



Judgment No. 2017-UNAT-779



Counsel for Mr. Abu Hweidi *et al.*:

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Counsel for Commissioner-General:

Rachel Evers

- ii) Nine posts for a School Quality Assurance Coordinator (“SQAC”) - three in Nablus, three in Hebron and three in Jerusalem; and
- iii) Five posts for a Professional Development and Curriculum Coordinator (“PDCC”) - all located at the Education Science Faculty in Ramallah.

... The Agency received a total of 60 applications, including the applications of the Applicants in the present case. Twenty-one applications were received for the posts of SQAC, 22 applications were received for the posts of AC, and 17 applications were received for the posts of PDCC.

... A Senior Management Team held a meeting on 1 May 2014. The recruitment for the three Units was discussed and some conclusions were adopted. Particularly, it was said that “[t]here is no guarantee therefore that Education Specialists will be successful in their application [*sic*], but initially recruitment will be restricted to the current Education Specialists”. All of the Applicants were Education Specialists.

... From 25 August to 27 August 2014, the Applicants were interviewed by a properly constituted Interview Panel (“the Panel”), comprised of the Chief, Field Education Programme (“CFEP”), the Deputy Director of UNRWA Operations, West Bank (“D/DUO/WB”) as Chairperson, Deputy Chief, Field Education Programme (“D/CFEP”), and a Recruitment Staff Development Officer. Following the interviews, the Panel identified suitable candidates for only six of the 18 available posts. According to the recruitment reports produced together with the Respondent’s reply, the Applicants in the present case were all identified as “not suitable”.

... On 30 October 2014, the Agency circulated, both internally as well as externally, vacancy announcements for the 12 remaining posts. The vacancy for Assessment Coordinator in Nablus was advertised by oversight, as a suitable candidate had been identified previously. The Agency received 374 applications.

... None of the Applicants participated in the second round. Applicants Mohammad Abu Farah, Mohd Suboh, Ja’far Titi, Alaa’ Badawi, Hisham Hammad and Samih Al Araj indicate[d] not having applied for the second round. Applicants Fayeq Abu Hweidi, Adel Zawawi, Amani Shehadeh, Nabil Mahfouth and Nabil Mansour d[id] not give any indications as to whether they applied for the second round. Applicant Jamal Marshood indicates that he applied for the second round but he was not invited to compete. Applicants Mohd Ghanem and Abdel Fattah Masheikh initially applied for the second round but indicate[d] that they decided not to continue.

... On 21, 26 and 27 January 2015, the Applicants requested decision review of the decisions not to appoint them to the posts for which they had applied.

... By letters dated 25 and 26 February 2015, the Director of UNRWA Operations in the West Bank, responded to the Applicants’ requests for decision review and stated that “[t]he recruitment process with respect to the Coordinator positions is ongoing. Therefore, no final decision has been taken with respect to your candidacy”.

... In April and May 2015, the Agency informed the successful candidates from the first and second round recruitment processes of their selection to the posts.

... Between 21 and 24 May 2015, the Applicants filed their applications with the [UNRWA Dispute] Tribunal. Between 24 May and 7 June 2015, the applications were transmitted to the Respondent.

... On 17 August 2016, according to the Respondent, 11 of the 18 Coordinator posts had been filled.

... On 3, 9 and 11 September 2015, the Respondent filed his replies contending that the applications were not receivable.

... By Judgment [UNRWA/DT/2016/024], the [UNRWA Dispute] Tribunal decided that the cases were consolidated and that the applications were receivable. The Respondent was given leave to submit his reply on the merits within 30 days of the date of the Judgment.

3. The UNRWA DT rendered its Judgment on 28 November 2016, dismissing the applications in their entirety. Initially, the UNRWA DT found that Mr. Al Araj had no standing to contest the decision not to select him and therefore his application was not receivable.

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(iv) compensate Mr. Abu Hweidi *et al.* for moral damages incurred due to stress, anxiety and discrimination.

The Commissioner-General's Answer

8. The Commissioner-General submits that the UNRWA DT Judgment was, as a matter of law, fact and procedure, free of error. The UNRWA DT dismissed the applications in a reasoned and thorough Judgment addressing the a

12. The Commissioner-General further submits that Mr. Abu Hweidi *et al.* merely re-argue their case when asserting, through a range of statements, that they should have been considered “priority” candidates and “the most suitable for the posts advertised”. The selection process for the posts was conducted on a competitive basis, in accordance with the Agency’s regulatory framework. The fact that Education Specialists were given priority in the first recruitment round does not mean that the principle of competitive recruitment was abandoned.

13. Finally, the remedies sought by Mr. Abu Hweidi *et al.* have no legal basis. The impugned Judgment being free of error of fact, law and procedure, there is no legal basis for “reversing” the Judgment, nor for considering an award of compensation for material or moral damages.

14. Based on the foregoing, the Commissioner-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

15. After having consolidated the cases and having found all but one of the applications receivable by Judgment UNRWA/DT/2016/024, the UNRWA Dispute Tribunal dismissed the fourteen applications, setting aside the various grounds of Mr. Abu Hweidi *et al.*’s complaints.

16. Mr. Abu Hweidi *et al.* filed their appeal, stating that there were errors of law, fact and procedure in the selection exercise, causing harm to their professional development and career progression.

17. Annexed to their appeal are three affidavits *et al.*

interest of justice and the efficient and expeditious resolution of the case, provided that the Appeals Tribunal shall not receive additional written evidence if it was known to the party seeking to submit the evidence and should have been presented to the Dispute Tribunal.

2. In all other cases where additional findings of fact are needed, the Appeals Tribunal may remand the case to the Dispute Tribunal for further fact-finding. Where the Appeals Tribunal re-mands a case to the Dispute Tribunal, it may order that the case be considered by a different judge of the Dispute Tribunal.

18. The affidavits seem, however, to compensate for the absence of a hearing of witnesses before the UNRWA DT which had been requested by Mr. Abu Hweidi et al.² The UNRWA DT's decision not to hold an oral hearing was a shortcoming of the procedure, since the parties had not agreed to the case being decided on the papers and the facts needed to be established by witnesses and/or further documentary evidence, as they were related to the disputed issue of a possible bias against Mr. Abu Hweidi et al., and hence could have had an impact on the outcome of the case³

19. Article 9 of the UNRWA DT Statute states:

1. The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.

2. The Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.

20. In turn, the UNRWA DT Rules of Procedure provide:

Article 11 Hearing

1. The Judge hearing a case may hold oral hearings.

...

Article 12 Oral evidence at oral hearings

1. The parties may call witnesses and experts to testify. ...

² Current Area Staff Union Chairman at West Bank (2016-present), Mr. Jamal Abdullah, and former Area Staff Union Chairman at West Bank (2013-2016), Dr. Shaker Al-Risheq, are both cited by name in the initial application before the UNRWA DT: "This statement was witnessed by the Chairperson of the Teachers' Union [sic] in the West Bank Mr Jamal Abdullah" and "[w]e request the testimony of Dr. Shaker Al Risheq the Chairperson of the Staff Union in the West Bank in this regard".

³ The Appeals Tribunal notes that the affidavits are all dated 26 January 2017, that is after the publication of the impugned Judgment on the merits, which was rendered on 28 November 2016.

...

Article 13 Evidence

1. The [UNRWA Dispute] Tribunal shall determine the admissibility of any evidence.
2. The [UNRWA Dispute] Tribunal may order production of evidence from either party at any time and may require any person to disclose any document or provide information that appears to the [UNRWA Dispute] Tribunal to be necessary for a fair and expeditious disposal of the proceedings.
3. A party wishing to submit evidence which is in the possession of the opposing party, or of any other entity may, in the initial application or at any stage of the proceedings, request the [UNRWA Dispute] Tribunal to order the production of the evidence.

...

Article 14 Case management

The [UNRWA Dispute] Tribunal may, at any time, either on an application of a party or of its own initiative make any order or give any direction which appears to the judge to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties.

21. Although broad discretion in case management is afforded to the trial judge, there are some facts which are so essential that they need to be established in the interest of justice, particularly when they are related to core aspects of the dispute. The trial judge's discretion is therefore not unfettered and is subject to review on a case-by-case basis.⁴

22. One of these essential factual issues in this case is the allegation of bias against the Chief, CFEP. Mr. Abu Hweidi *et al.* contend that there was a predetermined intent to exclude most of them (all Appellants are Education Specialists) from the selection exercise for the Coordinator posts. The Chief, CFEP, is alleged to have said in a meeting before the selection started that only a few Education Specialists would be selected in the first round. Also, he was reported to have said that a second round would be organized, which would be open not only to Education Specialists, but also to other internal and external candidates.

⁴ The Appeals Tribunal has already acknowledged the existence of the right to be heard, although in a distinguishable case (*Bastet v. Secretary-General of the United Nations*)

23. Mr. Abu Hweidi *et al.* contend that this demonstrates that had the Chief, CFEP, not been determined to hinder them, he would not have been able to know in advance that not all the posts would be filled in the first round of the selection exercise.

24. The UNRWA DT rejected that contention of bias, for the following reasoning:⁵

... The [UNRWA Dispute] Tribunal cannot accept such an argument. Eighteen vacancies were advertised for the three Coordinator posts in the various locations in the West Bank. Sixty Education specialists had applied. As the recruitment was a competitive process, it is realistic to conclude that not all of the posts could be filled by suitable candidates. On the contrary, the [UNRWA Dispute] Tribunal finds that the Applicants cannot complain about the Agency giving them priority by organising a first selection process for Education Specialists only.

25. There is no dispute that the Education Specialists were the only ones allowed to participate in the first round of the selection process. What is in contention is whether the UNRWA Dispute Tribunal erred in procedure when it dismissed the claim of bias finding that it was “realistic” to conclude that not all of the posts could be filled by suitable candidates. The UNRWA DT based its conclusion on a mere inference although there was an explicit request for production of evidence in this regard by Mr. Abu Hweidi *et al.* who were not afforded the opportunity to produce this evidence.

26. The UNRWA DT’s inference might not have prevailed, if the UNRWA DT had assessed the requested evidence, or if it had held an oral hearing, as was requested from the beginning and expressly authorised by Articles 11 and 14 of the Rules of Procedure of the UNRWA Dispute Tribunal.

27. Furthermore, Mr. Abu Hweidi *et al.* raised the fact that the interview panel was also biased because it “was influenced by the Chief[, CFEP,] who did not intend for them to succeed in the interview process”. The Chief, CFEP, was one of the Panel Members (as mentioned in the annex filed with the Respondent’s answer before the UNRWA DT).

28. Given the gravity of the allegation and its possible bearing on the outcome of the selection process, the UNRWA DT should have engaged in a thorough examination of the facts, rather than drawing an inference. Under the circumstances of the case, the inference drawn by the UNRWA DT was not reasonable.

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29. Mr. Abu Hweidi *et al.* also contend that the interview questions posed to the candidates were not identical, in contravention of paragraph 22 of UNRWA Area Staff Personnel Directive A/4 Part.II/Rev.7 which states, in relevant part, as follows:

The interview panel for each vacancy is responsible for: [p]reparing standardised interview questions to be addressed to all candidates in advance of the interview, ensuring that these questions are gender neutral and do not result in unfair treatment of any candidate

30. The UNRWA DT found in this regard that “there has been no evidence submitted that would show that the Panel did not apply the principle of ‘preparing standardised interview questions to be addressed to all candidates in advance of the interview...’”.⁶

31. However, Mr. Abu Hweidi *et al.* had requested that the UNRWA DT order the Commissioner-General to produce this evidence, as allowed for by Article 13 of the UNRWA DT Rules of Procedure.⁷ But their request was denied.⁸ Had this evidence been produced as requested – given the fact that only the Respondent had access to that documentation – the UNRWA DT’s decision would have been more fact-based – and might have been different.

32. Another fact that was not sufficiently established before the UNRWA DT is whether or not the answers given in Arabic were translated. The UNRWA DT erred when it dismissed Mr. Abu Hweidi *et al.*’s contentions in this regard, by doing so mainly on the basis of hypothetical reasoning rather than established facts:⁹

... Some Applicants raise the point that not all of the candidates’ answers in Arabic

33. Lastly, the UNRWA DT should have established whether keeping the results of the first round confidential had an impact on Mr. Abu Hweidi *et al.*'s participation in the second round and whether this could imply harm to their entitlement to preference, as established by UNRWA Area Staff Personnel Directive A/4 Part. II/Rev. 7:¹⁰

... The paramount consideration for selection will be the necessity to secure the highest standards of efficiency, competence, an

