



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BENCHEBBAK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION
FOR SUSPENSION OF ACTION**

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. On 2 February 2010, the Applicant joined the United Nations Mission for the Referendum in Western Sahara (MINURSO) after a competitive test and interview as Fuel Assistant on a fixed-term appointment at the GL-4/6 level. On 17 October 2011, the Applicant filed the present Application for the suspension of the implementation of the administrative decision to not renew his contract and consequently separate him from service on 22 October 2011 (“the impugned decision”). The non-renewal decision was premised upon the Applicant’s lack of the required academic qualifications to hold the position he has been seating on.

Facts

2. On 31 August 2010, a Human Resources Assistant requested the Applicant to provide the Personnel Section with his high school certificate or an “equivalent two years diploma” by close of business 15 September 2010. The Applicant could not produce this.

3. Since then, the Administration has asked, on a number of occasions, the Applicant to provide a high school certificate or “equivalent two years diploma”.

4. On 20 September 2010, the Applicant provided the Personnel Section with a document which stated that he joined the Royal Air Force School in 1977 and that he holds an Elementary Certificate in Technical Management. The document also indicated that he had attended a training course in Inventory Management. The Applicant was again requested to provide the Personnel Section with a high school certificate.

5. On 29 December 2010, following a meeting with the CCPO 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.

6. Meanwhile, a request had been sent by MINURSO Human Resources to the Recruitment Verification Unit (RVU) in Brindisi which failed to determine whether or not the Applicant's qualifications were 'equivalent to' a high school diploma or not, and the matter was referred to Field Personnel Division (FPD/OHRM) of Office of Human Resources Management (OHRM).

7. On 9 March 2011, the Chief of Mission Support, Nader Darwich, in MINURSO requested the Field Personnel Division (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 faces in finding suitable candidates who possess computing, language and logistics skills.

8. On 23 May 2011, the Applicant was informed by the Chief of Mission Support in reference to a fax from OHRM dated 20 May 2011, that OHRM had completed a review of his education qualifications and concluded that MINURSO "followed established procedures in analysing his case in establishing that he lacked the required qualifications". FPD/OHRM 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.

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

10. On 13 June 2011, the Applicant informed the MINURSO National Staff Committee that "[i]ts with a great regret that I have to announce that I am resigning

from the National Staff Committee as the committee secretary with effect today, for some very personal matters.”

11. 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.

12. On 23 September 2011, the OIC of Mission Support of MINURSO informed the Applicant that his appointment was further extended and would consequently expire on 22 October 2011 and that he would be separated from service on that date.

13. On 6 October 2011, the Applicant requested management evaluation of the decision to not further extend his appointment beyond 22 October 2011.

14. On 17 October, the Applicant filed an Application for a suspension of the decision not to renew his contract beyond 22 October 2011. The Application was served on the Respondent on the same date.

15. On 19 October 2011, the Tribunal issued Order No. 129 (NBI/2011) scheduling a hearing for 3 November 2011 and suspending the implementation of the decision until 10 November 2011.

16. On 26 October 2011, the MEU completed their review and held that the Administration had acted in accordance with the applicable rules in deciding not to extend the Applicant’s appointment beyond 22 October 2011 and that the suspension of action until 10 November 2011 is to allow the filing of the Respondent’s comments, the hearing and the determination of the matter.

17. On 27 October 2011, the Respondent requested the Tribunal to discharge Order No. 129 (NBI/2011) in light of the completion of management evaluation on 26 October 2011.

18. On 28 October 2011, the Applicant also informed the Tribunal that he received the response from management evaluation on 27 October 2011.

19. The MEU made the following findings in their response dated 27 October 2011:

- a. The Applicant is not entitled to an extension of his appointment beyond 10 November 2011;
- b. The expiration date specified in the Applicant's contract is 2 February 2011. Upon expiry of that contract it was not renewed, but merely extended consecutively until 22 October 2011 to give the Applicant opportunity to provide the documentation, to review those submitted and to allow management evaluation of that decision;
- c. Accordingly, the Applicant's fixed-term appointment is subject to expiry on 10 November 2011. The Applicant's separation does not involve a termination but is a non-renewal upon expiry;
- d. The Administration acted in accordance with the applicable rules in deciding not to extend the Applicant's appointment beyond 22 October 2011, and that the suspension of action until 10 November granted by the UNDT is to allow the filing of the Respondent's comments, the hearing and the determination of the matter. Overall, the Administration has given the Applicant's credentials the utmost consideration.

20. The Secretary-General endorsed the findings and recommendations of the MEU and upheld the contested decision with the determined shift in the date of separation from service of the Applicant.

21. On 31 October 2011, the Applicant filed an Application on the Merits.

22. On the same day, the Applicant filed an Application for Interim Relief pursuant to art. 14 of the Rules of Procedure. The Application was served on the Respondent on

the same day registering the deadline for the Respondent's Reply on 30 November 2011.

23. On 31 October 2011, the Tribunal issued Order No. 136 (NBI/2011) rejecting the Respondent's request to have Order No. 129 (NBI/2011) discharged and proceeding with the hearing on 3 November 2011. The Tribunal additionally instructed Counsel to be prepared to address the Tribunal on all legal issues arising in the case during the hearing noting in particular the Motion filed by Applicant on interim relief as per art.14 of the Rules of Procedure.

24. On 3 November 2011, the Tribunal proceeded with the hearing scheduled as per Order No. 136 (NBI/2011) concerning *inter alia*, the Motion for interim relief pursuant to art.14 of the UNDT Rules of Procedure.

The Applicant's case

25. The Applicant's case may be summarized as follows:

26. The Applicant avers that proper consideration was not given in respect of his academic qualifications.

27. The Applicant left the Lycée Allaymoune on 14 April 1977, one year before the high school diploma exams, having been enrolled in the fifth year, scientific core. He then joined the Moroccan armed forces technical school where he pursued and received Elementary and Superior Certificate in Technical Management, a "three years study". He remained in the Moroccan armed forces for 10 years and left as a Staff Sergeant. He then pursued further training in Material Facilities, Management and Inventory Management.

28. The Applicant claims that he repeatedly and expressly asked that his qualifications be accepted in lieu of a high school certificate. He has strong performance evaluations and compelling recommendations, and the Administration ought to have exercised its discretion in his favour in this regard. He further argues

that his current supervisor and another work colleague do not have high school certificates, and that such certificates are often not required in similar technical MINURSO posts.

29. The Applicant argues that there is considerable evidence that senior members of MINURSO harbour *animus* towards the Applicant which suggests that the Respondent was influenced by other reasons not to renew his contract. The following facts demonstrate such *animus*:

- a. The Applicant was the Secretary of the National Staff Committee which held a planned strike and protest on 23 May 2011. On the same day the Applicant was presented with a notice of non-renewal and detained by security, physically searched and a blood test demanded;
- b. Several days after the Applicant's MEU request of 6 October 2011, MINURSO CCPO, Ms. Amina Noordin, filed a complaint against the Applicant with the local police bypassing the UN disciplinary process. This complaint was promptly dismissed as unfounded;
- c. Despite the fact that the Applicant has never been charged or disciplined by the United Nations, damaging accusations have been made against him and circulated widely within the UN.

30. The impugned decision further demonstrates the unlawfulness on the basis that the only justification given for the Applicant's non-renewal has been his alleged lack of required education qualifications. The Applicant's original job posting called for a high school certificate but the Administration informed him that an equivalent would be acceptable. There has never been a legal requirement within the UN that GS-4 level staff must have a high school certificate.

31. The Applicant's contract is now due to expire on 10 November 2011, as per Order No. 129 (NBI/2011) and is consequently an urgent matter. In the week leading up to 17 October 2011, the Applicant had been arrested, subjected to security escorts

on the MINURSO compound and disciplinary questioning. In light of these events the Applicant has acted as promptly as reasonably possible.

32. In respect to the irreparable damage, the Applicant is 54 years old, the sole breadwinner of his family and if separated would face numerous difficulties in meeting his financial obligations. Furthermore, given his age, his job prospects look bleak.

33. The Applicant further avers that the contested decision is one of “non-renewal.” It is susceptible to suspension of action, as it does not constitute “promotion”, “termination” or a matter of “appointment”. The Administration has often taken the position that a non-renewal is not a “termination” and a renewal is not an “appointment”. The Applicant seeks, in the alternative to suspension of the impugned decision, an order for special leave with pay pending final determination of the case, to minimize unrecoverable loss.

The Respondent’s case

34. The Respondent’s case may be summarized as follows:

35. The Applicant has failed to demonstrate that the impugned decision is *prima facie* unlawful. Moreover, according to the Applicant’s letter of appointment “[t]his appointment is offered on the basis, *inter alia*, of your certification of the accuracy of the information provided by you on the personal history form.” The Applicant’s fixed term appointment was therefore conditional on the provision of a high school certificate.

36. The educational requirement for the subject post, as set out in the vacancy announcement, is a high school certificate. The Applicant could not produce a high school certificate or documentation of education equivalent to a high school certificate.

37. The Applicant was given more than nine months to produce the required education certificates. Despite numerous requests, the Applicant has been unable to provide either a high school certificate or any documentation that his training is equivalent to a high school certificate. The Applicant was also aware from the day he signed his letter of appointment that a high school certificate was required and that his appointment was conditional upon submission of the requisite educational qualifications.

38. The record shows that the Administration followed the correct procedures in assessing the Applicant's credentials. Following a review of the additional documentation submitted by the Applicant, the Administration determined that the Applicant does not meet the educational requirements for the post he currently encumbers. The Applicant was also asked to provide further comments on his credentials before a final decision was taken not to extend his contract.

39. The Applicant's contention that two other staff members in MINURSOs Fuel Unit do not possess a high school certificate is irrelevant to this case.

40. The Applicant's contention that the contested decision was motivated by extraneous factors is without merit. The record shows that MINURSO tried to resolve the matter informally and even requested a review of the equivalency of the Applicant's military and technical training before taking a decision on his contract. Accordingly, the decision not to extend the Applicant's contract was made in accordance with the applicable Staff Rules and Regulations.

41. The Applicant will not suffer any irreparable harm by virtue of the non-renewal of his contract. The Applicant submits that he is 54 years old and the sole breadwinner of his family and would consequently face financial difficulties if his appointment was not extended. Given that the Applicant's sole claim is monetary damage, the Respondent submits that he can be financially compensated in the event he prevails on the merits. The Applicant has therefore failed to establish that he would

be irreparably harmed in the event his application for suspension of the implementation of the impugned decision as interim relief is granted.

42. The Applicant further submits that the matter is urgent because his contract is due to expire on 22 October 2011. Given that the Tribunal suspended the implementation of decision until 10 November 2011, which effectively extends the Applicants' contract beyond 22 October 2011, the Application cannot be said to be of a particular urgency.

43. The Respondent submitted in court that the record shows that the Applicant was given numerous occasions to submit the documentation. The Applicant's contentions that the contested decision is *prima facie* unlawful are without merit as the procedures followed by the Respondent cannot be said to be unlawful. There was no personal *animus*, the Applicant's former position as the Secretary of the National Staff Committee to the UNION is irrelevant.

44. At the hearing of this matter the Respondent also submitted that the Application is not receivable under Article 14 as this is a case of termination and not non-renewal.

Consideration

45. The Applicant made this Application pursuant to art. 13.1 of the Dispute Tribunal's Rules of Procedure. This said article provides that:

The Dispute Tribunal shall make an order on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

46. On the basis of the above provision, a suspension of action application will only succeed where the three conditions are met. The Applicant needs to establish a case of *prima facie* unlawfulness, that the case he has made out is urgent and where

the Tribunal is called to intervene where the implementation of the contested decision would cause irreparable damage.

47. On 19 October 2011, the Tribunal issued Order No. 129 (NBI/2011) suspended the implementation of the contested decision until 10 November 2011 allowing the Tribunal to allow the filing of the Respondent's Reply, the hearing held on 3 November 2011 and the determination of the matter.

48. The Applicant was communicated the response from MEU on 27 October 2011 as well as the Secretary-General's response.

49. The Applicant has filed his case on the merits, registered in the Dispute Tribunal's records as UNDT/NBI/2011/070 and simultaneously filed under art 14 of the Dispute Tribunal's Rules of Procedure seeking an interim relief. The Applicant has also stated that he is not pressing the art.13 Application anymore.

Conclusion

50. In view of the foregoing, Order No. 129 (NBI/2011) is no longer in force as of the date of this Judgment.

51. The Application for suspension of action, under UNDT/NBI/2011/064 is hereby rejected.

(Signed)

Judge Vinod Boolell

Dated this 10th day of November 2011

Entered in the Register on this 10th day of November 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi