



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

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Judgment No. 2024-UNAT-1436

**James Wan**  
**(Respondent/Appellant on Cross-Appeal)**  
**v.**  
**Secretary General**  
**of the International Civil Aviation Organization**  
**(Appellant/Respondent on Cross-Appeal)**

**JUDGMENT**

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Before: Judge Katharine Mary Savage, Presiding  
Judge Leslie F. Forbang  
Judge Abdelmohsen Sheha

Case No.: 2023-1795

Date of Decision: 22 March 2024

Date of Publication: 7 May 2024

Registrar: Juliet E. Johnson

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Counsel for Mr. Wan: George G. Irving

Counsel for Secretary General: Christopher M. Petras

**JUDGE KATHARINE MARY SAVAGE, PRESIDING.**

1. Before the Appeals Board of the International Civil Aviation Organization (ICAO and Appeals Board, respectively), Mr. James Wan, a former D-1 level Deputy Director, Administration and Services Bureau of ICAO, appealed the decision to impose on him the disciplinary sanction of summary dismissal for serious misconduct (impugned decision). By Decision No. ICAO/2022/007, the Appeals Board affirmed the summary dismissal but nevertheless found that the decision by the President of the ICAO Council (the President) to approve Mr. Wan's summary dismissal was based upon five distinct findings, one of which was "patently incorrect", with the result that the decision of the President was found to be a nullity. The Appeals Board ordered that Mr. Wan be paid his salary and benefits from the date of their cessation until the approval by the President of the Council, if any, is properly obtained, provided that such payment shall not exceed the payment of salary and benefits for a period greater than two years.
2. The ICAO Secretary General appeals against this decision and Mr. Wan cross-appeals.
3. For the reasons that follow, we grant the appeal and dismiss the cross-appeal.

**Facts and Procedure<sup>1</sup>**

4. Mr. Wan joined ICAO in 2009. At the time of the impugned decision, Mr. Wan held the D-1 post of Deputy Director, Administration and Services Bureau of ICAO.
5. Two investigations were conducted by the United Nations Office of Internal Oversight Services (OIOS) into misconduct allegations involving Mr. Wan. Upon completion of the investigations, OIOS made the following findings:<sup>2</sup>
  - During the 2017 recruitment process of the P-5 Chief, Business Technology and Services Section (C/BTS), Mr. Wan did not disclose that one of the short-listed candidates Dr. [S] was his PhD thesis supervisor and had served on his PhD Examining Committee.
  - In the conclusion of a series of consultancy contracts who were on his PhD Examining Committee, the Applicant failed to disclose a conflict of interest situation in respect of contracts with Dr.[S] and Dr. [J], with contract values of CAD 562,500.00 and CAD 58,500.00, respectively.

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<sup>1</sup> Unless noted otherwise, the following uncontested facts are taken from the Appeals Board Decision No. ICAO/2022/007, as relevant.

<sup>2</sup> Appeals Board Decision No. ICAO/2022/007, paras. 4 to 8.

- Mr. Wan issued unauthorized visa letters to three foreign nationals who purportedly were to come to Canada to work for approximately four weeks at ICAO on projects under [a Memorandum of Understanding] between ICAO and their home state.
- Mr. Wan failed to disclose a conflict of interest situation arising from the fact that the consultancy contracts of Dr. [S] and Dr. [J] included tasks related to the ICAO Scientific Review Journal Project, for which a business case review was submitted to the Business Development Group (BDG) on 1 April 2019, when Mr. Wan was a BDG member.

Following the receipt of the investigative reports emanating from these investigations, on 16 November 2021, the ICAO Secretary General wrote to President, as required by ICAO Staff Regulation 9.9, requesting approval to terminate the appointment of Mr. Wan, on the basis of a finding of clear and convincing evidence of serious misconduct regarding allegations of misconduct. The Memorandum erroneously included one additional finding which had not been established by OIOS, i.e., that Mr. Wan had obstructed in various ways an investigation into a 2017 cybersecurity incident at ICAO and had prevented the ICAO Treasury Officer from informing the Royal Bank of Canada about the incident.

6. That same day, the President approved the termination of Mr. Wan's appointment. The ICAO Secretary General then notified Mr. Wan by letter of his provisional decision to summarily dismiss him for serious misconduct as disclosed in the investigative reports. Mr. Wan was offered an opportunity to respond. He provided his response on 29 November 2021. On 8 December 2021, the Secretary General advised Mr. Wan that the decision to impose the disciplinary sanction of summary dismissal against him was confirmed and would take effect immediately.

7. On 22 December 2021, Mr. Wan filed a request for administrative review of the impugned decision. On 18 February 2022, he received a negative response to his request.

8. On 21 March 2022, Mr. Wan filed his appeal to the Appeals Board in respect of the impugned decision.

9. On 23 June 2022, the Appeals Board held a case management hearing, and on 15 September 2022, the Appeals Board held a hearing of the case.

*Decision of Appeals Board*

10. On 21 December 2022, the Appeals Board issued its decision on Mr. Wan's appeal of his summary dismissal. It noted that the undisputed evidence before the Appeals Board was that in May 2017, Mr. Wan's PhD thesis supervisor, Dr. S, applied for the position of C/BTS, having been provided with a copy of the job opening by Mr. Wan before the job opening was made public. Mr. Wan did not disclose that Dr. S, who was one of the shortlisted candidates, had been his PhD thesis supervisor and had served on his PhD Examining Committee. The Appeals Board found that it was apparent that Mr. Wan had identified the existence of a conflict-of-interest situation in that he had arranged for another staff member to be involved in the recruitment process. However, when that person became unavailable, Mr. Wan took an active part in the process, apparently as a matter of "necessity" but did not disclose his conflict of interest concerning Dr. S to the selection panel. The Appeals Board found that necessity is not and cannot be considered a justification to act in a conflict of interest in respect of the selection process for the appointment to a post. It rejected Mr. Wan's argument that given that his relationship with Dr. S had been known, including by the ICAO Secretary General, he was not obliged to remove himself from the recruitment process. It held that he was obliged to recuse himself, to notify the Ethics Officer (EO) and inform the members of the interview panel of his relationship with Dr. S. The Appeals Board found that the established facts clearly amounted to misconduct.<sup>3</sup>

11. A second count of misconduct was found by the Appeals Board to exist in that in 2019, Mr. Wan was involved in the review of the business case for a journal entitled the ICAO Scientific Review but failed to disclose being a member of the BDG which had oversight of revenue generating operations of ICAO, or his association with either Dr. S or Dr. J who worked on the project. Also not disclosed by Mr. Wan was that both Dr. S and Dr. J were on the board of directors of the Informing Science Institute, which hosted the website of the journal from 2017. Given his obligations to notify the EO of a conflict of interest and not act under such a conflict, the Appeals Board found that the established facts amounted to misconduct since the clear duty to advise of the conflict of interest had not been met.<sup>4</sup>

12. The Appeals Board therefore found that two of the five counts of misconduct before it had been established by clear and convincing evidence; that the established facts in relation to two counts legally amounted to misconduct; that those facts were sufficient for the sanction of

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<sup>3</sup> *Ibid.*, paras. 66 to 81.

<sup>4</sup> *Ibid.*, paras. 95 to 97.

dismissal to have been applied; and the sanction was therefore proportionate. The Appeals Board thus affirmed the Secretary General's decision to summarily dismiss Mr. Wan for misconduct. In relation to three further counts, the Appeals Board granted Mr. Wan's appeal on the basis that misconduct had not been established by clear and convincing evidence.<sup>5</sup>

13. However, the Appeals Board found that the Memorandum seeking the President's approval to terminate the services of Mr. Wan incorrectly stated that OIOS had found Mr. Wan to have committed five distinct counts of misconduct when in fact OIOS had found him to have committed four. Although OIOS did not find that Mr. Wan had obstructed in various ways an investigation into a 2017 cybersecurity incident at ICAO and had prevented the ICAO Treasury Officer from informing the Royal Bank of Canada about the incident, the Secretary General in the Memorandum incorrectly included this as one of the grounds of misconduct found by OIOS to exist.<sup>6</sup>

14. The Appeals Board therefore concluded that the President's approval of Mr. Wan's dismissal was based upon the five findings set out in the Memorandum, one of which was patently incorrect. Since ICAO Staff Regulation 9.9 applied, the Secretary General was required, given that the matter concerned the termination of appointment of a staff member at the D-1 and D-2 levels, to seek the written approval of the President of the Council. Such approval amounts to a confirmation that an exhaustive, logical, sound, objective and comprehensive investigation was performed and that due process was assured. The Appeals Board found that since Mr. Wan was entitled to have the required procedure properly followed, as an essential precondition to the implementation of the decision to terminate his employment, the approval given by the President to terminate his appointment had to be "be considered as *void ab initio*, or a *nullity*".<sup>7</sup> The approval of the President had thus no effect, with the implementation of the decision to terminate Mr. Wan's services being *ultra vires*, in that the precondition provided for in Staff Regulation 9.9 was not validly met. The Appeals Board concluded that it remained open to the Secretary General to request the approval pursuant to Staff Regulation 9.9, based upon a proper statement of the findings against Mr. Wan.<sup>8</sup>

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<sup>5</sup> *Ibid.*, Order A).

<sup>6</sup> *Ibid.*, paras. 134, 135 and 137 to 141.

<sup>7</sup> *Ibid.*, para. 141.

<sup>8</sup> *Ibid.*, para. 142.

15. The Appeals Board accordingly ordered that Mr. Wan be paid his salary and benefits, including pension contributions, from the date of their cessation on 8 December 2021 until approval by the President pursuant to Staff Regulation 9.9, if any, is properly obtained, provided that such payment shall not, in any event, exceed the payment of salary and benefits for a period greater than two years.

16. On 20 March 2023, the Secretary General filed an appeal before this Tribunal. Mr. Wan filed his answer as well as a cross-appeal on 5 May 2023. The Secretary General filed his answer to the cross-appeal on 30 May 2023.

### **Submissions**

#### **The Secretary General's Appeal**

17. The Secretary General appeals against the decision of the Appeals Board that the approval by the President of the Council to terminate Mr. Wan's appointment must "be considered as void *ab initio*, or a nullity" in that the Memorandum incorrectly stated the finding of OIOS with respect to one of the five charges upon which the summary dismissal was based.

18. The Secretary General contends that the error contained in the Memorandum was of no consequence given the evidence which proved Mr. Wan's serious misconduct. The Appeals Board therefore erred in law in that two of the findings made against Mr. Wan which were not reversed on review involve serious misconduct, which on their own would have been sufficient in the context for the sanction of dismissal to have been applied. In its decision, the Appeals Board concluded that the facts in respect of Mr. Wan's conflict of interest in the selection process involving Dr. S and the Scientific Review Journal project had been established by clear and convincing evidence; that the established facts legally amounted to misconduct; and that those facts on their own were sufficient for the sanction of dismissal to have been applied and the sanction was therefore proportionate. The Appeals Board therefore affirmed the Secretary General's decision to summarily dismiss Mr. Wan for misconduct.

19. Moreover, the due process requirements for disciplinary cases had been met. Mr. Wan was informed about the allegations against him. He was interviewed as part of the investigation and afforded the opportunity to provide his evidence and testimony on the allegations. He also had an opportunity to respond to the investigative reports and supporting evidence and to defend himself, and he received notice of the counts of alleged misconduct raised against him, with the opportunity

provided to again comment on the allegations before the disciplinary measure was imposed, which he did.

20. The Secretary General submits that there was no evidence of a tainted investigation, and it was therefore manifestly unreasonable for the Appeals Board to place greater weight on the one mischaracterized finding in the Secretary General's Memorandum over the consistent and corroborated evidence of Mr. Wan's conflict of interest contained in the investigative reports, coupled with his implicit admissions of his misconduct. Given the seriousness of the counts before the President and the nature of the conflict-of-interest charges which could not reasonably be disputed, Mr. Wan's termination for serious misconduct was justified. Even with the one alleged finding by OIOS erroneously included, it made no difference in that it was not in itself determinative of the matter given Mr. Wan's serious misconduct on the other counts which justified his summary dismissal.

21. The Secretary General therefore requests that the Appeals Tribunal affirm Mr. Wan's summary dismissal for misconduct effective from 8 December 2021; and reverse the Appeals Board's Decision declaring the approval by the President of the Council a nullity and requiring that Mr. Wan be paid his salary and benefits, including pension contributions, from the date of their cessation in December 2021 until approval by the President of the Council pursuant to Staff Regulation 9.9, if any, is obtained.

### **Mr. Wan's Answer**

22. Mr. Wan opposes the appeal contending that there is no error in fact in the finding that the summary of the findings presented to the President was based upon an entirely false premise. He contends that the inclusion of inaccurate information appears specifically designed to prejudice him in that this was a highly politicized and sensitive issue for the Council. It was entirely reasonable for the Appeals Board to conclude that this was highly prejudicial to Mr. Wan and tainted the resulting decision. Mr. Wan claims that the Secretary General's contention that his error in law was of no consequence relegates the unique provision for approval by the President for disciplinary decisions for higher level staff to a mere *pro forma* exercise.

23. Mr. Wan submits that the no-difference principle does not apply in this case. While the Appeals Board sustained two of the misconduct allegations and found these to warrant separation, this was subject to review on grounds of sufficiency of evidence and proportionality, with the

President's ability to review the proportionality of the disciplinary measure impaired by the false information he was given. The Appeals Board found that this was not a mere procedural irregularity, but a fundamental element of due process, an essential precondition that is a right of ICAO staff incorporated into the ICAO Staff Regulations by the Council for good reason.

24. Mr. Wan therefore seeks that the Appeals Tribunal dismiss the appeal and affirm the decision of the Appeals Board in overturning the impugned decision.

### **Mr. Wan's Cross-Appeal**

25. As a preliminary matter, Mr. Wan takes issue with the fact that he was unrepresented before the ICAO Appeals Board, since the process does not provide for in-house counsel or, until recently, the ability to engage counsel of choice. This while ICAO was represented by counsel which put Mr. Wan at a considerable disadvantage directly impacting the outcome of his case.

26. In addition, Mr. Wan contends that the Appeals Board erred in fact by failing to give any weight to the fact that an internal investigation into the 2017 recruitment process of Dr. S led to the then Secretary General dismissing the complaint of a conflict of interest. Furthermore, Mr. Wan claims that the Appeals Board ignored evidence relative to the identity of the "project business owner" for the Scientific Review Journal project and the nature of the BDG discussions about the project, or the lack thereof.

27. Mr. Wan states that the Appeals Board erred in law by finding that the established facts of his conflicts of interests amounted to misconduct. He asserts that in finding that his actions amounted to misconduct the Appeals Board "assumed an obligation for a formal disclosure [of conflicts of interests] and recusal that was never promulgated", which he claims was retroactively applied by the EO and was at odds with the "actual directive" that mandated disclosure of conflicts of interests to one's manager.

28. Mr. Wan contests the proportionality of the sanction of dismissal on the ground that it was justified by the Appeals Board as proportional due to his actions being unethical, but there was no indication of how he benefitted from his conduct or that it affected any of his official functions. Mr. Wan therefore seeks that the Appeals Tribunal rescind the impugned decision, order his reinstatement, or alternatively three years' net base salary, and two years' net base pay for harm to reputation, loss of opportunity and damage to his career.



**The Secretary General’s Answer to Mr. Wan’s Cross-Appeal**

29. The Secretary General opposes the cross-appeal on the basis that the Appeals Board considered Mr. Wan’s claim with respect to a prior internal investigation and decision of the then Secretary General as one that does not warrant any significant weight being attached to it because the principles of criminal law do not apply in a disciplinary case. The Appeals Board determined the admissibility and weight of the evidence, and in doing so found no legal error or misapplication of the law, and arrived at a decision which was neither defective nor unreasonable.

30. The Secretary General further submits that Mr. Wan’s claim that the Appeals Board ignored evidence relative to the identity of the “project business owner” for the Scientific Review Journal project and the nature of the BDG discussions about the project, or the lack thereof, is without merit and must be rejected. Mr. Wan identified no error by the Appeals Board nor showed that a manifestly unreasonable decision resulted.

31. The Secretary General submits that while Mr. Wan claims that the Appeals Board erred in law by finding that the established facts of his conflicts of interest amounted to misconduct, he bases this claim on conclusions of fact and law that are inconsistent with the Appeals Board’s express findings.

32. The Secretary General concludes that Mr. Wan’s challenge of the proportionality of the sanction of dismissal is without merit given that the Appeals Board justified the sanction as proportional due to his actions being unethical. The Secretary General therefore seeks that this Tribunal grant the appeal, vacate the Appeals Board’s order declaring the approval of the President of the Council a nullity, refuse the cross-appeal and affirm Mr. Wan’s summary dismissal for misconduct with an effective date of 8 December 2021.

## Considerations

### *Preliminary issue: legal representation*

33. Mr. Wan raises as a preliminary issue in this appeal that he was placed at a considerable disadvantage, which directly impacted the outcome of his case, by the fact that he was unrepresented before the ICAO Appeals Board. This was so since ICAO Staff Rule 111.1(15) does not provide for in-house counsel or, until recently, the ability to engage counsel of a staff member's choice. This while ICAO was represented by counsel.

34. ICAO Staff Rule 111.1(15) provides that a staff member may present that staff member's appeal "in person or may be assisted or arrange to have it presented on that staff member's behalf by any other active or retired staff member serving or residing at the duty station where the hearing is conducted (counsel)".

35. In *Heftberger*,<sup>9</sup> a direct challenge to ICAO Staff Rule 111.1(15) was raised on appeal before this Tribunal and opposed by the Secretary General on the basis that the ICAO Staff Regulations and Rules form part of a staff member's contract of employment and that the UNAT does not have the authority to amend or not to apply such Rules. This Tribunal nevertheless raised a concern regarding the restrictions on representation imposed on staff members by the Staff Regulations and Rules on the basis that such limitations were unexplained and constituted a significant constraint on what is regarded as a fundamental right of a staff member, namely to legal representation of his or her choice.<sup>10</sup>

36. Unlike in *Heftberger* in which a direct challenge to Staff Rule 111.1(15) was raised, Mr. Wan did not raise such a challenge to the Staff Rule, with the issue of representation not raised by him before the Appeals Board. There is no dispute that the restriction on legal representation at the Appeals Board was incorporated into his contract of employment as a provision of the Staff Regulations and Rules and that Mr. Wan elected not to exercise his right to make use of a fellow staff member to represent him before the Appeals Board. In these circumstances, we are not persuaded that Mr. Wan has shown, having entered into the contract of employment that he did with ICAO, that he was entitled to legal representation before the Appeals Board as a matter of right. We are also not satisfied that Mr. Wan, having elected to

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<sup>9</sup> *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2023-UNAT-1374.

<sup>10</sup> *Ibid.*, Judge Graeme Colgan's Concurring Opinion, para. 2.

represent himself and not obtain assistance from a staff member, was prejudiced as a result in the proceedings before the Appeals Board.

*Merits of appeal*

37. Article XI of the ICAO Service Code was amended in October 2020 to establish an Appeals Board, chaired by an independent person with legal and judicial expertise who is not a staff member. This followed the decision of this Tribunal in *Heftberger*,<sup>11</sup> in which it was found that for the UNAT to conduct its function as an appellate tribunal, impugned decisions must emanate from a neutral first instance process.

38. The task of the Appeals Board where a decision has been taken by ICAO to terminate the services of a staff member is to consider the evidence adduced and to determine whether the facts on which the sanction is based have been established on clear and convincing evidence, whether the established facts qualify as misconduct and whether the sanction imposed is proportionate to the offence. Having had regard to the evidence before it, the Appeals Board found that on two of the five counts before it there existed clear and convincing evidence that Mr. Wan had committed misconduct for which termination of his services was a proportionate response.

39. The first issue that arises on appeal concerns the impact on Mr. Wan's right to due process of the erroneous recording by the Secretary General that five instead of four counts of misconduct were identified during the investigation. Staff Regulation 9.9 requires, in cases of termination of appointment of staff at the D-1 and D-2 levels, that the Secretary General "shall seek the written approval of the President of the Council". There is no dispute that the Memorandum addressed to the President by the Secretary General incorrectly recorded that a finding of misconduct had been made by OIOS against Mr. Wan to the effect that he had obstructed an investigation into a cybersecurity incident, when no such finding had been made during the investigation. It is also not in dispute that the Memorandum containing such erroneous recordal formed the basis for the decision taken by the President to approve the termination of Mr. Wan's services. In issue on appeal is whether the Appeals Board erred in finding that the error contained in the Memorandum

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<sup>11</sup> *RoseMarie Heftberger v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2020-UNAT-1012.

was of such consequence that the decision of the President to terminate Mr. Wan's appointment must be considered as void *ab initio* or a nullity.

40. Where an irregularity or error in proceedings is identified, its nature and impact must be weighed in context, with it carefully considered whether a different outcome would have resulted had the irregularity not occurred.<sup>12</sup> This requires that it be found to a high standard, variously been described as an “overwhelmingly clear” or “irrefutable” standard,<sup>13</sup> that the outcome would have been inevitable even if the Administration had acted in a lawful manner. If this is so, the fact of the irregularity will not avail to the benefit of the staff member.<sup>14</sup> Commonly referred to as the “no difference principle”, such an approach may be applied where, despite the irregularity which has arisen, the ultimate outcome is an irrefutable foregone conclusion.<sup>15</sup>

41. The clear facts before the Appeals Board supported its finding that Mr. Wan had provided his PhD thesis supervisor Dr. S with a copy of a job opening at ICAO before the vacancy had been made public; that, recognizing the existence of a conflict of interest, Mr. Wan had arranged for another staff member to be involved in the selection process, but that when that person became unavailable, Mr. Wan had taken an active part in such process; and that in doing so, Mr. Wan had failed to disclose his conflict of interest to the selection panel, namely that Dr. S, who was one of the shortlisted candidates, was his PhD thesis supervisor and had served on his PhD Examining Committee.

42. Mr. Wan claimed that he had participated in the selection panel as a matter of “necessity”. However, the Appeals Board found that necessity is not and cannot be considered a justification to act with a conflict of interest in respect of a selection process for appointment to a post.<sup>16</sup> It rejected Mr. Wan's argument that given that his relationship with Dr. S was known, including by the ICAO Secretary General, he was not required to remove himself from the selection process, to recuse himself from a conflict situation, to notify the EO, and to inform the members of the interview

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<sup>12</sup> *Enrico Muratore Aproso v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1371, para. 79; *Sarwar v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-757, para. 87.

<sup>13</sup> *See Allen v Secretary-General of the United Nations*, Judgment No. 2019-UNAT-951, para. 38.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para. 60.

<sup>16</sup> Appeals Board Decision No. ICAO/2022/007, para. 68.

panel of his relationship with Dr. S.<sup>17</sup> The Appeals Board found that on clear and convincing evidence the established facts clearly showed that Mr. Wan had committed misconduct.<sup>18</sup>

43. The second count of misconduct found by the Appeals Board to have been committed by Mr. Wan concerned his involvement as a member of the BDG which had oversight of revenue generating operations of ICAO, in the review of the business case for the ICAO Scientific Review Journal without disclosing his association with either Dr. S or Dr. J who worked on the project, or that both Dr. S and Dr. J were on the board of directors of the Informing Science Institute, which hosted the website of the Journal from 2017. The Appeals Board found that Mr. Wan was obliged to notify the EO of a conflict of interest and not act under such a conflict, and that on clear and convincing evidence it was established that he had committed misconduct in failing to disclose the conflict of interest which existed.

44. This Tribunal accepts the findings of the Appeals Board that on clear and convincing evidence it was apparent that the two counts of misconduct had been committed by Mr. Wan, and that the established facts amounted to misconduct. We are further satisfied that those facts were sufficient to justify the sanction of dismissal having been applied and that the sanction, given the serious nature of the misconduct committed by a senior staff member, was proportionate. Given the seriousness of the misconduct committed, it follows that the decision of the Appeals Board to uphold the decision taken by ICAO to summarily dismiss Mr. Wan was reasonable on the material before it and that in doing so, the Appeals Board did not err.

45. In issue is whether the erroneous recordal of the outcome of the investigation in the Memorandum sent to the President, was an irregularity of such a nature as to justify the order of the Appeals Board that “[u]nder the due process considerations of the processes in this matter ... the implementation of that decision was *ultra vires*, as the preconditional approval of the President of the ICAO Council was a *nullity*”.<sup>19</sup> We find that it was not.

46. The Appeals Board was required to review the dismissal decision taken and render a final decision in relation to such review. As much is apparent from Article XI, Staff Regulation 11.1 of the ICAO Service Code, which provides that “[e]ach staff member shall have the right to a review...[of] ... any disciplinary measure imposed under Article X as well as

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<sup>17</sup> *Ibid.*, paras. 69 and 70.

<sup>18</sup> *Ibid.*, paras. 73 and 81.

<sup>19</sup> *Ibid.*, Order B).

summary dismissal under Regulation 9.17”. The decision of the Appeals Board as a “neutral first instance process” is, in terms of Article XI, Staff Regulation 11.2, to be “final” and, in terms of Staff Regulation 11.3, to be “final and binding on all of its members”. In addition, Staff Rule 111.1(20) provides that “[a]fter due consideration, the Board Chair shall render a decision on the matter, which shall be on behalf of the Board and shall be final and binding on all of its members”.

47. Yet, despite affirming the dismissal, somewhat perplexingly the Appeals Board found that the President’s approval of Mr. Wan’s dismissal was *ultra vires* and a nullity, ordering that his dismissal was conditional on the approval of the President, “if any”, being granted in due course.<sup>20</sup> The effect of this was that the Appeals Board failed to make a final decision regarding the dismissal of Mr. Wan and, in this respect, the Appeals Board erred.

48. In the proper exercise of its functions, the Appeals Board was required to consider amongst others, the language of Staff Regulation 9.9, its context, nature and apparent purpose in light of the applicable administrative provisions contained in the Staff Regulations and Rules as a whole. From this, it would have been apparent that the Staff Regulation seeks to provide the necessary checks and balances to safeguard against the unfair termination of senior staff members. In the light hereof, the Appeals Board was required to undertake an assessment of the impact and prejudice which may have been caused by the erroneous inclusion of one additional misconduct count when four others had been properly placed before the President. This required that the error be weighed in context, with careful consideration given to whether a different outcome would have resulted had the irregularity not occurred. The Appeals Board failed to undertake such an exercise.

49. With two of the five counts of serious misconduct affirmed by the Appeals Board, we are satisfied that on the material presented by the Secretary General to the President, it is patently clear that even had the erroneous reference to one count of misconduct been excised from the Memorandum, there was sufficient evidence before the President to support the conclusion that Mr. Wan had committed serious misconduct of a nature that justified his dismissal. We find that on balance, it cannot reasonably be concluded that the inclusion of one erroneous finding would have tilted the balance towards Mr. Wan’s dismissal. We are therefore not satisfied that properly considered, the irregularity or error committed was of such

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<sup>20</sup> *Ibid.*, Order C).

a nature as to justify the remittal of the approval decision to the President for reconsideration “if any”. This is more so given that the clear facts support the outcome reached by the Appeals Board to affirm the dismissal decision taken. There exists no basis in law to justify the remittal of the matter to the President in such circumstances with no purpose to be served in doing so.

50. It follows for these reasons that the appeal must be granted and the decision of the Appeals Board affirmed with the necessary modifications.

*Merits of cross-appeal*

51. In his cross-appeal Mr. Wan contends that the Appeals Board erred in fact in failing to give any weight to his claim that an internal investigation into the 2017 recruitment process of the P-5 Chief, Business Technology and Services, had resulted in a decision of the then Secretary General to dismiss the complaints of a conflict of interest. The import of this challenge raised is that the decision taken barred a further investigation from being undertaken against Mr. Wan.

52. By its nature, an investigation in the context of an employment relationship seeks, amongst other issues, to uncover facts as to alleged disciplinary or other breaches. The findings and conclusions reached during the course of a prior internal investigation are based on the facts available to the investigators at the time. Such findings and conclusions do not amount to a binding determination that the misconduct alleged has not been committed, and may only, subject to the facts, warrant a conclusion that insufficient evidence had been placed before an investigator to show the existence of alleged misconduct. While there exist clear distinctions between an internal disciplinary investigation and a criminal investigation, even in a criminal investigation the fact that no crime has been found to have been committed does not as a general rule bar any further or subsequent investigation into the same matter prior to any criminal charges which may ensue.

53. Mr. Wan advanced no evidence which indicates that he had suffered any prejudice as a result of the fact that a further investigation was undertaken concerning his conduct, and the objection raised by him as to the fairness of the process is therefore found to be without merit and cannot be sustained.

54. As to the misconduct findings made against him, Mr. Wan contends that the Appeals Board ignored evidence, including as to the identity of the “project business owner” for the Scientific Review Journal project and the nature of the BDG discussions about the project, or the lack thereof, as being without merit. Yet, in his challenge to the Appeals Board’s findings in this regard, Mr. Wan identified no error committed by the Appeals Board, nor that a manifestly unreasonable decision on the part of the Appeals Board resulted. We are satisfied, as discussed in relation to the merits of the appeal, that both of the misconduct findings made by the Appeals Board were supported by clear and convincing evidence which proved that serious misconduct had been committed by Mr. Wan.

55. Mr. Wan’s challenge to the proportionality of the sanction of dismissal is similarly without merit having regard to the facts before the Appeals Board and its findings, the justification given for the sanction and the senior position held by him. Mr. Wan’s actions were found to be unethical, and dismissal was therefore a proportionate response to the misconduct committed by him. It follows for these reasons that the cross-appeal cannot succeed and falls to be dismissed.



**Judgment**

56. The Secretary General's appeal is granted, and the order of remittal, together with the award of compensation, is reversed. The cross-appeal is dismissed.

Original and Authoritative Version: English

Decision dated this 22<sup>nd</sup> day of March 2024 in New York, United States.

*(Signed)*

Judge Savage, Presiding

*(Signed)*

Judge Forbang

*(Signed)*

Judge Sheha

Judgment published and entered into the Register on this 7<sup>th</sup> day of May 2024 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar