ABU SHMAIS

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 Jihad Abu Shmais (the “Applicant”) against the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), 1) to serve him a letter of reprimand, 2) not to appoint him at Grade 12, and 3) not to select him for the Material Inspector post at Grade 14 at the Procurement and Logistics Department.

Facts

2. Effective 11 May 2004, the Applicant was employed by the Agency as a Senior Clerk in the Procurement & Logistics Department (“PLD”) in the Jordan Field Office (“JFO”).

3. In October 2013, the Applicant was selected for the post of Financial Assistant at the Wadi Seer Training Centre. On 13 May 2014, an allegation of misconduct was made against the Applicant. The allegation concerned an event which had happened on 12 May 2014. The Applicant was accused of “physically attacking a Messenger while he was performing his duty”. It was also noted that the Applicant cursed his supervisor and colleagues on that day. The Applicant was suspended with pay pending the outcome of the investigation.

4. On 21 August 2014, the Applicant was offered, on a temporary basis, the post of Stock & Material Inspection Officer, Grade 12, at the PLD. The incumbent of the post was on Special Leave until June 2015. On the same day, as a result of the investigation, the Applicant was also served a letter of censure for having used unbecoming words towards his supervisor and colleagues.

5. On 7 September 2014, the Applicant was transferred to the position of Chief Clerk Procurement, Grade 9. The Applicant requested review of the decision to censure him and of the decision to transfer him to a Grade 9 position.

6. By email of 13 November 2014, the Director of UNRWA Operations, Jordan (“DUO/J”) decided to cancel the letter of censure, and, instead, issue a letter of
reprimand. In addition, he informed the Applicant that he had instructed his staff to contact him in relation to the decision not to confirm the Applicant in his previous appointment.

7. By letter dated 1 December 2014, the Officer-in-Charge (“OiC”) Human Resources Department informed the Applicant of the corrective actions following the DUO/J’s email of 13 November 2014. The letter of censure was cancelled, as was his last performance report based on which he had not been confirmed in his previous position. The OiC Human Resources Department noted:

3 - As agreed, you are now reconfirmed at your previous Grade 12 (benefitting from a continuous grade and salary protection) until such time as a suitable post becomes vacant against which you can be transferred or selected following a competitive process.

8. From the beginning of 2015, the Applicant applied for several positions at Grade 12, but was unsuccessful in securing such a position.

9. On 26 February 2015, the Applicant requested review of the decision of 1 December 2014. On 26 March 2015, the OiC UNRWA Operations, Jordan responded to the Applicant, indicating that his request for decision review was regarded as not receivable as it was filed passed the 60-day deadline.

10. On 21 May 2015, the Applicant submitted a request for review of the decision of 26 March 2015.

11. On 13 January 2016, the Applicant submitted a complaint to the DUO/J about the Management of the PLD. He complained that he still had not been appointed on a Grade 12 post, and he claimed that he was aware of some corruption cases in the PLD.

12. On 31 January 2016, the Applicant filed an “objection letter” with respect to his performance evaluation for 2015.

13. On 25 April 2016, the Applicant filed another complaint with the Department of Internal Oversight Services (“DIOS”). The complaint was reviewed by the Intake
Committee and it was determined that the complaint did not relate to misconduct but rather was “a JFO management issue”.

14. On 26 May 2016, the JFO Intake Committee decided to refer the complaint to the manager of the PLD. The manager indicated that the Applicant had been assigned additional responsibilities when possible, but that the root of his complaints was his “general dissatisfaction and frustration” at still being appointed on a Grade 9 position.

15. On 5 June 2016, the Field Human Resources Officer was requested to lead the managerial review of the Applicant’s complaint and to check on the measures implemented and/or recommended for the Applicant.

16. Effective 24 August 2016, the Agency temporarily assigned the Applicant to another Department at Grade 12. On 7 September 2016, the Applicant was sent back to his previous post in the PLD.

17. On 5 April 2017, the Applicant was served a letter of reprimand for engaging in non-work related activities during working hours, which resulted in delay in work and poor performance.

18. On 6 April 2017, the Applicant requested the DUO/J to cancel the letter of reprimand and to open an investigation into “this issue and all other issues” in the PLD.

19. On 3 May 2017, the Applicant was interviewed for the position of Material Inspector, Grade 14.

20. On 9 May 2017, the Applicant submitted a decision review request with the DUO/J regarding the decision to reprimand him and “other related actions” taken against him in the PLD.

21. On 25 May 2017, the Applicant was informed that he was not selected for the post of Material Inspector.

22. On 18 June 2017, the DUO/J confirmed the decision to reprimand the Applicant for engaging in non-work related activities during working hours.
23. On 12 July 2017, the Applicant submitted a request for review of the decision not to select him for the post of Material Inspector.

24. On 18 July 2017, the application was filed with the UNRWA Dispute Tribunal (the “Tribunal”). It was transmitted to the Respondent on 1 August 2017.

25. On 22 August 2017, the Applicant filed a motion to add annexes to his application. The motion was transmitted to the Respondent on the same day.

26. On 25 August 2017, the Respondent filed his response to the Applicant’s motion, requesting the Tribunal to reject the motion of the Applicant. Furthermore, the Respondent requested an extension of time to submit his reply to the application in the event that the Tribunal granted the Applicant’s motion. The Respondent’s response was transmitted to the Applicant on 27 August 2017.

27. On 29 August 2017, the Respondent submitted a motion seeking leave to submit additional evidence to his response dated 25 August 2017. The Respondent’s motion was transmitted to the Applicant on 30 August 2017.

28. The Respondent filed his reply on 31 August 2017. The Respondent’s reply was transmitted to the Applicant on 6 September 2017.

29. By Order No. 118 (UNRWA/DT/2017) dated 10 September 2017 (“Order No. 118”), the Tribunal granted the Applicant’s and the Respondent’s motions to file additional evidence. The Respondent was granted 21 days to submit a response to the Applicant’s additional annexes to his application.

30. On 11 September 2017, the Respondent filed a motion for an extension of time to file the translation of the reply. The motion was transmitted to the Applicant on the same day.

31. On 17 September 2017, the Applicant filed the additional annexes to his application. The submission was transmitted to the Respondent on the same day.

32. On 21 September 2017, the Respondent filed his response to Order No. 118. The response was transmitted to the Applicant on the same day.
33. On 25 September 2017, the Respondent filed the Arabic translation of the Respondent’s reply. The translation was transmitted to the Applicant on the same day.

34. On 6 October 2017, the Respondent submitted his response to the additional annexes which the Applicant had filed on 17 September 2017. The submission was transmitted to the Applicant on 8 October 2017.

**Applicant’s contentions**

31. The Applicant contends:

i) He has been appointed on a Grade 7 post for three years, although his actual Grade is 12;

ii) He has been insulted and humiliated for the last three years in the PLD;

iii) The post of Distribution Manager was abolished as a fixed-term post, and another staff member was appointed under a different contract modality;

iv) Another staff member was appointed as Material Inspector for more than one year as OiC, despite the fact that he was available to fill the post;

v) Another staff member was appointed as OiC Garage and Dispatch Officer, despite the fact that he was available to fill the post;

vi) The letter of reprimand does not have a legal basis;

vii) The Head of the PLD is a “biased and racist person” who tried everything during the interviews and tests to prevent him from getting a suitable post;

viii) After he was tested for the post of Warehouse Officer, the post was abolished and re-advertised under the contract modality of a Limited Duration Contract;

ix) The selection processes lacked transparency, and the interview panels lacked objectivity; and
x) The duties of a Property Inspector are much wider than those of the Stock Inspector. A Property Inspector is a Grade 12, but the Stock Inspector was upgraded to Grade 14.

32. The Applicant requests:

i) Cancellation of the letter of reprimand;

ii) To be appointed on the post of Material Inspector, Grade 14;

iii) Full protection from retaliation;

iv) Compensation for psychological damage;

v) Compensation for material damage, as he lost the opportunity to be selected for many posts; and

vi) To correct the anomaly concerning his functional title in his pay slip.

Respondent’s contentions

33. The Respondent contends:

i) The decision to reprimand the Applicant was properly effected. It was based on established facts. The Applicant’s supervisor had verbally warned him on several occasions;

ii) The Applicant did not bring any evidence to substantiate his allegations against his supervisors;

iii) The decision not to select the Applicant for the post of Material Inspector was taken following the unanimous conclusion of the interview panel not to recommend him; and

iv) There was no right for the Applicant to receive special treatment; he has no right to have a member of the staff union as part of the recruitment panel.

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

Receivability

35. On 18 July 2017, the Applicant filed an application with the Tribunal. By this application the Applicant contested the decisions 1) to serve him a letter of reprimand, 2) not to appoint him at Grade 12, and 3) not to select him for the Material Inspector post at Grade 14 at the PLD.

36. On 9 May 2017, the Applicant submitted a decision review request to the DUO/J regarding the decision to reprimand him and “other actions taken against him in the PLD since October 2013”. On 12 July 2017, the Applicant submitted a request for review of the decision of 25 May 2017, not to select him for the post of Material Inspector.

37. It follows from the above, that the decisions the Applicant has contested by his application dated 18 July 2017 were indeed the subject of the two requests for decision review, submitted on 9 May 2017 and 12 July 2017. The Applicant submitted his application very shortly after he had submitted his request for review of the decision not to select him for the post of Material Inspector. However, since at the time of this Judgment the decision not to select the Applicant for the post of Material Inspector has not been cancelled, the Tribunal considers that the application is receivable and as such directed against the three above-mentioned decisions.

The reprimand

38. On 5 April 2017, the Applicant received a letter of reprimand from the Head of the PLD. The reprimand indicated that the Applicant had failed to properly perform the functions of his position. The letter states that, on several occasions during working hours, the Applicant’s supervisor had observed him engaging in non-work related activities on his private laptop and phone. This conduct led to repetitive delays in the completion of the Applicant’s assigned tasks and to delays in the work of the team.
39. In his application, the Applicant does not contest that the above-mentioned had occurred. He merely alleges that the Head of the PLD is biased and racist. However, he does not give any evidence in support of these serious allegations. Therefore, as the facts are not disputed, the Tribunal considers that the Applicant has not demonstrated that the reprimand was unlawful.

*Decision not to select him for the post of Material Inspector*

40. As already mentioned above, the decision not to select him for the post of Material Inspector was contested by his request for decision review submitted on 12 July 2017, and was also contested in the application.

41. The Applicant does not proffer any serious contentions against this decision. The Applicant only claims that the interview panel was biased and that the Chairperson did not want to select him. The Respondent submitted to the Tribunal the Recruitment Report for the post of Material Inspector. It is clear from the report that the Applicant was interviewed along with six other candidates. The panel unanimously decided not to recommend the Applicant for the post. According to the report the Applicant did not meet one competency and partially met two other competencies. The Applicant did not submit any evidence in support of his allegation of bias. Therefore, the Tribunal considers that the Applicant did not establish that the decision not to select him was unlawful.

*Decision not to give him a new post at Grade 12*

42. The Applicant claims that ever since he had wrongly received the letter of censure on 24 August 2014, he has been poorly treated by the Agency. As a result of this letter, he was not confirmed in his appointment at the time, at Grade 12. However, it is clear from the documents in the file, and particularly from a letter dated 1 December 2014 sent to the Applicant by OiC Human Resources Department, Jordan that, following the decision review, the Applicant was “reconfirmed” at his previous level of Grade 12. Thus, he benefitted from a continuous grade and salary protection “until such time a suitable post become[] vacant against which [he could] can be transferred or selected following a competitive process”.

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43. The Tribunal has to examine if the Agency made sufficient efforts to identify a post for the Applicant, equivalent to his Grade 12. It is clear from the case file that the Applicant had been a candidate in several recruitment processes, however he never managed to be selected for a position. With respect to this, the Tribunal can only acknowledge the discretionary power of a selection panel to recommend or not to recommend a candidate for a post.

44. Moreover, in spite of the Applicant’s requests, the Agency never transferred him to a suitable post. Particularly, by an email dated 13 January 2016 to the DUO/J, the Applicant complained that there were many Grade 12 posts available at the JFO, yet he had been waiting for 15 months for a suitable place. By email sent on 7 June 2016 to the Head of the Field Legal Office in the JFO, his supervisor acknowledged that the Applicant had good reasons to be frustrated and to feel resentment; however, that he was trying to amend the situation in the most appropriate way by assigning the Applicant more responsibilities.

45. In the case at hand, the Tribunal does not consider that a period of more than two years after a promise to be appointed on a Grade 12 post, is a reasonable time frame. Consequently, the Tribunal considers this to be an irregularity. The Tribunal does recognize that the Applicant, by his own behavior, is partially responsible for the situation. Nonetheless, the original cause of the Applicant’s troubles is that he was wrongly not confirmed in the post of Stock and Material Inspector, Grade 12.

Remedies

46. The Tribunal held above that, in this case, the only irregularity was not fulfilling the commitment to give the Applicant a Grade 12 post within a reasonable time frame. However, as is clear from the case file, the Applicant benefitted from salary protection, and, accordingly, he did not suffer any material damages. For the claimed lost opportunities of promotion, the Applicant does not offer any evidence.

47. With respect to the Applicant’s request for moral damages, Article 10(5) of the Tribunal’s Statute provides:

5. As part of its judgement, the Dispute Tribunal may order one or both of the following:
48. In the present case, the Tribunal notes that the Applicant’s requests for compensation in the form of moral damages for the psychological harm that he suffered are not supported by evidence. Therefore, the Tribunal holds that it would not be appropriate to award any compensation for moral damages.

Conclusion

35. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

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Judge Jean-François Cousin

Dated this 11th day of December 2018

Entered in the Register on this 11th day of December 2018

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Laurie McNabb, Registrar, UNRWA DT, Amman