.

IV. In his application to the Tribunal, the Applicant alleged that the Advisory Joint Appeals Board considered a confidential staff report which had never been communicated to him. He has alleged in his additional written statement of 21 April 1981 that the proceedings before the Board were irrevocably tainted and biased by libellous and untrue statements made by the Respondent's representative and ruled out of order by the Chairman, and that the Board was improperly composed because of the membership of Mr.

Marrett, who is said to have had a case pending before the Board. The Tribunal's view is that it is entitled and indeed required to consider these allegations and whether, if substantiated, they vitiate the Board's report.

V. In the Tribunal's opinion, the allegation concerning a confidential staff report is not material to the conclusions reached by the Board and cannot invalidate those conclusions, including the decision that the appeals are frivolous. Such conclusions of the Board do not rest upon anything in the confidential staff report but upon the finding that, in full cognizance of the facts and consequences and without duress or compulsion, the Applicant entered into an agreement with the Secretary-General by which he waived any entitlement or claim other than those specifically mentioned in the letter of agreement.

VI. The Tribunal has also considered the two additional allegations made in the Applicant's written statement of 21 April 1981 and does not think that they invalidate the conclusions of the board. The allegedly libellous and untrue statements by the representative of the Respondent were ruled out of order by the Chairman and were not taken into consideration by the Board. The Tribunal finds no evidence that these statements tainted or biased further proceedings. The fact that Mr. Marrett may have had a case pending before the Board would not disqualify him from sitting as a member of the Board to hear the Applicant's appeals.

VII. Accordingly, the application is not receivable by the Tribunal.

(Signatures)

Francisco A. FORTEZA
Vice-President, presiding

Arnold KEAN
Member

Samar SEN
Member

Jean HARDY
Executive Secretary

Geneva, 8 May 1981

Judgement No. 270

(Original: French)

Case No. 238:
Sforza-Chrzanowski

Against: **The Secretary-General of the United Nations**

Request for revision of Judgement No. 250.

Request for oral proceedings.—Rejected.—Request for revision.—Article 12 of the Statute of the Tribunal.—Letter from the Vice Minister of the Ministry of Foreign Affairs of the Republic of Korea.—Question whether that letter constitutes a newly discovered fact within the meaning of article 12 of the Statute.—Conclusion of the Tribunal that the letter does not constitute a newly discovered fact within the meaning of that article.—Application rejected.
