



UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2019-UNAT-947

El Madhoun
(Respondent/Applicant)

v.

Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East

(Appellant/Respondent)

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2019-1243
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. El Madhoun: Self-represented
Counsel for Commissioner-General: Rachel Evers

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. This matter arose out of Mr. Awni El Madhoun's application contesting his non-selection to the position of Warehousing and Distribution Officer, filed before the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively). The UNRWA DT held that Mr. El Madhoun had been unlawfully excluded from the short-list of candidates for not possessing a university degree when the Agency had improperly applied the criteria described in its vacancy announcement, namely that a "university degree or equivalent experience" was required. The UNRWA DT rescinded the non-selection. This Tribunal, for the reasons elaborated below, overturns the impugned Judgment on grounds the Agency acted within its discretion to limit its short-list to those candidates with the requisite degree.

Facts and Procedure

2. The following facts are uncontested:¹

... Effective 4 July 1999, the Applicant was employed by the Agency on a fixed-term appointment, Grade 8, Step 1, as Credit Extension Assistant at the Gaza Field Office ("GFO").

... Following several transfers and promotions, effective 1 February 2010, the Applicant was promoted to the post of Supply Officer Warehousing, Grade 12, GFO. This is the Applicant's current post.

... Between September 2012 and September 2017, the Applicant was assigned several times, in an acting capacity, to the posts of Logistics Officer and Warehousing and Distribution Officer.

... On 5 June 2017, the Agency internally advertised a vacancy notice for the post of Warehousing and Distribution Officer ("WDO"), Grade 15, Logistics Office, GFO. The Agency received a total of 74 applications, including the Applicant's. Seven candidates with a relevant university degree were shortlisted and invited for an interview on 12 September 2017. The Applicant, who lacks a university degree, was not shortlisted.

... The Applicant was informed about not being shortlisted for the interview through the Agency's online recruitment platform.

¹ Impugned Judgment, paras. 2-10.

... By email dated 11 September 2017, the Applicant requested the Director of UNRWA Operations, GFO ("DUO/G") to give him the opportunity to be shortlisted and thus to be interviewed.

... After the interviews, the Interview Panel (the "Panel") unanimously recommended the appointment of one of the seven candidates and rostering a second candidate. On 20 September 2017, the DUO/G approved the Panel's recommendations.

... On 17 October 2017, the Applicant submitted his request for decision review.

... On 27 November 2017, the present application was filed with the UNRWA Dispute Tribunal [...].

3. In the impugned Judgment,² the UNRWA DT found that the Agency had not short-listed Mr. El Madhoun because there had already been seven candidates that had been short-listed who possessed the requisite university degree and so the Agency had not examined whether other candidates, including Mr. El Madhoun, had equivalent experience to the degree requirement. For this reason, the UNRWA DT held that the Agency had not properly applied the criteria described in its vacancy announcement, namely that a "university degree or equivalent experience" was required. Consequently, the UNRWA DT ordered the whole selection process to be rescinded or in the alternative the Agency pay Mr. El Madhoun USD 1,000. The UNRWA DT rejected Mr. El Madhoun's request for moral damages on the basis that he had not provided the requisite evidentiary proof.

4. The Commissioner-General filed an appeal on 28 March 2019. Mr. El Madhoun did not file an answer.

Submissions

The Commissioner-General's Appeal

5. The UNRWA DT erred in fact when it concluded without evidence that the Agency had not examined whether other candidates, including Mr. El Madhoun, possessed experience equivalent to the educational requirement set forth in the vacancy announcement. Contrary to this finding, the Agency had submitted in its reply that all candidates had been reviewed by the Field Human Resources Office and Logistics Office against the essential post requirements outlined in the vacancy announcement. This was also supported by the selection report that

² *El Madhoun v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2019/005 (impugned Judgment).

Mr. El Madhoun had requested to be placed into evidence. The Agency had reviewed all candidates and had created a long-list and then a short-list. Having reviewed all of the candidates, including Mr. El Madhoun, the Agency short-listed only those candidates who held the relevant university degree. The UNRWA DT, however, did not order the Commissioner-General to produce the long-list for this selection process.

6. The UNRWA DT's rescission order was predicated on the conclusion that the Agency had not properly applied the criteria described in the vacancy announcement. This conclusion constitutes an error in fact and law as the process complied with PD A/4/Part II/Rev.7/Section 1/Amend. 1, the UNRWA Area Staff Selection Policy (Staff Selection Policy). There is no right to be short-listed and discretion lies with the Agency. The Judgment is, therefore, a manifestly unreasonable curtailment of the Agency's discretion. By concluding that the Agency was obliged to consider as equals those fully meeting the educational requirements and those meeting the requirements on equivalency, the UNRWA DT introduced a requirement that was contrary to the Staff Selection Policy and, therefore, exceeded its jurisdiction.

Mr. El Madhoun's Answer

7. Mr. El Madhoun did not file an answer.

Considerations

8. The UNRWA DT held that the selection process was unlawful and had to be rescinded for two reasons: (i) the Commissioner-General did not provide any compelling reasons for not having examined whether the experience of Mr. El Madhoun would have offset his lack of a university degree; and (ii) by doing so, the Agency did not apply properly the criteria described in the vacancy announcement.

9. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:³

[w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether

³ *Cobarrubias v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-510, para. 19, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

In non-selection matters, our jurisprudence has established, in accordance with the principles recalled above, that:⁴

... Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal's selection decision for that of the Administration. Rather, as we stated in *Abassi*, the Dispute Tribunal's role in reviewing an administrative decision regarding an appointment is to examine: "(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration". The role of the UNDT is "to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner.

... As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed. But this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member's] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the [staff member] who must show through clear and convincing evidence that [he] was denied a fair chance of promotion".

10. The Staff Selection Policy sets out several guidelines that may be used to establish an equivalency between the criteria of education and experience. It determines, among other regulations, how many additional years of relevant experience may be required when a candidate does not meet the academic criterion specified by the vacancy announcement.

11. In the absence of a university degree, Mr. El Madhoun did not satisfy the academic criterion stated in the vacancy announcement. He was, however, long-listed. This means that the Agency took his experience into consideration and decided that his additional years of experience justified his pre-selection. Even if the number of long-listed candidates has not been specified in the impugned Judgment, it may then be presumed that the Agency reviewed all candidates, including those not holding a relevant degree but an equivalent experience offsetting the lack of education.

⁴ *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, paras. 31 and 32 (internal citations omitted).

12. We must therefore conclude that the UNRWA Dispute Tribunal erred in fact in considering that the Agency did not examine whether the experience of Mr. El Madhoun could offset his lack of a university degree.

13. As submitted by the Appellant, two steps must be distinguished in the selection process: firstly, the Agency examines all applications with the purpose to create a long-list including all the candidates who meet the requirements as described in the announcement; and secondly, the Agency short-lists a limited number that proceeds to the next step in the selection process.

14. Especially for the shaping of a short-list, the discretion of the Administration is broad even if, as mentioned above, not unfettered.

15. The short-listing must be based on objective and impersonal criteria and those criteria have to be free of allegations of bias, conflict of interest or discrimination.

16. The criteria mentioned in the vacancy announcement are minimum criteria established at a time when the Agency does not know how many candidates will apply and what their profile will be. Their purpose is to allow the Agency to make a long-list. The purpose of the short-list is to deepen the selection process and to select a limited number of candidates among those who satisfied the minimum criteria and were long-listed.

17. At the stage of the short-listing, it is therefore reasonable for the Agency to refer exclusively to some of the criteria mentioned in the vacancy announcement or to pay attention to other distinctive features, insofar as they are reasonable in a given situation.

18. In the present case, the reference to a university degree is an objective and impersonal criterion. There was no obligation, neither from the Staff Regulations nor from the announcement, to limit the short-listing to specific criteria. In the absence of allegations of bias or discriminatory application, the criterion related to the university degree was reasonable and could be used without any additional reference to the experience of the candidate.

19. In the result, therefore, the decision by the Agency to limit the short-list to seven candidates with a university degree was reasonable and we must conclude that the UNRWA Dispute Tribunal erred in law in considering that the Agency did not properly apply the criteria described in the vacancy announcement.

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Judgment

20. The appeal is upheld and Judgment No. UNRWA/DT/2019/005 is vacated.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

(Signed)

(Signed)

Judge Neven, Presiding

Judge Knierim

Judge Halfeld

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar