



International Civil Aviation Organization

APPEALS BOARD

Case No.: ICAO Appeal No. 2020-004
Decision No.: ICAO/2023/004
Date of issue: 17 July 2023
Original: English

Before: Judge Rowan Downing KC: President
Mr. Ciaran Carolan: Member
Mr. Anda Djojonegoro: Member

Registrar: Mr. Arie Jakob

KAMINI D. BALRAM

v.

SECRETARY-GENERAL
OF THE INTERNATIONAL CIVIL
AVIATION ORGANIZATION

DECISION

Counsel for Applicant: Mr. George Irving

Counsel for Respondent: Mr. Christopher Petras

1. INTRODUCTION

1.1 On 1 October 2020, the Applicant filed an appeal against a decision not to appoint or approve her for appointment to the D-1 post of Deputy Director, Human Resources of the International Civil Aviation Organization (ICAO) in response to Vacancy Notice 2019/34/P111373 (the Post). The Human Resources Committee of the Council of ICAO had cleared her candidature and the Secretary General of ICAO had recommended the Applicant for appointment to the Post, but the required approval of the President of the ICAO Council (the President) was not forthcoming.

1.2 The application is contested by the Respondent.

2. RECEIVABILITY

2.1 The jurisdiction of the Appeals Board is limited by Article XI, 11.1 (c) of the ICAO Service Code to the review of “administrative decisions”:

11.1 Each staff member shall have the right to a review in accordance with the rules established pursuant to this Article in the following cases:

a) any disciplinary measure imposed.....

b) an order of discharge

c) any administrative decision which it is alleged constitutes non-observance of a contract of employment, or of the terms of the ICAO Service Code, or non-observance of established administrative practices in such a way as adversely to affect the individual.

2.2 There must be an “administrative decision” for the Appeals Board to have jurisdiction to consider an application for review. It is to be noted that Staff Regulation 11.1 is not limited to administrative decisions of the Secretary General, but is expressed in terms of “any administrative decision”. In *Cherif v. Secretary General of the International Civil Aviation Organisation*, Judgment No.2011-UNAT-165, at paragraph 21, UNAT recognised that an appealable administrative decision is, “usually taken on behalf of the Secretary General”. (emphasis added). Thus, it is clear that decisions made by others may be considered to be appealable administrative decisions in certain circumstances.

2.3 Decisions of the Secretary General concerning individual staff members are generally administrative decisions, but is the decision of the President in this matter an administrative decision or an executive decision?

3. BASIC FACTS

3.1 At the end of a selection process for the Post, the Secretary General, by Inter-Office Memorandum of 23 June 2020, sought approval from the President to appoint the Applicant to the Post, such being a precondition to the appointment being made within ICAO. By an Inter-Office Memorandum of 9 July 2020, the President advised that he could not support the appointment, thus refusing to give his approval. By a further Inter-Office Memorandum of 17 July 2020, the Secretary General requested that the President reconsider his decision. By Inter-Office Memorandum of 22 July 2020, the President declined the request to reconsider the matter and restated his reasons.

3.2 The Respondent, whilst contesting the substantive application, supported the receivability of the Application. Notwithstanding, the Appeals Board is required to ensure that it has jurisdiction in the matter. It cannot merely proceed on the basis of agreement between the parties that it has jurisdiction.

3.3 On 13 July 2020, the Applicant was informed that the President had not approved the recommendation of the Secretary General to appoint her to the Post.

3.4 On 6 August 2020, the Applicant filed a Form 177 requesting an Administrative Review by the Secretary General. On 8 September 2020, the Secretary General advised of her inability to change the decision.

3.5 On 1 October 2020, the Applicant filed a form 178 application to the Advisory Joint Appeals Board. Following the abolition of the former Advisory Joint Appeals Board in 2021 the case file was transferred to the Appeals Board.

3.6 The Applicant seeks the review of two decisions, the first is that of the Secretary General, the second is in respect of the President of the Council of ICAO.

3.7 At a Case Management Discussion held on 31 March 2023, it was ordered that there be a separate hearing in respect of the receivability of the application. The parties were given an opportunity to file submissions on the point. A hearing on the issue of receivability was conducted on 2 May 2023. The Appeals Board notes the submissions of the parties and the assistance thereby given.

4. LEGAL REQUIREMENTS

4.1 In the case of *Harb v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-643, commencing at paragraph 25, the United Nations Appeals Tribunal (UNAT) usefully set out the requirements of a decision to be considered as an appealable “administrative decision”, by analogy effectively falling within the definition of Article XI, 11.1 (c) of the ICAO Service Code:

25. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and by the Appeals Tribunal. In *Andronov*, the former Administrative Tribunal stated:¹

... There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

26. In the seminal case of *Andati-Amwayi*, the Appeals Tribunal defined what constitutes an administrative decision susceptible to challenge as follows:²

... What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

... In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member

¹ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003)

² *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, paras. 17 to 19

to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

27. In short, as held by this Tribunal in *Lee*³, the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

5. RELEVANT STRUCTURE AND ADMINISTRATIVE ISSUANCES OF ICAO

5.1 ICAO is governed by an Assembly of Member States. The Assembly appoints a Council of 36 Member States to act as its executive. The Council in turn appoints a President. The Secretary General is appointed by the Council under a Charter of Appointment letter.

5.2 ICAO appears to be the only UN agency with a permanent Council that has direct involvement in Secretariat processes. As a result, it is apparent that defining the boundaries between the functions of President of the Council and Secretary General is not entirely straightforward, with some matters appearing to have mixed decision-making lines of authority.

5.3 The Secretary General is the Chief Executive Officer according to Article 50 (h) of the Convention establishing the International Civil Aviation Organisation, done at Chicago 1944, (the Chicago Convention). The Secretary General has a management team known as the Full Senior Management Group, comprising all Bureau Directors and Deputy Directors, all Regional Directors, Chief Finance, Chief Strategic Planning, Coordination and Partnerships and Chief Internal Oversight. This team works with the Secretary General and not with the President.

5.4 The President of the Council leads his own team comprising 36 Members of Council. The President does not have a direct working relationship with any of the Secretariat staff other than the Secretary General.

5.5 It is necessary to consider the structure and role of the Council of ICAO to determine whether its role in respect of its intervention in respect of the appointment of staff at the level of D1 is administrative or not in nature.

5.6 The Chicago Convention provides that the Council is elected by an Assembly of Member States and has power to not only appoint the Secretary General, but also to make provision for the appointment of other personnel. See Articles 50, 54, and 58.

5.7 Article 58 is quite specific in respect of the powers of the Council, providing in respect of "Personnel", that:

Art 58

Subject to any rules laid down by the Assembly and to the provisions of this Convention, the Council shall determine the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State.

³ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49.

5.8 This power is not only regulatory, (as was found in the case of *Cherif, supra*) but also administrative in nature, as it can relate to the specific appointment of the Secretary General, as an individual, and to “other personnel of the Organization”.

5.9 On 20 January 2009, during the 186th Session of the Council, pursuant to the powers given under Article 58 of the Chicago Convention, the Council passed the following resolution in respect of all appointments and promotions for posts at P4 and above:

Appointments and promotions to senior level (P-4 and above) posts at ICAO (Subject No. 7)

1. The Council considered the above subject on the basis of a proposal which the Representative of Canada had addressed to the President of the Council in a letter dated 16 December 2008, and which the President had circulated to all Council Delegations by electronic mail dated 17 December 2008.
2. The above-mentioned letter was supplemented by updated information provided orally by the Representative of Canada.
3. Following some discussion, a proposal for Council action on the subject was amended in accordance with some suggestions put forward, and the Council accordingly:
 - a) keeping in mind Resolution A1-8 (Appointments and promotions at ICAO), decided that as of 20 January 2009, it would require the written approval of the President of the Council for any hiring, appointment and promotion of P-4 employees and above;
 - b) decided that these measures would be permanent as of the date of 20 January 2009; and
 - c) instructed its Human Resources Committee to review procedures and propose amendments to the Service Code in order to faithfully reflect the Council’s decisions in sub-paragraphs a) and b) above.
4. Reservations voiced by the Representative of Saudi Arabia were recorded for the minutes of the meeting.

5.10 On 18 March 2009, this resolution was amended to additionally provide:

Appointments and promotions to senior level (P-4) posts at ICAO (Subject No. 7). In accordance with Rule 43 of the Rules of Procedure for the Council, the Council decided to reopen discussion of this item, which had been considered earlier in the session (186/1), and agreed to amend sub-paragraph 3 a) of C-DEC 186/1 to read:

“a) keeping in mind Resolution A1-8 (Appointments and promotions at ICAO), decided that as of 20 January 2009, it would require the written approval of the President of the Council for any hiring, appointment, promotion, extension and termination of P-4 employees and above.” The approval of the President would not, however, be necessary for the following decisions:

- i) hiring or extension of temporary employees when the contract offered is of less than one year (e.g. special service agreements, contracts for freelance interpreters/translators); and
- ii) hiring or renewal of a contract for field staff of technical cooperation Projects.”

5.11 Staff Regulation 4.12 is also relevant to the supervision of the Council over the appointment of D-1 and D-2 posts, as it provides that “The Council shall establish a Committee to review the selection reports of D-1 and D-2 level posts,”. This is achieved through the Council’s Human Resources Committee (HRC), which operationally acts as a result of the provisions in Annex IV, paragraph 1 of the Service Code, designating the HRC with ensuring that:

“...the shortlisted candidates meet the selection criteria and that all those rejected by the process have been fairly treated...[taking] into account the goal to enhance the ability of ICAO to attract, retain and motivate a competent, diverse and flexible workforce capable of delivering outcomes to the highest standard.”

5.12 And at paragraph 10:

“The HRC shall review the qualifications of the final shortlisted candidates to verify whether or not the candidates meet the requirements as set in the Vacancy Notice and to ensure that they are suitably qualified to discharge the functions of the post under consideration.”

5.13 Taking into consideration the Chicago Convention powers and duties, the above resolutions, Staff Regulations and the Staff Service Code, an “appointment” in the context of personnel of the Organization will include appointments by way of promotion, thus covering decisions which “*must produce direct legal consequences affecting a staff member’s terms and conditions of appointment*” and an “*administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member*” as contemplated in the definition of a reviewable administrative decision to be found in the case of *Hard, supra*.

5.14 It appears that the intention is that the Council is directly involved in the administrative processes of the appointment of higher-level staff to ensure that the selection criteria are met and that candidates meet the requirements of the vacancy notice and can discharge the functions of a post being considered. The Council has delegated the final approval of staff to certain designated posts to the President.

5.15 Further, as a consequence of the resolutions of the Council, set out above, the following provision was made in the ICAO Staff Service Code in respect of a role being given to the President to approve all appointments at the D-1 level:

ANNEX IV^[1]_[SEP] HUMAN RESOURCES COMMITTEE

PROCEDURES FOR THE SELECTION OF D-2 AND D-1 LEVEL POSTS, THE POST OF ETHICS OFFICER AND THE POST OF CHIEF INVESTIGATOR

Decision for D-1 posts other than Chief, Evaluation and Internal Audit Office (C/EAO)

14. Taking into account the advice offered by the HRC on the shortlisted candidates, and after obtaining the written approval of the President of the Council, the Secretary General shall choose the preferred candidate and report the decision to the Representatives on the Council via a Confidential Secretary General memorandum and, subsequently, in a Staff Notice. An Electronic Bulletin announcing the appointment shall be disseminated to States.

15. Should the President of the Council disapprove of the candidate chosen by the Secretary General, the latter 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.

5.16 The Secretary General cannot appoint a preferred candidate until “after obtaining the written approval of the President of the Council”. Thus, the decision of the Secretary General to seek the approval of the President of the appointment of the Applicant did not have a direct legal consequence upon her. There was no legal effect until a decision was made by the President regarding such approval.

5.17 The decision of the President not to approve the appointment of the Applicant to the Post is the only decision which had a direct legal and individual consequence for the Applicant. This is not merely a step along the way of the process leading to an appointment being made, rather, it was an essential decision directly impacting upon the terms of appointment or contract of employment of an

individual staff member. It was effectively the final act and crystallization of any recommendation to appoint made by the Secretary General.⁴ It is thus a reviewable administrative decision.

5.18 The Appeals Board concludes that the application is receivable.

6. PROCEDURES BEFORE THE APPEALS BOARD

6.1 On 1 October 2020, the Applicant filed a form 178 application to the Advisory Joint Appeals Board. Following the abolishment of the former Advisory Joint Appeals Board in 2021 the case file was transferred to the Appeals Tribunal upon its establishment in 2021.

6.2 On 9 March 2023, the application was assigned to the Appeals Board as it is constituted.

6.3 On 31 March 2023, this matter was the subject of a Case Management Discussion.

6.4 On 11 April 2023, an order was issued by the Appeals Board in respect of the provision of relevant documents in respect of the selection process and the exchanges between the President of the ICAO Council and members of the Selection Panel. The Appeal was also ordered to be considered firstly in respect of its receivability, the hearing in respect of which was held on 2 May 2023.

6.5 On 23 May 2023, the hearing of the substantive application was held. No witnesses were called.

7. RELEVANT FACTS IN CHRONOLOGICAL ORDER

7.1 On 28 March 2019, the Secretary General advised the senior management team of ICAO that the Applicant, in addition to her duties as Chief, Staff Employment and Administration (C/SEA), had been assigned to coordinate activities of human resources, an assignment that was extended with no end date. The applicant was given full delegated powers in respect of the position.

7.2 On 24 October 2019, the Human Resources Committee of the Council approved the vacancy notice for the Post, which was subsequently advertised on 25th of October 2019 with an application deadline on 29th December 2019. The applicant applied for this post on the 20th of December 2019.

7.3 There were 129 applications for the post. Of these, 108 were deemed not to meet the requirements for the Post. The remaining 21 candidates were then given a written test. Three candidates withdrew their applications. Following the test, seven candidates were shortlisted for interview. On 5 March 2020, a Panel of Directors interviewed six of the candidates, one of the seven having withdrawn. On the same day, in line with the practice for the appointment of all posts at the level of D1 and D2, 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 has been undertaking competency assessments for ICAO since 2013. The Applicant was ranked sixth in this assessment. The Panel of Directors recommended four external candidates be advanced for presentation to the Human Resources Committee. The Applicant was not one of these candidates.

7.4 On 10 March 2020 the Secretary General approved the four external candidates as recommended by the Panel of Directors, adding the Applicant, as an internal staff member, to the final shortlist. She stated the reason for doing this was based upon the Applicant's "experiences and

⁴ See *Wan v. Secretary General of the International Civil Aviation Organization*, Decision number . ICAO/2022/007 at paragraphs 132-133

performance as HR coordinator during D/ADB's absence since April 2019." The Secretary General stated that she had "consulted the shortlisted candidates with the Council President".

7.5 On 17 April 2020, the Human Resources Committee examined the selection process, reviewing the now five shortlisted candidates for the Post, agreeing that they all be retained for further consideration.

7.6 On 23 June 2020, in a detailed Inter -Office Memorandum, the Secretary General requested the approval of the President for the appointment of the Applicant to the Post. The basis of the decision was set out under the headings- *Roles of D/ADB and DD/ADB HR, Substantial turnover in the senior management team of the Secretariat, Cost Containment and restructuring of HR sections, Gender representation and geographic diversity in the Full Management Group and Career development for internal ICAO staff.* The Secretary General went on to state:

"I recognize that the candidate's interview with the Panel of Directors and her assessment by the external consulting firm in the recruitment process were not strong, in contrast to the good written test. However, please note that I also met and discussed individually with all shortlisted candidates, as is my customary practice for all senior management recruitment processes, and Ms Balram showed a very good performance in my assessment. I further wish to stress that the candidate has proven her value as ICAO staff member over many years, as also confirmed in her PACE reports, and she did an excellent job in coordinating HR activities in the absence of the Director ADB since April 2019. The decision to promote Ms Balram will without doubt further motivate the candidate and will avoid any risk of discouragement or potential dysfunction in the HR area.

Even though the decision on this matter rests with the Secretary General, subject to your approval, I shared my intention to appoint Ms Balram in a meeting with all Directors. Some Directors highlighted a few areas for further development that should be appropriately addressed with Ms Balram if selected, and the Directors subsequently expressed support for my appointment decision.

In view of the above, I believe that Ms Kamini Balram is the most suitable among the shortlisted candidates for the position of Deputy Director ADB/ HR in consideration of the 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."

7.7 On 9 July 2020, the President replied to the request of the Secretary General, denying his approval. This response is set out in full, as it is of importance to the considerations in this case:

I refer to your memorandum dated 23 June 2020 regarding the appointment of the Deputy Director Human Resources.

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 regarding the appointment of the Deputy Director Human Resource are well understood. However, they 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 notice 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 competences. An appointment based on contingent justifications, would therefore prevent our Organisation to have a deputy director human 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.

Consequently, I cannot support your proposal and invite you to consider alternatives emerging from the recruitment process.

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, the fact that this position was not budgeted at all (regular budget or other source of funding) is not a good practise and must be avoided.

Thank you.

(signed)

Salvatore Sciacchitano

7.8 While formal exchanges were taking place between the Secretary General and the President, the Applicant had a number of exchanges with the President, the Secretary General and others.

7.9 On 13 July 2020, the Applicant was informed that the President had decided not to approve the recommendation of the Secretary General that the Applicant be appointed to the Post. She was told that the President had based his decision on the views of the interview panel members and on the outcome of the assessment centre test. The Applicant was also asked during this meeting whether she should accept an acting appointment to the Post, as the President had advised that he would approve such an acting appointment rather than an appointment to the substantive post. The Applicant did not accept this offer and has asserted that she found it difficult to comprehend that she would be suitable for the acting post but not the substantive post given that the functions to be carried out would be the same.

7.10 On 16 July 2020, the Applicant received a telephone call from the President during which he provided feedback. He was of the view that there were anomalies in the selection process, upon which he did not elaborate, and thus he was not able to support the proposal of the Secretary General. He stated that the primary reason for his refusal decision was the result of the assessment centre and on "formal and informal" discussions with members of the interview panel and other individuals whom he did not identify.

7.11 In response to the Memorandum of the President, on 17 July 2020, the Secretary General requested that the President reconsider his decision. This memorandum is also set out in full:

I wish to refer to your memorandum dated 9 July 2020 regarding the appointment of the Deputy Director, Bureau of Administration and Services, Human Resources (DD/ADB HR).

Following our first exchange of views in April and subsequent discussions on the matter, we had agreed that more time was required to consider the issue in view of the unprecedented challenges to the staff and the organisation in response to the COVID-19 pandemic. I have provided my written decision and rationale to you on 23rd June 2020 after thorough consideration of all facts and the matters and after consultation with senior managers.

I wish to reiterate that my decision to appoint Ms. Balram to the post DD/ADB HR is not an exceptional decision in a contingency situation, but was based on the recruitment process and the five following competitive considerations that I have conveyed in detail in my above referred to referendum memorandum

1. Role of D/ADB and DD/ADB HR
2. Substantial turnover in the senior management team of the Secretariat
3. Cost containment and restructuring of HR sections
4. Gender representation and geographic diversity in the Full Senior Management Group
- 5 Career development for internal ICAO staff

As an internal staff member, Ms. Balram has performed well in her job, as evidenced in her PACE report by her supervisor - the former D/ADB, and has done an excellent job as HR coordinator to support the Organisation in these challenging times from April 2019 until now. In this role Ms. Balram has been effectively handling highly complex and sensitive HR matters, played a critical role in the revisions of the ICAO Framework on Ethics, and has taken the lead in discussions on human resources matters before the 40th session of the Assembly and the Council.

In my view Ms. Kamini Balram is the most suitable among the shortlisted candidates for the position of Deputy Director ADB/HR in consideration of the current situation.

Let me reiterate that the organisation will undergo a major turnover in senior management positions in the near future and will rely on comprehensive institutional knowledge and sustainability in crucial positions. As you are aware, some members of the senior management group have only recently reported for duty, some senior positions have just been advertised and others will soon become vacant. The appointment decision for the position of Director, ADB is expected to be taken in November 2020, and it will require another 6 to 12 months for the selected person to become fully operational after reporting for duty. Similarly, the process from advertising to onboarding of other vacant senior positions in the secretariat will take approximately 10 months, and both external as well as internal candidates will require a significant amount of time to become operational in their assignments.

With reference to your comments on the recruitment process in this case, I wish to stress that, as per ICAO Service Code, the "Secretary General shall appoint the staff of the Organisation. For appointments, extensions and reappointments of D-1 and D- 2 staff, the Secretary General shall obtain the written approval of the President of the Council". In exercising this appointment authority, the "Secretary General shall act with the advice and assistance of the Panel of Directors for D-1 posts (Staff Regulation so 4.10 and 4.11 refer). It is therefore my role and responsibility to take into consideration all pertinent factors when recruiting senior positions in the Secretariat. The advice provided by the panel of Directors as well as the results of the assessment centre are two of several elements to assist me in making an informed decision in the recruitment process. These important components of the process are however not the sole deciding factors among many elements that I take into careful consideration for senior appointments, including my personal review of the applications and written tests, my personal interviews with all candidates, as well as my personal reference checks. I have clearly highlighted all factors in my memorandum to you of 23 June. You will recall that changes to the recommended shortlist by the panel of Directors have been made in a number of recent recruitment cases, based on careful consideration of all factors and following consultation with you. There are also a number of cases from past recruitment exercises where candidates were selected based on their outstanding expertise, experience and other factors, despite weaker assessment centre results. Conversely, strong assessment centre results were no guarantee for satisfactory work performance in the past in this Organisation.

In accordance with my charter letter from the council, the functioning and efficient management of the Secretariat is my responsibility, and I am accountable to the Council for the delivery of expected results. As Secretary General, I can only achieve this goal through the support of a strong and competent team of senior managers who I can rely on. I wish to reiterate my assessment that Ms. Balram is the most suitable among the shortlisted candidates for the position of Deputy Director ADB/ HR at this juncture. Your decision not to support my appointment of Ms. Balram will have a negative impact on the work of the Secretariat, including on immediately ongoing change initiatives and restructuring efforts of human resources in ADB, as well as on medium and long term plans to increase the efficiency and effectiveness of ICAO.

Mr. President, in light of my detailed assessment in my memorandum of 23 June and the additional explanation provided above, I wish to request you to reconsider your decision with

respect to the appointment to the post of DD/ADB HR for the benefit and best interests of the Organisation

(signed)

Fang Liu

7.12 It is important to note that the Secretary General referred to her charter letter from the Council, the terms of which were binding upon her. In this letter, dated 5 April 2018, there is an express direction by the Council that the Secretary General pay particular focus to “human resources management including recruitment based on competency with due consideration of gender balance and equitable geographic representation.” This expression in the charter letter must be taken to reflect the policy of the Council in respect of gender and geographical considerations when an appointment is made or recommended.

7.13 By inter-Office Memorandum of 22 July 2020, the President replied to the Secretary General, setting out the basis of his continued refusal to approve the appointment of the Applicant to the post:

I have carefully reviewed your IOM dated 17 July 2020 reiterating your proposal of appointment of the Deputy Director Human Resources.

I wish to emphasize that it is not my intention to question your role and responsibility in taking into consideration the pertinent factors that guide your proposal (role of DD/ADB versus D/ADB, turnover of senior staff, cost containment, gender representation and career development of internal staff).

As stated in my previous IOM, I value your personal assessment of the candidate. However, I wish to recall that 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 and this issue cannot be disregarded. Consequently, my position in not approving your proposal is not meant to challenge your prerogatives. Rather it is based on the fact that the principles of fairness and transparency, evoked with the insistence by the Council, have not been clearly complied with at the outcome of the recruitment process. In fact, I note that your proposal is based only on the aforementioned pertinent factors without due regard to the factual elements emerging from the recruitment process.

I wish to reiterate that the candidate in question was not included in the shortlist by the interview panel but was admitted to the verification of the assessment centre only following your intervention. Notwithstanding the candidate in question was the weakest candidate according to the assessment centre, she was retained in the list submitted to the HRC while one candidate better assessed was excluded. Moreover, the post was not budgeted and its financial viability is now presented in the framework of an organisational restructure compatible only with the appointment of the proposed candidate. On the contrary, two other D1 positions have been advertised just a few days ago without concerns expressed to me on their financial implications.

These elements raise 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, in my opinion, could generate ultimately unnecessary reputational risks to the organisation.

Sincerely,

(signed)

Salvatore Sciacchitano

7.14 In an email from the Applicant to the Secretary General, copied to the President, on 26 July 2020, the Applicant made the following assertion:

In my conversation with the President on 16 July 2020, he confirmed the position you communicated earlier on 10th and 13th July 2020, that he did not approve your decision that I be appointed as the DD HR. He stated that his decision not to approve your appointment decision

was based primarily on the result of the assessment center and on “formal and informal” discussions, he had with members of the interview panel and other individuals.

7.15 On 27 July 2020, the President responded to the Applicant, copying the Secretary General, writing:

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.

7.16 On 31 July 2020, the Secretary General advised the Applicant that she had decided to discontinue the recruitment process and that the post would be re-advertised. The Applicant was later advised that day that the recruitment for the post had been discontinued for “administrative reasons”.

7.17 Neither the Applicant nor the Respondent question the procedures leading up to the recommendation of the Applicant for the Post. The Applicant’s complaint is directed to the manner in which the President exercised his discretion.

7.18 On 6 August 2020, the Applicant filed a Form 177 Staff member request for Administrative Review by the Secretary General.

7.19 In response, on 8 September 2020, the Secretary General advised of her inability to change the decision. Specifically, she advised:

“I decided to re advertise the DD/HR post in accordance with paragraph 15 of Annex IV the of the ICAO Service Code, following the disapproval by the President of the Council of your appointment to the post. The action by the President in this regard was taken in accordance with staff regulation 4.10, 4.22 and 4.323 as well as paragraphs 14-15 of Annex IV to the Service Code, whereby the appointment of D1 staff is expressly subject to the approval of the President of the Council. The President of the Council highlighted the interview panel’s assessment and the Independent Management Assessment Centre’s findings as revealing critical deficiencies, which, in the exercise of his discretion, outweighed other factors that have been presented in favour of your appointment. The disapproval by the President on these grounds was thus a lawful exercise of the discretion conferred upon him under the aforementioned provisions of the Service Code.”

8. GROUNDS OF REVIEW AND INITIAL SUBMISSIONS OF THE APPLICANT, AS SET OUT IN THE APPLICATION

8.1 The Secretary General selects a candidate “based on all of the parameters of the selection process”. See Staff Rule 104.8, paragraphs 5-8.

8.2 The Secretary General is guided by the Panel of Directors whose advice must be in compliance with the provision of the ICAO Service Code. The Secretary General must consider the performance appraisal reports of internal candidates from within ICAO and from other UN agencies. See Staff Rule 104.8

8.3 The Secretary General appoints a Panel of Directors comprising four D-2 Bureau Directors one of whom shall be the Director of the Bureau of Administration and Services (ADB). They review and make recommendations in respect of the candidates.

8.4 The Secretary General, taking into account the recommendations of the Panel of Directors, the requirements of the post and the need to ensure diversity in terms of equitable geographical representation and gender equality, decides on candidates to be interviewed by the Panel of Directors. The Secretary General may participate in the interviews.

8.5 Following a recommendation of the Panel of Directors, the Secretary General will decide on the candidates to be shortlisted and presented to the Human Resources Committee for its review.

8.6 The Applicant submitted in her application that in her report to the Human Resources Committee, the Secretary General, on two separate occasions, confirmed that she had consulted with the President to clear the list of seven candidates deemed qualified to be invited for interview and assessment centre review and to later clear the list of five candidates to be retained on the final shortlist. The Applicant noted she was on both lists which were presented to the Human Resources Committee.

8.7 The Human Resources Committee reviews the selection report of D1 and D2 posts to ensure the candidates meet the selection criteria. The Committee is specifically required to take into account the ability of ICAO to attract, retain and motivate a competent, diverse and flexible workforce capable of delivering outcomes at the highest standards and those matters which are set out in Annex IV of the Service Code.

8.8 Subject to objections from the Human Resources Committee on the suitability of candidates or any part of the selection process, candidates who have gone through the recruitment process and are deemed qualified for appointment to the position are considered appointable.

8.9 The Applicant noted that she was on the list of qualified candidates cleared by the Human Resources Committee and was the only internal candidate. She had an expectation that the provisions of staff regulation 4.1 would apply in the making of the final decision by the Secretary General and the President, noting that this provision provides that, preference should, in principle, be given to staff members of the Organization.....”.

8.10 The authority to approve D-1 level appointments is such that the President is limited and he is bound by precise guidance and/or instructions, as his decision must be based on the Summary of decisions of the Human Resources Committee which is a statutory body of the Council. It is not within his authority to intervene in any part of the selection process, to re-evaluate candidates or to engage in formal and informal discussions with individual panel members on any of the candidates.

8.11 The President acted outside of these parameters and decided to pursue his own investigations and exercise his discretion outside the established procedures especially disregarding the deliberations and recommendations of the Human Resources Committee, “it arguably amounts to an illegitimate and arbitrary exercise of power”.

8.12 “[i]t is not within the President's authority, under the ICAO Service Code or Staff Rules to intervene in any part of the selection process, including having “formal and informal” discussion on a particular candidate with certain members of the panel of directors and other individuals.

8.13 The selection process and the appointment authority is within the mandate of the Secretary General in accordance with the Staff Rules. Those regulations do not give the President any independent authority to re-evaluate the selection process or carry out his own independent assessment of a candidate, formally or informally, in granting his approval for the appointment decisions made by the Secretary General. The President's intervention changed the outcome of the appointment decision of the Secretary General whose authority is delegated to her by the Council. The President's intervention contravenes the summary of Decisions/Discussions of the Human Resources Committee, which weighs in favour of an internal candidate, consistent with the requirements of Article 5 paragraph 4.5 of the ICAO Service Code.

8.14 The President's confirmation that the reasons for his refusal to approve her appointment were 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 members of the interview panel, was

inconsistent with the facts. The Secretary General confirmed in her report to the Human Resources Committee that on two separate occasions she had consulted with the President to clear the list of candidates deemed qualified to be invited for interview and assessment centre and to clear the list of candidates retained on the final shortlist for consideration by the Human Resources Committee, noting that the Applicant was on both lists.

8.15 The President acted in breach of procedures and took into account irrelevant matters and failed to have regard to relevant matters. The Applicant asserted that the actions of the President were arbitrary and lacked transparency, undermining the policies and procedures of ICAO. In doing so he acted beyond his mandate effectively conducting his own recruitment process including “having formal and informal discussions” about the applicant's candidature with some of the panel members and other individuals prior to reaching his decision.

8.16 The President illegally overruled the outcome of the Human Resources Committee review. Withholding his approval was an improper and unlawful exercise of discretion inconsistent with the overall policy values of ICAO as a specialist agency of the United Nations.

8.17 The President acted in bad faith and was biased against the Applicants' candidature for the Post as before he had made his decision the Applicant was approached and advised that the President would agree to her taking an acting position in respect of the Post. This lacked fairness and transparency in respect of the decision.

8.18 The President failed to take into account the flawless performance reviews of the Applicant for 2019 to 2020 when she acted as HR coordinator.

8.19 The President failed to take into account Service Code paragraph 4.5 which is intended to give effect to ICAO policy supporting the career progression of individuals in the Organisation. The ICAO Council and Assembly mandates the Organisation to have a strategy to support career progression and staff and succession planning including gender and diversity. It is therefore an obligation to ensure that there is fair treatment of internal candidates.

8.20 The President stated that he did not approve the decision of the Secretary General because of discussions he had with her subsequent to her written submission to him, contrary to his obligation to act on the written submission and not on private discussions. This undermined procedures and was not accountable or transparent. It was not a fair and transparent promotion process.

8.21 The President did not follow the procedures appropriately, involving himself in the fundamental steps of the selection process. The Regulations do not make allowance for the President to usurp the functions of the Human Resources Committee.

8.22 The ICAO Assembly recently reaffirmed its commitment to enhance gender equality and the advancement of women's developments by supporting UN Sustainable Development Goal 5 to achieve gender equality and empower all women and girls.

8.23 As a woman of Indian extraction from a developing country within the Caribbean and South American region the Applicant asserted she was the subject of bias.

8.24 At the hearing of the matter on 23 May 2020, counsel for the Applicant advised the Appeals Board that the basis of the case for the Applicant was that she did not receive a full and fair consideration.

9. SUBMISSIONS BY THE RESPONDENT

9.1 The Respondent submitted that the Applicant received full and fair consideration and that “the Applicant’s assertions of error, bias and other misfeasance in respect of the President’s disapproval of the Secretary General’s choice of Applicant for the DD/HR post are not supported by the evidence”.

9.2 The Respondent drew the attention of the Tribunal to the learning in *Rolland v. Secretary General of the United Nations* 2011-UNAT-122 at paragraph 26, where it was held that:

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity.... If the management is able to even minimally show that the Applicant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Applicant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

9.3 As a consequence, the burden shifts to the Applicant to produce clear and convincing evidence that she was denied a fair chance of promotion.

9.4 The Respondent asserts as demonstrating the fairness of the consideration the fact that the Applicant was the weakest of the six candidates in the external assessment process, but she was still short listed. The Respondent asserts that the “sole focus of the applicant’s appeal is on the disapproval by the President of the Secretary General's choice of the Applicant for the Post, which the applicant maintains was based on “extraneous and impermissible considerations and action”. There was a reference to staff regulations 4.19, 4.22 and 4.23.

9.5 The Respondent further submitted that the President withheld his approval on the grounds that the Applicant was not properly qualified for the Post and that the Applicant was negatively assessed by the interview panel, not initially being “shortlisted”, and that she was the weakest candidate following the set of 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.

9.6 The President further expressed the view that change management was a central part of the position requirements. The Respondent brought to the attention of the Appeals Board the observation made by the President in his correspondence of the 9th of July 2002 that “based on the overall assessment, the [Applicant] demonstrated serious weakness in the area of vision and other critical competences. An appointment [of the applicant], based on contingent justifications, would therefore prevent [the] Organisation to have [sic] a Deputy Director Human Resources 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”.

9.7 The Respondent further asserted that the President could legitimately take into account the performance of the Applicant in the recruitment process and the strength of her qualifications for the Post when exercising his discretion whether to grant or withhold his consent to the appointment of the applicant to the post.

9.8 The President was also able to exercise a supervisory role to enquire in circumstances where the Applicant was included into the short list by the Secretary General and not the Panel of Directors.

9.9 Finally, the Respondent submitted that no rights of the Applicant were breached by the President in his consideration of the recruitment process by his discussions with the Secretary General and members of the panel or by his withholding his approval.

10. REJOINDER OF THE APPLICANT TO THE REPLY OF THE RESPONDENT

10.1 The Applicant sought and was granted the right to file a rejoinder to the response of the Respondent.

10.2 The Applicant stated that she did not question the need to have the written approval of the President for D-1 appointments, but that such oversight function needed to be exercised in accordance with Staff Regulations passed by the Council and binding upon the President.

10.3 She recognised that the ICAO Service Code failed to provide specific guidance as to the manner in which the approval is to be considered, but that as part of the discretionary process there had to be good faith and fairness which underline all administrative actions.

10.4 She was denied such full and fair consideration on the basis of unfair influence and extraneous considerations through the President seeking “subjective opinions and lobbying of members of the Panel of Directors”.

10.5 The Secretary General has the power of appointment under staff regulation 4.10 and that the Applicant was selected in part for the policy reasons of gender representation, geographical diversity and preference for staff development and continuity, as well as her own interview process, and the performance of the Applicant. The President failed to take these into account and further failed to consider Staff Regulation 4.5 affording preference for internal candidates.

10.6 The factors above outweigh the subjective results of the interviews conducted by the Panel of Directors, pursuant to Staff Regulation 4.11 (a).

10.7 The Panel of Directors is an advisory body as set forth in Staff Rule 104.8, making recommendations to the Secretary General in respect of candidates following interviews and other assessments.

10.8 The Panel of Directors reports to the Secretary General and has no authorization to deal directly with the President or to discuss any of the candidates with the President.

10.9 It was noted that in the penultimate paragraph of the memo of the Secretary General to the President on 23 June 2020 the Secretary General stated:

“Even though the decision on this matter rests with the Secretary General, subject to your approval, I shared my intention to appoint Ms. Balram in a meeting with all directors. Some directors highlighted preview areas for further development that should be appropriately addressed with Ms Balram if selected, and the director's subsequently expressed support for my appointment decision”.

10.10 The Secretary General conducted her own assessment of the candidates including an interview of each. She then reached her decision “taking into account the policy goals of the organization, the record of performance and other factors, addressing career progression of staff and succession planning column in the need to respect the staff regulations”.

10.11 The Secretary General found that the recommendation of the Panel of Directors was deficient in the terms of shortlisting of candidates. The inclusion of the Applicant in the submission to the HRC was done with the consent of the President.

10.12 The Secretary General confirmed she consulted with the President on the final list to be presented to the HRC.

10.13 The President is mandated to approve or reject the decision of the Secretary General on the basis of the submissions made to him. He has no mandate to go further and to solicit the views of others.

10.14 The President was inconsistent, on the one hand having approved the addition of the Applicant to the list of candidates for consideration for appointment by the HRC, but later claiming that the applicant was not suitable for appointment to the Post. The Applicant questioned why the President appeared to have changed his mind.

10.15 The President took into account irrelevant matters concerning change management with regard to technology, transformation through data analytics, artificial intelligence and machine learning, none of which were requirements for the Post.

10.16 The President failed to take into account the Applicant's experience with the Enterprise Resource Planning System.

10.17 There is an inconsistency between the Panel's assessment and that of the SHL Assessment Centre, with the Panel concluding that the Applicant failed to demonstrate leadership and managerial skills, while the Assessment Centre consider this as one of the Applicant's key strengths and solid capability.

10.18 The views expressed by the Directors directly contradict the performance appraisals of the Applicant while carrying out the functions of HR coordinator *ad interim*, and that her supervisor, a member of the Panel of Directors was one of the directors who had rated her competence as being ES.

10.19 The Panel of Directors did not demonstrate that it had a structured rating system for scoring each of the candidates on the same questions, thus meaning that the results were subjective. Further none of the members of the Panel of Directors kept contemporaneous records of its meetings.

10.20 Mr. Steve Creamer, a member of the Panel of Directors disclosed that further exchanges took place directly between one or more of the Directors and the President with no procedures or protocols being established for this to occur.

10.21 Extraneous considerations were taken into account. Some Directors had complained in the past of the Applicant's insistence on following rules. She asserted that one of the candidates for the position was a close relative of a Council member.

10.22 The President stated that the reason for the disapproval to appoint the Applicant was for budgetary reasons, as the position was not budgeted. The Applicant submitted that this was a matter of speculation by the President and that the Post was operationally required by the Council and the HRC had found that the selection process was regular.

10.23 The President failed to take into account the importance of institutional knowledge and the avoidance of major turnover, two matters specifically taken into account by the Secretary General.

10.24 In the Inter-Office Memorandum from the Secretary General to the President of 17 July 2020, requesting his reconsideration of the matter the Secretary General stated:

“you will recall that changes to the recommended shortlists by panel of Directors have been made in a number of recent recruitment cases, based on careful consideration of all factors and following consultation with view. There are also a number of cases from past recruitment exercises where candidates were selected based on their outstanding expertise, experience and other factors, despite weaker assessment centre results. Conversely strong assessment centre results were no guarantee for satisfactory work performance in the past in this Organisation”.

10.25 The President replied to the Secretary General asserting that the Applicant was not properly qualified and that “principles of “fairness and transparency have not been complied with” without explaining why he thought so, but he never raised the issues with the HRC.

10.26 The decision of the President must be made within the parameters of the provisions outlined in the ICAO Service Code, Article IV: Recruitment, Appointment, Promotion and Development of Staff. The Applicant specifically referred the Appeals Board to paragraph 4.1 specifying the issue of the highest standards of efficiency, in a competency and integrity and that “due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible and ensuring gender representation” and further paragraph 4.5 stating that “preference should, in principle, be given to staff members of the organisation...”. The Applicant submitted that she was not given full and fair consideration by virtue of these rules alone.

11. CONSIDERATIONS

11.1 The Secretary General of ICAO is head of the Secretariat and Chief Executive Officer of the Organization responsible for general direction of the work of the Secretariat and provides leadership to all Secretariat staff. In her work she is guided by the terms of her appointment, as set out in her charter of appointment, as well as the administrative issuances of the Organization.

11.2 The requirement of the President to give approval to an appointment at the level of D1, and other appointments, is apparently novel, as, save for posts filled by formal election of Member States, matters of appointment in the United Nations system generally are given to the head of an agency, without the involvement of any governing body. The relevant Articles of the Chicago Convention are set out above in respect of the receivability of the application, as are the relevant resolutions of Council. It is clear that the resolutions and subsequent administrative issuances are in conformity with the strict legislative requirements in respect of the process of appointments of staff. It is evident from this that the power given to the President to approve appointments is, in itself, a valid power. Neither party has questioned this.

The Staff Service Code, as at 2020, contained the following provisions:

ANNEX IV^(L)_(SEP) HUMAN RESOURCES COMMITTEE

Procedures for the Selection of D-2 and D-1 level posts.....

ANX IV-3 1227/37/128

14. Taking into account the advice offered by the HRC on the shortlisted candidates, and after obtaining the written approval of the President of the Council, the Secretary General shall choose the preferred candidate and report the decision to the Representatives on the Council via a Confidential Secretary General memorandum and, subsequently, in a Staff Notice. An Electronic Bulletin announcing the appointment shall be disseminated to States.

15. Should the President of the Council disapprove of the candidate chosen by the Secretary General, the latter 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.

12. ROLE OF THE APPEALS BOARD

12.1 The Appeals Board does not reconsider a decision, substituting its own views for those of the decision maker. Rather it reviews a decision to ensure that the processes provided for have been properly and fairly carried out.

12.2 By the following cases, the UNAT has directed how the Appeals Board is to conduct its review of cases of this nature.

In *Ljungdell v. Secretary General of the United Nations* Judgment No. 2012-UNAT 265 UNAT, para 30, observed in respect of the exercise of the discretion in respect of staff selection:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

In *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23 and 24, the UNAT emphasized that:

[I]n reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration. ...

The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

In *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20, 21 and 26, the UNAT stated:

The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion. ...

All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

12.3 It is apparent from a review of Paragraph 14 of Annex IV to the ICAO Staff Service Code, as set out at paragraph 5.15 above, and the resolution of Council establishing the procedure, that there are no specific criteria directly provided for the President to consider when exercising his discretion to approve an appointment of a person to a post of D-1.

12.4 The UNDT held in *Dube v. Secretary General* Judgment No. 2015-109 in a judgement upheld by UNAT on appeal⁵, that :

⁵ 2016 UNAT 674

95. *The prescription of roles for all of the actors in a recruitment process is aimed at ensuring fairness and clearly demonstrates that none of the said actors is to have a monopoly of the process., the prescription of roles for the different actors is intended to ensure independence, transparency and the absence of undue influence.*

96. *The Approving Authority who makes the final selection decision is expected to act within his or her mandate and cannot ignore the extant provisions of applicable legislation.*

12.5 With no criteria provided, the power appears to be arbitrary, that is a power exercised by an authority without constraint, which is thus effectively impossible to review. This brings into consideration the following matters which apply by inference as general considerations of proper administrative processes applicable to all international organizations. If it is intended that they do not apply to the exercise of a discretion, then they need to be specifically excluded.

12.6 There are a number of basic precepts to consider when examining an unfettered discretion.

- a) The rule of law is a fundamental principle applying to international organizations in a normative sense. The exercise of power should be subject to legal rules and limitations, thus preventing abuse and promoting fairness and transparency. An unfettered discretion is inconsistent with the rule of law by allowing decisions to be made without clear legal boundaries.
- b) Accountability is fundamental. Unfettered discretions limit the ability to hold decision makers accountable for their decisions, as there are no clear standards or guidelines against which their actions can be evaluated.
- c) Administrative decisions should be based on fair, non-arbitrary rational grounds. An unfettered discretion can lead to inconsistent or irrational decision making, as there are no clear standards or guiding principles in respect of the exercise of power.
- d) Legal certainty is fundamental. Administrative law aims to provide legal certainty to all stakeholders affected by a decision. Unfettered discretions undermine legal certainty by allowing decision makers to deviate from established rules, policies, guidelines and principles without legal and defensible justification.

12.7 The establishment of a formal review process in respect of administrative decisions by ICAO is indicative of it supporting and ensuring adherence to each of these basic precepts, thus ensuring decision makers are subject to accountability through process review, giving staff redress where errors in the decision-making process are disclosed.

12.8 It has been held by the UNAT that “[T]he Administration’s discretionary authority is not unfettered.” See *Asaad* 2010-UNAT-021, para. 11.⁶ “The Secretary-General must act in good faith and comply with the applicable law. His decisions must not be taken on erroneous, inconsistent or fallacious grounds. If a decision is contested, it is for the Tribunal exercising its control to reconcile the judicial authority vested in it in the interests of justice of the United Nations with the discretionary power vested in the Secretary-General.” *Bertucci* 2011-UNAT-121, para. 37.

12.9 In Judgment 3652,⁷ the ILO Administrative Tribunal found that discretion must be exercised within the bounds of legality. See also Judgment 3864⁸

⁶ Confirmed in *Bertucci* 2011-UNAT-121, para. 37; *Pérez-Soto* 2013-UNAT-329, paras. 28-29; *Lauritzen* 2013-UNAT-282, para. 28; *Hamayel* 2014-UNAT-459, para. 17; *Abdullah* 2014-UNAT-482, para. 60.

⁷ 122nd Session *P. (Nos. 1 and 2) v. FAO* Judgment No. 3652
ILOAT

⁸ 124th Session, *T. v. The Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization*

12.10 It is apparent that the exercise of the discretion of the President must be within the legal limits and principles that should guide such discretion. That is, notwithstanding that the President has a broad degree of discretion, such must be exercised fairly and within the framework of the organizations's governing documents and relevant international legal principles.

12.11 In particular, this view is also supported by the learning in *Dube* at paragraph 96 as set out above:

The Approving Authority who makes the final selection decision is expected to act within his or her mandate and *cannot ignore the extant provisions of applicable legislation.* (emphasis added)

12.12 It must be assumed that if administrative acts are to be taken in a lawful manner, they are capable of review as to the procedures and that decisions are in no way arbitrary, even though the regulations founding the duty are silent as to the procedure to be followed. There cannot be a presumption of regularity unless one can ascertain what is, in law and fact, regular. The duty of the President to approve an appointment cannot be exercised in an unfettered manner. The Appeals Board must look at the context in which the power sits within the regulatory framework.

12.13 The President is bound to act reasonably, not to act with bias, to only take relevant matters into account, not to take irrelevant matters into account, to properly apply any overarching policy matters, the regulations and rules applicable to the selection and appointment process, to be procedurally fair, logical and not reach the decision on the basis of an error of fact. These are basic requirements to be taken into account in respect of the extant provisions of applicable regulation. The President cannot act in a manner which would negate the rights and obligations of the Secretary General in respect of discretionary actions taken in compliance with the selection regulations. There is simply no power given to do this.

12.14 Through the correspondence between the Secretary General and the President, the Appeals Board was placed in a position by the President where it could see the matters taken into account and the processes involved in the President reaching his decision. The Appeals Board has examined the reasons expressed, in addition to the matters set out above.

12.15 It is apparent that the President effectively undertook a review of the selection procedure by conducting his own selection for the Post.

12.16 The President in his Inter-Office Memorandum of 9 July 2020 to the Secretary General, the full text of which is above at paragraph 7.7, set out his initial considerations when reaching his decision not to approve the appointment, relevantly they were:

- a) His main motivation was the consideration of the recruitment process;
- b) The Applicant “did not emerge from the recruitment process as properly qualified for the post”;
- c) The Applicant was not “initially “shortlisted”and was the weakest candidate following the test of the Assessment Centre”;
- d) The Vacancy Notice stated that the holder of the post “provides leadership in change management initiatives to ensure efficiency and effectiveness of the Organization”;
- e) The Applicant “demonstrated serious weaknesses in the areas of vision and other critical competences”; and
- f) The appointment was partly based on contingent justifications

12.17 The President further expanded upon the reasons for his decision in his reply of 22 July 2020 to the request on 17 July 2020 of the Secretary General to the President for a reconsideration of his decision not to approve the appointment of the Applicant:

- a) He did not question the role of the Secretary General in respect of her taking into consideration “pertinent factors....role of DD/ADB verses D/ADB, turnover of senior management, cost containment, gender representation and career development of internal staff...”;
- b) That the Applicant “did not emerge from the recruitment process as properly qualified for the post and this issue cannot be disregarded”;
- c) The decision of the President was “based on the fact that the principles of fairness and transparency evoked with instance by the Council, have not been clearly complied with at the outcome of the recruitment process”;
- d) The Secretary General based her decision on the factors in paragraph j, above;
- e) the Applicant was not included in the shortlist by the interview panel, but was added by the Secretary General;
- f) The Applicant was the weakest candidate according to the Assessment Centre, but was retained in the list submitted to the Human Resources Committee;
- g) The post was not budgeted and its financial viability is now presented in the framework of an organizational restructuring compatible only with the appointment of the” Applicant; and
- h) The President regarded the implementation of the recruitment procedures in respect of fair treatment of all candidates, transparency of process as being important and that if such were not followed then there was a reputational risk for the Organization.

12.18 The primary ground of review in this matter was expressed by counsel for the Applicant as being one in respect of whether the Applicant had received a “full and fair consideration” and whether the proper procedures were followed in respect of the policies and administrative issuances of the Organization. The Applicant also complained of bias, a breach of procedural fairness, and the precepts of natural justice, error of fact as to the requirements of the position, failure to take relevant matters into account, abuse of authority/*ultra vires*, taking of irrelevant matters into account and that the decision was unreasonable and illogical.

12.19 While the President maintained that his major concern was the consideration of the “recruitment process”, he appears to have substantially negated the selection process. He has acknowledged the discretions given to the Secretary General to differ from the advice given to her by the Panel of Directors by the inclusion of the Applicant in addition to the four otherwise recommended candidates. The President has placed more value on things coming from his own 'redoing' of the selection process than the decisions of both the Secretary General and the Human Resources Committee, a Committee of the Council, which is specifically mandated to review the recruitment process. This Committee expressly found that there had been compliance with the selection process and that the four candidates recommended by the Panel of Directors, and the Applicant, added by the Secretary General, should proceed in the selection process.

12.20 It is apparent that the President was of the view that the Council had provided him with the duty to consider appointments, approving them or not, to ensure that “principles of fairness and transparency”, as stated in his Inter-Office Memorandum to the Secretary General of 23 July 2020, are complied with in “the recruitment process”. The Appeals Board finds no direct expression of this intent in any of the documents of the Council which it has been able to locate or to which it has been referred and that this appears to be a matter which is not provided for when considering the legality of the process.

12.21 What is meant by the expression “the principles of fairness and transparency”? This appears to be a different concept from that of ensuring that the rules, regulations, policies and procedures of the Organization have been complied with in a “fair and transparent manner”. Indeed, the Respondent has not asserted that they were not complied with in a fair and transparent manner, on the contrary, the assertion is that indeed, there was compliance with the selection procedures.

12.22 Rules and administrative issuances involved in a selection process may lack “fairness” in the view of some, but such as the rules and administrative issuances are, they must be complied with fairly. This means that the rights and duties of people involved in the selection process are observed and complied with fairly. There is no right to reconsider a process on the ground of an assertion that the result must reflect a general notion of “fairness”, as appear to be the standard applied by the President when effectively redoing the selection process. The President appears to have considered that the processes in respect of selection have caused an “unfair” result. It is apparent that the President formed a view that there were external candidates who were better fitted to the position than the Applicant. That approach to “fairness” implies a lower priority being placed on provision of continuity for internal candidates, as to give internal candidate priority over external candidates may cause them to protest that they were better qualified. Such approach unfairly fails to take into account the operation and application of the regulatory framework in place for the making of the selection of a candidate. The regulations expressly permit the preference to be given to internal candidates, and for people to be included into the process by the Secretary General who had otherwise been excluded. The check upon this part of the process is the decision made by the Human Resources Committee. It is not valid to reconsider the selection transaction on the basis of some new approach taken which is based upon a personal view rather than a consideration of the regulatory framework in place. The existing regulatory framework had to be considered in a fair and proper manner.

12.23 Transparency of the application of the selection processes comes about through the actions in the process being disclosed to all so that compliance with the processes can be seen, that discretions have been exercised in a manner which can be seen as being within power and are thus valid. In this case it is apparent that the Secretary General was transparent about the inclusion of the Applicant in the list of candidates for inclusion in the assessment test and in the list to go before the Human Resources Committee for its consideration and clearance. It is clear that the Secretary General was following the directions given to her by the Council in its letter of Charter to her of April 5, 2018 and as contained in the paragraph 4.1 of the Service Code⁹. The Secretary General consulted the President about the inclusion of the Applicant, although she had no obligation under the rules and regulations of ICAO to do so. Counsel for the Respondent specifically acknowledged the right of the Secretary General to include the Applicant in the list of candidates for consideration by the Human Resources Committee.

12.24 The rules and regulations may not give the result that somebody likes or which is “unfair” when seen in the absence of the regulations, but the regulations are to be applied and cannot be negated on the basis of some overarching concept of general “fairness and transparency”. This is not the test to be applied. There is no general right to look at the “fairness” of a process which is set forth in rules and regulations approved by the Council and the Assembly of Member States and in respect there has been no failure of compliance.

⁹ ICAO Service Code 4.1 in full reads:

“The paramount consideration in the appointment and promotion of staff shall be the necessity for securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible and ensuring equal gender representation. Subject to the foregoing, selection of staff members shall be made without distinction as to race, sex or religion, nor shall there be any discrimination on account of any disability of a candidate who meets the qualifications required to perform the tasks. Unless otherwise permitted under these Regulations, appointment and promotion of staff members shall be made on a competitive basis”.

12.25 It is permissible to review or consider a matter to ensure that there has been fairness in the *application* of the rules and regulations, but that is a process matter, not a matter which looks to the result and the selection for recommendation of appointment of one person over others as being unfair in a context where there are discretionary rights exercised and decisions made along the way based upon compliance with the Rules and Regulations of the Organization. It is part of the concept of there being a full and fair consideration of the applications within the context of the rights of the various actors in the selection process. Thus, was the initial processing of the applications full and fair when the decision was made that most did not make the basic requirements for the post? Were the interviews conducted fairly and were the candidates fully considered? Were the rights and discretions of the Secretary General exercised properly and within her discretionary power when she included the Applicant in the list of candidates to be reviewed by the Assessment Centre? Was the review of the procedures by the Human Resources Committee properly conducted? Was the final recommendation by the Secretary General a lawful exercise of her discretion, taking into account the policies of the Organization, the requirements of gender balance, geographic considerations, career progression and other mandated considerations?

12.26 An outcome cannot be justified by considerations which go beyond the rules and regulations unless there is a specific and directed mandate to cover such. The President was required to consider the appointment within the context of the rules, regulations and policies of ICAO and not apply a nebulous and subjective concept of “fairness”. The Appeals Board finds that it is not the role of the President to introduce a new concept of “fairness and transparency” of the result and that this alone is sufficient to set aside the decision of the President.

12.27 The Appeals Board finds that the President, in introducing the overarching “principles of fairness and transparency” to the decision, caused the compliance with the recruitment procedures to be circumvented to arrive at a different outcome. In doing this he fell into error, acting beyond his powers. It is apparent that the lack of criteria or expressed guidance in respect of the procedures for the granting of approval, caused the President to take a subjective and personal view of the selection process and thus stray from the considerations of the general legality and fairness of the actions taken. The Appeals Board is not critical of the President in the circumstances, as there was simply inadequate guidance provided. He was clearly attempting to give some sense to the duty given.

12.28 The President fell into further error by consulting with members of the Panel of Directors, a matter which he did not mention in either of his Memoranda of 9 July 2020 or 17 July 2020, but did admit to it in his email of 27 July 2020 to the Applicant. They had completed their work and had provided advice to the Secretary General. It was not appropriate nor an authorised process to go behind their advice to the Secretary General and apparently seek the opinions of the individual members of the Panel. They also had no right, individually or collectively, to give advice to the President. They were *functus officio*, having completed their task and having provided a joint advice to the Secretary General.

12.29 The role of the President was to examine the reports, materials and submissions made to him by the Secretary General and to reach a concluded view in respect of the appointment of the proposed candidate. Discussing the processes with the members of the Panel of Directors was not part of his role.

12.30 The President must make a decision within the regulatory and policy framework of the Organization. He must be logical and cannot introduce new tests or selection criteria which are not part of the selection regime of the Organization. He cannot ignore policy issues which have been the basis of the recommendation. To do so would not amount to a full and fair consideration of the matter.

12.31 The Applicant has raised the fact that the President found that the Applicant would be suitable to act in the Post until an approved person was selected is also a matter which is contrary to his findings of the Applicant not to have the required skills for the Post. The Applicant asserts that this

decision was inconsistent with the refusal to appoint her to the Post. The Appeals Board notes, notwithstanding the decision it has reached, the appointment of an existing staff member to an acting post may not necessarily mean that that person is suitable for the appointment to the substantive post. It may mean this, but it may equally mean that this person is the best current member of staff to fill the post on an interim basis.

12.32 The Appeals Board notes that the Applicant has provided it with details of her current redeployment within the Organization. The Appeals Board does not take this information into account as it is not relevant to the matters for its consideration.

13. CONCLUSION

13.1 The Appeal's Board findings are summarized below:

- a) While acknowledging that the Organization has a very broad discretion in the matters of appointments of its staff, the discretion must be exercised in a lawful and proper manner in accordance with the rules and regulations in respect of the selection of candidates for a post in accordance with the general principles of law governing the international civil service, as such discretion must be exercised within the bounds of legality. It must not be an arbitrary decision and must be capable of review in accordance with the precepts of administrative law for international organizations.
- b) The President did not act in manner within the limits of the power of approval given.
- c) In considering the grant of approval, the President applied a test which was not provided for in the selection processes, the rules, regulations or policies of the Organization looking rather at an overarching "fairness" in the selection process. In so acting he did not fully and fairly give consideration to the recommendation of the Applicant for the Post.

13.2 The President undertook the role of the selection himself, when he had no authority or right to do so. This action on the part of the President constituted a substantial procedural breach or irregularity, but it was not due to any misfeasance, rather due to the lack of guidance provided.

13.3 The Applicant having demonstrated on the basis of clear and convincing evidence and following the examination of the applicable law, the Appeals Board finds that the Applicant was denied a fair chance of promotion.

14. OBSERVATIONS BY THE APPEALS BOARD

14.1 The issues raised in this matter stem from the lack of clarity and criteria to be applied by the President when considering whether to give his approval to the recommendation of the Secretary General. It was for the Council to provide such to ensure certainty, transparency and fairness in the process.

14.2 It is suggested that the Council should provide, with clarity, the purpose of the obligation of the President to approve appointments recommended to be made to certain positions within ICAO. Further, consideration should be given to the provision of criteria to be applied by the President. If indeed the purpose of the requirement is to provide some form of overarching "fairness and transparency" in the recruitment process, the same transparency of process should be provided in respect of the process of approval by the President.

15. **COSTS**

15.1 Given the lack of clarity and transparency of the prescribed processes involved when the President makes a decision to approve a recommendation of the Secretary General, there was a need for the Applicant to bring this application. The Appeals Board recommends as a matter of fairness and justice, that the Respondent make an *ex gratia* payment of the party-party legal costs of the Applicant from the date upon which representation was permitted before the Appeals Board.

16. **RELIEF**

16.1 The Applicant has claimed the following:

- a) Rescission of the contested decision and, as an effective remedy, appointment to the Post lawfully denied;
- b) Loss of income and loss of opportunity;
- c) Damage to professional reputation; and
- d) Moral damages.

16.2 Under Rule 52 (a) of the Rules of Procedure of the Appeals Board, a power is given to the Appeals Board to order the rescission of the contested administrative decision, with an obligation to “also set an amount of compensation that the Administration may elect to pay as an alternative to rescission of the contested administrative decision or specific performance”.

16.3 An order shall be made rescinding the decision of the President to not give his approval, The Applicant also seeks to be appointed to the Post. This is not a matter of specific performance, but rather a request that the Appeals Board make the decision to give approval, which decision is reserved to the President. The Appeals Board has no authority to make the decision for the President. Setting aside the decision of the President does not result in a positive decision by the President to approve the recommendation of the appointment of the Applicant to the Post.

16.4 In setting the sum to be paid as an alternative to rescission, it is noted that the Post was re-advertised. The Applicant had the opportunity to reapply and to be appointed upon such application. This has the effect of limiting the monetary sum awarded.

16.5 In respect of the other claims for other damages by the Applicant, the Appeals Board has the power to award “Compensation for harm” but any such award must be “supported by evidence”, as set out Rule 52 (b). The Appeals Board has no evidence before it in respect of the actual damage to the reputation of the Applicant or in respect of the moral damages claimed. It is thus unable to award such damages. At paragraph 35 of the application of the Applicant she has noted that “The decision to not appoint me to the post of DDHR and instead to discontinue the process and re-advertise the post, has a direct impact on my career and subjected me to considerable stress.” This statement is not backed up by evidence.

17. **ORDERS**

17.1 The contested decision of the President is rescinded.

17.2 If the Administration elects not to rescind the decision, the Applicant shall be paid for loss of income in a sum calculated on the difference between her actual salary and benefits on 1 October 2020, and the D1 salary and benefits for the Post, including the pension contribution of the Respondent, which shall be paid to her as a cash sum, as if she had held the Post from 1 October 2020 until the date upon which the candidate selected for the re-advertised Post reported to take up duties.

17.3 The total sum of damages is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at the date of this decision shall apply. If the total 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.

17.4 Other applications for damages are dismissed due to the lack of evidence.

Dated this 17th day of July 2023

Judge Rowan Downing KC
President

Entered in the Register on this 17th day of July 2023

Arie Jakob
Secretary/Registrar

Note

The Parties are reminded of their right to appeal this decision to the United Nations Appeals Tribunal under the conditions specified in the Statute of that Tribunal. See <https://www.un.org/en/internaljustice/unat/unat-statute.shtml> .