

Judgment No. 2024-UNAT-1440



Counsel for Appellant: Self-represented

Counsel for Respondent

JUDGE GAO XIAOLI , PRESIDING .

1. Mr. Gheorghe Catalin Radu, a former D-1 staff member with the International Civil

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as by that time, unfortunately, significant damage had already been done to Mr. Radu's reputation by the former EO that impeded the entire process.

50. Mr. Radu contends that according to PI/1.6, the EO was required to complete an assessment within 30 days. However, in Mr. Radu's case, it took over a year from the date he was notified of the allegations to the date he was informed that the complaint was sent for formal investigation to OIOS. OIOS also noted in its investigation report the abnormal length of time of the initial assessment that amounted to an in-depth investigation although it should not have been so. As also denounced by OIOS, the Staff Rules and the Ethics Framework do not provide for the EO to investigate matters on her own initiative as it is a prerogative of OIOS.

51. Mr. Radu submits that the Appeals Board erred by failing to consider his allegations of bias and malfeasance by the EO. The EO abused her authority when she sent her preliminary assessment report (the preliminary assessment report) to a Committee which did not exist at the time the complaint was made and established as a feature of the new Ethics Framework. The Appeals Board refused to take into account the complaints against the former EO and her preliminary assessment report, d-3.6 ms.6 -3.3 (p)-2.1 (i)T4 1 Tf 01 ()-0.6 (d 66.9 5)T4 1 Tfcatie 417.1 tter

53. Mr. Radu asserts that although there was no formal complaint from V01, V03, V04, V05 and V06, their names were included in the preliminary assessment report misleading the content of his case. The Director, OIOS stated in the context of evaluating the possibility to have OIOS investigate the matter, that he was “uncomfortable with its size and scope as it looks as if

69. Furthermore, Mr. Radu's claim that his lack of access to confidential correspondence between the Secretary General and ALD/OHR "denied [him] the opportunity to present a complete defense" is equally without merit. ICAO Staff Rule 111.1(17) generally shields confidential attorney-client communications bearing upon the decision under appeal from disclosure to the staff member. Under Rule 6 of the Appeals Board Rules, the Appeals Board may direct the party invoking confidentiality to produce the document for / review and a determination by the Appeals Board as to whether its relevance overrides its confidentiality. The Appeals Board examined the correspondence and determined that its "sole purpose" was "[the] requesting and the giving of legal advice" and that it "is thus subject to an immun i8 (e)-3.ali 3 0 . 7

decision on the case. Mr. Radu's assertion that this exchange put OIOS in the position of being "prosecutor and judge at the same time" distorts the role of OIOS in the investigative process. The Appeals Board duly considered the claim of a conflict of interest on the part of OIOS but concluded "[t]here [was] no evidence to support such an assertion". Mr. Radu has not demonstrated any error by the Appeals Board in this regard.

72. The Secretary General next asserts that Mr. Radu has the burden of establishing that the decision of the Appeals Board is defective, and he must therefore identify the alleged defects and state the grounds relied upon in asserting that the decision is erroneous; he, however, simply rehashes the same arguments he unsuccessfully made to the Appeals Board. In this case, the Appeals Board conducted a detailed analysis of its scope of review, the nature of the evidence before it, and the applicable burden of proof, while also taking into account Mr. Radu's analysis of the evidence in respect of each witness and the errors he alleged with respect to the consideration of the evidence and the conclusions reached, and considered these matters in respect of the allegations of each of the five victims.

73. As to V01, the Appeals Board considered the entire "matrix of evidence," including, at every stage, the exculpatory evidence presented by Mr. Radu, and found, , that the evidence given by V01 "was detailed and precise and largely corroborated" by the evidence of other witnesses, whereas the evidence of Mr. Radu was "contradictory, uncertain as to numerous matters, and not consistent". The Appeals Board further analyzed the evidence and found that there was "clear and convincing evidence that this situation had a negative impact on V01 and that the approaches were clearly unwelcome[,] and ultimately concluded that the facts alleged as to V01 were "established according to the 'standard of proof' of clear and convincing evidence".

74. The Appeals Board applied the same approach to V04—thoroughly examining the totality of the evidence, including the evidence of Mr. Radu. The Appeals Board, , noted that V04 impressively "recalled events in significant detail ... [which] were confirmed by the text exchanges[,] and that "[w]hen asked to expand on her evidence by the investigators, she was consistent and again detailed[,] whereas the Appellant's explanations "lack[ed] veracity", were

75. As to the Appeals Board's finding that the established facts amounted to misconduct, Mr. Radu merely repeats the arguments the Appeals Board rejected and fails to demonstrate how the Appeals Board erred in a manner that invalidates its judgment.

76. Mr. Radu's challenge to the proportionality of the sanction imposed is without merit. The Appeals Board applied the correct legal standards in considering the proportionality of the imposed disciplinary sanction striking the right balance between the lawful exercise of the Secretary-General's discretion to select an adequate and proper sanction and Mr. Radu's right to judicial protection. The Appeals Board thus determined that the disciplinary sanction of separation from service was proportionate to Mr. Radu's misconduct. While the Appeals Board acknowledged that this disciplinary sanction was one of the most severe that could be imposed,

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97. The interpretation of a staff rule begins with the literal reading of the rule, but it also should be done in the context and structure where the rule is placed. Our case law established that the interpretation of a rule is made within the context of the hierarchy in which the rule appears.⁴² This was the approach taken by the Appeals Board in interpreting the Staff Rule . In this connection, the contested provision is part of Staff Rule 110.1 which regulates “

” and is under the subtitle “

”. The provisions preceding this rule lay down detailed procedures for both the Organization and the staff member to abide by, so that the staff member has sufficient and proper opportunity to respond and produce countervailing evidence at the critical stages of the disciplinary process. That would include, for example, after receiving the allegations of misconduct, the investigation report and the provisional decision. The Staff Rule is a natural continuation along this line except that it concerns the staff member who is on certified sick leave.

98. We agree that a rule must generally be interpreted by reference to its context and purpose. However, we agree with Mr Radu that a plain literal reading makes it clear that the Organization is in general under the obligation to consult with the Medical Clinic in order to proceed with the disciplinary process if the staff member is on certified sick leave. “[S]hall normally proceed” means that there is a presumption of proceeding according to the procedures envisaged in the previous clauses. However, what constitutes the exception to this general

conclude that this breach alone was not such as to vitiate the decision taken in relation to his continued employment with ICAO .

100. In its decision on 21 February 2023, the Appeals Board found that the facts in respect of

- (b) dealing with cases in ways that are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceeding

applicant gave sworn eviden

123. Although the Appeals Board stated that Mr. Radu had given sworn evidence before it, that was not the case. It is therefore unclear from the Appeals Board's decision what approach the Appeals Board adopted to the assessment and evaluation of the different versions of the parties or why it elected not to call any witnesses to testify. Without any explanation regarding such approach

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ensuring that in doing so the parties are placed on an equal footing. Rule 24 of the Appeals Board Rules requires the Appeals Board to conduct the hearing of appeals on an inquisitorial basis, assisting the parties as is necessary, in order to determine the facts in issue. The Appeals Board may not, in the performance of its task, dispense with important legal rules relating to the evaluation of witnesses and evidence, which safeguard the parties and ensure that decisions taken are not arbitrary or unjust.

127. Rule 36 of the Appeals Board Rules expressly provides that parties have the right to give evidence as witnesses, to call other witnesses and that the Appeals Board may call for witnesses to be called to testify and examined. The Appeals Board is permitted by Rule 40 to determine whether the personal appearance of a witness is required at oral proceedings and determine appropriate means to ensure such appearance. Where a witness is called, under Rule 42 and reiterated in Rule 50(d), the Appeals Board is to first examine that witness and then provide the parties with a reasonable opportunity to cross-examine such witness. Given these Rules, where the Appeals Board decides not to call for evidence, it is incumbent on it to explain why this is so. Without a careful analysis of considerations relevant to a determination of the credibility of the distinct versions before it and the reliability of such versions, it is difficult to understand on what basis a finding could be justified such that it was “impressed with the evidence of V04”, but not with that of Mr. Radu.

128. We find that there was not clear and convincing evidence of misconduct on the part of Mr. Radu in relation to V04. In light of the factual disputes which exist, in undertaking the task of a neutral first instance review body, the Appeals Board was required to evaluate the evidence in a

must succeed, with Appeals Board Decision No. 2 set aside, with the matter remanded to the Appeals Board for a re-hearing, without delay, before a differently constituted panel.

Judgment

130. Mr. Radu's Appeal against Appeal Board's Decision No. 1 is dismissed.

131. Mr. Radu's appeal against Appeals Board's Decision No. 2 is granted, by Majority (Judges Savage and Colgan), Judge Gao dissenting, with the allegations in respect of complainants V01 and V04 being remanded to a differently-constituted ICAO Appeals Board for re-hearing.

Judge Gao appends a partially dissenting opinion.

Original and Authoritative Version: English

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

Judge Savage

Judge Colgan

Judgment published and entered into the Register on this 24th day of May 2024 in New York, United States.

Juliet E. Johnson, Registrar

JUDGE GAO XIAOLI 'S PARTIALLY DISSENTING OPINION .

1. In this Judgment, the Appeals Tribunal granted the appeal with respect to Appeals Board Decision No. 2. I however respectfully disagree with the reasoning and outcome with respect to Appeals Board Decision No. 2.

2. The Majority's decision regarding Appeals Board Decision No. 2 is based on the following main grounds: i) the Appeals Board erroneously assumed that Mr. Radu had given evidence; ii) the Appeals Board made a positive credibility assessment of V01 and V04 without hearing them in person, while at the same time making a negative credibility assessment of Mr. Radu who was presenting his case before the Appeals Board who had not been sworn in as a witness and did not

the clear and convincing evidence standard has been met which established that the alleged misconduct in fact occurred.

9. Having concluded that the facts have been established, it is necessary to consider the next prong of the test, i.e. whether the established facts concerning V01 and V04 qualify as misconduct under the Staff Regulations and Rules

10. Paragraph 3 of ICAO Personnel Instruction PI/1.3 provides that “[s]exual harassment is any unwelcome sexual advance, request for sexual favor, or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. In all cases it refers to conduct that is unwanted by the recipient.” Paragraph 7 of PI/1.3 reads: “Sexual harassment is distinguished from other forms of mutual contact by its unwelcome, unreciprocated and imposed nature. Mutually acceptable behaviour is not sexual harassment regardless of the employment relationship.” Paragraphs 3.3 and 3.5 of PI/1.6.5

12. The situation with respect to V04 is different. Mr. Radu did not contest the facts and V04 stated that she “did not feel harassed or victimized” and she had “successfully fended off” Mr. Radu.⁵⁸ The Appeals Board found it evident that Mr. Radu had engaged in conduct amounting to sexual harassment, inferring from her statement that she did not welcome his behaviour. It further held that some words or expressions indicating intimacy or having sexual connotations used by Mr. Radu towards V04 were forced familiarity on V04. I find the Appeals Board’s inference unpersuasive.

13. According to PI/1.3 and PI/1.6, the core element of the definition of sexual harassment is its unwelcome, unreciprocated and imposed nature. It refers to conduct that is unwanted by the recipient. Mutually acceptable behaviour is not sexual harassment regardless of the employment relationship. The victim’s perception of the incident is thus vital when evaluating whether the contested conduct constitutes sexual harassment. If the concerned party did not deem she was harassed or victimized by the other party, it indicates that the conduct in question was acceptable to her. As such, the conduct is “mutually acceptable behaviour” instead of sexual harassment. In [redacted], one of the victims, AA, originally expressed her concern over the appellant’s demeanour, but she never considered the incident as sexual harassment and accepted an apology and considered the matter closed. The UNAT found that “[w]hile the conduct may have been unwelcome, AA did not consider it sexual in nature or offensive. An unwelcome kiss, without sexual motivation, and which causes no offence, is not sexual harassment.”⁵⁹

14. The evidence on record shows that the exchanges between Mr. Radu and V04 were mutually accepted from the very beginning, not one-way or forced on V04. V04 either responded actively to Mr. Radu or at least did not oppose or reject

19. Mr. Radu submits that the Organization breached his due process rights at several junctures during the investigation, the disciplinary process and the hearing before the Appeals Board. He challenges most of the Appeals Board findings in this regard. I find no merit in any of these allegations. I will only address the issues where Mr. Radu made proper submissions before us, and will not further address issues where Mr. Radu merely repeats his submissions before the Appeals Board.⁶²

20. First, Mr. Radu claims that the complaints against him could have been resolved through informal methods, and by not giving him the opportunity to do so, his due process rights were violated. However, a review of the ICAO Personnel Instructions reveals an alleged offender does not have a right to an informal approach. The informal approach is directed at the victim, not the alleged offender.

21. PI/1.3/10 sets an obligation on the staff member to immediately inform the alleged harasser of the unwelcome nature of his behavior and express their expectation that it will cease. After taking this action, if the offensive behaviour does not cease, informal and formal means of resolving the problem are available. The exception to the inform obligation is where it is too difficult for the staff member to approach the alleged harasser directly.⁶³

22. Further, PI/1.6/3.7 states that an aggrieved staff member has the option to choose from two mechanisms to address cases of alleged harassment an informal approach and a formal approach.⁶⁴ The option of choosing from two available mechanisms has been given to the

⁶² Mr. Radu's challenge of the non-disclosure of communications between the ICAO Secretary General and ALD/OHR; and his challenge regarding legal counsel.

⁶³ 10. Staff members who believe they are being sexually harassed should immediately inform the alleged harasser of the unwelcome nature of his or her behaviour and express their expectation that it

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which put it in a suitable position to explain to the Secretary General any questions that may arise. In deciding the weight to attach to the investigation report and making the final decision regarding the alleged misconduct, the Secretary General is the judge instead of OIOS. Mr. Radu's assertion of conflict of interest on the part of OIOS is therefore also misplaced.

Original and Authoritative Version: