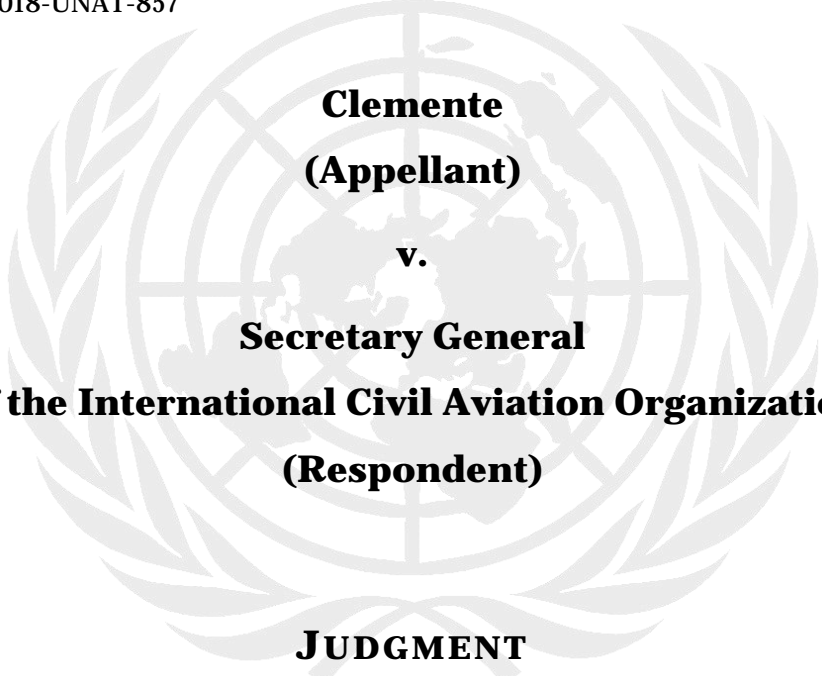




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-857



**Clemente
(Appellant)**
v.
**Secretary General
of the International Civil Aviation Organization
(Respondent)**

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge John Murphy Judge Sabine Knierim
Case No.:	2018-1147
Date:	29 June 2018
Registrar:	Weicheng Lin

Counsel for Ms. Clemente:	Self-represented
Counsel for ICAO Secretary General:	Christopher M. Petras

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against the decision of the Secretary General of the International Civil Aviation Organization (ICAO), dated 6 November 2017, to accept the Opinion of the Advisory Joint Appeals Board (AJAB) and reject Appeal No. 180. Ms. Maria Teresa Clemente filed the appeal on 1 February 2018, and the Secretary General of ICAO filed an answer on 3 April 2018.

Facts and Procedure

2. Ms. Clemente is an ICAO retiree. At the time of the events that gave rise to her appeal, Ms. Clemente held the post of Payroll Assistant, Financial Services Section – Separations and Payroll, of the Finance Branch, at the G-8 level.

3. On 27 September 2010, the Chief of Finance (C/FIN), by a memorandum to the Deputy Director of the Bureau of Administration and Services (DD/ADB), requested approval to reclassify Position 101543 (Post No. 2733.061), Payroll Assistant, from the G-8 to the P-2 level, attaching the revised post description for the post of G-8 Payroll Assistant.

4. On 23 September 2011, the Chief of Recruitment, Establishment and Classification (C/REC/EST) wrote to the C/FIN informing him that the revised post description for the post of G-8 Payroll Assistant “[had] been reviewed against the [General Service] Classification Standard and confirmed at the G-8 level”.

5. On 11 October 2011, in a letter addressed to the Director of ADB (D/ADB), Ms. Clemente expressed her disagreement with the “decision” to maintain the status quo with respect to the classification of her post at the G-8 level and requested a “second review”.

6. By letter dated 4 January 2012, the D/ADB informed Ms. Clemente of the outcome of the second review. The relevant portion of the letter reads:

As per your request on 11 October 2011 for a secondary review, we have conducted a classification review of the job description for position 101543. We regret to inform you that all three classifiers who have independently reviewed the level of the position against the [International Civil Service Commission (ICSC)] Classification Standards confirm it at the G-8 level.

7. On 27 March 2012, in an Inter-Office Memorandum (IOM) addressed to the ICAO Secretary General, Ms. Clemente requested “consideration for the award of a personal promotion from my current level/step G8-11 to P2 level”, based on the additional duties and responsibilities she had assumed.

8. On 30 May 2012, the ICAO Secretary General notified Ms. Clemente that she had been granted a personal promotion to Step 11 of G-9 level, as Payroll Assistant, Financial Services Section – Separations and Payroll, Finance Branch, Office of the Secretary General, with effect from 6 March 2012, and requested that she sign and return an attached copy of the letter to indicate her acceptance.

9. On 5 June 2012, Ms. Clemente signed the letter signifying her acceptance of its terms but included the words “Without Prejudice”.

10. On 26 June 2012, Ms. Clemente requested “a review of personal promotion decision” by the ICAO Secretary General. Ms. Clemente, referring to the ICAO Secretary General’s IOM of 30 May 2012, drew his attention to her IOM of 27 March 2012 in which she had requested a personal promotion to the P-2 level. Ms. Clemente requested the ICAO Secretary General to review his decision to grant her a personal promotion to the G-9 level and that she be promoted to the P-2 level “in light of the considerable increase in [her] level of responsibility which commenced on 1 April 2010”.

11. The ICAO Secretary General did not respond to Ms. Clemente’s 26 June 2012 request.

12. On 22 August 2012, Ms. Clemente submitted an appeal to the AJAB.

13. On 31 May 2013, Ms. Clemente left ICAO, following a two-month extension of appointment after having reached her retirement age.

14. The AJAB heard the appeal on 27 January 2017, and issued its opinion on 12 October 2017, wherein the AJAB, *inter alia*, made the following findings:

- (a) Ms. Clemente failed to timely request ICAO Secretary General review of the Administration’s 4 January 2012 decision on the proper classification of her post and she therefore lost the right to appeal the same.

- (b) The ICAO Secretary General's grant to Ms. Clemente of a personal promotion from the G-8 to G-9 was consistent with ICAO's personal promotion policy, which allowed for a promotion from one level to the next higher level.
- (c) Ms. Clemente was neither eligible to receive a second personal promotion to the P-2 level, nor had any right to such a promotion, as she had just been granted one to the G-9 level.

15. In view of the foregoing findings, the AJAB unanimously recommended that the appeal be rejected in its entirety.

16. On 6 November 2017, the ICAO Secretary General issued her decision on Ms. Clemente's appeal, whereby she concurred in the AJAB's findings and accepted its unanimous recommendation.

17. After Ms. Clemente filed her appeal and the ICAO Secretary General filed her answer, on 9 April 2018, Ms. Clemente filed a "Motion for Clarification of Facts not Addressed by the ICAO Secretary General nor by the ICAO AJAB" (the Motion) and the ICAO Secretary General filed her response to the Motion on 13 April 2018.

18. On 30 May 2018, the Appeals Tribunal issued Order No. 322 denying the Motion.

Submissions

Ms. Clemente's Appeal

19. Ms. Clemente contends that P-2 was the grade she deserved, taking into consideration the additional duties and responsibilities she had performed since 1 April 2010. In effect, the nature of her position changed from that of the General Service category to Professional category. Ms. Clemente submits that the AJAB erred in not examining and not recognizing such changes in the terms of her employment. Further, ICAO's denial to acknowledge this fact constituted non-compliance with Ms. Clemente's contract of employment and grossly unfair treatment.

20. Ms. Clemente's claim for a personal promotion to the P-2 level, based on additional duties and responsibilities, was a separate issue from the personal promotion to the G-9 level which she would have qualified for even if she had not taken on the additional duties and responsibilities, having met the criteria for such promotion based on long service (i.e. having

completed at least 27 years of continuous satisfactory service; being less than three years from retirement age; at the top step of the grade level; not having had a promotion during the last five years; and no prospect of a promotion before retirement). As such, the personal promotion to the G-9 level which was granted to Ms. Clemente should not be construed as compensation for the higher-level duties assigned to her since 1 April 2010.

21. Ms. Clemente further submits that the D/ADB failed to inform her that she had to file an appeal of the 4 January 2012 decision (which confirmed that her post was correctly classified at the G-8 level) within 30 days from the date on which she received notification, even though ICAO Staff Rule 111.1 “implies that the appellant should have been advised accordingly”. Notably, ICAO Staff Rule 111.1(2) provides that “[w]hen informing a staff member following either review or appeal action, the Secretary General shall, where appropriate, advise the staff member as to possible further recourse actions”.

22. Ms. Clemente adds that whereas the classification review of the revised job description was conducted by “three independent classifiers”, their actual independence is questionable since all three classifiers worked in the same office and reported to the same classification authority at ICAO.

23. Furthermore, whereas the 4 January 2012 letter states that the classification review of the revised job description was conducted “against the ICSC Classification Standards” and confirmed the post at the G-8 level, it is noted that ICAO adopted the new ICSC Classification Standards on 1 April 2012. In effect, the review was conducted against standards that ICAO had not yet adopted.

24. Ms. Clemente requests that the Appeals Tribunal conduct a comparative review of her 6 March 2016 and 23 September 2011 job descriptions to determine whether she is “deserving of an adjustment in pay”.

The Secretary General’s Answer

25. ICAO Staff Rule 111.1(5) mandates that staff members seeking to appeal an administrative decision must request the ICAO Secretary General review of the contested decision within 30 calendar days of receiving written notification of that decision. ICAO Staff Rule 111.1(7) further provides that a staff member who fails to observe the foregoing time limit shall lose the right to appeal.

26. By omitting to request the ICAO Secretary General review of the 4 January 2012 decision which confirmed that her post was correctly classified at the G-8 level, Ms. Clemente failed to comply with a mandatory step in the first instance procedure, as required under ICAO Staff Rule 111.1(5), and therefore lost the right to appeal the same.

27. The Appeals Tribunal has consistently held that it has been strictly enforcing, and will continue to strictly enforce, the various time limits. Ms. Clemente did not comply with the time limits prescribed by ICAO Staff Rule 111.1(5). Administrative review is the equivalent of “management evaluation” under Article 7(3) of the Appeals Tribunal Statute (Statute). Pursuant to Article 7(3), the Appeals Tribunal has no authority to waive deadlines for management evaluation, such as those prescribed by ICAO Staff Rule 111.1(5). Further, it has no jurisdiction or competence to receive an appeal when, as in this case, an appellant fails to comply with a mandatory step in the first instance procedure. As a result, Ms. Clemente’s appeal is not receivable.

28. Even if the Appeals Tribunal were to conclude that Ms. Clemente’s appeal is receivable, the appeal has no merit for the following reasons:

- (a) the Appeals Tribunal has held that it is not its function to substitute its decisions for that of the Secretary General in job classification matters. Furthermore, the Appeals Tribunal has articulated a standard of judicial review for classification decisions, adopting, in principle, the jurisprudence of the Administrative Tribunal of the International Labour Organization (ILOAT), whereby:

... [it] will not undertake an exercise to classify or reclassify posts in an organisation’s structure (...), since decisions in this sphere lie within the discretion of the organisation and may be set aside only on limited grounds. Such is the case, for example, if the competent bodies breached procedural rules, or if they acted on some wrong principle, overlooked some material fact or reached a clearly wrong conclusion (...). In the absence of such grounds, the Tribunal will not remit the case to the organisation, nor will it substitute its own post evaluation for that of the competent bodies (...)

Nonetheless, in this case, Ms. Clemente is essentially asking the Appeals Tribunal to classify or reclassify her post on the basis of an alleged “oversight” on the part of ICAO to correctly do so, which “oversight” she maintains was repeated by the AJAB. Yet, in making this plea, Ms. Clemente neither identifies any breach of

procedure or improper motivation, nor specifies any overlooked material fact or mistake of law on the part of the AJAB. To the contrary, the AJAB found that the ICAO procedure for classification review was followed.

- (b) The AJAB found that Ms. Clemente's personal promotion from G-8 to G-9 was consistent with the ICAO personal promotion policy, which establishes a promotion from one level to the next higher level; and that, having received a personal promotion to G-9, Ms. Clemente was ineligible for an additional personal promotion to P-2 because, under the policy, the granting of a personal promotion was conditioned on the staff member having not been promoted during the previous five years.
- (c) The Appeals Tribunal jurisprudence recognizes that the ICAO Secretary General has a broad discretion in making decisions regarding promotions and appointments. The AJAB applied these principles in Ms. Clemente's case and found that all criteria in the ICAO personal promotions policy had been properly considered. As has been demonstrated, however, Ms. Clemente has not identified any error of fact or law with respect to the AJAB's findings that she was neither eligible to receive, nor had any right to a personal promotion to the P-2 level. Instead, she merely reiterates her claim that ICAO failed to correctly classify her post.
- (d) Further, the Appeals Tribunal has consistently held that it is not sufficient for an appellant to simply state that he or she disagrees with the findings of fact or to merely repeat the arguments that did not previously succeed at a lower level. To meet the standard of review on appeal for determining if there has been an error of fact, the appellant must identify the apparent error of fact in the judgment and the basis for contending that an error was made, and the burden is on the appellant to satisfy the Tribunal that the finding of fact was not supported by the evidence or that it was unreasonable.

29. The ICAO Secretary General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

30. Ms. Clemente states in her appeal that she “is now appealing to the UNAT under the provisions of the UNAT Statute, Article 2.1(e) on the grounds that the administrative decision constitutes non-observance of [her] contract of employment and the AJAB’s error on a question of fact which resulted in a manifestly unreasonable decision and unfair treatment”.

31. She claims that she had been told by the Payroll Officer, her supervisor, that her post needed to be upgraded to a P-2 level from the then current G-8 level and that a request for reclassification would be filed with the Administration. A review of her post confirmed it at the G-8 level. She states that she requested a classification review because she knew “just how much her level of responsibility had changed (...) from that of the GS category to the professional category”.

32. She avers that she “strongly believes that there was an oversight on the part of ADB/HRB to correctly classify her post to reflect the new reality of her position that commenced on 1 April 2010. [She] believes that this oversight constituted a non-compliance of her employment contract. Furthermore, the AJAB made the same error in not examining and not recognizing the changes in [her] terms of employment.”

33. On 4 January 2012, she was advised that, even after a second review, her post was maintained at the G-8 level.

34. Despite her claims that her post had been wrongly classified, she did not challenge that decision. Had she wished to do so, she was obliged under the ICAO Staff Rules to first request a review of that decision by sending a letter to the ICAO Secretary General within 30 days of receipt of the notification of the decision.

35. ICAO Staff Rule 111.1(5) provides in part that: “A staff member who wishes to appeal the decision referred to in Regulation 11.1 shall, as a first step, address a letter to the Secretary General requesting that the decision be reviewed. Such a letter shall be sent within 30 calendar days of the time the staff member received notification of the decision in writing.”

36. ICAO Staff Rule 111.1(7) provides: “A staff member who fails to observe the time limits indicated in 5 and 6 shall lose the right to appeal, unless the delay is waived under 8 below.”

37. There is no record that Ms. Clemente addressed this requirement in any way. She did not address a letter to the ICAO Secretary General and she did not request, pursuant to ICAO Staff Rule 111.1(8), that the delay in the filing of the appeal be waived in view of exceptional circumstances.

38. The AJAB accordingly found that Ms. Clemente had failed to observe the time limits applicable to a request for review of the 4 January 2012 decision that her position had been correctly classified at the G-8 level and had thus lost the right to appeal.

39. She does not deny in her appeal that she did not comply with the time limit, but she argues that ICAO Staff Rule 111.1(2) implies that she should have been advised of the applicable time limit.

40. The last sentence of ICAO Staff Rule 111.1(2), states: “When informing a staff member following either review or appeal action, the Secretary General shall, where appropriate, advise the staff member as to possible further recourse actions.”

41. We reject Ms. Clemente’s argument. ICAO Staff Rule 111.1(2) refers to possible further recourse actions other than review or appeal. It does not oblige the ICAO Secretary General to provide a staff member with guidance on the appeals procedure.

42. Staff members are presumed to know the regulations and rules applicable to them and cannot rely on ignorance as an excuse.¹

43. We find that the ICAO Secretary General made no error in accepting the finding of the AJAB that Ms. Clemente’s appeal of the Administration’s 4 January 2012 decision on the grade-level classification of her post was time-barred.

44. The administrative review by ICAO is the equivalent of management evaluation under Article 7(3) of the Statute of this Tribunal,² and Article 7(3) must be interpreted in the same manner as Article 8(3) of the UNDT Statute.³

¹ *Rahman v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-260, para. 24.

² Effective 1 July 2009, the United Nations and ICAO entered into a written agreement providing the Appeals Tribunal with “competen[ce] to hear and pass judgement on an application filed by staff members of the [ICAO]” “in accordance with Article 2, paragraph 10 of the Statute”.

³ *Nianda-Lusakueno v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2014-UNAT-472, para. 28.

45. Article 7(3) of the Statute provides, in part, that “[t]he Appeals Tribunal shall not suspend or waive the deadlines for management evaluation”. This provision is identical to Article 8(3) of the UNDT Statute.

46. This Tribunal has consistently held that Article 8(3) of the UNDT Statute must be read literally to prohibit the UNDT from waiving the deadlines for seeking management evaluation; thus, the UNDT has no jurisdiction or competence to waive such deadlines.⁴

47. Thus, pursuant to Article 7(3) of the Statute, this Tribunal does not have jurisdiction to waive the time limit for Ms. Clemente to seek review of the 4 January 2012 decision.

48. We therefore do not have jurisdiction to address the merits of the claims she raises on appeal against the 4 January 2012 decision that her post was correctly classified at the G-8 level.

49. Ms. Clemente has not demonstrated that the AJAB erred in any way in finding that the ICAO Secretary General’s granting of a personal promotion from the G-8 to G-9 level was in accordance with the personal promotions policy that establishes a promotion from one level to the next higher level. The AJAB considered that “ICAO’s Service Code (Staff Regulations), Staff Rules and Personnel Instructions make no allowance for personal promotions (also called “personal upgradings”) and that such promotions are given only on the basis of an internal (ICAO) policy”.⁵

50. Further, Ms. Clemente has not established any error in the AJAB’s decisions that she was not eligible to receive a second personal promotion to the P-2 level, and that, in any event, she had no right to such promotion.

⁴ *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376; *Ajdini v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108; *Trajanovska v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-074; *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-036.

⁵ Starting with the 50th anniversary of the founding of ICAO on 7 December 1994, the ICAO Secretary General decided to grant a very limited number of personal upgradings, from one level to the next higher level, to staff with long service. The criteria for such upgrading were as follows: having completed at least 27 years of continuous satisfactory service; being less than three years away from retirement age; and not having had a promotion during the last five years and no prospect of a promotion before retirement. Personal promotions are decided under the ICAO Secretary General’s discretionary authority on a case-by-case basis.

51. The AJAB observed that one of the criteria for a personal upgrading was that the staff member was not to have had a promotion during the last five years, whereas Ms. Clemente had just been granted a promotion to the G-9 level.

52. Moreover, the AJAB considered that personal promotions fall wholly within the discretion of the ICAO Secretary General, so that, while Ms. Clemente may have had expectations of a personal promotion, she had no right to such promotion.

53. Ms. Clemente has failed to establish any error, whether of fact, law or procedure, in the findings of the AJAB.

54. Thus, the ICAO Secretary General's decision accepting the AJAB's unanimous recommendation is affirmed.

Judgment

55. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Knierim

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar