

2024-UNAT-1436, James Wan

UNAT Held or UNDT Pronouncements

As a preliminary matter, the Appeals Tribunal dismissed Mr. Wan's argument that he had been placed at a considerable disadvantage, directly impacting the outcome of the case, by the fact that he had been unrepresented before the ICAO Appeals Board.

Turning to the merits of the case, the Appeals Tribunal affirmed the findings of the Appeals Board that on clear and convincing evidence two counts of misconduct had been proved to have been committed by Mr. Wan which justified the imposition of the sanction of dismissal. On the material presented by the Secretary-General to the President, the Appeals Tribunal found it clear that despite the erroneous inclusion of one additional count of misconduct in the Memorandum, there remained sufficient evidence before the President to support a conclusion that Mr. Wan had committed serious misconduct justifying his dismissal. Having affirmed the dismissal of Mr. Wan, it was not open to the Appeals Board to remit the matter for approval to the President for reconsideration "if any". The Appeals Tribunal granted the appeal and reversed the order of remittal, together with the award of compensation.

In relation to the cross-appeal, the Appeals Tribunal found that Mr. Wan had advanced no evidence which indicated that he had suffered any prejudice due to a further investigation into his conduct and that this did not impact on the fairness of the process. Given the evidence supporting the two misconduct findings and the seriousness of the misconduct committed, the Appeals Tribunal dismissed Mr. Wan's challenge to the proportionality of the sanction. The Appeals Tribunal dismissed the cross-appeal.

Decision Contested or Judgment/Order Appealed

Before the Appeals Board of ICAO, Mr. Wan, a former ICAO staff member at the D-1 level, appealed the decision to impose on him the disciplinary sanction of summary

dismissal for serious misconduct.

The Appeals Board found that two of the five counts of misconduct had been established and upheld the decision to summarily dismiss Mr. Wan for misconduct. The Appeals Board however found that the Memorandum seeking the President's approval to terminate the services of Mr. Wan had incorrectly stated that OIOS had found Mr. Wan to have committed six distinct counts of misconduct when it had found him to have committed five counts of misconduct. The Appeals Board found that the approval given by the President to terminate Mr. Wan's appointment was void ab initio, or a nullity. It therefore ordered that Mr. Wan be paid his salary and benefits, including pension contributions, from the date of their cessation until approval by the President, "if any", is properly obtained, provided that such payment not exceed the payment of salary and benefits for a period greater than two years.

The ICAO Secretary General appealed against this decision and Mr. Wan cross-appealed.

Legal Principle(s)

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. This requires that it be found to a high standard, variously described as an "overwhelmingly clear" or "irrefutable" standard, 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. 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.

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.

Outcome

Appeal granted, Cross-appeal dismissed on merits

Outcome Extra Text

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.

Full judgment

[Full judgment](#)

Applicants/Appellants

James Wan

Entity

ICAO

Case Number(s)

2023-1795

Tribunal

UNAT

Registry

New York

Date of Judgement

7 May 2024

President Judge

Judge Savage

Judge Forbang

Judge Sheha

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Due process

Legal representation

Disciplinary sanction

Summary dismissal

Legal services (OSLA or other) and self-representation

Termination (of appointment)

Applicable Law

ICAO Staff Regulations

- Regulation 11

ICAO Staff Rules

- Rule 111.1(20)

Related Judgments and Orders

2023-UNAT-1374

2020-UNAT-1012

2023-UNAT-1371

2019-UNAT-951

2017-UNAT-761