



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

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**James**  
**(Appellant and Respondent on Cross-Appeal)**

**v.**

**Secretary-General of the United Nations**  
**(Respondent and Appellant on Cross-Appeal)**

**JUDGMENT**

**[No. 2010-UNAT-009]**

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Before:	Judge Rose Boyko, Presiding Judge Inés Weinberg de Roca Judge Jean Courtial
Case No.:	2009-010
Date:	30 March 2010
Registrar:	Weicheng Lin

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Counsel for Appellant/Respondent: Duke Danquah

Counsel for Respondent/Appellant: John Stompor/Phyllis Hwang

**JUDGE ROSE BOYKO**, Presiding Judge.

**Synopsis**

1. The Appellant, Winston James (James), was denied an appointment to a P-3 position. His case was transferred from the former Joint Appeals Board (JAB) to the United Nations Dispute Tribunal (UNDT), which found that he could not be recruited from his general service role to the professional level without undergoing the required examination. The UNDT awarded three-months salary as compensation for the distress caused by the Organization.

2. James appealed the UNDT Judgment<sup>1</sup> alleging that the UNDT erred in failing to consider that he was not seeking a permanent promotion from the General Service to the Professional category, and that it was unnecessary for him to meet the strict requirements for a temporary appointment to the professional category. On appeal he claims compensation alleging that he suffered a loss of opportunity, and seeks compensation for 20 months salary at the professional level.

3. The Secretary-General cross-appealed on the issue of compensation awarded for distress, on the grounds that the UNDT erred in fact and law in awarding compensation for distress said to have been caused by the Organization.

4. This Court dismisses James's appeal and affirms the UNDT finding that he was not qualified for the P-3 position. Accordingly, this Court also dismisses James' appeal that the UNDT erred in awarding him three-month salary as compensation for loss of opportunity.

5. This Court allows the cross-appeal and sets aside the order for compensation for three months salary.

**Facts and Procedure**

6. James and his wife were both United Nations staff members working in New York City.

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<sup>1</sup> UNDT/2009/025 dated 30 September 2009.

7. During his first ten years of service James, who began on a short-term appointment in 1992 as an administrative clerk at the G-4 level, was extended until December 2002, by which time he had reached the G-6 step VIII level in the United Nations Office for Project Services (UNOPS), where he was a procurement associate.

8. In December 2002, he was granted special leave without pay for several months and subsequently moved with his wife to Geneva, where she had been posted by the United Nations. For the next four years, commencing in March 2003, he obtained a short-term G-5 level position in the Office for the Coordination of Humanitarian Affairs (OCHA) in Geneva (an internal recruitment) which was extended from September 2003 to 31 July 2006.

9. His wife was assigned back to New York and, in June 2007, James was reappointed on a short-term contract as an administrative assistant in the Department of Political Affairs (DPA) in New York when he first received an offer at the G-4 level. However, with the assistance from the Office of Human Resources Management (OHRM), his level was amended to the G-6 step I level, and, on 8 June 2007, to the G-6 step VIII level. His appointment at that level was approved on an exceptional basis by OHRM after some discussions about how James's situation as the spouse of a professional employee should be dealt with.

10. This discussion was recorded in a series of emails leading up to that appointment. In an e-mail dated 14 May 2007 to DPA, OHRM noted the following:

In light of the Organization's commitment to facilitate employment of UN staff spouses in expatriate assignments ... on an exceptional basis the previous levels and experiences of [James] in other duty stations and/or other UN system organizations should be recognized when being considered for the temporary G-6 position in DPA and determining the level ... this decision is done on an exceptional basis on the understanding that we are in the process of examining the current policy with a view to allowing for this exception to other staff members in similar circumstances.

11. This appointment was subsequently unconditionally confirmed and extended until 31 December 2008. In February 2008, James applied and was selected by OCHA for a temporary vacancy as a P-3 Programme/Finance Officer. On 9 April 2008, the Chief of the Human Resources Section of OCHA wrote to OHRM informing it of James's selection for the P-3 post and requesting its assistance in the reassignment of James from DPA to OCHA.

12. On 11 April 2008, OHRM sent an e-mail to OCHA stating that OHRM had approved James's appointment to DPA at the G-6 level only on an exceptional basis, but

that due to an oversight the restrictions on his appointment had not been included on the original I-slip. OHRM attached the corrected I-slip which reflected two restrictions on James's original appointment in June 2007:

- i. "Appointment [was] strictly limited to this post"; and
- ii. "[n]o extension [was allowed] beyond eleven months without OHRM approval and required break-in-service."

13. By e-mail dated 15 April 2008, OHRM informed OCHA that it was withdrawing its earlier memorandum addressed to DPA seeking the latter's consideration of James's release to OCHA. It explained that his appointment to his G-6 position with DPA had not been done through the staff selection system pursuant to ST/AI/2006/3; and since he was holding an eleven-month fixed-term appointment, he would have to be considered as an external candidate and would not be eligible for the assignment. The e-mail noted that OHRM had reviewed James's qualifications as an external candidate and that he did not possess the relevant professional experience.

14. Upon receipt of the decision not to consider him eligible for the post in question, James sought administrative review. The review found that the decision was made in accordance with the rules of the Organization. James then filed his appeal with the JAB.<sup>2</sup> In July 2009, his case was transferred to the UNDT<sup>3</sup> whose Judgment (UNDT/2009/025) dated 30 September 2009 is the subject of this appeal.

15. The UNDT stated that pursuant to Staff Rule 104.15 a person can only be promoted from general service to the professional category if he or she has passed a competitive examination. Since James had not passed the competitive examination, the UNDT rejected his request to be placed in a P-3 position.

16. The UNDT found that the Administration's subsequent imposition of limitations on his contract constituted a breach of his contractual rights. It stated that James's conditions of employment had been agreed on between him and the Organization in 2007 and were binding on both parties. The UNDT further ordered the Secretary-General to remove the limitations imposed in the James's contract of employment.

17. The UNDT next held that the Organization failed to act in good faith by not giving James a clear explanation of Staff Rule 104.15 and its implications on the prospects of

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<sup>2</sup> JAB/2008/072.

<sup>3</sup> UNDT/NY/2009/033.

success at the time he applied for the P-3 post. This could have either dissuaded him from applying for the post or encouraged him to sit for the required competitive examination. The Administration's failure to do so caused James to go through the entire selection process not knowing that he could not succeed; James rightly expected to be appointed to the post and the Administration failed to treat him fairly in this regard.

18. The UNDT further held that the manner, in which the Administration rejected the recommendation to appoint James to the P-3 position, lacked due process and was incorrect. First, the James was told that he was not an internal candidate because of the purported limitations on his contract only after he had applied, and had been selected, for the P-3 post. This was contrary to the conditions under which he had been employed a year earlier. Second, OHRM reviewed his qualifications and experience for the post after he had already been selected by OCHA and without his knowledge. James had therefore no opportunity to comment on the findings which were contrary to those previously made by the Selection Panel, in breach of his due process rights. The UNDT found that the outcome for James also "reignit[ed]... his anxiety about retaining his existing level and step of employment".

19. The UNDT concluded that James was subjected to unnecessary and avoidable stress and anxiety. It, however, found that he "suffered no loss of chance and is not entitled to compensation for the failure to be appointed or to an order that the administration implement OCHA's recommendation to appoint him to the P-3 post in question". The UNDT however ordered the Secretary-General to pay James compensation for the distress caused by the Organization in the amount of three months salary at the G-6 step VIII level based on salary rates at the date of the judgment.

20. James filed an appeal on 30 November 2009 against the UNDT judgment (UNDP/2009/025). The Representative of the Secretary-General filed a cross-appeal on 23 December 2009.

### **Submissions**

#### **James's Appeal**

21. James contends that the UNDT erred in assuming that he was seeking a permanent promotion from the General Service to the Professional category. He clearly stated that the P-3 post he applied for was a temporary post and was therefore not subject to Staff Rule 104.15, which lays out the procedure for permanent promotion of

staff members from the general service to the professional category. He was therefore an internal candidate applying for a temporary vacancy at the professional level and was not subject to Staff Rule 104.15. James notes that his eligibility to the temporary professional post was authorized by ST/AI/1999/9, sections 2.1 and 2.2(a), which permitted a staff member in the general service category to be considered for precisely such a temporary post without having to undergo the competitive examination. The UNDT he argued erred in finding that he was not eligible for consideration for the P-3 post.

22. James further challenges the UNDT's finding that he suffered no loss by the fact that he was not appointed to the P-3 position. He submits that he lost the opportunity to be placed against the P-3 post from May 2008 to the present. He notes that the incumbent of the post has still not returned to it so that the post continues to be occupied by a staff member on a temporary basis. He therefore lost a minimum of 20 months salary at the professional level, representing at least the equivalent amount of \$ 115,000.00 covering the 20-month period. James accordingly requests that, in addition to the three months salary that the UNDT ordered to be paid to him, he be awarded damages in the above amount.

**Secretary-General's Answer**

23. The Secretary-General submits that under Staff Rule 104.15, staff members in the General Service category are generally ineligible for appointment to professional posts except through competitive examinations. James had not passed the required examination and was generally not eligible.

24. The Secretary-General notes that in the case of a temporary vacancy in the Professional category, a staff member in the General Service category may be temporarily assigned to the vacant post. In accordance with Staff Rule 103.11 and ST/AI/1999/17, a staff member in the General Service category may be required to serve in a post in the Professional category for a temporary period and may be paid a special post allowance for this service. However James must still meet the qualifications required for a post in the Professional category, even for a temporary assignment. James did not meet such requirements and accordingly was not appointed to the P-3 post despite its temporary nature.

25. The Secretary-General next submits that, based on Article 101(1) of the Charter and Staff Regulations 1.2(c) and 4.1, the Secretary-General has a broad discretion in matters of staff selection and promotion.

26. The Secretary-General asserts that in accordance with Section 2 of ST/SGB/2004/8, OHRM has the central authority for matters pertaining to the management of human resources. OHRM considered James's application against the requirements for the temporary post as set forth in the vacancy announcement. It determined that he did not meet all the requirements and accordingly took corrective measures. It advised OCHA on 15 April 2008 that James's qualifications did not meet the requirements of the professional post and, on 5 May 2008 advised James accordingly. The Secretary-General concludes that James was therefore fully and fairly considered for the post and his rights were not violated.

27. The Secretary-General states that the UNDT therefore did not err in deciding that James was not entitled to compensation for the failure to order his appointment to the P-3 post.

28. The Secretary-General therefore requests this Court to deny James's plea for an award of damages for the failure to be appointed to the P-3 post.

#### **Secretary-General's Cross-Appeal**

29. The Secretary-General submits that the UNDT committed several errors in fact and in law in ordering compensation for distress allegedly caused by the Organization.

30. The Secretary-General contends that the legal framework governing compensation precludes the award of compensation to James in this case. The legal framework governing the award of compensation by the UNDT is based on the UNDT Statute and the jurisprudence of the former United Nations Administrative Tribunal (Administrative Tribunal). Article 10 of the UNDT Statute provides that where the UNDT has made a determination on the merits of a case and found in favor of an applicant, it may order compensation pursuant to Article 10(5)(b) of the Statute. Although the Administrative Tribunal was not prohibited from awarding punitive damages, such prohibition is expressly included in Article 10(7) of the UNDT Statute to prevent the UNDT from ordering exemplary or punitive damages.

31. While the Administrative Tribunal has awarded compensation on the basis of procedural errors alone, even where such error did not result in pecuniary loss or did not change the outcome of the proceedings, in the Secretary-General's view, this position should be re-examined by UNAT in view of the new prohibition on awards of exemplary and punitive damages under the UNDT Statute. In this regard, he points out that

awarding compensation in cases of procedural or administrative errors, where the staff member has shown no demonstrable loss, may be deemed to constitute awarding punitive damages.

32. The Secretary-General recognizes that the UNDT may award compensation for pecuniary damages or damages for non-pecuniary loss, such as moral injury. However, even where moral injury has been established, the Administrative Tribunal has not always awarded monetary compensation where it determined that the judgment itself constituted sufficient satisfaction. The Secretary-General maintains that the sufficiency of judgment for moral injury is an approach which has also been adopted by international tribunals such as the International Court of Justice. The Secretary-General concludes that, particularly in view of the new prohibition on awarding exemplary and punitive damages, a judgment pronouncing that the Organization acted wrongly vis-à-vis an appellant may, in appropriate cases, constitute sufficient satisfaction for moral injury incurred by a staff member.

33. The Secretary-General concludes that James has not shown any demonstrable loss, nor provided any precise evidence to justify an award of moral damages.

34. The Secretary-General finally submits that the factual and legal grounds upon which the UNDT based its award for compensation to James are erroneous for the following reasons:

1. First, the Secretary-General alleges that the UNDT's conclusion that the Organization gave James false hopes and unrealistic expectations that he would be appointed to the position constitutes an error of fact which resulted in the manifestly unreasonable decision that the Organization was "in breach of its obligation of fairness" to James.
2. Second, the Secretary-General submits that the UNDT erred in law in construing the respective rights and obligations of candidates and the Organization during the recruitment process for the temporary vacancy. In this regard, he contends that the Organization has no obligation to inform prospective candidates of the Staff Rules in advance that would render them ineligible for consideration. He also notes that the process of evaluating and selecting candidates is "not a joint exercise between candidates and the administration" requiring the latter to give applicants a right to participate in the recruitment process.



3. Third, the Secretary-General contends that the UNDT mischaracterized the communications between OCHA, OHRM, and James and drew erroneous conclusions regarding alleged omissions by OHRM.
4. Finally, the Secretary-General submits that the UNDT erred in fact in finding that there were grounds for James to believe that the exceptional approval for his recruitment at the G-6 step VIII level would be rescinded.

35. The Secretary-General accordingly requests that the payment of the three months' net salary ordered by the UNDT should be vacated.

**James's Answer to Cross-Appeal**

36. James re-asserts his arguments to the effect that he possessed the required qualifications to be eligible for the P-3 post.

37. James submits that he had not sought compensation for moral injury, but rather for loss of opportunity, and that the compensation for moral injury was awarded at the sole discretion of the UNDT. He further argues that a claim for moral injury was established based on the "Respondent's willful and malicious acts in attempting to prevent the Appellant's mobility which was granted under the exception handed down by the ASG-OHRM".

38. James further argues that in the present case, the Administration failed to adhere to its own rules and regulations which had a negative impact on his career. The damages that he suffered were pecuniary in nature because he was deprived of the income he would have earned at the P-3 level. There is also a psychological component because he was abruptly deprived a promotion to a P-3 post. The present case is therefore not a case where punitive damages are requested to sanction the Secretary-General; rather James requests compensation for the real and moral damages suffered.

39. James perceives a contradiction in the Secretary-General's contentions on the award for moral injury. While he argues that moral injury can only be recompensed by a positive judgment for the Appellant without any award of pecuniary damages, the Secretary-General argued before the JAB that James could be compensated should he win the case on the merits. James further points out that according to recent UNDT jurisprudence, "compensation" for the purpose of the UNDT Statute may include recompense for economic loss.

**Considerations**

40. The issues on this appeal and cross-appeal are:

1) Whether the UNDT erred in finding that James was not eligible for the P-3 position, either because he did not take the examinations or based on the Organization's determination of James's qualifications for the P-3 position?

2) Whether the UNDT erred in finding that James suffered no loss by the fact that he was not appointed to the P-3 position?

3) Whether the UNDT erred in awarding compensation for the distress allegedly suffered by James and caused by the Organization?

41. Turning to the first issue of whether the UNDT erred in finding that James was not eligible for the P-3 position, or in accepting the Organization's determination that James did not qualify for it, this Court affirms the UNDT's finding that James was not eligible for the P-3 position in either case.

42. Clearly efforts were previously made by the UN to accommodate James when he was forced to relocate because of his spouse being assigned elsewhere. Again efforts were made in the instant case to accommodate him and the employer realized that the position sought by James was one with prerequisites that could not be waived, hence the hoped for position was out of his reach unless he took the necessary examination. This Court affirms the UNDT findings that James was ineligible for the P-3 position on the grounds that he did not qualify for this position by not taking the requisite examination. There was no evidence presented by James to the UNDT to refute a finding that he was not qualified for the position in question.

43. James argued on appeal that the UNDT erred in finding that he was seeking a permanent appointment whereas he was only applying for a temporary appointment in which case different considerations would apply. We reject this argument and note that the Administrative Instructions relied on by James respecting "temporary assignments" (Section 2, ST/AI/1999/9) are intended for the achievement of gender equality to broaden career development opportunities for women. The Administrative Instruction he relies on is therefore of no assistance to him because it specifically applies to address the issue of gender inequality which has not been made an issue on the facts. Even if

temporary, when he has not clearly demonstrated that he has equivalent or other qualification for the employer to consider, on its face, he does not qualify.

44. This Court accordingly dismisses James's appeal that the UNDT erred in not finding that he qualified for the P-3 position. In view of its affirming the finding that James was not qualified for the P-3 position, this Court also dismisses James's appeal that the UNDT erred in not awarding him compensation for loss of opportunity.

45. It is unnecessary for this Court to consider the contract terms issue which is not on appeal. However it notes that an employment contract is not the same as a contract between private parties.

46. The cross-appeal is allowed and the order for compensation for three months is set aside for the following reasons. First, no compensation was requested; second, there was no evidence of damages or injuries; and lastly, James acknowledged on appeal that he did not ask for or suffer this damage, instead that his real injury was the monetary loss he claims. The applicable law governing compensation precludes the award of compensation to James in this case. Accordingly, this Court sets aside the UNDT order for the three months' net salary.

### **Judgment**

47. This Court dismisses the present appeal and affirms the finding that James was ineligible for the P-3 position. Accordingly, we dismiss his appeal that the UNDT erred in not awarding him compensation for loss of opportunity. This Court allows the cross-appeal and sets aside the order for compensation for three months.



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Judge Boyko, Presiding



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Judge Weinberg de Roca



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Judge Courtial

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



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Weicheng Lin, Registrar, UNAT