



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2009/033/  
JAB/2008/072  
Judgment No.: UNDT/2009/025  
Date: 30 September 2009  
Original: English

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**Before:** Judge Coral Shaw

**Registry:** New York

**Registrar:** Hafida Lahiouel

JAMES

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Duke Danquah, OSLA

**Counsel for Respondent:**  
Steven Dietrich, ALU/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. In August 2008, the applicant, a G-6 employee of the United Nations, appealed to the Joint Appeals Board (JAB) against a decision that he should not be appointed to a P-3 position for which he had been selected after an interview. The decision not to appoint the applicant to the P-3 post was, in turn, influenced by the administration's decision to add some limitations to his existing contract.

2. The applicant has applied for the restrictions placed on his conditions of service to be removed and for an order that the administration implement the decision to appoint him to the P-3 post in question. The applicant also seeks financial compensation for suffering and stress.

3. In July 2009 his case was transferred to the United Nations Dispute Tribunal for decision. Both parties to this case have agreed for it to be heard and decided by the Tribunal without further evidence or submissions other than those provided to the JAB.

## **The issues**

4. The issues before the Tribunal in this case are:
- a. Was the applicant eligible for appointment from general to professional level?
  - b. Was the imposition of limitations on the applicant's existing contract of employment lawful?
  - c. Was the applicant treated fairly and reasonably in respect of his job application?

## **Facts**

5. The applicant was initially employed by the United Nations on a short-term appointment in 1992 as an administrative clerk at G-4 level. His employment was

extended until December 2002, by which time he had reached G-6 step VIII level in the United Nations Office for Project Services (UNOPS), where he was a procurement associate.

6. 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. In March 2003, the applicant obtained a short-term G-5 level position in the Office for the Coordination of Humanitarian Affairs (OCHA) in Geneva. His appointment was treated as an internal recruitment and was extended from September 2003 until 31 July 2006. When the applicant's wife was transferred back to New York, he separated from service in Geneva. He then sought employment in New York with the United Nations and various agencies.

7. In June 2007, he was reappointed on a short-term contract as an administrative assistant in the Department of Political Affairs (DPA). He was initially offered a G-4 level position, but after he sought assistance from the Office of Human Resources Management (OHRM) the offer was amended to a G-6 step I level. After further representations he was notified on 8 June 2007 by the Assistant Secretary-General for OHRM that the offer was again changed to the G-6 step VIII level. His appointment at that level was approved on an exceptional basis by OHRM after some internal discussion about how the applicant's situation as the spouse of a professional employee should be dealt with.

8. This discussion was recorded in a series of emails leading up to that appointment. An email dated 14 May 2007 from OHRM to DPA reads:

“This refers to the case of [the applicant] and his consideration for a temporary G-6 position in DPA.

We have carefully reviewed the case. 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 [the applicant] 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.

Kindly note that 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.”

9. While the applicant’s appointment was then unconditionally confirmed and extended until 31 December 2008, other email correspondence reveals that OHRM had considered offering the applicant the position with some limitations which would have made him ineligible to be considered for internally circulated vacancy announcements at the G-5 level and above, leading to appointment of one year or longer. On 14 May 2007, an OHRM officer wrote:

“[The applicant’s] appointment will be strictly limited to this G-6 post in DPA. Since the appointment did not go through the established procedures of the staff selection system, [the applicant] will be ineligible to be considered for internally circulated vacancy announcements at the G-5 level and above leading to appoint of one year or longer.”

10. This proposal was rejected in another internal OHRM communication sent on 16 May 2007:

“I would think that the step at the G-6 level should be determined so that he would not be paid less than in his previous position with the UN. With regard to the restrictions, he could certainly be limited to service in this G-6 post in DPA. However, I believe that one of the main reasons for the exception was to allow for mobility, so I would not make him ineligible to apply for other posts through the competitive process.

I hope this helps in moving this case forward.”

11. The records on file do not show the outcome of this OHRM discussion. On 8 June 2007, the applicant received the following email from OHRM, sent on behalf of the Assistant Secretary-General for Human Resources Management:

“I refer to your email dated 6 June 2007 and would like to thank you for your commitment to the United Nations as well as the efforts you have made to support your spouse’s career in the United Nations. Indeed I wish to assure you that OHRM is in the process of reviewing the Organization’s policies with respect to the employment of spouses

as a means to further support and encourage staff mobility.

In light of the reasons provided in your e-mail message, an amended offer corresponding to the level and steps you held in UNOPS in 2001 is being prepared for your signature.”

12. The following year, in February 2008, while still in his G-6 position, the applicant applied for and was selected by OCHA for a temporary vacancy as a P-3 level Programme/Finance Officer. The Chief of Human Resources Section of OCHA wrote to OHRM advising of the selection and asking for OHRM to assist in the reassignment of the applicant from DPA to OCHA.

13. On 11 April 2008, OHRM sent an email to OCHA, stating:

“As you know, OHRM approved, on an exceptional basis, the appointment of [the applicant] to DPA at the G-6 level.

Due to an oversight, the restrictions on [the applicant’s] appointment were not included on the original I-slip dated 8 June 2007. The appointment was initially for a three-month period only.

The corrected I-slip is now attached.”

14. The corrected I-slip added two restrictions to the applicant’s original appointment in June 2007:

“Appointment strictly limited to this post,” and

“No extension beyond eleven months without OHRM approval and required break-in-service”

15. OHRM then responded to OCHA’s request for the applicant’s assignment. It noted in an email dated 15 April 2008 that the applicant’s appointment at its current G-6 position in DPA had not been through the staff selection system as per ST/AI/2006/3 and, as he was holding an eleven-month fixed-term employment, he would have to be considered as an external candidate and would not be eligible for the assignment. The email stated that OHRM had reviewed the applicant’s qualifications as an external candidate and, contrary to the opinion of OCHA, he did not possess relevant professional experience. It said that experience under the general service functions could not be considered as professional experience. The

email ended:

“Through [a] copy of this email . . . I am withdrawing OHRM’s memorandum of 9 April 2008 to DPA seeking the latter’s consideration of [the applicant’s] release to OCHA.”

16. When the applicant was informed of the decision he sought administrative review of the decision. This was unsuccessful. The review found that the decision not to consider him eligible for the post in question was made in accordance with the rules of the Organization. The applicant then filed his appeal with the JAB.

### **Applicant’s submissions**

17. The applicant alleges that:

- a. The Assistant Secretary-General’s decision of 8 June 2007 effectively restored the applicant’s status as a staff member with the entitlements and benefits previously afforded to him as a staff member with sixteen years of work in the United Nations and without the limitations subsequently imposed by OHRM. Further, the applicant should have been considered as internal candidate for the purposes of the vacancy in question.
- b. OHRM violated his due process rights by issuing an amendment to his conditions of service and placing restrictions on his mobility. OHRM discriminated against him by knowingly allowing the Chief of the General Service Staff Section of OHRM to disregard the exception granted by the Assistant Secretary-General.
- c. The 11 April 2008 changes to the Applicant’s I-slip were contrary to the Assistant Secretary-General’s decision of 8 June 2007.
- d. OHRM’s reluctance to accord the applicant the status he enjoyed (as a G-6 step VIII staff member) before leaving for Geneva stemmed from his extended absence from New York—this, in turn, was a violation of

administrative instruction on employment of spouses (ST/AI/273), which aims to encourage mobility.

### **Respondent's submissions**

18. The respondent contends that:
  - a. Because the applicant did not go through the staff selection system in June 2007, he should have been considered as an external candidate when applying for posts in the United Nations. Under Staff Rule 104.11, internal candidates are staff members recruited under Rules 104.14 and 104.15. Because he was external candidate in the general service category, under Staff Rule 104.15 he was not eligible to apply for a post in the professional category.
  - b. Although OHRM issued an I-slip after the applicant's selection in February 2008, the applicant could not have been unaware that his appointment was temporary in nature and limited to service in DPA as he had not been formally recruited through the staff selection system.
  - c. In any case, OHRM determined that the applicant was not suitable for the post as he lacked the necessary experience and qualifications.
  - d. On 15 May 2008, OHRM officials had met with the applicant to explain his appointment status and to apologise for the inadvertent administrative error of omitting employment restrictions in his letter of appointment with DPA.

### **Issue 1: Recruitment from general to professional level**

19. Staff Rule 104.15 deals with the recruitment of staff from the general service to the professional category. It establishes Boards of Examiners to make recommendations to the Secretary-General in respect of appointments. The rule specifies those appointments which shall be made exclusively through competitive

examination. In relation to recruitment from the general service to the professional category of staff, it provides:

“Recruitment to the Professional category of staff from the General Service and related categories having successfully passed the appropriate competitive examinations shall be made within the limits established by the General Assembly. *Such recruitment shall be made exclusively through competitive examination.*” (Emphasis added.)

20. ST/AI/2006/3, which was referred to in the OHMR email of 15 April 2008 as a reason for him not being eligible for the position he had applied for, is an administrative instruction for the implementation of Staff Rule 104.15. It is not the source of the rule.

21. The system of competitive examination for such recruitment has been challenged in cases before the United Nations Administrative Tribunal. In Judgment No. 851 (1997), the United Nations Administrative Tribunal held that “the means of serving the Organization as a professional staff member have been evenhandedly applied. Everyone, whether internal or external, must take the same examination to become a Professional staff member at the P-1 and P-2 levels.” In Judgment no. 1303 (2006), the Administrative Tribunal stated that “movement of such candidates [staff members in the general service category] is limited to the P-1 and P-2 levels and is to be exclusively through competitive examination.”

22. The policy of Staff Rule 104.15 is that before a person can be promoted from general service to the professional category he or she has to pass a competitive examination. Although Staff Rule 104.11 specifies that it applies to internal candidates, Staff Rule 104.15 is general and is not expressly limited to internal or external candidates. I find that, pursuant to Staff Rule 104.15, the applicant who was at the general level of staff would not normally be eligible to be recruited to the professional category of staff without going through the competitive examination.



**Issue 2: The limitations on the applicant's contract**

23. While the applicant asks the Tribunal to characterize the administration's imposition of limitations on his contract as discriminatory behaviour, it is in fact a breach of his contractual rights. It is a fundamental principle of contract law that a contract may not be varied without the consent of both parties.

24. In this case the administration sought unilaterally to impose limitations on the original contract of employment under which the applicant had been appointed a year earlier. The timing of the letter advising him of these changes was two days after OHRM received OCHA's recommendation. This invites the obvious inference that the limitations were imposed to bolster OHRM's reasons for refusing the appointment and to that extent the applicant's belief that he had been discriminated against is not entirely without foundation.

25. The limitations may also have been contrary to the position taken at the time of his appointment that the exceptional nature of his employment should not make him ineligible to apply for other posts. The record presented to the Tribunal does not make it clear whether any limitations were intended to apply at that time but certainly the applicant was not advised of any such limitations and accepted the unconditional contract as then offered.

26. On the basis of the information provided to the applicant by OHRM (including the 8 June 2007 email sent on behalf of the Assistant Secretary-General), the applicant had reasonable grounds to believe that there were no limitations on his appointment. The respondent's argument that the applicant must have been aware that there were some limitations imposed on his contract is simply not supported by the evidence.

27. I conclude that the applicant's conditions of employment—without the limitations that the administration attempted to impose in April 2008—had been agreed between him and the United Nations in 2007 and were binding on both parties.

**Issue 3: Were the actions of the Organization fair and reasonable?**

28. It is a universal obligation of both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process.

29. I find that some of these elements were lacking in the behaviour of the administration towards the applicant.

30. If OCHA had given the applicant a clear explanation of Staff Rule 104.15 and its implications for his prospects of success at the time he applied for the P-3 post, this should have been enough to either dissuade him from applying for the position or to encourage him to sit for the required competitive examination. However, the administration did not do this. This may well have been an oversight or out of a misguided desire to assist the applicant but, as a result, the applicant went through the entire selection process not knowing that he had no chance of success. He was interviewed, OHCA made a decision that he was the most suitable candidate, and he was recommended for appointment. Understandably, he fully expected to be appointed to the post for which he had successfully applied. He had been given a false and unrealistic expectation by the administration which had not been open with him. In this regard the administration was in breach of its obligation of fairness to the applicant.

31. While OHRM was within its rights to reject the recommendation to appoint the applicant to the professional post because of Staff Rule 104.15, it proceeded to justify its position to him in a manner which lacked due process and was incorrect.

32. First, the applicant was told that he was not an internal candidate because of the purported limitations on his contract only after he applied and was selected for the P-3 post. This advice was contrary to the conditions under which he had been employed a year earlier. In addition, the only reference to the need for him to have passed a competitive examination was the mention of ST/AI/2006/3 without explanation of how that administrative instruction was relevant to the applicant's situation.

33. Second, OHRM reviewed the applicant's qualifications and experience for the post after he had been selected by OCHA. This review by OHRM was done without the applicant's knowledge. He had no opportunity to comment on this review and to answer the findings made against him which were contrary to those made by the selection panel. This is a clear breach of due process.

34. In these circumstances it is not surprising that the applicant formed the impression that his rights were not observed and he was being discriminated against by the administration who he justifiably believed had acted contrary to the exceptions granted by the Assistant Secretary-General in June 2007.

### **Decision**

35. As Staff Rule 104.15 is a bar to the applicant being recruited from his general service role to the professional level without undergoing the competitive examination, his request to be placed in a P-3 position cannot be upheld.

36. The attempt by OHRM to place limitations on the applicant's existing terms of employment without his consent was in breach of his contract and unlawful. The limitations set out in the memorandum of 11 April 2008 are of no effect and must be removed.

37. The manner in which the application for the P-3 position was handled was at best careless. It was unfair to allow the applicant to go through the entire selection process when he was not eligible for consideration, regardless of his previous experience in the Organization. It gave rise to unattainable expectations on his behalf.

38. OHRM's response to the recommendation that he be appointed to the post was in breach of the applicant's right to be treated in good faith, fairly and in accordance with the Organization's rules and procedures. In reliance on the late addition of limitations to his contract, OHRM characterized him as an external candidate and used that as one of the reasons to find he was not eligible for the

position. In its letter to him OCHA referred to an administrative instruction without quoting it or citing the correct staff rules relied on to justify the decision. Given that he was being told that he could not be appointed to a position that he had just been selected for, this was an unfair way of conveying what must have been surprising and upsetting news that was not of his making.

39. The outcome for the applicant was not only disappointment at not getting the position he had incorrectly been led to believe he was going to be appointed to but also the reigniting of his anxiety about retaining his existing level and step of employment. He saw the limitations OHRM attempted to impose on his employment as undermining the exceptions which he had fought so hard to obtain a year earlier. At that time, he had argued successfully for the proper consideration of his circumstances under the Guidelines set out in the Administrative Instruction on the Employment of Spouses (ST/AI/273, dated 4 March 1980).

40. I find that the applicant was subjected to unnecessary and avoidable stress and anxiety by the manner in which his application for a P-3 position was handled and by the subsequent response to his selection by OHRM. OHRM's apology to him was in part an acknowledgment of this but was limited to an admission of the initial mistake on its part and was not adequate in addressing the wrong done to the applicant.

41. As Staff Rule 104.5 meant that he had virtually no chance of being appointed to the position he had applied for, the applicant 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. However, I find that the applicant is entitled to compensation for the distress caused by the Organization, amounting to three months of his salary at G-6 step VIII level based on salary rates at the date of judgment.

### **Conclusion**

42. The Secretary-General is ordered to remove the limitations imposed on the applicant's 12 June 2007 Contract of Employment in the memorandum dated 11

April 2008 with effect from 11 April 2008.

43. The Secretary-General is ordered to pay the applicant the equivalent of three months' net base salary at G-6 level, step VIII, based on salary rates at the date of judgment.

*(Signed)*

Judge Coral Shaw

Dated this 30<sup>th</sup> day of September 2009

Entered in the Register on this 30<sup>th</sup> day of September 2009

*(Signed)*

Hafida Lahiouel, Registrar, New York