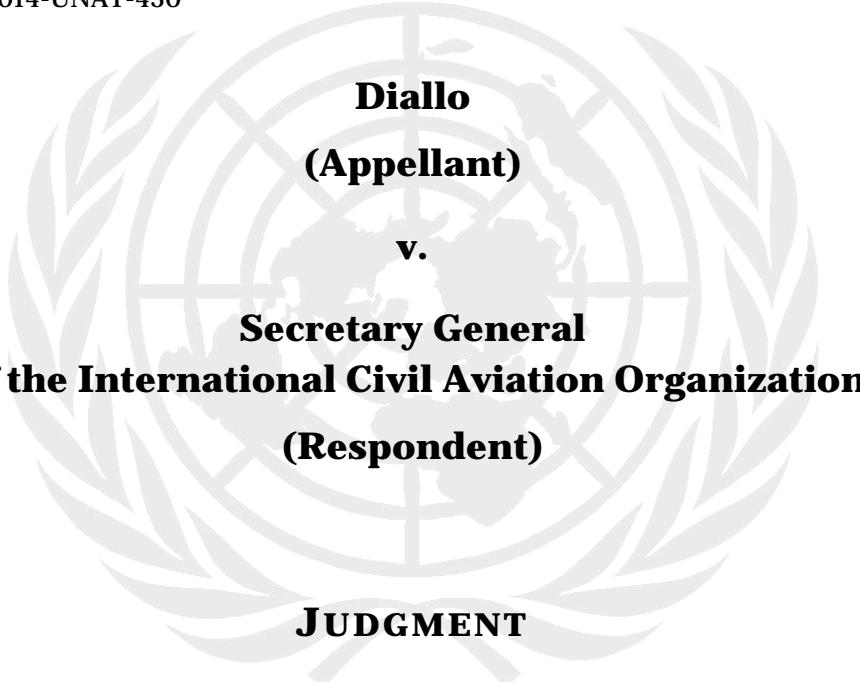




UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2014-UNAT-430



Before: Judge Sophia Adinyira, Presiding

Judge Mary Faherty

Judge Richard Lussick

Case No.: 2013-489

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Appellant: Abdoulaye Diallo

Counsel for Respondent: Christopher M. Petras

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Daniela Diallo against the decision taken by the Secretary General of the International Civil Aviation Organization (Secretary General and ICAO, respectively) on 22 February 2013 in ICAO appeal No. 171. Ms. Diallo appealed on 29 May 2013 and the Secretary General answered on 25 July 2013.

Facts and Procedure

2. Ms. Diallo joined ICAO in June 2007 as a G-6 Purchasing Clerk in the Technical Cooperation Bureau (TCB). Her appointment was subsequently renewed several times. During this time, Ms. Diallo was also assigned to the post of Field Operations Assistant in TCB's Field Operations Section (FOS) – Africa.

3. Effective 12 December 2008, Ms. Diallo was promoted to the G-7 level, whereupon she received a one-year appointment to the post of Field Operations Assistant. On 4 December 2009, this appointment was renewed from 12 December 2009 for a period of one year. On 9 December 2010, Ms. Diallo's appointment was again renewed for a period of one year, through 11 December 2011.

4. In February 2011, Ms. Diallo was reassigned to the newly created Project Financing and Development (PFD) Section within TCB. According to the Secretary General, her post was renumbered as Post No. 6480.003 and her previous post, Post No. 6490.008 ceased to exist.

5. By letter dated 29 June 2011, the Secretary General informed Ms. Diallo that her appointment was to be terminated due to the abolition of her post (No. 6480.003), effective 31 July 2011. The letter further advised Ms. Diallo that ICAO would endeavor to find alternative employment for her within ICAO and that if such employment would not be found, her appointment would end on 31 July 2011 and she would be paid termination indemnity in the amount of three months' net base salary. The Secretary General submits that the ongoing financial crisis threatened the solvency of the Administrative and Operational Services Costs (AOSC) Fund (i. e., the source funding Ms. Diallo's post), thereby necessitating cost-cutting measures. As one of the cost-cutting measures, the TCB Director suggested the abolishment of the PFD Section including Ms. Diallo's post, which was

mistakenly identified as the post number of her former position as G-7 Field Operations Assistant in FOS. On 14 June 2011, the Secretary General approved the proposal.

6. On 8 July 2011, Ms. Diallo requested that the Secretary General rescind the decision to terminate her appointment and reinstate her to the position of G-7 Field Operations Assistant in FOS. She argued that the post that was to be abolished was not the post she was encumbering and that it is was her understanding that she was merely providing temporary assistance to PFD and remained attached to her G-7 Field Operations Assistant post in FOS. She also questioned whether the PFD position had ever been established or had a job description applied to it, and claimed that she was never officially notified of her reassignment.

7. On 22 July 2011, the Secretary General informed Ms. Diallo that he maintained his 29 June 2011 decision.

8. On 11 August 2011, Ms. Diallo appealed to ICAO's Advisory Joint Appeals Board (AJAB). In addition to the arguments previously presented, she alleged that her termination was motivated by the Secretary General's animus against her, which she alleged was generated by resentment over her husband having filed an AJAB appeal in relation to his 2009 retirement and the desire to retaliate against her and her family.

9. Ms. Diallo points to several examples of "continuous harassment" and "suffering and humiliation", including the resistance she encountered when she asked to access her personnel and confidential files and the refusal to allow her to take photocopies; the fact that her files contained documents that had never been communicated to her; as well as the fact that the Director, TCB, instructed officers not to talk to her once she received her letter of termination.

10. According to the Secretary General, the ICAO Administration circulated her curriculum vitae to all Directors and Regional Directors in an attempt to find her an alternative post; Ms. Diallo however refused to even apply for another position within ICAO stating that by applying she would be acknowledging that her post had been abolished.

11. The AJAB heard the appeal on 15 May 2012, and issued its report on 1 February 2013. The AJAB made the following determinations:

- a) There were no grounds to uphold Ms. Diallo's assertion that she was retaliated against by ICAO's Secretary General because of her husband's appeal.
- b) ICAO's decision to restructure the TCB by abolition of certain posts was well within its discretion and was not tainted by improper motives.
- c) As of 31 July 2011, Ms. Diallo was still holding the post in FOS and the decision to abolish her post was partly based on an error of fact since the ICAO Administration attempted to abolish a post in PFD that had never been established.
- d) ICAO did not show good faith in its efforts to find Ms. Diallo an alternative post.
- e) Ms. Diallo failed to adduce substantive evidence for harassment and threat expressed by the Secretary General.
- f) ICAO violated Ms. Diallo's right to have access to all pertinent documents in her personnel and confidential files.

12. The AJAB recommended to the Secretary General that ICAO pay Ms. Diallo her full salary and entitlements from the date her contract was terminated on 31 July 2011 through the end of her contact on 11 December 2011 as well as compensation in the amount of two months' net base salary. The Secretary General of ICAO, while not fully concurring with the Board's conclusions, accepted the recommendations to pay the above amounts, conditioned upon Ms. Diallo agreeing to waive her appeal rights and make no further claims against ICAO in this matter.

13. Ms. Diallo appeals the Secretary General's decision.

Submissions

Ms. Diallo's Appeal

14. Ms. Diallo contends that despite finding a series of violations of her rights as a staff member, the AJAB expressed only partial support for her legitimate claim for compensation commensurate with the loss of career opportunities as well as her "level of suffering, due to [her] abusive dismissal from ICAO". The AJAB failed to fully recognize or recognize at all "the personal involvement of the Secretary General in masterminding, preparing and

orchestrating [her] dismissal”; the fact that ICAO did not act in good faith attempting to find Ms. Diallo an alternative post; as well as the extent of the damage she suffered. The AJAB therefore failed to fully exercise its jurisdiction.

15. Ms. Diallo submits that the AJAB erred in fact resulting in a manifestly unreasonable decision by rejecting the written testimony of her immediate supervisor, which indicated clearly that the Secretary General orchestrated her departure from ICAO. The AJAB also erred in rejecting the facts testified to by Ms. Diallo’s second reporting officer clearly showing that the Secretary General planned “to get rid of [her]”.

16. Ms. Diallo requests that the Appeals Tribunal order her reinstatement to any administrative post at the G-7/IV level, the level she was occupying at the time of her termination. She also asks the Appeals Tribunal to award her compensation in the amount of three years’ net base salary for loss of earnings and one-year net base salary for moral damages.

ICAO’s Answer

17. ICAO contends that Ms. Diallo has not demonstrated that the AJAB failed to exercise the jurisdiction vested in it. The AJAB’s opinion shows that the AJAB fully considered the alleged errors, acknowledged the adverse impact on Ms. Diallo, and recommended the award of compensation for both the flawed process used by the Administration to abolish her post and the infringement of her rights. Ms. Diallo merely disagrees with the AJAB’s conclusions without showing any error.

18. ICAO submits that Ms. Diallo has not demonstrated any errors of procedure with respect to the admission of the written statement of her immediate supervisor or in deciding upon the weight to be given to it. A review of the record reveals that the statement was in fact considered, but that the AJAB concluded that it could not attach much weight to it because it was neither able to assess the witness’ credibility nor to test the truth of the statement in person, and the representative of ICAO’s Secretary General did not have the chance to cross-examine the witness. Furthermore, Ms. Diallo has not shown any error on behalf of the AJAB in its consideration and assessment of the evidence given by her second reporting officer.

19. ICAO contends that Ms. Diallo has failed to discharge the burden of showing that the AJAB's findings were not supported by the evidence or were unreasonable and that the Appeals Tribunal should defer to the AJAB's findings. ICAO's Secretary General requests that the Appeals Tribunal reject the appeal in its entirety.

Considerations

20. In the present case, Ms. Diallo appeals on the grounds that the AJAB failed to render her full justice as the compensation it awarded her was not commensurate with the loss of career opportunities as well as with her "level of suffering, due to [her] abusive dismissal". Ms. Diallo further appeals that the AJAB erred in procedure and in fact, resulting in a manifestly unreasonable decision by rejecting the written testimony of her immediate supervisor, which indicated clearly that the Secretary General orchestrated her departure from ICAO. She also contends that the AJAB erred in rejecting the evidence of her second reporting officer which clearly showed that the Secretary General planned "to get rid of [her]".

21. We will firstly address the issues raised in the second ground of appeal.

The claimed errors in procedure on the part of the AJAB

22. This ground relates to the AJAB's rejection of Ms. Diallo's allegation of prejudice and discrimination in the abolition of her post and of threat and harassment expressed by ICAO's Secretary General based on the testimonies of her immediate supervisor and her second reporting officer.

23. The Appeals Tribunal finds no merit in this ground of appeal. The approach of the AJAB is consistent with the jurisprudence of the Appeals Tribunal in *Messinger*¹ and *Larkin*.² The AJAB, in a position similar to an adjudicating tribunal or trier of fact, has broad discretion to determine the admissibility of any evidence and the weight to attach to such evidence.

¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

² *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134.

24. Our review of the AJAB's findings shows that the AJAB was cognisant of its role in receiving and assessing evidence before it. The AJAB overruled the objection by the representative of ICAO's Secretary General to the admission of the written testimony of the immediate supervisor of Ms. Diallo, and considered the testimony in its decision. The AJAB, however, decided not to attach much weight to the statement because it was neither able to assess the witness' credibility nor to test the truth of the statement in person, and also because the representative of ICAO's Secretary General did not have the chance to cross-examine the officer who was away on holidays.

25. In respect of the oral testimony of Ms. Diallo's second reporting officer, the AJAB held that the testimony was "not further supported by any documented or circumstantial evidence, and does not name any person, who could have been further questioned by the representative of [Ms. Diallo] and the Board and cross-examined by the Representative of the Secretary General, whether the Secretary General has expressed any threats against [Ms. Diallo]. In addition, the e-mail sent by [Ms. Diallo] does not prove [her] allegations" of harassment and threat.

26. We note further that the AJAB did not entirely discard the oral and written testimony of Ms. Diallo's second reporting officer. The AJAB's finding in favour of Ms. Diallo that the process which the ICAO Administration had used to abolish her post was flawed was based in part on the evidence of this officer.

27. We do not find any error by the AJAB in its consideration and assessment of the evidence before it. Its findings in this aspect were reasonable.

28. We affirm the finding by the AJAB that Ms. Diallo could not adduce substantial evidence for harassment and threat expressed by ICAO's Secretary General against her. We also affirm the finding by the AJAB that Ms. Diallo's claim that ICAO's Secretary General had targeted her for dismissal could not be supported. In the circumstances, we find no merit in her claim of error in procedure and fact by the AJAB.

The claim that the AJAB failed to exercise its jurisdiction

29. This ground of appeal is in essence an appeal against the quantum of compensation awarded her in terms of moral damages. Ms. Diallo contends that despite its findings of a series of violations of her rights as a staff member, the AJAB expressed only partial support

for her legitimate claim for compensation commensurate with the loss of career opportunities as well as her “level of suffering, due to [her] abusive dismissal”.

30. We find merit in this complaint. The AJAB held that Ms. Diallo’s post was abolished as a result of restructuring in ICAO; and therefore dismissed her claim that ICAO’s Secretary General orchestrated her dismissal and her claim for harassment and threat. Nevertheless the AJAB made a number of findings in her favour which indicated that her rights as a staff member were abused during the restructuring process.

31. The AJAB rightly considered that the abolition of a post was always a traumatic experience for the incumbent, and therefore greater objectivity, care, good faith and transparency were required. In this case, the AJAB made a finding that: “as of 31 July 2011, [Ms. Diallo] was still holding the post in FOS (6490.008) and the decision concerning the abolition of posts had been partially based on an error of fact, because it attempted to abolish a post in PFD (6480.003) which has never been established”. As a result, Ms. Diallo suffered harm and damage from this error.

32. The AJAB held further that: inaccurate factors were used by the Administration as justification for not considering Ms. Diallo as a suitable and acceptable candidate for a vacancy within the TCB even at a lower grade than her abolished post, which “not only *a priori* jeopardized the success to offer [her] another employment opportunity but also constitutes prejudice and implies absence of good faith efforts”.

33. The AJAB also found that ICAO “ha[d] violated [Ms. Diallo’s] right to have access to all pertinent documents comprised in her Personal and Confidential files, implying lack of transparency of Human Resources processes”.

34. These findings were summarised by the AJAB as follows:

... [Ms. Diallo] suffered harm and damage from the error of the Organization to treat her temporal reassignment as a permanent one;

... although the Organization has made efforts, overall [Ms. Diallo] had been discriminated against ICAO Staff Regulation 9.4, and the Organization did not comply with its obligation of good faith and due diligence efforts to consider [Ms. Diallo] for available posts; and

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... [Ms. Diallo's] right to have access to all pertinent documents recorded in her Personnel and Confidential files have been violated.³

35. We consider these breaches fundamental in nature to warrant an award of moral damages. In *Asariotis*,⁴ this Tribunal stated, by way of general principles:

To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

36. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the trier of fact.

37. In this case, the AJAB as shown above identified the harm and damage ICAO caused Ms. Diallo by the violation of her rights as a staff member, and how these violations affected her employment opportunity.

38. We consider these breaches fundamental in nature to warrant an award of moral damages applying the principles under heading (i) in *Asariotis*. The AJAB recommended that Ms. Diallo be paid two months' net base salary which we consider manifestly insufficient

³ AJAB Opinion No. 130, Appeal No. 171 – Mrs. Daniela Diallo, paras. 6.1.3 – 6.1.5.

⁴ *Asariotis v. Secretary-General of the United Nations*, Judgment 2013-UNAT-309, para. 36. (Emphases in original; internal citations omitted.)

in light of the AJAB's findings in her favour. The quantum of damages ought to be commensurate with the magnitude of the breaches and the devastating effect and moral injury caused to Ms. Diallo.

39. We will accordingly set aside the amount of two months' net base salary and substitute it with the sum of six months' net base salary.

40. We will, however, not disturb the award of the payment of her full salary and all entitlements up to the end of her contract on 11 December 2011.

41. The appeal is allowed in part.

Judgment

42. The decision of ICAO's Secretary General is affirmed subject to variation of the damages from two months' net base salary to six months' net base salary, with interest at the US Prime Rate accruing from 31 July 2011, the date on which Ms. Diallo was separated from service with ICAO. This amount shall be paid within 60 days from the date this Judgment becomes executable. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

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Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

(Signed)

(Signed)

Judge Adinyira, Presiding

Judge Faherty

Judge Lussick

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar