UNRWA DISPUTE TRIBUNAL

Before: Judge Goolam Meeran
Registry: Amman
Registrar: Laurie McNabb

ZEIDAN
AND
AL ABDULLAH

v.

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

JUDGMENT

Counsel for Applicant:
Amer Abu Khalaf (LOSA)

Counsel for Respondent:
Anna Segall (DLA)
Introduction

1. This is a consolidated judgment on two cases that were subject to an order for combined proceedings by Order No. 059 (2013) dated 2 July 2013.

2. The Applicants are challenging the recruitment process that was followed to fill the post of Chief Area Office, Saida.

Facts

3. On 20 September 2004 the Applicant Zeidan commenced employment with the Agency on a three year fixed-term appointment as a School Supervisor, Human Rights, Grade 11. On 1 December 2011, he was upgraded to his current post of Education Specialist, Human Rights, Grade 13 at the Education Department, Lebanon Field Office (“LFO”).

4. On 15 September 1986 the Applicant Al Abdullah commenced employment with the Agency as Area Maintenance Supervisor, Central Lebanon Area. On 28 March 1996 he was appointed to his current post of Field Sanitary Engineer, Health Department, LFO.

5. On 26 April 2012, the Agency issued Vacancy Announcement No. 20/2012 for the post of Chief Area Office, Saida (“CAO/S”), Grade 20. The vacancy announcement stated:

   The Recruitment process is based on the Agency’s strategy to obtain the best qualified and suitable employees through a competitive recruitment process. After the deadline for receiving applications, all applications will be reviewed by Human Resources and the Hiring Department. Short-listed candidates who fully meet the required criteria shall undergo technical and practical tests. For all posts, the weight allocated for the combined technical & practical tests is 60% and for the interview is 40%. The final recommendation for selection is based on the combined test results, interview assessment, Agency priorities and needs and the candidate’s profile.
6. By e-mail dated 29 August 2012 from Micheline Saad, a Human Resources Associate at the LFO, candidates were given instructions for the technical test for the post of CAO/S, including the following summary:

The technical test will comprise three elements:

1. A written component […] The candidates’ answer will be scored out of 20. The duration of the test will be 2 hours.

2. An oral presentation (for between 10-15 minutes) component in which the candidate will be offered an opportunity to explain his/her answers in the written component. Score will be given out of 20.

3. A question and answer session (for between 15-20 minutes) with a panel of 3 persons in which each candidate will be asked certain pre-defined questions that relate to the written test. A score will be given out of 20.

7. By return e-mail on the same day Applicant Al Abdullah wrote to Ms. Saad and Mr. Roger Davies, the Deputy Director of UNRWA Affairs, Lebanon, Programmes (“DDUA/L/P”) and Acting Director of UNRWA Affairs, Lebanon (“ADUA/L”), and copying Mr. Robert Hurt, the Deputy Director of UNRWA Affairs, Lebanon, Services (“DDUA/L/S”), among others, stating:

… I would like to inform you that I will not attend the technical test for the said post since I do not believe that the established testing procedure will ensure transparent professional and objective measurement of the candidates competences. I hope that is replaced by a more transparent and professional procedure.

8. By joint letter to the Director of UNRWA Affairs, Lebanon (“DUA/L”) dated 8 October 2012 the Applicants expressed their concerns and reservations about the procedures and practices applied during the recruitment process for the post of CAO/S. The majority of concerns related to the nature of the technical test and the composition of the selection panel. The letter concluded as follows:

Since the above violations constitute major breach of UNRWA’s regulations, professionalism, objectivity, and transparency as UN agency […] we do kindly request revoking all procedures,
recommendations, decisions and impacts caused by the above mentioned recruitment process.

9. By letter to the Applicants dated 10 October 2012, Ms. Ann Dismorr, the DUA/L, noted that the relevant recruitment exercise was carried out prior to her appointment and that certain decisions pertaining to the recruitment exercise were taken by the Acting Director at the time. The request for review would be submitted to the Deputy Commissioner-General for consideration.

10. By e-mail to Ms. Dismorr dated 15 October 2012 the Applicant Al Abdullah noted that he had expressed his reservations about sitting the technical test in writing “to all concerned”.

11. By memorandum to Ms. Margot Ellis, the Deputy Commissioner-General, dated 1 November 2012, Ms. Dismorr noted that four candidates were appealing “the testing and interviewing process” followed in the recruitment exercise for the CAO/S post and provided background to the recruitment process.

12. By letter dated 13 December 2012 to the Applicants and two other unsuccessful candidates for the CAO/S post, the Deputy Commissioner-General conveyed the outcome of her decision review as follows:

My review notes that Mr. Al Abdullah declined to sit the written test, thereby disqualifying him from further consideration for this post. In addition, I note that [...] Mr. Zeidan [...] scored less than 50% on the written and oral tests. As such scores were below both the minimal threshold and not among the top five scoring candidates, [...] you were not further considered for the final interview.

The documentation that I have reviewed demonstrates that the Lebanon Field Office conducted a very strong, transparent, and impartial recruitment exercise, and I have not identified any instances in which the administration of the written and oral test contravened any Agency rules, standards, or practices. On the contrary, I am of the opinion that the Lebanon Field Office has done its utmost to ensure a fair process that has provided candidates with ample opportunities to showcase the knowledge, skills, and experience they have garnered over the course of their respective careers.
I therefore conclude that the original decision made by the Director of UNRWA Affairs, Lebanon Field Office, should remain in place and that the selection decision for the post of Chief, Area Office, Saida should proceed.

13. On 17 December 2012 Mr. Zeidan filed his application. The application was transmitted to the Respondent on 19 December 2012. On 18 January 2013, the Respondent filed his Reply.

14. On 30 January 2013, the Tribunal received an application from Mr. Al Abdullah. On 18 February 2013 the Respondent filed his Reply.

15. The Respondent’s replies to the claims provided further elaboration on the concise summary of the response, of the Deputy Commissioner General, to the requests for decision review.

16. By e-mail dated 26 February 2013, the Applicant Al Abdullah requested leave to submit observations on the Respondent’s Reply. The e-mail was transmitted to the Respondent and leave granted to the Applicant to file observations by e-mail from the Tribunal dated 6 March 2013.

17. On 13 March 2013, the Applicant Al Abdullah filed his Observations on the Respondent’s Reply. He submitted that he had challenged, “from the very beginning, the procedure for evaluating candidates for the [CAO/S] post; not the final decision not to select him for the post…” as the Respondent’s Reply had stated.

18. By Order No. 039 (2013) dated 27 May 2013, the Tribunal ordered the parties to state whether they agreed that these cases be subject to an order for combined proceedings.

19. By Joint Response to Order No. 039 dated 31 May 2013, the Applicants agreed that their cases should be consolidated.

20. On 1 July 2013 the Tribunal held a case management discussion. Mr. Zeidan participated via video and Mr. Al Abdullah via telephone link from Lebanon. The Respondent was represented by Mr. Davide Marzano who
participated via video link from Jerusalem. The Tribunal asked Mr. Al Abdullah and his representative to provide clarification on the preliminary question of Mr. Al Abdullah's standing to challenge the selection process for the post of CAO/S. Specifically, the Tribunal noted that after receiving an invitation to sit the examination for the relevant post, Mr. Al Abdullah decided not to participate.

21. The Tribunal also emphasized to both Applicants that if the Respondent carried out a bona fide recruitment exercise for the relevant post, it is not for the Tribunal to intervene and pass judgment on the format of the examination that was administered. However, since the Applicants were alleging that the selection exercise was devised and conducted with the ulterior purpose of excluding them, the Tribunal will examine those arguments and contentions subject to receipt of detailed particulars from the Applicants and the Respondent's comments thereon.

22. By Order No. 059 (2013) dated 2 July 2013, these cases were subject to an order for combined proceedings. Mr. Al Abdullah was ordered to file a submission stating the grounds in support of his contention that he has standing to challenge the contested decision, and that the Tribunal has jurisdiction to consider his appeal, notwithstanding the fact that he decided not to participate in the selection exercise. The Applicants were also ordered to file submissions providing particulars of the irregularities or improprieties that they allege infected the selection process and any documentary evidence in support thereof. The Respondent was ordered to file responses to the Applicants' submissions.

23. On 8 July 2013, the Applicants filed their Responses to Order No. 059.

24. On 15 July 2013, Mr. Zeidan filed a Corrigendum to his Response to Order No. 059.

25. On 16 July 2013, the Respondent filed Responses to Order No. 059.

27. By Order No. 074 (2013) dated 18 July 2013, the Tribunal granted the Applicants leave to file observations on the Respondent's Responses to Order No. 059.


PRELIMINARY ISSUE: STANDING OF MR. AL ABDULLAH

Contentions

29. The Applicant contends that he has the right to ensure the implementation of the Agency's recruitment policy, which affects the terms of his appointment as a staff member of the Agency. He is challenging the procedure for evaluating candidates for the CAO/S post and not the final decision not to select him for the post. He submits that this falls within the jurisdiction of the Tribunal in accordance with Article 2 of the Statute of the Tribunal. Therefore, he has standing to challenge the contested decision and the Tribunal has jurisdiction to consider the appeal.

30. The Respondent contends that Mr. Al Abdullah has no \textit{locus standi} in this case, as his non-selection for the post of CAO/S was not the result of an administrative decision pursuant to Article 2 of the Tribunal's Statute.

31. The Respondent contends that the Applicant’s refusal to participate in the written test precluded the Agency from assessing whether he possessed the skills and competencies that could have qualified him for the final interview stage. He has no \textit{locus standi} to bring a claim because his non-selection was not the result of an administrative decision pursuant to Article 2 of the Tribunal’s Statute, but because of a decision that he had taken voluntarily.

Considerations

32. The Tribunal finds that the Applicant Al Abdullah does not have standing to challenge the decisions made in relation to the structure of the technical test and
the composition of the selection panel because he did not participate in the assessment exercise and therefore was not directly affected by the decisions.

33. Even if the Tribunal were to find that the recruitment processes contravened the Agency’s Regulations, Rules or other issuances, or that the technical test was specifically designed to benefit some candidates over others, the Applicant would not have been adversely affected by such decisions because he did not participate. His unilateral and voluntary decision to abstain from participation in the recruitment exercise means that he lacks standing to challenge the way in which the recruitment exercise was administered.

34. The Tribunal does, however, note with concern, the Applicant’s claim, which has not been disputed by the Respondent, that he did not receive a response to his e-mail of 29 August 2013 in which he outlined his concerns about the examination process. The e-mail was sent to both the Acting and Deputy Directors of UNRWA Affairs, Lebanon, as well as to a number of Human Resources staff.

35. The Applicant Al Abdullah lacks standing to bring his claim and his application is therefore dismissed.

MAIN ISSUE: THE RECRUITMENT PROCEDURE

Applicant Zeidan’s contentions

36. The Applicant contends that:

(i) The structure of the technical examination, specifically the inclusion of the oral presentation and question and answer session, increased the subjectivity of the assessment, thereby leaving the process open to manipulation.

(ii) The panel “manipulated the grades…to prove that he failed and he wasn’t entitled to go for final interview, and the assessment process they followed helped them further to do so”. The grading system “was meant to disqualify the Applicant”, “justify the panel’s nepotism and favoritism, and escape accountability…”

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(iii) The written element of the technical examination was comprised of questions and scenarios that did not have an objectively correct answer. The assessment of the candidates' answers would therefore be purely subjective.

(iv) The panel assessing the presentation, question and answer session and the final interview was the same.

(v) The composition of the assessment panel violated Field Technical Instruction 03/2010 of 16 April 2010 in that it comprised the A/DUA/L and two of his immediate subordinates and did not include a representative from UNRWA Headquarters. This meant there was no “independent” opinion on the recruitment.

37. The Applicant requests the Tribunal to order that:

(i) All procedures applied during the recruitment for the post of CAO/S be cancelled.

(ii) All decisions and recommendations based on the recruitment process for the post of CAO/S be revoked and annulled.

(iii) The post of CAO/S is to be re-advertised as soon as possible.

(iv) A new recruitment procedure is to be applied for the recruitment of the CAO/S post.

Respondent’s contentions

38. The Respondent contends that:

(i) All aspects of PD A/4/Part II, Rev. 7 were complied with, including advertising the post, short-listing candidates, conducting technical tests, and assessing candidates.

(ii) At the inception of the technical test, a detailed briefing note was provided to all participants explaining the process, stressing the importance of the post for the Agency and detailing the different stages of the technical testing process.

(iii) The use of the same panel in the different stages of the recruitment exercise was in line with the Agency regulations and directives, and allowed for a level of consistency in the evaluation of candidates. The panel was able, through its involvement in the different stages of the technical evaluation, to carry out a holistic assessment of the candidates’ competencies, interpersonal skills and knowledge.
(iv) The design of the technical test allowed members of the panel to measure the candidate’s maturity, critical thinking, creativity, understanding of the community, and the ability to respond to situations that draw from real life examples. Candidates’ responses were evaluated accorded to a pre-determined scoring matrix assessing answers, eliminating any possible form of test manipulation and reducing the level of subjectivity.

(v) As there is no “representative department in HQ” providing technical oversight for the position of CAO/S, it was considered appropriate by the ADUA/L to maintain a panel consisting of the ADUA/L, the DDUA/L, the Chief Field Infrastructure and Camp Improvement, and the Field Human Resources Officer.

(vi) The Field Technical Instructions state that panels “should” include an HQ representative and expressly provided for the Field Office Director to grant exceptions. This was not an intention to introduce a mandatory requirement in respect of the participation of a HQ representative.

(vii) The decision not to select the Applicant Zeidan was based on weaknesses identified through the technical test after a thorough and fair evaluation. The Applicant was not successful during the various phases of the technical test in demonstrating the skills and competencies that would qualify him for the final interview stage. His overall score of 18 out of 60 points did not place him in the top five scoring candidates.

(viii) The Applicant has not provided any convincing evidence that the recruitment panel adopted an approach contrary to the advertised criteria or that he was treated unfairly. The onus or burden of proof is on the Applicant where allegations of extraneous motivation are made.

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

The Law

40. Area Staff Personnel Directive A/4/Part II, Rev. 7, which sets out the UNRWA Area Staff Selection Policy, provides:

8. For appointments at grade 18 and above, the Commissioner-General retains decision-making authority. Appointment recommendations will be made by Hiring Directors (Field Directors and HQ Department/Programme
Directors) to the DHR who will, after review, present the recommendations to the Commissioner-General for approval.

* * *

12. Field Directors may issue additional guidelines consistent with this Directive to address specific aspects of the staff selection process.

* * *

22. The interview panel for each vacancy is responsible for:

- Preparing standardised interview questions to be addressed to all candidate in advance of the interview, ensuring that these questions are gender neutral and do not result in the unfair treatment of any candidate;
- Conducting competency-based interviews;
- Evaluating candidates based on test results, interview, references and performance appraisals;
- Making recommendations to Hiring Director on suitability of candidates.

* * *

Testing

38. Tests may be administered or waived as determined by the Hiring Department, and may either support the short-listing process or be conducted in conjunction with the personal interview.

39. Tests are developed jointly by the Hiring Director and Recruitment Administrator. 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. Evaluation criteria and weightings are determined prior to the administration of tests, and must reflect the post requirements set out in the job description and vacancy announcement. Assessment of tests is conducted by the Hiring Department in conjunction with the Recruitment Administrator based on pre-approved criteria, and without knowledge of the identity of the candidates.

* * *
Composition of interview panels

69. Interview panels must consist of at least three and normally up to five members, and must include at least one representative of the Recruitment Administrator and one from the Hiring Department. In the case of Programme or Support Department positions in the Field, the Field Director should ensure appropriate representation for the relevant Programme or Support Department. The representative of the Recruitment Administrator will be a voting member. The interview panel must consist of male and female members. The grade level of panel members should normally be congruent with the seniority of the post under recruitment. All interview panel members should normally have been appropriately trained in competency-based interviewing techniques, including gender and diversity-sensitive recruitment practices. Hiring Directors will be responsible for identifying all staff in their Field/Department who will be involved in interview panels and ensuring that they receive the necessary training.

41. The Agency’s Area Staff Selection Guidelines (“the Guidelines”) “were created to supplement the revised Area Staff Selection Policy” and to help ensure consistency and transparency in the selection processes. Module 4 of the Guidelines on Preparing and Administering Pre-Employment Tests sets out “a recommended process for creating effective pre-employment tests and administering tests in a secure environment” and provides as follows:

5. Hiring Managers are authorized to establish pre-employment testing criteria for evaluation and the weightings of items and competencies to support the selection process.

*   *   *

10. Pre-employment tests may be used to support the short-listing process or be conducted in conjunction with the interview process.

*   *   *

30. All items on pre-employment tests must be competency based or related to the specific job functions. Test questions or any other form of assessment tools must support a diversity-sensitive recruitment practice. The use of any test
item to evaluate a candidate based on non-post related criteria is strictly prohibited.

42. Field Technical Instruction 03/2010 on Interview Guidelines was issued on 16 April 2010 by the former DUA/L, Salvatore Lombardo. The purpose of the guidelines is “to provide a recommended process to prepare for and conduct competency-based interviews.” The guidelines provide as follows:

**Procedures for Interview Panel Formation**

*                    *                    *

13. Chairpersons shall be made up of senior managers and international staff.

15. As technical tests are conducted, the Recruitment Administrator, in consultation with the interview chairperson shall determine at least two additional staff members from the interview pool to participate on the panel. One of these participants should come from the Hiring Department and one from outside the Hiring Department. The participant from outside the Hiring Department should not be a subordinate of the Chairperson.

*                    *                    *

**Composition of Interview Panels**

38. Interview Panels must always be composed of at least three panel members and include at least one member from the Hiring Department and staff member from a different department. A representative from Human Resources will participate as an observer to ensure integrity and fairness during the interview process. Where possible, the composition of interview panels should be gender balanced.

*                    *                    *

40. For the recruitment of grades 18 and above, the interview panel should consist of a Deputy Director of UNRWA Affairs, the Hiring Manager and a member of the representative department at HQ.

41. Where possible, an Interview Panel should not include a supervisor and a subordinate.

*                    *                    *
Exceptions to this policy

44. The Field Director may grant an exception to this policy upon the recommendation of the FHRO.

Considerations

43. The Tribunal is satisfied with the Respondent’s explanation that the design of the technical test “allowed the members of the panel to measure the candidate’s maturity, critical thinking, creativity, understanding of the community, and the ability to respond to situation that draw from real life examples.” Candidates’ responses were evaluated according to a pre-determined scoring matrix, reducing the element of subjectivity in the assessment exercise. The Applicant has not submitted that the design of the technical test contravened any Regulations, Rules or other issuances. As the Tribunal previously advised the Applicants, if the Respondent carried out a bona fide recruitment exercise for the relevant post, it is not for the Tribunal to intervene and pass judgment on the format of the examination that was administered.

44. Where an applicant alleges that the exercise of that discretionary authority was arbitrary or capricious, motivated by prejudice or extraneous factors, or flawed by procedural irregularity or error of law, the burden of proving prejudice or improper motivation rests with the applicant. The Applicant Zeidan has failed to produce any evidence to support his contention that the panel manipulated the grading exercise to exclude him from the final interview or that the panel’s assessment was motivated by improper and impermissible considerations.

45. In Abbassi, 2011-UNAT-110, the United Nations Appeals Tribunal observed:

In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the
procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

46. It is not for the Tribunal to second guess the assessment of a properly-constituted selection panel. The Applicant submits that the Field Office breached Field Technical Instruction 03/2010, issued by the LFO on 16 April 2010, when constituting the selection panel. In particular, he has drawn attention to Articles 40 and 41. The Tribunal is satisfied with the Respondent’s explanation that there was no representative department at Headquarters for this particular post, so it was not considered necessary to include such a representative on the selection panel. The Tribunal also notes that Article 40 states that an interview panel should include such a member. Whilst such language indicates that it was a requirement that was strongly advised and intended to be persuasive it is not couched in mandatory terms. Had Article 40 provided that the panel “shall” or “must” include a representative from Headquarters, the Tribunal would have found this to be a mandatory requirement.

47. As to the Applicant’s concern that an Interview Panel should not include a supervisor and subordinate as stated in Article 41, the Tribunal notes that this provision is to be complied with “where possible”. In this instance, it was considered appropriate to include the ADUA/L on the panel along with the DDUA/L; the Chief, Field Infrastructure and Camp Improvement; and the Field Human Resources Officer. The Tribunal sees nothing sinister about the composition of the panel.

48. Finally, the Tribunal is not convinced that it was unfair for the same selection panel to assess each stage of the selection exercise and agrees with the Respondent that, on the contrary, such an approach would allow for a consistent and holistic assessment of the candidates.
49. To the extent that the Applicant Zeidan is contesting the decision not to select him for the interview stage of the selection exercise, this claim fails because the Applicant has not shown an adequacy of evidence or even reasonable suspicion that the selection exercise should be impugned either because it was designed to exclude or disadvantage him or was otherwise flawed. The evidence supports the view that as a result of a properly conducted selection process he did not meet the required “pass” mark to merit an interview. In the absence of evidence of procedural impropriety it is not for the Tribunal to substitute its judgment for that of the selection panel.

Judgment

50. The applications are dismissed.

(Signed)

Judge Goolam Meeran
Dated this 22nd day of January 2014

Entered in the Register on this 22nd day of January 2014

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman