Before: Judge Goolam Meeran

Registry: Amman

Registrar: Laurie McNabb

DANNAN

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Anna Segall
Introduction

1. This is an application by Mohammed Dannan (the “Applicant”), a staff member at the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the “Respondent”), against the decision not to select him for the post of Field Personnel Officer, Syrian Arab Republic (“FPO/SAR”).

2. On 15 September 2009 the Applicant filed his appeal with the Joint Appeals Board (“JAB”). Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the JAB was abolished as of 1 July 2009. With effect from 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (“the Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal.

3. Given the administrative difficulties and delay in establishing the Tribunal, and the need to manage the huge backlog of cases in an orderly manner, it was considered that it would be in the interests of justice to grant the Respondent an extension of time to file a Reply in this case.

Facts

4. On 11 January 1984, the Applicant commenced employment with the Respondent as a Senior Clerk, grade 8 at the Syria Field Office. Following several transfers and promotions, at the material time the Applicant occupied the post of Field Administrative Services Officer, grade 14, at the Syria Field Office.

5. Between May 2006 and January 2009, the Agency issued six internal/external vacancy notices for the post of FPO/SAR at grade 17. The following “Minimum Qualifications” were set out in the vacancy notice each time the vacancy was advertised:
IV. MINIMUM QUALIFICATIONS

A. Academic and Professional
   A university degree in business, Public Administration, Personnel Management or a related discipline.

B. Experience
   i. Seven years of experience responsibility in Personnel and general administration and supervision.
   ii. Experience or training in the use personal computers and in operating of standard software applications such as MS-Word, Excel & Access.

C. Language
   Excellent command of spoken and written English and Arabic.

D. Competencies
   i. Excellent communication skills.
   ii. Proven ability in establishing effective internal work relationship at all levels and in managing/leading a team.
   iii. Good judgment and decision-making skills.
   iv. Direct involvement with or exposure to a unionized environment.
   v. Ability to work under pressure.

VI. EQUIVALENCY
   Candidates with an equivalent combination of relevant academic qualifications, professional training and progressive work experience may also be considered.

6. Thirteen applications were received in response to the first three vacancy notices issued on 30 May 2006, 24 July 2006 and 29 January 2007, respectively. Due to a lack of qualified candidates, none of the thirteen applicants were short-listed and the post was re-advertised.

7. On 1 July 2007, the Agency issued internal/external vacancy notice no. 37/2007. It received 12 applications and short-listed three candidates. They sat a written technical test on 30 April 2008 and were interviewed on 15 December 2008. Following the interviews the Agency re-advertised the vacancy, keeping one of the interviewed candidates (the “Selected Candidate”) in reserve.
8. On 22 December 2008, the Agency issued internal/external vacancy notice no. 89/2008. Of the 50 applications received, the Applicant was the only candidate short-listed. He was not interviewed but his candidacy was kept in reserve.

9. On 21 January 2009 the Agency issued vacancy notice no. 04/2009 and received 49 applications. Two internal and three external candidates were short-listed and sat a written technical test on 15 February 2009. The two internal applicants (the Applicant and the Selected Candidate) passed the test. The Applicant scored 65% and the Selected Candidate scored 75%.

10. On 2 March 2009 both candidates were invited for an interview. In an undated recruitment report, the Interview Panel set out its assessment of the candidates. It noted that the Applicant’s strength was his “long experience with UNRWA in financial and general administrative services.” However, the Interview Panel also noted the following shortcomings:

   5. **Shortcomings:**

   (i) Could not adequately respond to the panel.
   (ii) Failed to demonstrate good judgment in answering questions on staff relations, gender and harassment.
   (iii) Poor communication and interpersonal skills.
   (iv) Could not demonstrate satisfactory level of managerial and supervisory experience and skills.
   (v) Limited problem solving skills.

The Interview Panel concluded that the Applicant did not meet the required profile for the post and therefore did not consider him suitable for selection.

11. The Interview Panel unanimously recommended the Selected Candidate for appointment to the post of FPO/SAR at one grade below the advertised level, i.e. at grade 16. In its assessment of the Selected Candidate the Selection Panel found:

   [Name omitted] came across during the interview as a confident and assertive candidate. She was thoughtful and articulated her views clearly and concisely. Though short on direct human resources her ability to analyse staff related matters in a practical
sense was remarkable.

The Director of UNRWA Affairs, Syria (“DUA/SAR”) endorsed the recommendation of the Interview Panel.

12. On 10 April 2009 an Equivalency Determination Form, submitted by the Field Administration Officer, Syria (“FAO/SAR”) was approved by the DUA/SAR. The recommendation section of the form stated:

The candidate, over and above the required BA has a 2 year diploma, a professional condensed course in Human Resources and several relevant short training courses.

[Name omitted] experience as a Secretary to DE HQ Amman (6 yrs + 4m) and FAO/SAR (4 yrs) is considered a general administration work where she demonstrated communication skills, drafting and time management skills, and coordination skills. Dealing with different types of personalities and issues which gave her exposure to broader Agency-wide issues. This experience also enhanced her interpersonal skills and professional maturity.

In her assignment as Scanning team supervisor for more than two years she has demonstrated her capabilities as a team leader as well as her ability to achieve objectives with minimum supervision.

…She has invested a lot of efforts and money in her personal development, pursuing a Masters degree (MBA which she is due to complete in September 2009)…

13. The front page of the recruitment report is stamped with the date of receipt by the Advisory Committee on Human Resources (4 May 2009) and the Director of Human Resources (“DHR”) (7 June 2009). On 29 June 2009, a revised Area Personnel Directive – A/4/Part II/Rev.7/Section I – was issued, effective 1 July 2009, delegating authority for appointment of area staff to posts at grade 17 and below to Field Directors for posts in their respective Field. In accordance with this Personnel Directive, the DHR sent a letter dated 5 July 2009 to the Acting DUA/SAR stating:

Since there has not been an ACHR meeting since the receipt of your recruitment case for the post of Field Personnel Officer SAR, Grade 17, the file has been kept pending with DHR.
I am now returning the file to you for your own decision under the new Personnel Directive A/4/Part II/Rev.7/SectionI and OD 20.

14. On 7 July 2009, in an annotation on the letter from the DHR, the DUA/SAR approved the recruitment of the Selected Candidate in accordance with the recommendation of the Interview Panel and the endorsement of the former DUA/SAR.

15. By letter dated 13 July 2009, the FAO/SAR informed the Applicant that he had not been selected for the FPO/SAR post. The Applicant responded in a letter to the FAO/SAR dated 15 July 2009 requesting information about the selection criteria used in the selection process, specifically the qualifications and experience required.

16. By letter dated 16 July 2009, the FAO/SAR responded to the Applicant, setting out the minimum requirements for the FPO/SAR post as advertised and attaching a copy of the vacancy notice and the guidelines on equivalency determination.

17. By letter to the FAO/SAR dated 20 July 2009, the Applicant requested further information as follows:

   I would highly appreciate it if you could provide me with some specific explanations as to where the Academic and Professional Qualifications, Personnel, General Administration and supervision experience of the selected candidate were made equivalent to those mentioned in your letter.

18. In a follow-up letter dated 3 August 2009 the Applicant noted that he had not yet received a response to his letter of 20 July 2009 and requested detailed reasons why he was not selected for the post of FPO/SAR and justification for the delay in announcing the decision of the selection panel.

19. By letter dated 5 August 2009 the FAO/SAR responded to the Applicant’s letters of 20 July and 3 August 2009. The FAO/SAR advised the Applicant that the Agency was unable to share information regarding other persons. The FAO/SAR also explained that the Applicant’s “answers to the questions and performance in the interview did not demonstrate the depth of knowledge,
communication skills, and problem solving skills considered necessary” for appointment to the post. Finally, the FAO/SAR explained that the delay in announcing the selection decision resulted from the fact that the Advisory Committee on Human Resources did not meet to decide on the matter during the material time.

20. On 5 August 2009 the Applicant met the FAO/SAR and the Officer-in-Charge, DUA/SAR (“OIC/DUA/SAR”) to discuss the matter further. In a letter to the OIC/DUA/SAR dated 9 August 2009, the Applicant set out his recollection of the explanations provided at the meeting, requested further “specific explanations” as to how equivalency was determined, and asked the OIC/DUA/SAR to give instructions to reverse the selection decision.

21. By letter dated 3 September 2009, the FAO/SAR responded to the Applicant’s letter dated 9 August 2009 noting that the Applicant was raising concerns and requests that had already been responded to verbally and in writing, and reiterating that the request to reverse the selection decision could not be accommodated.

22. By letter dated 7 September 2009 the Applicant indicated his intention to appeal the selection decision for the FPO/SAR post. He requested confirmation as to whether the letter from the FAO/SAR of 3 September 2009 could be construed as a decision from the OIC/DUA/SAR not to review and reverse the selection decision. In an annotation on the 7 September letter, the OIC/DUA/SAR confirmed that the letter of 3 September 2009 had been coordinated with him and that he did not intend to reverse the decision.

23. On 15 September 2009, the Applicant filed his appeal with the Secretary of the Joint Appeals Board.

Applicant’s contentions

24. The Applicant contends that:
(i) the decision not to select him for the post was arbitrary and not
effected according to procedure as the selected candidate did not
possess the necessary qualifications for short-listing; and

(ii) the Agency implemented improper equivalencies to allow the
selected candidate to meet the requirements of the vacancy.

25. The Applicant requests the Tribunal to order, the following:

(i) the reversal of the selection panel’s decision and the appointment of
the Applicant to the post applied for; and

(ii) compensation for the difference in the Applicant’s salary between
the date the selected candidate was appointed and the date the
Applicant is appointed to the post.

Respondent’s contentions

26. The Respondent contends that:

(i) the selection process for the post of FPO/SAR was properly effected;
and

(ii) the remedy sought by the Applicant has no legal basis.

27. The Respondent requests the Tribunal to dismiss the application.

The law

Law on non-selection

28. The legal and policy framework governing recruitment within the Agency,
at the time material, is set out below.

29. Former Area Staff Regulation 4.3 provided:

Due regard shall be paid in the appointment, transfer and
promotion of staff to the necessity for securing the highest
standards of efficiency, competence and integrity.

30. Former Area Staff Personnel Directive A/4/Part II Rev.6/Amend.2, in effect
at the time when vacancy announcement no. 04/2009 was released, provided:
4. OBJECTIVE

The Agency’s recruitment process must result in the filling of Area posts by the best candidates who are professionally qualified and personally motivated to contribute to the achievement of the Agency’s goals and objectives.

…

7.3 Recruitment Strategy

The recruitment of Area staff is based on the Agency’s strategy to obtain the best-qualified and suitable employees through a competitive recruitment process.

…

7.5 Shortlisting of Candidates

…

7.5.6 All applications for senior posts are to be pre-screened and a shortlist produced as follows:

Tranche 1: Identify those candidates who possess the required education and experience as defined in the approved post description.

Trance 2: Identify those candidates who may be assessed as having equivalent qualifications to those required.

The above should complete the prescreening process. If, however, both tranches identify fewer than three candidates, then and only then include tranche 3.

Tranche 3: Identify those candidates who meet most of the requirements, and could possibly be considered on an exceptional basis while defining on what basis this judgment is made.

31. The determination of equivalency in the selection of area staff personnel was delegated from the Agency’s Department of Human Resources to the Field Office Directors in a letter dated 6 July 2008 and effective 1 July 2008. Determinations are to be made by reference to guidelines attached to the letter. Area Staff Personnel Directive A/4/Part II,Rev. 7/Section I, effective 1 July 2009, subsequently stated in paragraph 9 that “[a]uthority for appointment of area staff to posts at Grade 17 and below is delegated by the Commissioner-General to Field
Directors for posts in their respective Field…”

32. The Tribunal notes that the Respondent has broad discretion with regard to personnel matters. It is not the role of the Tribunal to assess the merits of the candidates for the post under consideration. However, the discretionary power of the Respondent is not absolute. The Tribunal has a role to play in examining whether the procedures as set out in the Staff Regulations and Rules and other relevant issuances were followed, and whether the staff member was given full and fair consideration. As held by the former United Nations Administrative Tribunal in Judgment No. 1252, *Campos* (2005), paragraph III:

> The views of the members of the JAB panel and also the views of the Tribunal panel as to who was the most suitable or the best candidate are irrelevant. All that can be required of those bodies is to review the process and to determine if the procedures do appear to have been complied with and that there was evidence that the Applicant’s candidacy was given due consideration and that the result appears to have been based on reason and that it was free from extraneous considerations and free from bias or prejudice.

33. The Applicant has requested the reversal of the recruitment decision and his appointment to the post applied for. The United Nations Appeals Tribunal in *Abbasi* 2011-UNAT-112, held at paragraph 26:

> The UNDT has jurisdiction to rescind administrative decisions concerning the selection of staff on certain grounds. A decision not to select a staff member may be rescinded in circumstances where he or she did not receive fair and adequate consideration, there has been any kind of discrimination or bias against the staff member, or the proper staff selection procedures were not followed.

34. The Applicant suggested in his application that “personal favouritism” was involved in the selection process. When an Applicant alleges that the exercise of the Respondent’s discretionary authority was arbitrary or capricious, motivated by prejudice or extraneous factors, or flawed by procedural irregularity or error of law, he bears the burden of proving prejudice and must provide convincing evidence that the Respondent’s decision was tainted. As held by the United Nations Appeals Tribunal in *Rolland* 2011-UNAT-122, at paragraph 26:
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.

Considerations

35. It is understandable that the Applicant should feel aggrieved by the fact that whereas he had the necessary minimum qualifications the successful candidate was short-listed under the test of equivalency. It is also understandable that in his quest for a rational explanation he should harbour the suspicion that the successful candidate was the beneficiary of favouritism. However, the Applicant has produced not a shred of evidence to back up the claim of favouritism.

36. The Respondent has produced a detailed account of the various unsuccessful attempts at recruiting a suitable candidate and the process and procedural steps by which a decision was taken to appoint the successful candidate. They have made more than the minimal showing within the meaning of the Judgment in Rolland in that cogent reasons have been put forward as to how and on what basis the successful candidate was preferred. In the circumstances the burden shifts to the Applicant who has to show that he was denied a fair chance of being promoted. He must do so by producing clear and convincing evidence. It is not enough merely to allege favouritism and yet produce no cogent evidence, arguments or submissions in support thereof.

37. The advent of equivalency in recruitment and selection procedures has a sound policy underpinning. It is undesirable, particularly for a public body, to exclude otherwise capable candidates from consideration for promotion by the application of rigid selection criteria provided that there is a level playing field once such a candidate is brought into the pool of eligible candidates. In this case the recruitment procedure included the administration of a test as well as an interview. Absent any basis for impugning the outcome of the tests and the interview it is not for the Tribunal to substitute its judgment and assessment for
that of a properly constituted selection panel. It has to be observed that the Agency has a carefully worked out programme for determining whether a particular candidate’s qualifications and experience are properly to be deemed equivalent to the stipulated criteria.

38. For the Applicant to succeed in this case he would have to show that there are reasonable grounds to suppose not only that the test scores were manipulated to confer an advantage on the successful candidate but also that the interview assessments were a sham. Furthermore, he would have to prove that the assessments of equivalence in qualifications and experience were fundamentally flawed. The burden of proof would then shift to the Respondent Agency to provide a cogent and innocent explanation.

39. The burden of proving that the selection process and the decision to appoint the successful candidate were tainted by bias and improper motives rests on the Applicant. The Applicant is unable to adduce any such evidence, not even a minimal showing.

40. The Tribunal finds, on the evidence before it, that there was no procedural impropriety, favouritism or any other kind of bias or prejudice that infected the selection process and the decision to appoint the successful candidate.
Judgment

41. It is the Judgment of the Tribunal that the claim fails and is dismissed in its entirety.

(Signed)
Judge Goolam Meeran
Dated this 27th day of August 2012

Entered in the Register on this 27th day of August 2012

(Signed)
Laurie McNabb, Registrar, UNRWA DT, Amman