



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-438

**Benchebbak
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Inés Weinberg de Roca
Judge Rosalyn Chapman

Case No.: 2013-501

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Miles Hastie/OSLA

Counsel for Appellant/Respondent: Simon Thomas

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/067, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 19 April 2013 in the case of *Benchebbak v. Secretary-General of the United Nations*. The Secretary-General appealed on 18 June 2013 and Mr. Abdelouahed Benchebbak answered on 15 August 2013.

Facts and Procedure

2. The following facts are uncontested:¹

... On 6 May 2009, the post of Fuel Assistant, GL-4 was advertised by [the United Nations Mission for the Referendum in Western Sahara (MINURSO)] with a deadline of 23 May 2009. The Applicant submitted his application for the said post on 14 May 2009. The vacancy announcement stated that a high school diploma was an “essential” requirement for the position.

... On 23 December 2009, the Applicant was invited, along with other short-listed candidates, to participate in an interview on 28 December 2009. Following the interview, the Applicant’s recruitment was approved on 4 January 2010 with an offer of appointment transmitted to him on 14 January 2010.

.. On 2 February 2010, the then Chief Civilian Personnel Officer (CCPO) confirmed the Applicant’s appointment and indicated that the continuation of his appointment with MINURSO was subject to the Applicant providing relevant evidence of education and experience.

... On 3 February 2010, the Applicant signed a letter of appointment for one year effective 3 February 2010 and expiring on 2 February 2011.

... On 31 August 2010, a MINURSO Human Resources Assistant requested that the Applicant provide the Personnel Section with his high school certificate or an “equivalent two years diploma” by close of business 15 September 2010. The Applicant was unable to produce this within the set deadline.

... Since then, the Administration requested, on a number of occasions, that the Applicant provide a high school certificate or an “equivalent two years’ diploma”.

... On 20 September 2010, the Applicant provided the MINURSO Personnel Section with a document which stated that he joined the Royal Air Force School of Morocco in 1977 and that he holds an Elementary Certificate in Technical Management. The document also indicated that he had attended a training course in

¹ Impugned Judgment, paras. 11-32.

Inventory Management. The Applicant was again requested to provide the Personnel Section with a high school certificate.

... On 29 December 2010, following a meeting with the CCPO, Ms. Amina Noordin, on 28 December 2010, the Applicant requested that the certificate awarded by the Moroccan Royal Air Force School and US Air Force Technical Training School be accepted in lieu of a high school certificate.

... Meanwhile, a request had been sent by the MINURSO Personnel Section to the Recruitment Verification Unit (RVU) in Brindisi, which failed to locate the Applicant in the RVU database of “pending” reference verifications and in nucleus. Additionally, RVU informed MINURSO that the subject of military equivalences in education was undergoing review and that RVU was “waiting for clear guidelines from OHRM [...]”. Consequently, the matter was referred to the Field Personnel Division of the Department of Field Support (FPD/DFS) at United Nations Headquarters in New York.

... On 9 March 2011, the MINURSO Chief of Mission Support, Nader Darwich, asked FPD to exceptionally approve the retention of the Applicant’s services in MINURSO in light of his findings on the Applicant’s skills and performance improvement as well as the difficulties MINURSO was facing in finding suitable candidates who possessed the requisite computing, language and logistics skills.

... On 4 May 2011, the CCPO presented the Mission’s position in an email to Ms. Emanuela Goerick of the Field Personnel Division, Department of Field Support at the United Nations Headquarters as follows:

While we note that if MINURSO had known that [the Applicant] did not have a high school diploma in February 2010, we would not have offered him employment, we would also like to point out that in December 2010 when the staff member presented us with certified documents supporting his military training and certificates from the Moroccan Royal Air Forces School and US Air Force Technical Training School, we were willing to accept the certificates in lieu of a high school diploma, subject to FPD/OHRM confirming the equivalency. (Emphasis added).

[...]

We would like to reiterate our request for exceptional approval to retain the services of the staff member as stated in our memo dated 9 March 2011, in view of the valuable skills gained during his previous military training in the Morocco Armed Forces and as a logistics coordinator for foreign companies; his fluency in English, French and Arabic; and taking into consideration the difficulties MINURSO faces in finding suitable candidates who posses [sic] computing, language and logistics skills.

... On 10 May 2011, the Applicant provided detailed comments on the issue of his educational qualifications, which included the statement:

09 May 2011, and after more than ten month [sic] waiting and several reminders to the ministry – I finally got the high school certificate issued by the Ministry of National Education – High Studies department – Rabat – Morocco and certified by local authorities and the foreign/external affairs ministry, [sic] The certificate states that I studied the experimental Sciences in the high School Allaymoun = Les Orangers at the 5eme level and left the school on the 14 April 1977 two months before the high school exams. [Emphasis in original]

... On 13 May 2011, the CCPO forwarded the Applicant's comments to Ms. Goerick and indicated that the certificate from the Applicant's high school showed that he had left high school during the first year of three, prior to sitting his exams. She further stated that "[s]tudents are required to complete three years of high school (referred to as 5eme, 6eme, and 7eme), in order to be awarded a high school diploma (baccalaureate)".

... On 16 May 2011 Ms. Goerick wrote to Mr. Sumiyo Sudo-Rao, Chief, Section B, Human Resources Services, OHRM, informing him:

[The Applicant] was not able to provide us with a certification from local Authorities on High School equivalency of his training. Instead of leaving High School two months before the High School exams (as stated by him), he left High School in 5eme, which means he did not pass the exams for 5eme, 6eme and 7eme, which is required in order to gain the Baccalaureat [sic] Sciences/High School Diploma.

In light of his inability [sic] to prove the High School Diploma equivalency of his training and the recent finding on his High School attendance, I would like to ask for your approval for Mission HR to not further extend his contract.

... On 17 May, Mr. Sudo-Rao wrote to Ms. Goerick as follows:

I understand the following have been confirmed:

- If MINURSO had known that [the Applicant] did not have a high school diploma in February 2010, the mission would not have offered him employment. The Vacancy Announcement issued on 6 May 2009 clearly indicates that "Successful completion of High School diploma is essential."
- [The Applicant] was given a final opportunity to provide comments on the matter before a decision is made about the nonrenewal of his appointment. Ms. Amina Noordin, CCPO, MINURSO, sent him an e-mail dated 13 May 2011 with full facts, and requested him to provide his comments by 18 May 2011.
- [The Applicant] provided his comments on 10 May 2011 with attachments. In that e-mail, the staff member admitted that he does not hold high school

diploma [sic], as he “left the High School two months before the high school diploma exams.”

- MINURSO found that [the Applicant] left High School in 5eme, which means he did not pass the exams for 5eme, 6eme and 7eme, which is required in order to gain the Baccalaureat [sic] Sciences/High School Diploma. He also could not submit a document to prove the High School Diploma equivalency of his military training.

Taking into account the above, I understand the MINURSO and DFS followed the procedures required to proceed with non-renewal of [the Applicant’s] appointment based on the fact anterior which came to light after the appointment of the staff member. If DFS agrees to the nonrenewal, please notify the staff member of non-renewal of his appointment with normal notice period (30 days for fixed-term appointment, S. R. 9.7(b)).

.. This message was then followed up on 20 May 2011 with a fax from Mr. Paulin Djomo, Officer-in-Charge, Africa II, Field Personnel Operations Service, FPD/DFS to Ms. Noordin, advising that following a review of the case and consultation with OHRM, the Applicant was to be separated.

... On 23 May 2011, the Applicant was informed by the Chief of Mission Support, in reference to this fax, that OHRM had completed a review of his educational qualifications and concluded that MINURSO “followed established procedures in analysing his case in establishing that he lacked the required qualifications”. FPD consequently recommended that the Applicant’s appointment should be extended to cover 30 calendar days written notice to end his fixed-term appointment. His contract was therefore extended to 22 June 2011.

... Also on 23 May 2011, the National Staff Committee, of which the Applicant was the Secretary, held a strike. Towards the end of the day the Applicant was detained by MINURSO security officers and was searched following an allegation that he was in possession of illegal drugs. No drugs were actually found on the Applicant and he was never subjected to disciplinary proceedings in respect of the incident.

... On 25 May 2011, the Applicant filed a request for Management Evaluation of the decision to not renew his contract beyond 22 June 2011.

... The Applicant submitted an official translation, dated 10 June 2011, of a letter from the Director of the Legal Affairs Department of the Kingdom of Morocco’s Ministry of National Education, High Learning, Executives Training and Scientific Research, which stated:

Regarding your above mentioned letter concerning the application of equivalence of the elementary certificate conferred by the national defense administration, the armed forces general staff, it is my honor to inform that the certificate in question entitles you access to the rank of technical agents, in pursuance of the

decision of the ministry of primary and secondary education, of 8 July 1975, a copy of which is hereto enclosed [sic].

... On 27 June 2011, the Management Evaluation Unit (MEU) received confirmation from the Administration and the Applicant that his appointment was being extended for an additional month until 22 July 2011 pending review of additional documentation the Applicant had submitted to the Administration in June 2011. The MEU therefore concluded, in light of his extension, that the matter was moot.

... On 22 July 2011, MINURSO Administration extended the Applicant's appointment for another month through to 22 August 2011 pending the completion of the MEU review. On 6 August 2011, MINURSO further extended the Applicant's appointment for another month through to 22 September 2011. On 23 September 2011, the Officer in Charge (OIC) of Mission Support of MINURSO informed the Applicant that his appointment was further extended and would consequently expire on 22 October 2011 but that he would be separated from service on that date.

3. On 19 April 2013, the UNDT issued Judgment No. UNDT/2013/067. The UNDT opined that since the Secretary-General is establishing minimum academic qualifications for each vacancy at the outset of the recruitment process, the onus is on him to assess the qualifications he is demanding without resort to external entities. In the present case, the Secretary-General did not exercise his discretion properly by relying on the government of Morocco to provide certification of equivalency and by not having guidelines in place to certify equivalency.

4. The UNDT further concluded that the Secretary-General erred in not renewing Mr. Benchebbak's appointment "based on the fact that he did not hold the academic qualifications required for the Fuel Assistant post when said qualifications may have been waived under staff rule 12.3(b) if [Mr. Benchebbak] had been given the proper consideration".² The UNDT awarded compensation in the amount of six months' net base salary.

5. The Secretary-General appeals the UNDT Judgment.

² Impugned Judgment, para. 69.

Submissions

The Secretary-General's Appeal

6. The Secretary-General submits that the UNDT erred by finding that, in Mr. Benchebbak's circumstances, a non-renewal was unlawful. In accordance with the jurisprudence of the Appeals Tribunal in *Obdeijn*³ the Administration, when requested by a staff member, must state the reasons for a non-renewal decision and establish that the decision is "neither arbitrary nor tainted by improper motives". The Administration complied with these requirements. Mr. Benchebbak was on notice at all times that his appointment was subject to providing the relevant documents certifying his education and experience. Furthermore, it was not arbitrary for the Organization to require Mr. Benchebbak to have a high school diploma, which was identified in the vacancy announcement as being essential, or to decline to extend Mr. Benchebbak's appointment when he failed to provide such diploma. Finally, the UNDT made no finding that the decision was tainted by improper motives.

7. The Secretary-General contends that the UNDT erred in law and fact by finding that the Secretary-General had sought instructions from the government of Morocco, in breach of the Charter. The Secretary-General merely sought clarification from the Government in order to determine what qualifications Mr. Benchebbak possessed. Based on the information provided, the Secretary-General made his determination that Mr. Benchebbak was not qualified for employment with the Organization. The government did not interfere with the Secretary-General's discretion. Finally, it is also in other contexts the practice of the Organization to seek information from the permanent mission of a staff member's home country with respect to documents provided by the staff member.

8. The Secretary-General next submits that the UNDT erred by finding that this case is equivalent to *Hastings*⁴ where the Organization declined to exercise its authority to make an exception. The application of *Hastings* to the case at bar is a legal error. In the present case, the Administration did consider making an exception pursuant to Staff Rule 12.3(b) if Mr. Benchebbak was able to establish that he had education and training equivalent to a high school diploma. Since Mr. Benchebbak did not have a high school diploma or equivalent, the non-renewal of his appointment was a reasonable exercise of the Secretary-General's discretion.

³ *Obdeijn v. Secretary-General of the United Nations*, Judgment 2012-UNAT-201.

⁴ *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

The UNDT erred in law by substituting its own decision that the Secretary-General should have waived the vacancy announcement's requirement that the selected candidate have a high school diploma or an equivalent level of formal education.

9. The Secretary-General contends that the UNDT erred in law by ordering compensation in the amount of six months' net base salary without making a specific finding of harm suffered and without specifying how the amount of compensation awarded related to any such harm.

10. The Secretary-General requests the Appeals Tribunal to find that the non-renewal decision was lawful and to vacate the UNDT Judgment in its entirety.

Mr. Benchebbak's Answer

11. Mr. Benchebbak contends that the UNDT did not err in finding the non-renewal decision unlawful. The Secretary-General erroneously suggests that *Obdeijn* stands for the proposition that a non-renewal decision can only be declared unlawful if the decision is arbitrary, tainted by improper motives, or if no reasons are given. However, discretionary decisions may also be vitiated for other reasons, as in the present case, the Organization's failure to evaluate the issue and its organizational needs and rely exclusively upon the fact that the Moroccan government would not furnish an answer to its question regarding "equivalency".

12. Mr. Benchebbak further contends that the UNDT correctly held that the Administration, and not the government of Morocco, was required to decide on the sufficiency of qualifications. In the case at bar, the Administration made no decision about what an equal qualification for the purpose of this post would be and ultimately, the Moroccan government made the decision when it failed to tell the Organization that Mr. Benchebbak was qualified for the post.

13. Mr. Benchebbak submits that the UNDT correctly applied the *Hastings* jurisprudence. First, the Organization never actually exercised its discretion with respect to the Rule 12.3(b) request or even considered it. Second, the issue was not whether Mr. Benchebbak's education was equivalent to a high school diploma; the issue was whether the educational requirements could have been waived given that MINURSO twice confirmed that it wished to retain Mr. Benchebbak in light of his skills and performance improvement.

14. Finally, Mr. Benchebbak contends that the UNDT did not err in awarding compensation. He cites to evidence presented at trial which, he suggests, constitutes the basis for an award of compensation. While Mr. Benchebbak acknowledges that the reasons provided in the Judgment concerning compensation are sparse, he states that it can be presumed that compensation was awarded based on the record as a whole, including factual allegations which the Secretary-General had the opportunity to test at trial.

15. Mr. Benchebbak requests that the Appeals Tribunal dismiss the appeal. Should the Appeals Tribunal find that the reasons for compensation are inadequate or that further findings of fact are required, he requests remand of the case.

Considerations

16. The vacancy announcement made it quite clear that a high school diploma was essential for the Post and that post-secondary education would be an advantage. Mr. Benchebbak had neither of these requirements.

17. Nonetheless, he applied for the post and was given a fixed-term appointment conditional upon his producing, *inter alia*, the relevant education documents. The Administration patiently gave Mr. Benchebbak many opportunities to produce a high school diploma, but he was unable to do so. In fact, had the Secretary-General taken a harder line he could have dismissed Mr. Benchebbak for misrepresenting his educational qualifications in his PHP (he stated therein that he had attended high school – “lycée” from October 1974 to June 1977 and had obtained a “Baccalauriat Science”, statements which he must have known were untrue).

18. The UNDT found that the Secretary-General improperly exercised his discretion “by relying on the Government of Morocco to provide certification of equivalency and by not having guidelines in place to certify equivalency”.⁵ This finding was based on the UNDT’s legally and factually erroneous finding that the Secretary-General wrongly exercised his discretion in allowing “a government or an authority external to the Organisation to determine whether or not a staff member is qualified for employment with the United Nations”.⁶ This finding is not supported by the evidence. The purpose of the

⁵ Impugned Judgment, para. 55.

⁶ *Ibid.*, para. 54.

Secretary-General writing to the Government of Morocco was to obtain information regarding Mr. Benchebbak's education.⁷ There is no evidence that the Secretary-General requested the said Government to decide whether or not Mr. Benchebbak qualified for employment with the United Nations.

19. The UNDT also found that the Secretary-General did not properly comply with Staff Rule 12.3(b) by failing to exempt Mr. Benchebbak from the requirement of a high school diploma in lieu of his other skills. There is no reasonable ground to support a finding that the Secretary-General wrongly exercised this discretion, or failed to exercise it at all. The evidence is that the Secretary-General did consider the possibility of an exemption from providing a high school diploma, which had been deemed "essential" in the vacancy announcement, provided that Mr. Benchebbak could produce an equivalent qualification. When judging the validity of the Secretary-General's exercise of discretion it is not the role of the UNDT 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 UNDT to substitute its own decision for that of the Secretary-General.⁸ Moreover, the Administration has the right to set minimum qualifications for a post, and it was therefore wrong in law for the UNDT to decide that Mr. Benchebbak's request for an exception under Staff Rule 12.3(b) was "improperly considered" because the Secretary-General should have considered Mr. Benchebbak's existing educational qualifications regardless of whether or not they were equivalent to a high school diploma.

20. Consequently, we find that the UNDT erred in law in deciding that the non-renewal of Mr. Benchebbak's contract was unlawful. Mr. Benchebbak was aware that a high school diploma was an essential qualification. His contract was conditional upon his producing proof of this qualification. Mr. Benchebbak was also aware that the consequence of failing to satisfy this requirement was non-renewal. We agree with the Secretary-General's submission that the decision not to renew was neither arbitrary nor tainted by improper motives.

21. Accordingly, we find that the Secretary-General's non-renewal decision was lawful. It follows that the UNDT's decision, including its award of compensation, cannot be allowed to stand.

⁷ See Annex 8 to Appeal.

⁸ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

Judgment

22. The appeal is allowed and the Judgment of the UNDT is vacated in its entirety.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar