



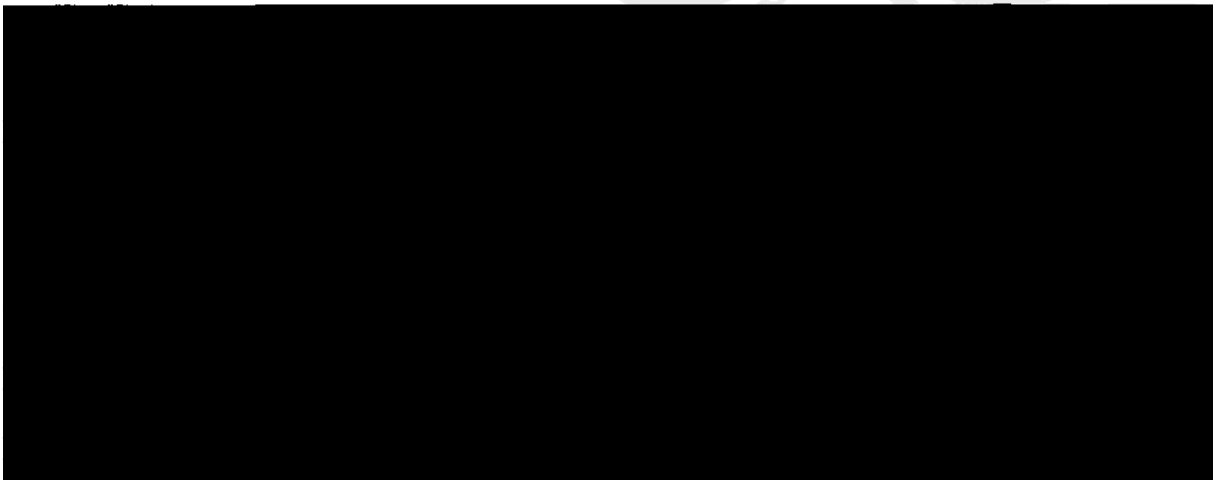
UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D APPEL DES NATIONS UNIES

Benchebbak
(Respondent/Applicant)

v.

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

J U D G M E N T



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

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 interviews". 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 Darwish, 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:

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

On 09 May 2011 and after more than ten months [sic] writing 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 Allaynon = 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. Smiy Sdo-Rao, Chief, Section B, Human Resources Services, OHRM, informing him:

[The Applicant] was not able to provide 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 Baccalaureate [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. Sdo-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

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 on(e) -hl3e1fr blishing(6)4(t2)-5.4o32.68 t351 0

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.

The UNDT erred in law by substituting its own decision that the Secretary-General should have considered 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 appeals

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 "from October 1974 to June 1977 and had obtained a Baccalaurat Science," statements which he must have known were untrue). 17.

Secretary-General writing to the Government of Morocco as 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 exemption 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 re7(Ted)289.3((co.5(7(pndedisc)-5.u4.6(g)1.3((e)2.

THE UNITED NATIONS APPEALS

Original and ~~A~~uthoritative Version: English

Dated this 27th day of ~~J~~une 2014 in Vienna, ~~A~~ustria.

(Signed)

~~J~~udge ~~L~~asick, Presiding

(Signed)

~~J~~udge Weinberg de Roca

(Signed)

~~J~~udge Chapman

Entered in the Register on 29th day of ~~A~~ugust 2014 in ~~N~~ew York, United States.

(Signed)