



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.

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

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 advise 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 IC

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

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

T 1 0 m s o f

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 day is waived under paragraph 5 hereof.

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 appeal⁷.

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