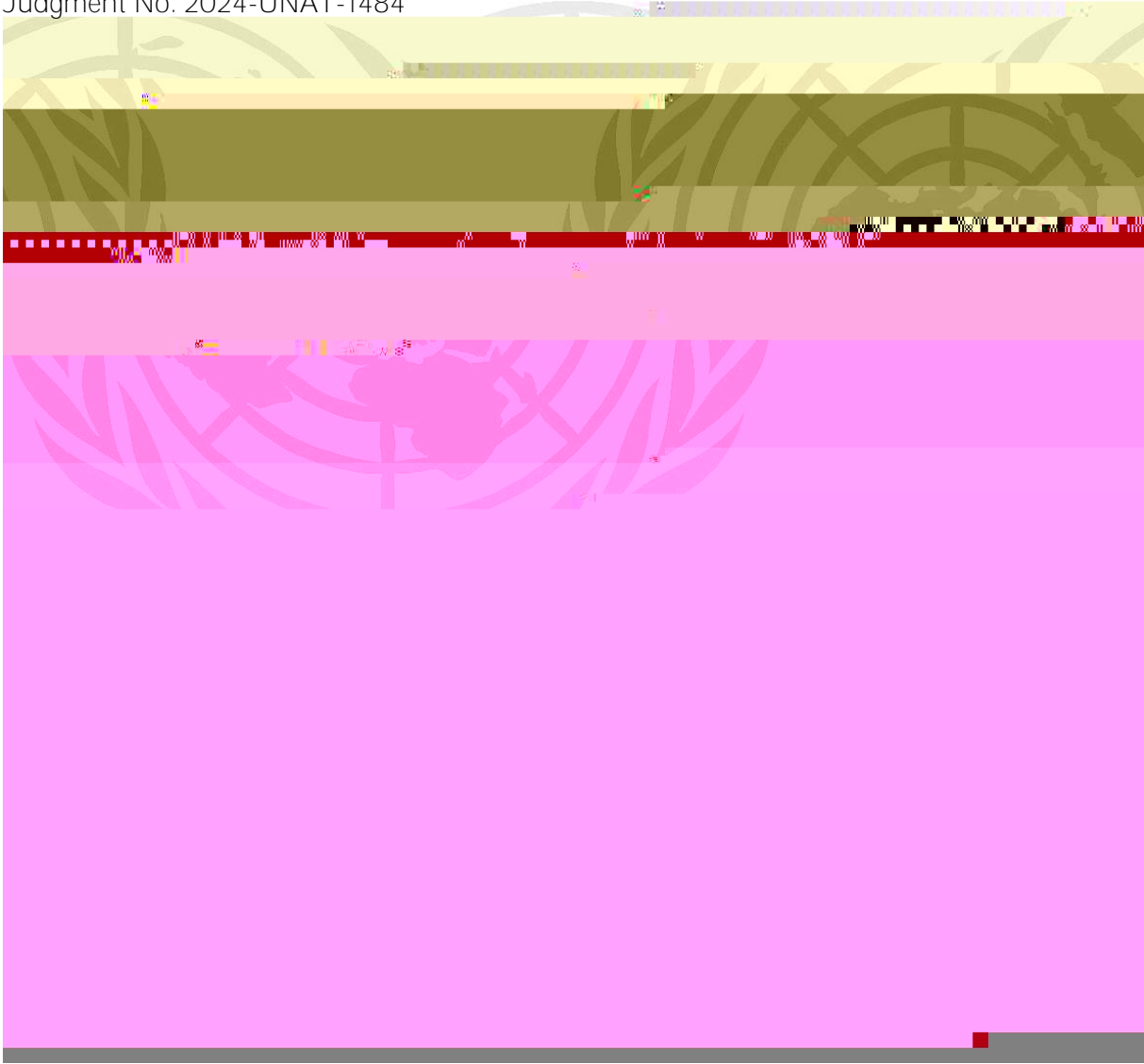


Judgment No. 2024-UNAT-1484



1. Ms. Kamini Devi Balram, a staff member of the International Civil Aviation Organization (ICAO), contested a decision not to appoint her to the position of Deputy Director, D-1, Human Resources, Bureau of Administration and Services (DD/ADB-HR), ICAO (Post) (contested decision).

2. By Decision No. ICAO/2023/004 (impugned Decision),<sup>1</sup> the Appeals Board of ICAO (Appeals Board) rescinded the contested decision, awarded compensation in lieu of rescission and dismissed on the merits Ms. Balram's other requests for compensation.

3. The Secretary General of ICAO lodged an appeal of the impugned Decision with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). Ms. Balram lodged a cross-appeal.

4. For the reasons set out below, the Appeals Tribunal grants the appeal, dismisses the cross-appeal, and reverses the impugned Decision.

5. On 25 October 2019, ICAO advertised the Vacancy Notice for the Post.<sup>3</sup>

6. On 20 December 2019, Ms. Balram applied for the Post.<sup>4</sup> Twenty-one candidates, including Ms. Balram were given a written test.<sup>5</sup>

7. On 5 March 2020, a Panel of Directors (Panel) interviewed six candidates, including Ms. Balram.<sup>6</sup> On the same day, in line with the practice for the appointment of all posts at the level of D-1 and D-2, the Secretary General undertook independent and separate interviews with each of the candidates. On 7 March 2020, the candidates undertook an assessment by Saville and Holdsworth Limited, a company that had been carrying out competency assessments for ICAO since 2013 (Assessment Centre). Ms. Balram was ranked sixth in the assessment. The Panel

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<sup>1</sup> *Kamini D. Balram v. Secretary General of the International Aviation Organization*, Decision dated 17 July 2023.

<sup>2</sup> Summarized from the impugned Decision as relevant to the appeal.

<sup>3</sup> Impugned Decision, para. 7.2.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, para. 7.3.

<sup>6</sup> *Ibid.*

recommended that four external candidates be advanced for presentation to the Human Resources Committee (HRC). Ms. Balram was not one of those candidates.

8.

current situation. I am fully confident that my decision will serve the best interest of the organisation for the benefit of its staff and members Member States.

11. On 9 July 2020, the President took the contested decision.<sup>10</sup> In the President's Memorandum, he denied the Secretary General's request, providing the following reasons:

You may recall that we discussed this issue approximately 2 months ago and at that time, I provided you with my advice. Meanwhile, I have carefully reviewed the considerations contained in your memorandum and wish to offer the following further observations.

Your views (...) are based on a contingent situation, mainly the current financial situation, which is, of course, very important and must be acknowledged, and the need to support the senior management turnover, which will be completed in approximately the next six months.

Still, the main driver for this appointment as for any other appointment is the recruitment process.

Of course, I value your personal assessment of the candidate. Unfortunately, however, the candidate that you proposed to appoint as Deputy Director Human Resources did not emerge from the recruitment process as properly qualified for the post.

In fact, the candidate was negatively assessed by the interview panel and was not initially "shortlisted", as you informed me at the time, and was the weakest candidate following the test of the Assessment Centre. All of the other five candidates interviewed by the panel and subsequently tested by the Assessment Centre performed better.

I wish to underline that the Deputy Director Human Resources' duties and responsibilities, as outlined in the Vacancy Notice, are crucial for the future of the organisation. In particular, the Vacancy [N]otice states that the Deputy Director HR "provides leadership in change management initiatives to ensure efficiency and effectiveness of the Organisation". As I have mentioned several times, our organisation needs to undertake a process of modernization with the objective to enhance efficiency and effectiveness. Effective Human Resource management is critical in this context.

On the contrary, based on the overall assessment, the candidate that you propose demonstrated serious weaknesses in the areas of vision and other critical competencies.

Lastly I wish to emphasize that in future, all vacancies should be clearly budgeted prior to being advertised. While COVID 19 has had consequences on the financial situation of ICAO,

16. By memorandum of 22 July 2020, the President reiterated his refusal to approve the appointment of Ms. Balram to the Post and noted that the circumstances of the recruitment process raised "serious questions on the implementation of the recruitment procedures with regard to fair treatment of all candidates, the overall transparency of the recruitment process" and could ultimately generate reputational risks to the Organization.<sup>16</sup>

17. On 27 July 2020, in response to Ms. Balram's e-mail of 26 July 2020, the President wrote:<sup>17</sup>

I wish to clarify that my decision is based exclusively on the outcome of the recruitment process, as reported in related documents, and on discussions held with the Secretary General and with some of the members of the interview panel. It is not based in any way on supposed discussions with "other individuals" as reported in your message.

18. On 31 July 2020, Ms. Balram was informed that the Secretary General had decided to discontinue the recruitment process for "administrative reasons" and that the Post would be re-advertised.<sup>18</sup>

19. On 6 August 2020, Ms. Balram filed a Request for Administrative Review by the Secretary General (RAR).<sup>19</sup>

20. On 8 September 2020, in response to the RAR, the Secretary General stated that the President's disapproval to appoint Ms. Balram had been a lawful exercise of the discretion conferred upon him.<sup>20</sup>

21. On 1 October 2020, Ms. Balram filed the appeal challenging the contested decision.<sup>21</sup> Following the abolishment of the former Advisory Joint Appeals Board in 2021, the case was transferred to the Appeals Board.

22. On 6 March 2023, the Secretary General submitted comments on the appeal before the Appeals Board.









extraneous considerations and bias cannot be ruled out. Any discussion of the candidates between the President and the Panel is in violation of the Secretary General's role. The Panel appears to have been in an implied conflict of interest when it worked to undermine the Secretary General's conclusion.

39. Ms. Balram requests the Appeals Tribunal to revise the amount of compensation awarded<sup>29</sup> and order compensation for abuse of process by the Secretary General before the Appeals Board and payment of further legal costs in the amount of USD 5,000 for the additional litigation resulting from the Secretary General's appeal before the Appeals Tribunal.

40. Ms. Balram argues that compensation in lieu of rescission should have been set in accordance with the principle of placing the staff member in the position he or she would have been if not for the breach. Ms. Balram could have been appointed to the Post with effect from July 2020 for a term of four years. Therefore, the period underlying the compensation should be extended from 1 October 2020 up to and until 30 June 2024. Moreover, as she was approaching the end of her career, this lost opportunity was likely the only one she had in the Organization.

41. Ms. Balram submits that the Appeals Board



49. Article IV of the ICAO Service Code provides that in making staff appointments the Secretary General is required to act with the advice and assistance of the Panel of Directors for D-1 posts<sup>33</sup> and following a review undertaken by a Committee established by the Council.<sup>34</sup> Following the Panel's report and the Committee's review, the Secretary General takes a decision including regarding the type and duration of the contract.<sup>35</sup> The Secretary General must inform the President of the Council of the decision taken and request the President's approval when appointing a person to a D-1 post;<sup>36</sup> and, where the President disapproves of the candidate chosen by the Secretary General, the Secretary General:<sup>37</sup>

(...) shall choose another candidate from the final shortlist, obtain the written approval of the President of the Council, and report the decision as described in paragraph 14 above. Alternatively, the Secretary General may decide to readvertise the post following the procedures contained in this Annex for the selection of D-1 posts, and to inform the Council accordingly.

50. An administrative decision not to appoint, promote or transfer can be challenged on review on the grounds that the Administration has not acted fairly, justly or transparently.<sup>38</sup> In undertaking such a review, this Tribunal is required to assess whether the applicable Regulations and Rules have been applied in a fair, transparent and non-discriminatory manner. It is not the Tribunals' role to substitute their decisions for that of the Administration.<sup>39</sup> If the Administration is able to show that the staff member's candidature was given full and fair consideration, the burden of proof shifts to the staff member who must show through clear and convincing evidence that the Administration has not acted fairly, justly or transparently in taking its decision.<sup>40</sup>

51. A rebuttable presumption exists that official acts have been regularly performed. This means in the current matter that because the Administration of ICAO was able, at least minimally, to show that Ms. Balram's candidature was given full and fair consideration, the presumption stood satisfied. The burden of proof then shifted to Ms. Balram who had to show

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<sup>33</sup> ICAO Staff Regulation 4.10 and 4.11.

<sup>34</sup> ICAO Staff Regulation 4.12 and 4.13.

<sup>35</sup> ICAO Staff Regulation 4.19.

<sup>36</sup> ICAO Staff Regulation 4.22. *See also Cherif Judgment, op. cit.*, paras. 2 and 24.

<sup>37</sup> Paragraph 15 of Annex IV to the ICAO Service Code.

<sup>38</sup> *Heftberger Judgment, op. cit.*, para. 83.

<sup>39</sup> *Dube v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-674, para. 38 (internal citation omitted).

<sup>40</sup> *Ibid.*, para. 40 (internal citation omitted).



resource selected on the basis of a strategic vision for the management of ICAO and could ultimately be detrimental to the organisation in the long term”.

54. Consequently, the Secretary General was invited by the President “ to consider alternatives emerging from the recruitment process”.

55. The Appeals Board found that the President had acted beyond his powers and applied a test which had not been provided for in reviewing the “fairness and transparency” of the outcome of the selection process. The President was found to have committed a substantial procedural breach or irregularity in undertaking his own process and ignoring the regulations which permitted giving preference to internal candidates. In addition, he was found to have erred in inappropriately consulting with Panel members, who were not authorized to give advice to the President.

56. The ICAO Service Code gives the President a veto power, in the sense that he is granted the authority and discretion to approve or reject D-1 and D-2 candidates.<sup>43</sup> This power is not unfettered and must be exercised reasonably and rationally, having regard to all relevant considerations.

57. It was apparent that the President had regard to relevant considerations in taking the decision that he did. Ms. Balram had been included in the process as an internal staff member but was negatively assessed during the interview by the Panel and the Assessment Centre, with the four other candidates having interviewed and tested better than she had. The President had regard to this weak performance during the interview and testing processes and appropriately considered that the position requi

process and conducting his own process





65. The Secretary General's appeal is granted, Ms. Balram's cross-appeal is dismissed, and the ICAO Appeals Board