UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/HQG/2017/021
Judgment No.: UNRWA/DT/2018/019
Date: 19 March 2018
Original: English

Before: Judge Jean-François Cousin

Registry: Amman

Registrar: Laurie McNabb

SALEH

v.

COMMISSIONER-GENERAL OF THE
UNITED NATIONS RELIEF AND WORKS
AGENCY FOR PALESTINE REFUGEES
IN THE NEAR EAST

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Eassa Saleh (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), not select him for the post of Senior Functional Expert.

Facts

2. Effective 4 August 2002, the Applicant was employed by the Agency as Analyst Programmer at Headquarters Gaza on a fixed-term appointment, Level 3D, Step 1. Effective 4 August 2004, he was appointed as Analyst Programmer, Grade 14, Step 1.

3. Effective 5 August 2012, the Applicant’s appointment was converted from the “X” to the “A” category, changing his appointment into a temporary indefinite appointment.

4. On 27 January 2016, the Agency advertised a vacancy announcement for six posts of Senior Functional Expert (“SFE”), Grade 17, in Headquarters Amman (“HQA”). The Agency received 111 applications. The hiring department short-listed 17 candidates for a written test. Twelve internal candidates, including the Applicant, and one external candidate passed the test. Subsequently, 13 candidates were invited for a personal interview.

5. In a recruitment report dated 20 June 2016, the Interview Panel recommended the appointment of three selected candidates as SFE in HQA. The Applicant was not recommended for the position. The Interview Panel concluded that the Applicant was not precise in his answers and failed to convince the Panel of his technical knowledge, despite the fact that he had recently been performing similar duties.

6. On 3 October 2016, the Agency re-advertised the vacancy announcement in order to fill the remaining three SFE posts in HQA. The Applicant applied but was
not short-listed. The Agency did not short-list the Applicant as he had been interviewed before and had not been found suitable.

7. On 30 January 2017, the Applicant submitted a request for a review of the decision not to short-list him.

8. On 6 April 2017, the application was filed with the UNRWA Dispute Tribunal (the “Tribunal”). The application was transmitted to the Respondent on 9 April 2017.

9. On 9 May 2017, the Respondent filed his reply. The reply was transmitted to the Applicant on 10 May 2017.

10. On 31 May 2017, the Applicant filed a “Motion for Leave to Submit Observations and Supplementary Evidence on the Reply of the Respondent”. The motion was transmitted to the Respondent on the same day.

11. By Order No. 070 (UNRWA/DT/2017) dated 11 June 2017 (“Order No. 70”), the Tribunal granted the Applicant’s motion.

12. On 20 June 2017, the Applicant filed observations and supplementary evidence. The Applicant’s submissions were transmitted to the Respondent on the same day.

Applicant’s contentions

13. The Applicant contends:

   i) Other staff members who had failed the written test in the first recruitment process were still short-listed for the second recruitment process. Since he was not short-listed for the second recruitment process, he received unequal treatment;

   ii) In the first recruitment process, test results of certain candidates were raised while they had not done well in reality;
iii) There is nothing in the Agency’s regulatory framework preventing him from being short-listed;

iv) He should have been recommended by the Interview Panel in the first recruitment process;

v) He fulfills all the requirements and experience for the post; and

vi) He has been acting in the post since 2014.

14. The Applicant requests:

i) The recruitment exercise for the post to be stopped; and

ii) To be offered the post.

**Respondent’s contentions**

15. The Respondent contends:

i) The short-listing process for the SFE post was properly effected. The Commissioner-General has broad discretion in matters of selection;

ii) The Applicant applied for the post of SFE on 17 February 2016. He went through a full recruitment process and was found not suitable. For this reason, he was not short-listed for the second recruitment process. This approach has been consistently applied to candidates who have not been successful in the recruitment exercise to the same position within a period of 12 months. It was applied to two other candidates who also had not been found suitable in the first recruitment process;

iii) To short-list and subsequently select the Applicant would not have been consistent with securing the highest standards required in appointment of staff since he had been found unsuitable;

iv) There is no evidence of the Applicant’s allegations that the interview results were unfair and intended to assist particular candidates;
v) When a post is re-advertised within 12 months, the Agency does not exclude candidates who have taken the test but were not interviewed afterwards;  

vi) The Tribunal is not the right forum to challenge policy positions adopted by the Agency; and  

vii) With this application, the Applicant cannot contest the first selection process.

16. The Respondent requests the Tribunal to dismiss the application in its entirety.

Considerations

17. The Applicant contests the decision not to select him for the recruitment process for three remaining SFE posts in Amman. Previously, the Applicant had applied for six vacant SFE posts, advertised on 27 January 2016. Following the first recruitment process, the Applicant had been interviewed but had not been recommended for the post. Three of the six posts were filled. In the present application, the Applicant is raising the issue of the legality of the first recruitment process. However, he never contested before the Tribunal the decision not to select him after the first recruitment process. Therefore, the first decision not to select him is final and cannot be contested by the Applicant.

18. On 3 October 2016, the Agency re-advertised the vacancy announcement for the SFE post in order to fill the three remaining posts. The Applicant applied but was not short-listed. The Respondent submits that the rationale for the decision not to short-list the Applicant is based on the Agency’s practice and policy, namely, that a candidate who has previously been interviewed for the same post and found not suitable, cannot be short-listed for a new recruitment process within 12 months for the same post.

19. The Applicant claims that such policy is illegal, that it does not exist in the Agency’s regulatory framework, and that this policy was not applied to all candidates in the second recruitment process.
20. The Respondent does not contest that there is no written administrative issuance which prohibits a candidate from being short-listed in a second recruitment for a post. Rather, the Respondent submits that the Commissioner-General’s broad discretionary authority in the selection process of staff allows him to apply such a policy.

21. The Tribunal does not agree at all with the Respondent’s contention. A policy precluding certain staff members from being short-listed for advertised posts is, in fact, a rule and as such must be written and published by the Agency. The acts of the Agency must be transparent, and the best way to be transparent is to publicly inform the staff members of the various Agency’s rules, directives, circulars and policies. As the contested decision was based on a policy which was never published, the Agency could not base its decision on it. For this reason the decision not to short-list the Applicant was unlawful.

22. In addition, it appears that the above-mentioned policy was not, in fact, applied by the Agency. The Applicant claims that this policy was not applied to all candidates in the second recruitment process, specifying that two candidates who had not been selected for an interview after the written test in the first recruitment process, were short-listed in the second recruitment process. The Respondent claims that those candidates who had not been selected for interviews in the first recruitment are not in the same position as the Applicant, as he was interviewed and found not suitable by the Interview Panel. The Tribunal finds that the Respondent’s claim clearly demonstrates that a policy which is not published leads to confusion and arbitrariness, as even the Tribunal cannot check if the policy was correctly applied. It follows from the above-mentioned that the decision not to select the Applicant must be rescinded.

23. As the rescinded decision concerns an appointment, the Tribunal has to apply Article 10(5) of the Tribunal’s Statute which provides:

5. As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested
administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph; […]

24. It is obvious that the Applicant lost a chance to be selected at a higher grade and that, if he had been short-listed, he would have had the opportunity to be recommended for the post. The Applicant, in the first selection process, had not been recommended by the Interview Panel for the reason that “[t]he interview panel concluded that the Applicant was not precise and failed to convince the panel of his technical knowledge, despite the fact that he has recently been performing similar duties”. The Tribunal is cognisant of the broad discretion the Commissioner-General has in matters of selection, and it may well be, even if the Applicant had been afforded the opportunity in the second recruitment process, that the Commissioner-General could have lawfully exercised his discretion not to select him, notwithstanding the Applicant’s employment record and the fact that he had been performing similar duties. At the best of times, the assessment of chance is not an exact science and the Tribunal must assess the matter and arrive at a figure that is deemed by the Tribunal to be fair and equitable, having regard to the number of imponderables present in this case. In all the circumstances, the Tribunal holds that the sum of USD2,000 constitutes an adequate remedy for the loss of chance.

25. In the present case, if the Agency decides not to rescind the contested decision, the Tribunal considers that the Agency has to pay the Applicant the amount of USD2,000.

Conclusion

26. In view of the foregoing, the Tribunal hereby DECIDES:

i) The decision not to select the Applicant is rescinded;

ii) If the Agency decides not to execute the rescission, the Respondent shall pay to the Applicant the sum of USD2,000; and
iii) The above sum is to be paid within 60 days of the date this Judgment becomes executable during which period the US Prime Rate, applicable as of that date, shall apply. If the 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 the payment.

(Signed)_______________________________
Judge Jean-François Cousin
Dated this 19th day of March 2018

Entered in the Register on this 19th day of March 2018
(Signed)_______________________________
Laurie McNabb, Registrar, UNRWA DT, Amman