



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

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Judgment No. 2018-UNAT-872



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

**JUDGMENT**

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Before:	Judge Martha Halfeld, Presiding Judge Richard Lussick Judge Deborah Thomas-Felix
Case No.:	2018-1164
Date:	26 October 2018
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-represented
Counsel for Respondent:	Christopher M. Petras

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against the decision of the Secretary General of the International Civil Aviation Organization (ICAO), dated 31 January 2018, to accept the Opinion of the Advisory Joint Appeals Board (AJAB or the Board) and reject Appeal No. 194. Mr. Tom Sylvester filed the appeal on 28 March 2018, and the Secretary General of ICAO filed her answer on 1 June 2018.

**Facts and Procedure**

2. At the time of the events that gave rise to Mr. Sylvester's appeal, he held the post of Chief Technical Advisor (Flight Operations)/Program Coordinator for the Cooperative Development of Operational Safety and Continuing Airworthiness Programme, South East Asia (COSCAP-SEA), at the ICAO Asia and Pacific (APAC) Office in Bangkok.

3. On 22 August 2016, Mr. Sylvester submitted a written complaint against Mr. Arun Mishra, Director of the ICAO APAC Office, alleging that a series of actions by Mr. Mishra undermined his capacity to perform his duties, subverted his performance assessment, undermined his contract renewal and damaged his professional reputation.

4. On 28 October 2016, the ICAO Secretary General advised Mr. Sylvester that, upon review of the Ethics Office's preliminary assessment report of his allegations, she had determined that "while there may have been procedural deficiencies in the execution of [Mr. Sylvester's] performance assessment, there [was] insufficient evidence to indicate that Mr. Mishra conducted the assessment in bad faith".

5. On 11 November 2016, Mr. Sylvester requested the ICAO Secretary General to review her decision of 28 October 2016 "not to refer [Mr. Sylvester's] complaint against Mr. Mishra for investigation". The ICAO Secretary General did not respond to Mr. Sylvester's 11 November 2016 request.

6. On 11 January 2017, Mr. Sylvester sent an e-mail to the Office of the ICAO Secretary General. The relevant portion of the e-mail reads:

As I have received no response to my letter of 11 November [2016] (...) requesting a review of this decision I must assume that you have decided not to respond or review. At this point I am

requesting a formal appeal of this decision. I would appreciate it if you could advise me if any other information is required from me to ensure that the appeal process is underway.

7. On 16 January 2017, Mr. Sylvester sent an e-mail to Mr. Arie Jakob, Secretary of the Board, wherein he wrote, *inter alia*: “I am writing to formally advise the AJAB of my intent to appeal the [ICAO] Secretary General’s decision of 28 October 2016 (copy attached). I made an initial request for a review of this decision on 11 November 2016 (copy attached), but no response was ever received.”

8. On 17 January 2017, Mr. Jakob responded and advised Mr. Sylvester as follows: “Once the Board is in receipt of said appeal, I will forward it to the Board for its consideration regarding admissibility etc.”

9. On 30 March 2017, Mr. Sylvester sent Mr. Jakob a follow-up e-mail, wherein he wrote, *inter alia*: “I would appreciate it if you could confirm that you received my appeal and attachments the other day.”

10. On 3 April 2017, Mr. Jakob confirmed that he had received Mr. Sylvester’s 16 January 2017 e-mail and asked whether there was anything beyond that e-mail. On 4 April 2017, Mr. Jakob sent Mr. Sylvester a follow-up e-mail in which he wrote: “Just to avoid any misunderstanding, your communication dated 16 January mentioned an intent to lodge an appeal; are you now representing that the letter dated 16 January 2017 constituted your letter of appeal?” Later that same day, Mr. Sylvester responded to Mr. Jakob, in part, as follows: “I sent you a package, letter and attachments in a zip file on March 26 [2017].”<sup>1</sup>

11. On 25 October 2017, Mr. Jakob notified Mr. Sylvester that on 16 October 2017, the AJAB had considered the matter of the receivability of his appeal *ratione temporis*. Mr. Jakob further informed Mr. Sylvester that paragraph 8 of Annex VIII to the ICAO Field Service Staff Rules (FSSR)<sup>2</sup> established an outer limit of 60 days from the date of submission of a request for Secretary General review for the staff member to submit an AJAB appeal, and since Mr. Sylvester had submitted a request for Secretary General review on 11 November 2016 and was thereby required to submit his appeal to the AJAB no later than 14 January 2017, his 27 February 2017 filing was untimely. Mr. Jakob also noted that consistent with

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<sup>1</sup> The letter of appeal included in Mr. Sylvester’s 26 March 2017 submission was dated 27 February 2017.

<sup>2</sup> It should be noted that ICAO FSSR is applicable to field service staff members employed by ICAO in connection with the execution of programmes and projects related to Technical Co-operation. The post Mr. Sylvester held at the time is covered by ICAO FSSR.

paragraphs 9 and 10 of Annex VIII to FSSR, a staff member who failed to observe the relevant time limits loses the right to appeal, unless the delay was waived, and advised Mr. Sylvester that he should provide the AJAB with relevant information as to why it was not possible for him to comply with the pertinent time limits, should he wish to request such a waiver.

12. On 31 December 2017, Mr. Sylvester submitted to the AJAB his request that the delay in the filing of his appeal be waived in view of exceptional circumstances.

13. On 10 January 2018, the AJAB issued its recommendation to the ICAO Secretary General with respect to Mr. Sylvester's request for a waiver of time limit, made pursuant to paragraph 10 of Annex VIII to FSSR, wherein the AJAB noted the following:

- The Appeals Tribunal and the former Administrative Tribunal held that “exceptional circumstances” justifying a waiver are those “beyond his or her control that prevented the applicant from exercising the right of appeal in a timely manner” and that “place him in a practical situation such that he is completely incapable of respecting the time limits imposed on him”.
- The medical certificates and reports supplied by Mr. Sylvester to support his claim of “exceptional circumstances” either pre-dated the impugned administrative decision or were dated after the deadline for submission of his appeal had already passed, and were therefore not relevant to Mr. Sylvester's ability to submit a timely AJAB appeal within the 60-day period.
- Evening assuming *arguendo* that the medical certificates and reports were relevant to the 60-day window established by the FSSR, Mr. Sylvester was able to successfully fulfil other like responsibilities—such as submitting his 10-page complaint against Mr. Mishra to the Ethics Officer on 13 June 2016; submitting his request for review to the ICAO Secretary General on 11 November 2016; and writing to the ICAO Secretary General about the status of his request for review on 11 January 2017—despite these same medical issues, which showed that he was not “completely incapable” of respecting the time limits.

- Mr. Sylvester’s claim that he “lacked knowledge” of the time limit for submitting his AJAB appeal was contradicted by the record, which shows that he was furnished with a copy of the FSSR and all Annexes thereto at the time ICAO confirmed the offer of the one-year appointment as Chief Technical Adviser, following Mr. Sylvester’s acceptance of the conditional offer of employment. Therefore, it is presumed that he should have known of the time limits, and thus cannot claim lack of knowledge of the rules as an excuse for the delay in filing his appeal.

14. Based on the foregoing, the AJAB determined that the explanations and documentation Mr. Sylvester submitted in support of his request for a waiver of time limit did not constitute evidence of “exceptional circumstances” justifying a waiver. Consequently, the AJAB unanimously concluded that Mr. Sylvester’s waiver request could not be supported.

15. On 31 January 2018, the ICAO Secretary General issued her decision, whereby she concurred in the AJAB’s unanimous conclusion that Mr. Sylvester’s request for a waiver of the time limits for submitting his AJAB appeal based on “exceptional circumstances” could not be supported, and therefore rejected his appeal in its entirety on the grounds that it was time-barred and thus not receivable.

### **Submissions**

#### **Mr. Sylvester’s Appeal**

16. Mr. Sylvester submits that the AJAB erred in its application of the relevant procedure and on questions of fact, resulting in a manifestly unreasonable decision. These errors led the ICAO Secretary General to take a decision that was not in line with the evidence presented.

17. The error in procedure consists of a highly prejudicial interpretation of the term “exceptional circumstances”. The test for “exceptional circumstances” is whether the circumstances would have affected the individual’s ability to complete the task and whether those circumstances were beyond the individual’s control. Mr. Sylvester contends that he suffered from very serious long-term illnesses which affected his cognitive abilities and interfered with his ability to concentrate. The evidence presented to the AJAB clearly showed that Mr. Sylvester’s ability to complete the required tasks was seriously affected and that he was incapable of completing them in a timely or competent manner.

18. Mr. Sylvester further submits that the AJAB acted without due consideration for his appeal by excluding all of the medical reports that were not issued during the period between 11 November 2016 and 14 January 2017, i.e. the 60-day window. Whereas the AJAB found the medical certificates and reports supplied by Mr. Sylvester not relevant to his ability to submit a timely AJAB appeal within the 60-day period because they either pre-dated the impugned administrative decision or were dated after the deadline for submission of his appeal had already passed, the AJAB relied on the fact that Mr. Sylvester was able to submit a 10-page letter of complaint to the Ethics Officer on 13 June 2016 (which also pre-dated the impugned administrative decision) to reach the conclusion that it amounted to evidence that he was not completely incapable of respecting the 60-day deadline to file an AJAB appeal. The AJAB appears to have been only interested in information, factual or not, that would allow it to recommend to the ICAO Secretary General that Mr. Sylvester's appeal should be rejected.

19. Moreover, the AJAB's recommendation is incomplete since there were no comments or consideration regarding the other reasons and circumstances (including major depression, severe infection, and the stress created by a hostile working relationship with the APAC Office) that were identified in Mr. Sylvester's request for a waiver.

20. Mr. Sylvester requests that the Appeals Tribunal reverse the ICAO Secretary General's 31 January 2018 decision to reject his appeal on the grounds that it was time-barred and order the AJAB to hear his original appeal against the decision not to investigate his complaint against Mr. Mishra.

### **The ICAO Secretary General's Answer**

21. The ICAO Secretary General submits that Article 7(3) of the Appeals Tribunal Statute (Statute) prohibits the Tribunal from waiving the deadlines for administrative review; thus Mr. Sylvester's appeal must be denied.

22. The Appeals Tribunal has deemed the administrative review by ICAO to be the equivalent of management evaluation under Article 7(3) of the Statute, and has held that Article 7(3) must be interpreted in the same manner as Article 8(3) of the UNDT Statute. Moreover, the Appeals Tribunal has consistently opined that Article 8(3) of the UNDT Statute must be read literally to prohibit the UNDT from waiving the deadlines

for seeking management evaluation and that the UNDT has no jurisdiction or competence to waive such deadlines.

23. While the AJAB found that Mr. Sylvester's request to the ICAO Secretary General to review her 28 October 2016 decision not to refer his complaint against Mr. Mishra for investigation was timely submitted on 11 November 2016, it found that Mr. Sylvester's 27 February 2017 appeal was untimely since he was required to submit his appeal to the AJAB by no later than 14 January 2017.

24. After considering the explanations and documentation furnished by Mr. Sylvester in response to the AJAB's request for information as to why it was not possible for him to comply with the pertinent time limits, the AJAB unanimously determined that Mr. Sylvester had failed to provide evidence of "exceptional circumstances" justifying a waiver. Consequently, the ICAO Secretary General's decision accepting the recommendation of the AJAB not to waive the time limit to submit an appeal was a proper exercise of her discretionary power.

25. The ICAO Secretary General further submits that the Appeals Tribunal has held that staff members are presumed to know the regulations and rules applicable to them. Consequently, the AJAB's rejection of Mr. Sylvester's claim that he "lacked knowledge" of the time limit for submitting his AJAB appeal was in accordance with well-established jurisprudence of the Appeals Tribunal.

26. The ICAO Secretary General requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the decision of the ICAO Secretary General in this case.

### **Considerations**

#### *Preliminary issue – jurisdiction and competence of the Appeals Tribunal*

27. Article 2(10) of the Appeals Tribunal Statute establishes the Tribunal's jurisdiction to sit in this case, and provides, in part, that "[t]he 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".

28. Article 2(1) of the Agreement concluded between the United Nations and ICAO on 6 January 2010 further prescribes that “[t]he Appeals Tribunal shall be competent to hear and pass judgement on an application filed by staff members of the Organization: (a) [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

29. In the present case, the aforementioned requirements for the Appeals Tribunal’s jurisdiction are fulfilled. Mr. Sylvester, an ICAO staff member, filed an appeal against the ICAO Secretary General’s 31 January 2018 administrative decision, whereby she accepted the AJAB’s unanimous recommendation that Mr. Sylvester’s request for a waiver of the time limits for submitting his AJAB appeal based on “exceptional circumstances” be denied.

*Main issue: receivability of the appeal to the AJAB*

30. The AJAB held that Mr. Sylvester’s appeal was time-barred and there were no exceptional circumstances to justify a waiver of the time limits. We will now examine the correctness of this ruling.

31. Annex VIII (Right of Review and Appeals) to the ICAO FSSR stipulates that:<sup>3</sup>

7. ... A staff member who wishes to appeal the decision referred to in Regulation 11.1 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 30 calendar days of the time the staff member received notification of the decision in writing.

8. A staff member who wishes to appeal against the answer received from the Secretary General, shall submit his appeal in writing to the Secretary of the Board within 30 calendar days from the date of receipt of the answer; *if no reply has been received from the Secretary General within 30 calendar days of the date the letter was received by him, the appeal shall be submitted within the following 30 calendar days.* A copy of the letter of appeal shall be sent by the staff member to the Secretary General.

9. A staff member who fails to observe the time limits indicated in [7 and 8] shall lose the right to appeal, unless the delay is waived under [10] below.

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<sup>3</sup> ICAO Field Service Staff Rules (7<sup>th</sup> ed., 2014) (emphasis added).



10. The staff member may request that in view of exceptional circumstances, the delay in filing the appeal be waived. The Board shall examine such request as a preliminary issue and make its recommendations thereon to the Secretary General for his decision.

32. The applicable law thus requires, as a first step, that the staff member concerned request review of the contested administrative decision within 30 calendar days from the date he received that decision. Mr. Sylvester fully complied with the above requirement, as evidenced by his 11 November 2016 request for review of the original administrative decision dated 28 October 2016 concerning the non-referral of his complaint for investigation.

33. As in the case at hand, if no answer is received within 30 calendar days of the receipt of the letter requesting review of the contested decision, the appeal shall be submitted within the following 30 calendar days. It is not disputed that the 60-day window for filing an appeal was from *11 November 2016 to 14 January 2017*, and that Mr. Sylvester's appeal, not submitted until March 2017 (or on 27 February 2017),<sup>4</sup> was far beyond the prescribed time frame. Nor is it challenged that Mr. Sylvester's alleged lack of knowledge is no excuse for that delay.<sup>5</sup>

34. Although not dispositive to the outcome of this case, we also take note of the fact that after having received the 25 October 2017 communication, whereby Mr. Sylvester was notified that his appeal to the AJAB had been considered untimely under paragraphs 9 and 10 of Annex VIII to the ICAO FSSR and was advised to submit relevant information as to why it was not possible for him to comply with the time limit, he did not request, until more than two months later on 31 December 2017, that the delay be waived in view of exceptional circumstances.

35. As noted, the issue for consideration and determination in the present appeal is whether the AJAB erred in law when it found that there were no exceptional circumstances to justify the waiver of the delay in filing an appeal before it. We find that the AJAB was correct in law and in fact in deciding that Mr. Sylvester had failed to establish any exceptional circumstances justifying a waiver of the time limit under paragraph 10 of Annex VIII to the ICAO FSSR. This decision was supported by the evidence and Mr. Sylvester has failed to show any reversible error on the part of the AJAB.

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<sup>4</sup> AJAB's report in respect of Appeal No. 194, paras. 13-14.

<sup>5</sup> *Ibid.*, para. 29.

36. In light of our jurisprudence, Mr. Sylvester bore the burden to prove any circumstances beyond his control that would have the effect of preventing him from acting within the statutory time limits.<sup>6</sup> This construction must be rigorously interpreted, as strict adherence to time limits is one of the cornerstones of the internal justice system.<sup>7</sup> In other words, there will be exceptional circumstances when there is an absolute impossibility for the filing party to file within the statutory time limits.

37. The only evidence Mr. Sylvester submitted in support of his claim were the medical reports. However, they were issued either before the impugned administrative decision had been issued or after the deadline for the submission of the appeal had passed and, more importantly, did not refer to any incapacity during the relevant time frame mentioned above. Therefore, the AJAB was correct in finding that they were not pertinent to Mr. Sylvester's inability to respect the time limits.

38. As the AJAB had found, it is true that the fact that Mr. Sylvester was able to submit a 10-page letter of complaint to the Ethics Officer on 13 June 2016 did not prove that he was capable of respecting the deadline to file an appeal to the AJAB within the 60-day time limit, i.e. 11 November 2016 to 14 January 2017. Firstly, that complaint largely pre-dated the impugned administrative decision of 28 October 2016; and secondly, an assessment of one's capacity to observe the time limit has to be limited to the pertinent time frame. Nevertheless, we also note that this argument was subsidiary to the AJAB's main reasoning and it was only put forward, assuming *arguendo* that the medical reports were relevant to the 60-day window, to refute Mr. Sylvester's justification of inability to comply with the required deadline.<sup>8</sup>

39. Mr. Sylvester put forward a number of other explanations for the delay. However, they are not supported by any evidence of exceptional circumstances to justify a waiver of the time limits.

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<sup>6</sup> *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693, para. 18, citing *Bofill v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-478, para. 19, in turn citing *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-029, para. 14.

<sup>7</sup> *Ali v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-773, para. 13, citing *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693, para. 18.

<sup>8</sup> AJAB's report in respect of Appeal No. 194, paragraph 27.

40. We are satisfied that the AJAB considered all evidence relevant to the issues before it. The appeal, consequently, fails.

**Judgment**

41. The appeal is dismissed and the decision of the ICAO Secretary General dated 31 January 2018 is hereby affirmed.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of October 2018 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Thomas-Felix

Entered in the Register on this 20<sup>th</sup> day of December 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar