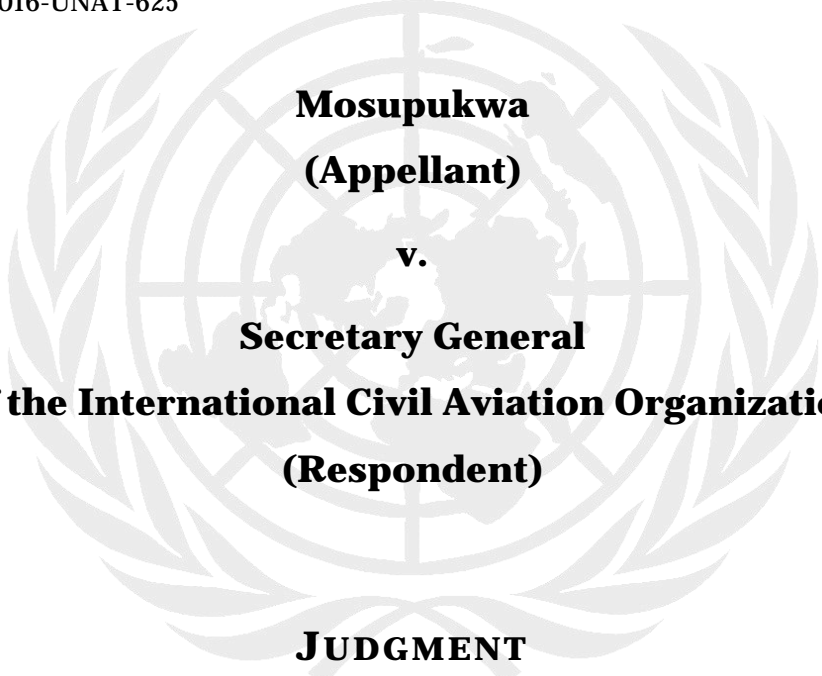




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-625



**Mosupukwa
(Appellant)**
v.
**Secretary General
of the International Civil Aviation Organization
(Respondent)**

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Rosalyn Chapman
Judge Mary Faherty

Case No.: 2015-730

Date: 24 March 2016

Registrar: Weicheng Lin

Counsel for Mr. Mosupukwa: Self-represented

Counsel for Secretary General of ICAO: Christopher M. Petras

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Kemoitse Jonathan Mosupukwa against the decision taken by the Secretary General of the International Civil Aviation Organization (ICAO) on 11 March 2014 to extend his appointment for a period of six months through 30 September 2014.

Facts and Procedure

2. Mr. Mosupukwa joined ICAO in April 2006 as a Project Coordinator at the D-1 level based in Nairobi, Kenya, on a fixed-term appointment.

3. In the early hours of 20 January 2014, Mr. Mosupukwa was attacked in his Nairobi residence by unknown assailants and sustained gunshot injuries. He was admitted to the Aga Khan University Hospital in Nairobi and stayed there for approximately three weeks.

4. At the time of the incident, Mr. Mosupukwa's fixed-term appointment had expired on 31 December 2013, but he continued to work for ICAO. In a letter dated 28 January 2014, the Secretary General of ICAO offered to extend his appointment retroactively for three months from 1 January 2014 through 1 April 2014. Mr. Mosupukwa accepted the offer on 12 February 2014.

5. In an e-mail dated 25 February 2014, the Chief of the Field Personnel Section, Technical Co-operation Bureau, ICAO, advised Mr. Mosupukwa that the ICAO Administration had commenced the separation formalities in advance of the expiration of his contract on 1 April 2014.

6. In an e-mail dated 3 March 2014 addressed to the Secretary General of ICAO, Mr. Mosupukwa requested the latter's intervention so as to put the separation formalities on hold, as he believed that the related separation actions were based on "malicious intent and not on [his] performance or project requirements".

7. By letter dated 11 March 2014, the Secretary General of ICAO offered Mr. Mosupukwa an extension of his appointment for a period of six months from 2 April 2014 through 30 September 2014, "on humanitarian grounds and on [an] exceptional basis". The Secretary General advised Mr. Mosupukwa that "[t]his extension of contract does not

contemplate any further possibility of extension, appeal, or request for suspension of action upon its expiration on 30 September 2014”.

8. In an e-mail dated 19 March 2014 addressed to the Secretary General of ICAO, Mr. Mosupukwa requested an explanation and/or clarification as to the meaning of the wording “on humanitarian grounds and on [an] exceptional basis”. He maintained that the Secretary General’s reference to no possibility of appeal or suspension of action in respect of the decision to extend his appointment for six months “violate[d] certain fundamental rights” of his, including the right to appeal. According to Mr. Mosupukwa, he received no response.

9. In an e-mail dated 20 March 2014, Mr. Mosupukwa advised the Chief of Field Personnel Section that “after further consultation”, he had decided to accept the Secretary General’s offer of a six-month extension of his appointment. He attached a copy of the Secretary General’s 11 March 2014 letter under-signed by him.

10. The application form for leave and travel that Mr. Mosupukwa signed on 26 August 2014 indicates that he was absent from work on sick leave from 20 January 2014 to 15 April 2014, and that, from 16 April 2014 to 14 June 2014, he worked on a half-day basis. According to the Respondent, Mr. Mosupukwa was discharged from the hospital in February 2014 and returned to work toward the end of August 2014. He worked the entire month of September 2014, during which he carried out numerous administrative and legal responsibilities.

11. On 26 June 2015, Mr. Mosupukwa filed an application with the United Nations Dispute Tribunal (UNDT) to “document the maltreatment [he] suffered at the hands of ICAO’s Technical Cooperation Bureau during his service and particularly from [the] beginning of January 2014 and the trauma of the events from thereon and to seek relief”. Upon learning that the UNDT had no jurisdiction over cases arising from ICAO, Mr. Mosupukwa filed the same application with the Appeals Tribunal.

12. In an e-mail dated 29 July 2015, the Registry of the Appeals Tribunal informed Mr. Mosupukwa, and the Representative of the Secretary General of ICAO, that the Registry was not in a position to accept his appeal because “it does not challenge a decision

taken by the Secretary General [of ICAO] based on findings and recommendations of an Advisory Appeals Board”.

13. In an e-mail dated 12 August 2015 addressed to the Registry only, Mr. Mosupukwa requested that the Registry reconsider its position in respect of his appeal. He maintained that his appeal was “properly filed with the Appeals Tribunal and [was] in conformity with the ICAO [Field Service Staff Rules (FSSR)] that govern [his] employment”.

14. On 14 October 2015, the President of the Appeals Tribunal instructed the Registry to transmit Mr. Mosupukwa’s appeal as is to the Respondent for an answer. The Secretary General of ICAO filed an answer on 11 December 2015, in which he challenged the receivability of Mr. Mosupukwa’s appeal.

15. In an e-mail dated 16 December 2015 to the Registry, Mr. Mosupukwa acknowledged receipt of the Respondent’s answer and queried whether he could comment on the answer. The Registry responded on the same day, advising Mr. Mosupukwa that he should file a motion for leave to file additional submissions if he wished to do so.

16. By e-mail dated 6 January 2016 to the Registry, Mr. Mosupukwa attached his “observations and comments on the Respondent’s answer”. In an e-mail also dated 6 January 2016, the Registry instructed Mr. Mosupukwa to file a motion for leave to file additional submissions in the eFiling portal, which would be forwarded to the Respondent for comments.

17. In an e-mail dated 6 January 2016, Mr. Mosupukwa advised the Registry to disregard his comments, since “the process of submitting [his] comments to the Respondent may delay the resolution of the matter, more so that [sic] the Respondent has requested the [Appeals] Tribunal to make a final decision on the matter based on his answer”.

Submissions

Mr. Mosupukwa’s Appeal

18. In his appeal, Mr. Mosupukwa alleges mistreatment culminating in his separation from service with ICAO while recovering from gunshot injuries, irregularities in the completion of his performance reports and the failure of the ICAO Administration to

respond to his requests for administrative review. He also makes a number of claims for compensation. However, these allegations and claims for compensation will not be summarized here, as the main issue in the present case is whether Mr. Mosupukwa's appeal is receivable, as raised by the Respondent.

19. The following is a summary of Mr. Mosupukwa's arguments regarding the receivability of his appeal that he made on 12 August 2015 in response to the Registry's initial refusal to accept his appeal.

20. Mr. Mosupukwa maintains that his appeal was "properly filed with the Appeals Tribunal and [was] in conformity with the ICAO FSSR Rules that govern [his] employment". He explains that his contract "was governed by ICAO Field Service Staff Rules (FSSR) not ICAO Staff Rules".

21. According to Mr. Mosupukwa, Part VIII of ICAO's FSSR Rules "does not require [him] to refer the matter to the Advisory Joint Appeals Board. Rule 8.2 makes it an obligation on the Secretary General [of ICAO] on receipt of an appeal, to set [up] an ad-hoc administrative machinery to advi[s]e him and ... if [the Secretary General of ICAO] had not done so, it should [not] be used against [Mr. Mosupukwa]. Rule 8.3 gives [Mr. Mosupukwa] a privilege to appeal the decision of the Secretary General [of ICAO] to the UN Administrative Tribunal whose functions have been taken over by the UN Appeals Tribunal."

ICAO's Answer

22. Mr. Mosupukwa's plea for a decision on the merits is not properly before the Appeals Tribunal, as it lacks jurisdiction or competence to address the merits of the substantive claims made by Mr. Mosupukwa where the matters have not been adjudicated by the Advisory Joint Appeals Board (AJAB). The Respondent notes that as of 13 March 2014, when the offer by the Secretary General of ICAO to extend Mr. Mosupukwa's fixed-term appointment for six months through 30 September 2014 was transmitted to him, Mr. Mosupukwa had the option of appealing that decision to the AJAB within two weeks of receipt of the offer or accepting the offer. Mr. Mosupukwa chose the latter.

23. The present appeal is not receivable, as the AJAB never communicated an opinion on Mr. Mosupukwa's case to the Secretary General of ICAO. Nor has Mr. Mosupukwa entered into an agreement with the Secretary General of ICAO for a direct submission of his application to the Appeals Tribunal.

24. It cannot be reasonably argued that Mr. Mosupukwa's injuries and hospitalization constituted "exceptional circumstances" beyond his control or responsibility which occasioned his failure to file an appeal with the AJAB.

25. The present appeal must be rejected, as it cannot be remanded to the AJAB because the Appeals Tribunal may not waive the deadline by which Mr. Mosupukwa was required to submit his appeal to the AJAB.

26. Furthermore, the present appeal must be rejected as not receivable *ratione materiae*, because Mr. Mosupukwa's appointment was terminated by his own voluntary action, such that there is no appealable administrative decision, and thus no basis for relief. On 20 March 2014, Mr. Mosupukwa accepted the offer of a six-month extension of his appointment. Consequently, he cannot appeal the same.

27. The Respondent requests that this Tribunal enter a final judgment denying Mr. Mosupukwa's appeal in its entirety.

Considerations

28. Mr. Mosupukwa's appeal enumerates twelve grounds upon which he contests the administrative decision to separate him from service with ICAO at the end of his contract.

29. In his answer, the Secretary General of ICAO raises the issue of receivability, submitting that Mr. Mosupukwa's appeal is not receivable, as no appeal had been submitted to the AJAB, nor was there any agreement with the Secretary General of ICAO for a direct submission of his appeal to the Appeals Tribunal.

30. Mr. Mosupukwa maintains in his e-mail to the Registry of 12 August 2015 that his appeal was "properly filed with the Appeals Tribunal and [was] in conformity with the ICAO FSSR Rules that govern [his] employment". He argues that pursuant to such Rules, he is not required "to refer the matter to the Advisory Joint Appeals Board".

31. Effective 1 July 2009, the United Nations and ICAO entered into a written agreement providing the Appeals Tribunal with “competen[ce] to hear and pass judgement on an application filed by staff members of [ICAO]” “in accordance with Article 2, paragraph 10 of the Statute” of the Appeals Tribunal (Statute).¹

32. The conditions governing appeals to the Appeals Tribunal by ICAO staff members are specified in the Statute and the Agreement between the United Nations and ICAO signed on 23 December 2009 by the Secretary General of ICAO and on 6 January 2010 by the Secretary-General of the United Nations (Agreement).

33. Article 2(10) of the Statute provides:

The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. ... Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

34. Article 2(6) of the Agreement, effective 6 January 2010, provides:

An application shall not be receivable unless the person concerned has previously submitted the dispute to the neutral first instance process provided for in the Staff Regulations of [ICAO] and the latter has communicated its opinion to the Secretary General [of ICAO], except where the Secretary General [of ICAO] and the applicant have agreed to submit the application directly to the Appeals Tribunal.

35. The AJAB is established as the “neutral first instance process” by Article XI of the ICAO Service Code (ICAO’s Staff Regulations 11.1 through 11.5). Specifically, ICAO’s Staff Regulation 11.2 requires the Secretary General of ICAO to establish rules consistent with the Service Code, which include “provision for an Advisory Joint Appeals Board that

¹ *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376, para. 23.

will submit its findings and recommendations to the Secretary General for his decision".² The AJAB is thus established by these Regulations as a guarantor of the neutrality of a first-instance procedure in the framework of which it has to submit its conclusions and recommendations to the Secretary-General of ICAO so that he can take his decision on the complaint made by a staff member or former staff member disputing an administrative decision.³

36. The relationship between ICAO and the Appeals Tribunal has been explained by this Tribunal in *Ortiz*:⁴

[A]n appeal [is] referred to the Appeals Tribunal, not directly against the original administrative decision, but against the final decision taken by the Secretary-General upon completion of the first-instance procedure. It is this Tribunal's business to deliberate upon AJAB's conclusions and recommendations and the reasons ... There should normally be no need for any other evidence than that submitted to AJAB.

37. With respect to ICAO's field service staff members, the time limits for the procedural steps involved in submitting an appeal to the AJAB are prescribed in Annex VIII, issued pursuant to Part VIII of the ICAO Field Service Staff Rules, which provides in relevant part:⁵

3. (a) A staff member who wishes to appeal against ... any administrative decision which it is alleged constitutes non-observance of a contract of employment, or of the terms of the ICAO Field Service Staff Rules, or non-observance of established administrative practices in such a way as to adversely affect the individual; shall as a first step, address a letter to the Secretary General requesting that the decision be reviewed. Such a letter shall be sent within one month of the time the staff member received notification of the decision in writing.

(b) If the staff member wishes to make an appeal against the answer received from the Secretary General, he shall submit his appeal in writing to the Secretary of the [AJAB] within two weeks from the date of receipt of the answer. If no reply has been received from the Secretary General within two weeks of the date the letter was received by him, the staff member shall, within the two following weeks, submit his

² *Ibid.*, para. 25.

³ *Ortiz v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2012-UNAT-231, para. 32.

⁴ *Ibid.* para. 33; see also *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376.

⁵ ICAO Field Service Staff Rules (Sixth Edition – 1992).

appeal in writing to the Secretary of the [AJAB]. A copy of the letter of appeal shall be sent by the appellant to the Secretary General.

4. A staff member who fails to observe the time limits indicated in 3 (a) and (b) shall lose his right to appeal, unless the delay is waived under paragraph 5 hereof.

5. The appellant may request that in view of exceptional circumstances the delay in filing his appeal be waived. The [AJAB] shall examine such request as a preliminary issue and make its recommendations thereon to the Secretary General for his decision.

38. In his e-mail of 3 March 2014, Mr. Mosupukwa requested the Secretary General of ICAO to review his decision of 25 February 2014 so as to put the separation formalities on hold. By letter dated 11 March 2014, the Secretary General of ICAO offered Mr. Mosupukwa an extension of his appointment for a period of six months from 2 April 2014 through 30 September 2014, without the possibility of extension, appeal or request for suspension of action upon its expiration on 30 September 2014. Under ICAO's Field Service Staff Rules, Mr. Mosupukwa had two weeks from receipt of that letter to submit an appeal to the AJAB. He completely failed to do that, but instead accepted the Secretary General's offer to extend his appointment for a further six months.

39. Under the applicable law, submission of an appeal to the AJAB is a mandatory step in the first-instance procedure. This Tribunal has previously held that it does not have jurisdiction or competence to address the merits of the substantive claims of an appellant raised on appeal where the AJAB did not consider the merits of those claims as the "neutral first instance process".⁶

40. It is common ground that Mr. Mosupukwa did not at any stage refer the contested administrative decision to the AJAB. Therefore, the question of a waiver of the time limit for filing his appeal to the AJAB owing to exceptional circumstances does not arise. Further, the exception to the requirement of submitting the dispute to the AJAB contained in Article 2(6) of the Agreement does not apply to Mr. Mosupukwa's case, since there was no agreement to submit his application directly to the Appeals Tribunal.

⁶ *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376, para. 34.

41. Mr. Mosupukwa's argument that he is not obliged to refer his appeal to the AJAB has no merit. He relies on Rules 8.2 and 8.3 of Part VIII of ICAO's Field Service Staff Rules in support of this contention, but these provisions do not apply in the absence of a valid appeal.

42. By omitting to submit his appeal to the AJAB, Mr. Mosupukwa failed to comply with a mandatory step in the first instance procedure. Accordingly, this Tribunal does not have jurisdiction or competence to receive his appeal.⁷

43. The appeal fails.

Judgment

44. The appeal is dismissed in its entirety and the decision of the Secretary General of ICAO is affirmed.

⁷ See *Ibid.*

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Faherty

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar