MADHOUN

v.

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

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Waleed Mustafa Mahmoud Madhoun (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 to select him for the post of Deputy Field Pharmaceutical Services Officer.

Facts

2. Effective 10 September 2005, the Applicant was employed by the Agency as Assistant-Pharmacist at Kraymeh Health Point, Jordan Field Office (“JFO”) on a fixed-term appointment, Grade 7. Effective 11 September 2015, the Applicant’s appointment was converted to a temporary indefinite appointment.

3. As a result of the reclassification of his post, effective 2 January 2014, the Applicant was promoted to the post of Health Centre Pharmacist, Amman New Camp Health Centre, Grade 8, Step 9.

4. On 12 January 2017, the Agency advertised, internally and externally, a vacancy announcement for the post of Deputy Field Pharmaceutical Services Officer (“D/FPSO”), Grade L5, at the Field Central Pharmacy. Two of the minimum qualifications required for the post were:

   • a university degree in pharmacy or other related discipline; and
   • a valid license to practice pharmacy in the country of duty station (where applicable).

5. The Agency received a total of 137 applications for the post, including the Applicant’s. Sixteen candidates, including the Applicant, were shortlisted in Tranche 1 and invited for a written test. Five candidates, who had scored 50 or above on the test, were invited for a personal interview. One of the five candidates was the Applicant. The interviews took place on 27 March 2017.
6. The Applicant was interviewed by a recruitment panel comprised of the Field Pharmaceutical Services Officer, the Field Procurement and Logistics Officer, the Chief, Health Protection and Promotion of Headquarters Amman and an Associate Human Resources Officer. The Field Pharmaceutical Services Officer was the Chairperson and Hiring Manager, the Associate Human Resources Officer was an Observer. The panel noted in the recruitment report that the Applicant had partially met the three competencies of “Team Work”, “Planning and Organising” and “Communication”. He was not recommended for the position. The interview panel recommended another internal candidate for appointment, and the Director of UNRWA Operations, Jordan (“DUO/J”) approved the recommendation on 23 April 2017.

7. On 8 May 2017, the Applicant filed a request for review of the decision not to appoint him to the post of D/FPSO. By letter dated 15 May 2017, the DUO/J affirmed the decision.

8. On 6 August 2017, the Applicant filed his application with the UNRWA Dispute Tribunal (the “Tribunal”). The application was transmitted to the Respondent on the same day.

9. On 4 September 2017, the Respondent filed his reply. The reply was transmitted to the Applicant on 11 September 2017.

10. On 19 September 2017, the Respondent filed the Arabic translation of his reply. The translation was transmitted to the Applicant on the same day.


12. On 8 November 2018, the Applicant filed a motion for leave to file additional evidence. The motion was transmitted to the Respondent on the same day.

13. On 8 November 2018, the Applicant’s Representative confirmed his intent to attend the hearing. The confirmation was transmitted to the Respondent on the same day.
14. On 16 November 2018, the Respondent confirmed his intent to attend the hearing and also indicated his intent to present two witnesses. The Respondent’s confirmation was transmitted to the Applicant on 18 November 2018.

15. By Order No. 208 (UNRWA/DT/2018) dated 18 November 2018, the Tribunal granted the Applicant’s motion.

16. On 27 November 2018, a hearing was held at Headquarters Amman. The Applicant and his Representative were present at the hearing. The Respondent was also present at the hearing and presented two witnesses: a Human Resources Recruitment Officer and the Chairperson of the recruitment panel.

17. By Order No. 220 (UNRWA/DT/2018) dated 28 November 2018 (“Order No. 220”), the Tribunal ordered the Respondent to produce a valid licence of the selected candidate to practice pharmacy.

18. On 5 December 2018, the Respondent filed his submission in response to Order No. 220. It was transmitted to the Applicant on 6 December 2018. The Applicant was given four days to comment on the Respondent’s response.

19. On 6 December 2018, the Applicant filed a motion requesting leave to submit observations and supplementary evidence on the Respondent’s response to Order 220. The Applicant’s motion was transmitted to the Respondent on 10 December 2018.

20. By Order No. 229 (UNRWA/DT/2018) dated 11 December 2018, the Tribunal granted the Applicant’s motion.

21. On 12 December 2018, the Applicant filed his observations and supplementary evidence on the Respondent’s response to Order No. 220. This was transmitted to the Respondent on 16 December 2018.
Applicant’s contentions

22. The Applicant contends:

   i) The selected candidate was exempted of the basic requirements stipulated in the provisions of Area Staff Personnel Directive A/4 Part II/Rev7 ("PD A/4"), while there were enough candidates who met the requirements for the post;

   ii) The selected candidate does not meet the requirement of not less than six years’ experience, including two years at a supervisory and administrative level. He does not have supervisory experience;

   iii) The experience needed for this post is one of a Pharmacist and not an Assistant-Pharmacist. A Pharmacist must have completed a university degree of five or six years, whereas an Assistant-Pharmacist obtains a diploma after two years at an intermediate college;

   iv) There was a close relationship between the selected candidate and the Chairperson of the recruitment panel. There was a conflict of interest; and

   v) The post of D/FPSO requires an academically qualified Pharmacist with a duly issued licence.

23. The Applicant requests:

   i) The rescission of the decision to appoint the selected candidate; and

   ii) To be compensated for material and moral damages.

Respondent’s contentions

24. The Respondent contends:

   i) The selection process for the post of D/FPSO was properly effected. The Applicant’s candidacy was given full and fair consideration;
ii) The interview panel unanimously found the selected candidate suitable. He was selected based on an equivalency determination, which had been approved by the Officer-in-Charge (“OiC”) Director of UNRWA Operations, Jordan on 23 April 2017. The selected candidate was not the only candidate with a diploma who had been invited for the interview. There was no preferential treatment;

iii) The selected candidate had 27 years of relevant experience and therefore met the requirements of the post on an equivalency basis. He also had supervisory and managerial experience, as he had worked as OiC D/FPSO on more than seven occasions and as Acting D/FPSO in Jordan since 2 January 2017; and

iv) The Applicant’s line manager’s presence in the interview panel is contemplated in paragraph 69 of PD A/4.

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

Considerations

Merits

26. The Applicant contests the Agency’s decision not to select him for the post of D/FPSO. The Applicant claims that the selected candidate did not meet the minimum qualifications required for the post, as he did not have a university degree in pharmacy or other related discipline, or a valid licence to practice pharmacy in Jordan.

27. It is not contested by the Respondent that the selected candidate only had a diploma and not a university degree. However, the Respondent indicates that the successful candidate was selected based on an equivalency determination as provided by paragraph 45 and 46 of PD A/4:
Second review and equivalency

45. If an insufficient number of candidates who fully meet the post requirements remain during or at the end of the assessment process, the Hiring Director can request the Recruitment Administrator to conduct a second review of applications received to identify further potential candidates.

46. Where, as a result of a second review, applicants are identified who are potentially suitable but do not fully meet the post requirements set out in the vacancy notice, the Hiring Director has the option to request an equivalency determination from the Recruitment Administrator. Where candidates do not meet the post requirements on an equivalency basis, the Hiring Director may recommend a candidate for appointment at one grade lower than the full grade of the post.

28. Furthermore, paragraph 70 of PD A/4 stipulates:

Equivalency determinations

70. In cases where there are insufficient candidates who fully meet the post requirements, candidates with an equivalent combination of relevant academic qualifications, professional training and progressive work experience may also be considered. Equivalency determinations will be made by the Recruitment Administrator, and approved by the respective Field Director for posts in the Field, and the Chief of the Personnel Services Division for posts in HQ.

29. In the Agency’s Area Staff Selection Guidelines, the following is stipulated in paragraph 27 and 29:

Exclusions from Application of Equivalency Considerations

27. Equivalency cannot be applied to candidates where their level of academic attainment is more than one level below the minimum requirements of the post, as outlined in the table below:

<table>
<thead>
<tr>
<th>Post Education Requirement</th>
<th>Minimum Education Accepted</th>
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<tbody>
<tr>
<td>PhD</td>
<td>Master’s</td>
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<tr>
<td>Master’s</td>
<td>Bachelor’s</td>
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<tr>
<td>Bachelor’s</td>
<td>Diploma</td>
</tr>
<tr>
<td>Diploma</td>
<td>Completion of Secondary Education</td>
</tr>
<tr>
<td>Completion of Secondary Education</td>
<td>Not Applicable</td>
</tr>
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* * *
29. Equivalency may not be applied to offset a professional certification or licensing which is a mandatory requirement of the position (i.e. doctors, engineers and other specialised trades).

30. It is clear from the Guidelines that the selected candidate’s diploma meets the minimum education requirement. Furthermore, the Tribunal accepts that the selected candidate had sufficient experience to compensate for the lack of a university degree. However, the Applicant also raised the issue of the licence to practice pharmacy. This issue was addressed during the hearing on 27 November 2018. The Applicant claimed that the selected candidate has only a licence for Assistant-Pharmacist, which does not allow him to practice pharmacy in Jordan. The Respondent, in return, claimed that the selected candidate did have a valid licence to practice pharmacy. The Tribunal subsequently ordered the Respondent to produce the licence to the Tribunal.

31. The above-mentioned Guidelines are a resource of recommended recruitment practices. They were issued as a supplement to the revised Area Staff Selection Policy, with the intention to provide an additional resource to staff members in the Field and at Headquarters who are involved in area staff selection processes and procedures. The Tribunal considers that, even where the Guidelines cannot be considered as mandatory rules, a required professional licence cannot be compensated by any equivalency considerations.

32. The Tribunal has examined that, since 2007, the Ministry of Health in Jordan has stopped issuing licences to Assistant-Pharmacists. This means that as of 2007, new Assistants-Pharmacist cannot be regarded as holding any licence. The licence of the selected candidate, which was submitted to the Tribunal by the Respondent, is dated 21 April 1992. This licence indicates that consent was given to practice the profession of “Pharmaceutical Assistant”. The Tribunal considers it obvious that, both before and after 2007, an Assistant-Pharmacist could and can work only under a Pharmacist’s supervision and that, as such, an Assistant-Pharmacist cannot be considered to be allowed to practice pharmacy in Jordan. Therefore, the Tribunal considers that the selected candidate did not meet one of the mandatory requirements for the post, i.e. a valid licence to practice pharmacy in Jordan.
Therefore, the selected candidate was irregularly selected for the post. Consequently, the Tribunal decides to rescind the decision to select the recommended candidate.

Compensation in lieu of rescission

33. 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:

(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.

34. Accordingly, as the rescinded decision concerns appointment, the Tribunal must determine an amount of compensation that the Agency may elect to pay as an alternative to the rescission of the contested decision.

35. The United Nations Appeals Tribunal (the “UNAT”) in Krioutchkov 2016-UNAT-691, also provides the following example in setting an amount of in-lieu compensation:

27. The UNDT’s discretion under Article 10(5)(a) is constrained by the mandatory requirement to set an amount of compensation as an alternative to an order rescinding a decision on appointment, promotion or termination. Accordingly, pursuant to Article 10(5) of the UNDT Statute, where the UNDT rescinds a contested administrative decision concerning appointment, promotion or termination, it must set an amount of compensation in lieu of rescission or specific performance, which the Secretary-General may elect to pay instead.

28. The UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings. We have consistently held that “compensation must be set by the UNDT following a principled approach and on a case by case basis” and “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case”.
29. In the instant case, the UNDT found that Mr. Krioutchkov’s non-selection for the second post under JO 25120 was unlawful. The UNDT therefore rescinded the selection of the successful candidate and awarded compensation in lieu of such rescission pursuant to Article 10(5)(a) above.

30. We find no fault with the UNDT’s award of compensation of USD 1,000 as the UNDT considered the chances of success as well as the difference of net base salary between the one Mr. Krioutchkov received at his current grade and step and his potential income after promotion as of August 2013, when the second post became vacant, feeling compelled by Hastings to limit the projection of the difference in salary to two years.

36. Had the selected candidate not been shortlisted, four candidates would have competed for the post. The Applicant was one of those four candidates. It is clear from the recruitment report that the Applicant and two other candidates were rated as partially meeting three competencies, while the fourth candidate was evaluated as meeting none of the competencies. Therefore, the Tribunal concludes that the Applicant’s chances of success are not convincing. Consequently, the Tribunal holds that it is appropriate to set the alternative compensation at the amount of USD1500.

Compensation for harm

37. 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:

[…]  

(b) Compensation for harm supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision (emphasis added).

38. In the present case, the Applicant claims that, as a result of the Agency’s decision, he suffered moral injury. In support of his claim, he submitted a medical report from a psychiatrist. The report indicates that the Applicant had been suffering from severe headache and nervous tension.
39. The Tribunal considers that the medical report is not persuasive to the extent that there is a causal link between the Applicant’s symptoms and the Agency’s decision. Therefore, the Tribunal holds that it would not be appropriate to award any compensation for moral damages.

Conclusion

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

i) The decision not to select the Applicant for the post of D/FPSO is hereby rescinded;

ii) Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant the amount of USD1500; 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.

iv) The Applicant’s request for moral damages is rejected.

(SIGNED)

Judge Jean-François Cousin

Dated this 7th day of January 2019

Entered in the Register on this 7th day of January 2019

(SIGNED)

Laurie McNabb, Registrar, UNRWA DT, Amman