KIWAN

v.

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

JUDGMENT

Counsel for Applicant:
Legal Office, Staff Assistance

Counsel for Respondent:
Anna Segall
Introduction

1. Ferial Kiwan (the “Applicant”), filed an application contesting the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the “Respondent”), not to invite her to sit the examination for the post of Area Relief and Social Services Officer (“ARSSO”).

Facts

2. On 18 April 2005 the Applicant commenced employment with the Agency as a Procurement Logistics Clerk, Grade 8, in the Procurement and Logistics Department, Lebanon Field Office.

3. From January 2009 to December 2009, the Applicant served as a Gender Awareness Trainer in the Lebanon Field Office.

4. From November 2009 to April 2010, the Applicant served as the Acting Field Training Officer in the Lebanon Field Office.

5. At the material time, the Applicant had returned to her original post as Procurement Logistics Clerk.

6. On 22 May 2012 the Agency advertised the post of ARSSO for Central Lebanon Area under Vacancy Announcement No. 25/2012 (“VA No. 25/2012”). The deadline for submission of applications was 4 June 2012. The vacancy announcement listed the following relevant requirements for candidates:

A. **Academic and Professional**

   A university degree in social work, sociology, psychology, social anthropology, guidance and counseling or other related discipline.

B. **Experience**

   i) At least three years experience in relief services and/or social development programmes, of which one year should be in management, preferably in a similar programme;
ii) Training in action oriented social research and participation in at least two social research projects.

7. The vacancy announcement noted that candidates with an equivalent combination of relevant academic qualifications, professional training and progressive work experience may also be considered.

8. On 4 June 2012 the Applicant submitted her application for the ARSSO vacancy.

9. A total of 116 applications were received. A Recruitment Report for the vacancy, dated 2 August 2012, states that screening was conducted by the Human Resources Associate; Chief, Field Relief and Social Services Programme; and Deputy Chief, Field Relief and Social Services Programme, in accordance with the criteria set out in VA No. 25/2012.

10. By memorandum to the Field Human Resources Officer, Lebanon (“FHRO/L”) dated 4 July 2012, a Human Resources Associate enclosed the “subject competition file” which listed the qualifications and experience of all applicants along with short-listing remarks. The candidates were divided into three different tranches: those candidates who met all requirements for the post were designated as tranche 1; those candidates who met most of the requirements were designated as tranche 2; and those candidates deemed to not meet the minimum requirements were designated as tranche 3. The Applicant was assessed as having a relevant degree and 2.3 years of relevant experience and was designated as tranche 3.

11. According to paragraph 9 of the Respondent’s Reply:

At a meeting held in late April 2012, the [Chief, Field Relief and Social Services Programme], in a concerted effort to enhance the promotion opportunities available to the Agency’s Social Workers, agreed to waive the requirement in VA No. 25/2012 for applicants to have one year’s work experience managing relief services and/or social development programmes. Accordingly, candidates for the post of ARSSO who were Social Workers of the Agency were short-listed for further consideration for the post by administration of a technical/practical examination if they me all the requirements other than the one-year managerial experience criteria. The waiver
of the one-year managerial experience requirement was also applied in the screening of the Applicant’s application.

This waiver is not mentioned in the Recruitment Report.

12. By an automatically generated e-mail, dated 4 July 2012, the Applicant was informed that:

The applicant screening process has been completed; but regretfully, you were not among those individuals selected for further consideration. While your qualifications were impressive and were considered, they do not match the position requirements.

13. The same day, the Applicant sent an e-mail to Ms. Natalie Burton, the FHRO/L, listing her qualifications and work experience against the requirements for the ARSSO post listed in the vacancy announcement and asking to know the status of her application. A follow-up e-mail from the Applicant dated 6 July 2012 noted that her application had been “excluded” and stated that her qualifications were within the range of criteria requested in the vacancy announcement.

14. By e-mail dated 6 July 2012, Ms. Burton informed the Applicant as follows:

This position requires 3 years of relevant experience. Experience that is considered relevant is determined and agreed upon with the hiring department prior to the screening of the applications. According to the screening review of your application, we have determined that you have only 2.3 years of the 3 years that is required for this post. I note that you have listed your administrative and training experience in your application. Unfortunately, this experience was not considered relevant to the post. We did, however, consider your experience as Microcredit Supervisor and Camp Coordinator to be related. Unfortunately, the cumulative years of experience in those roles are not sufficient to include you on the shortlist for this position.

15. By e-mail dated 18 July 2012 to Mr. Robert Hurt, who was at the time Deputy Director of UNRWA Affairs, Lebanon, and Officer-in-Charge of UNRWA Affairs, Lebanon, the Applicant requested a review of the decision not to invite her to sit the examination for the post of ARSSO.

16. Mr. Hurt responded to the Applicant by e-mail on the same day, affirming the decision, and providing the following explanation:
The question is whether you have 3 years of “experience in relief services and/or social development programmes, of which one year should be in management, preferably in a similar programme”. The sole reason for not short-listing you is because your experience as Acting Field Training Officer, Clerk in [Procurement Logistics Division] and Financial and Administrative Assistant was not considered as falling within this criteria.

The description of the duties you included in your CV for each of these positions do not establish that they related to “relief services and/or social development programmes”. In addition to what you wrote in your CV, being intimately familiar with the roles of Field Training Officer and Clerk in PLD, I can confirm that neither position can be concerned related to relief or social development.

As regards the description of duties and achievements for the position of Financial and Administrative Assistant, all of the duties and achievements related purely to financial, administrative and clerical tasks. While the organization you worked for (PARD: Popular Aid for Relief and Development) may be involved in relief and development activities, your application suggests that your function was not so involved.

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The Field does not apply the equivalency criteria unless there is a shortage of candidates that meet the minimum criteria.

The post of ARSSO is one of the most senior RSS posts in the Field. The duties and responsibilities listed in the Vacancy Announcement require a level of experience and exposure that, I am sorry to say, you do not have.

17. By e-mail to Mr. Hurt dated 24 July 2012, the Applicant stated that her interpretation of the vacancy announcement was that two years of experience were required in relief services and one year in management preferably, but not necessarily, in a similar programme. Mr. Hurt responded the same day confirming that he agreed with the original assessment that the Applicant did not meet the vacancy requirements as she did not have three years experience in relief services or social development programmes.

18. By application dated 30 August 2012, the Applicant appealed to the Tribunal, contesting the decision not to invite her for the technical examination for the post of ARSSO. This application was received by the Tribunal on 11 October 2012.
19. By e-mail dated 23 October 2012, the Registrar requested that the Applicant resubmit her application with numbered annexes and page numbers.

20. On 12 November 2012 the Applicant re-submitted her application. The Application was transmitted to the Respondent on 13 November 2012.

21. On 13 December 2012, the Respondent filed his reply. The Reply was transmitted to the Applicant on 16 December 2012.

22. On 25 March 2013, the Applicant filed a Motion to Supplement Evidence. The Motion was transmitted to the Respondent on 26 March 2013.

23. By Order No. 009 (2013) dated 10 April 2013 the Tribunal gave the parties seven days to consider and explore an alternative resolution to the dispute, including the offer of appropriate career development guidance and counseling so as to enhance the prospect of future advancement of the Applicant within the Agency. Without prejudice to any such discussions between the parties, the Tribunal also granted leave to the Applicant to file a rebuttal of the Respondent’s Reply, and ordered the parties to confirm whether they were content for the merits of the case to be decided based on documents before the Tribunal.

24. On 23 April 2013, the Applicant filed her Observations on the Respondent’s Reply. The Respondent was copied on the filing.

25. On 24 April 2013, the Respondent filed a Submission in Respect of Order No. 009 stating that he had explored the resolution of the matter with counsel for the Applicant, including considering providing the Applicant with additional career counseling and guidance. However, the parties had not been able to resolve the dispute. The Applicant was copied on the filing.

26. On 28 May 2013, the Applicant filed a Response to Order No. 009, noting that counsel for the Applicant had worked closely with counsel for the Respondent to identify opportunities for guidance for the Applicant within the Lebanon Field Office. The Applicant stated that “[a]ccording to the Field Office, there are no opportunities for training or guidance at the field level to assist the Applicant in career development at this time.”
27. The Tribunal notes with regret the apparent inability of the Agency to provide career development guidance and counseling to one of its staff members.

28. By Order No. 049 (2013) dated 11 June 2013, the Tribunal noted that the Applicant had failed to address the key points arising from the Respondent’s Reply and ordered the Applicant to file an additional submission addressing the shortcomings in her response to Order No. 009.

29. On 17 June 2013 the Applicant filed a Response to Order No. 049. The main submission of the Applicant was that her experience as a Financial and Administrative Assistant at the non-governmental organization (“NGO”) Popular Aid for Relief and Development should have been counted by the Agency as experience in “relief services and/or social development”. The Applicant’s Response was transmitted to the Applicant on the day or receipt.

30. By Order No. 051 (2013) dated 20 June 2013 the Respondent was ordered to explain why the requirement for one year of management experience was included in the vacancy announcement of 22 May 2012, subsequent to the decision referred to at paragraph 11 of this judgment and also why this criterion was included in Mr. Hurt’s e-mail to the Applicant of 18 July 2012 by way of explaining why the Applicant did not meet the selection criteria. The Tribunal also accepted the additional information submitted by the Applicant in her Motion dated 25 March 2013.

31. On 26 June 2013, the Respondent filed its Submission in Respect of Order No. 051. The Respondent submitted that in accordance with Area Staff Personnel Directive No. PD/A/4/Part II/Rev.7 (“PD A4”) the Agency is required to disclose in a vacancy announcement the required qualifications and experience for a post as stated in the Post Description. Once the vacancy announcement period ends, pursuant to PD A4, the Agency has the discretion to waive certain qualifications. The Respondent’s submission was transmitted to the Applicant on 27 June 2013.
Applicant’s contentions

32. The Applicant contends that:

(i) She was deprived of a fair and transparent opportunity to compete for the post of ARSSO.

(ii) The reasons provided in the decision review for not short-listing her contradict the requirements for the post set out in the vacancy notice.

(iii) In addition to the two years and three months experience in relief services or social development recognized by the Agency, the Applicant had a further two years and six months relevant experience working for the NGO Popular Aid for Relief and Development. It was an error by the Agency not to recognize this as relevant experience when assessing whether she met the minimum requirements for the post of ARSSO.

(iv) PD A4 states that preference should go to qualified candidates who are internal, Palestine refugees, and of the under-represented gender. She is both an internal candidate and a Palestinian refugee.

(v) The Agency incorrectly informed the Applicant that she was not selected due to her lack of managerial experience.

(vi) The vacancy announcement listed the “one year of managerial experience” as “preferred”, therefore it was procedurally irregular to not short-list her based on an assessment that her experience was not considered to fall within this criteria.

(vii) The vacancy announcement didn’t state that it was “a must” to have one year managerial experience in social science; rather it was “preferable”. Accordingly, if she has “[a]dmin experience” in any type of organization “it shouldn’t be a problem”.

(viii) The successful candidate had no managerial experience.

33. The Applicant requests the Tribunal to order:

(i) that she be short-listed for the post of ARSSO; and

(ii) compensation for the loss of the opportunity to compete for the post.

Respondent’s contentions

34. The Respondent contends that:

(i) The Applicant lacked the required work experience.
(ii) The Applicant’s interpretation of the minimum work experience criteria as requiring only two years’ work experience in relief services or social development programmes cannot prevail in the face of the plain meaning of the words used in the vacancy announcement.

(iii) The selection process was carried out in full conformity with Staff Regulations, Rules and Personnel Directives, thereby creating a legal presumption of the regularity of the impugned decision.

(iv) The Applicant has presented no evidence, convincing or otherwise, that the impugned decision was either tainted by procedural irregularity or motivated by extraneous or improper considerations.

35. The Respondent requests the Tribunal to dismiss the Application in its entirety.

The Law

36. PD A4 sets out the Agency’s Area Staff Selection Policy and provides, in relevant part:

Review of post description

29. To facilitate the timely filling of vacancies, whenever possible generic post descriptions should be developed and used for different occupational groupings.

30. In cases in which there will be a substantive change to the post description for a vacant post, the Hiring Director should submit a revised draft post description using the standard template to the Compensation and Management Services Division (CMSD). CMSD will review the post description, confirm the classification level, and forward the post description to the DHR for approval. If there will be no substantive change, the Hiring Director can proceed directly to initiate preparation of the vacancy announcement.

Preparation of vacancy announcement

31. Based on the information contained in the post description, the Hiring Director arranges for a draft vacancy announcement to be prepared using the standard template and submits it to the Recruitment Administrator.
Evaluation of applications

35. After the closing date of a vacancy the Recruitment Administrator reviews the applications, and generates a long list of applicants who meet all or most of the post requirements set out in the job description and vacancy announcement.

36. The shortlist is decided by the Hiring Director in conjunction with the Recruitment Administrator via the e-recruitment system. In the case of Programme or Support Department positions in the Field, the Field Director should ensure appropriate coordination with the relevant Programme or Support Department.

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60. In order to keep numbers manageable, for a single post vacancy normally between two to seven candidates should be short-listed if telephone interviews are to be conducted. Following this the interview panel will decide on the candidates (normally up to five including any internal candidates and roster candidates) who should undergo a personal interview.

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Special Selection Measures

66. The paramount consideration for selection will be the necessity to secure the highest standards of efficiency, competence, and integrity. Where multiple candidates are equally qualified preference for selection should normally be given to internal candidates, Palestine refugees, and candidates of the under-represented gender.

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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.
Considerations

37. The Commissioner-General has broad discretion in making decisions regarding appointments. In reviewing such decisions, it is not the role of the Tribunal to substitute its own decision for that of the Respondent regarding the outcome of the selection process. In other words, it is not for the Tribunal to assess the merits of the candidates for the position in question. However, the discretion of the Respondent is not absolute and the Tribunal will examine whether the procedure, as set out in the Staff Regulations and Rules and other relevant issuances, was followed, and whether the staff member was given fair and adequate consideration. As held by the United Nations Appeals Tribunal in *Abbasi* 2011-UNAT-112, 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. [emphasis added]

38. The starting point for a consideration of the merits of this claim is an examination of the selection criteria in the vacancy notice together with the basis upon which the Applicant considers that she met the criteria whereas the Respondent submits that she did not. The next stage of consideration is whether the Respondent’s action in not applying the equivalency provisions in PD A4 renders their decision in relation to the Applicant unfair and or in breach of the relevant procedures governing selection for vacant positions.

39. It is understandable that the Applicant found the wording of the first experience requirement of VA No. 25/2012 confusing. However, the Respondent waived the management requirement for all candidates. Accordingly, the part of vacancy announcement that was ambiguous was ultimately irrelevant in the recruitment process. All candidates were assessed according to the same standard: whether they had at least three years experience in relief services and/or social development programmes. The Applicant did not.
40. Ms Burton’s e-mail of 6 July 2012 (see paragraph 14), subsequently affirmed by Mr. Hurt’s response of 18 July to the Applicant’s request for decision review, cannot be impugned as being other than a correct interpretation and application of the selection criteria and the relevant procedures governing recruitment and selection in the Agency. The Applicant did not meet the selection criteria for the post in question.

41. The Respondent was not required to resort to the equivalency tests because there were a sufficient number of candidates who met the minimum selection criteria.

42. The Applicant should not regard her failure to meet the selection criteria for this vacancy as a setback to her legitimate career aspirations and is encouraged to seek further advancement commensurate with her qualifications and experience.

Judgment

43. The application is dismissed.

(Signed)

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Judge Goolam Meeran
Dated this 30th day of June 2013

Entered in the Register on this 30th day of June 2013

(Signed)

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Laurie McNabb, Registrar, UNRWA DT, Amman