

UNITED

## **Introduction**

1. On 28 October 2011 the Applicant filed the current Application with the United Nations Dispute Tribunal (UNDT) contesting the administrative decision by the United Nations Mission for the Referendum in Western Sahara (MINURSO) not to renew his contract.

## **Procedural History**

2. On 10 October 2011, the Applicant requested management evaluation of the decision to not further extend his appointment beyond 22 October 2011.

3. 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.

4. 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.

5. 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. The MEU concluded that the Applicant did not possess a High School Diploma, or documentation proving an education equivalent to a High School Diploma, that he did not meet the educational requirements for the post in question, and that he had misstated his educational background in his application for the position. The MEU did not find any unlawful motivation in the non-renewal of the Applicant's contract—indeed, the MEU stated that,

[t]he Administration refrained from a termination because of facts anterior. Instead the Administration chose to not renew your appointment in case you could not provide documentation of equivalent credentials. The Administration has given your credentials the utmost consideration



13. 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.

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

15. 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.

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

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

18. 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.

19. 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 [...]".



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]

23. 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







make a determination as to whether or not the Respondent properly considered the Applicant's and MINURSO's requests for an exception to the education requirement under staff rule 12.3(b).

Did the Respondent properly consider the Applicant's and MINURSO's requests for an exception to the education requirement under staff rule 12.3(b)?

*Applicant's submissions*

34. The Applicant submits that although the Respondent has sought to justify the non-renewal decision on the grounds that the Applicant does not possess the requisite educational qualifications for the post, this reason is neither factually nor legally sustainable. The vacancy announcement called for a High School Diploma, but the Administration indicated that they would accept an "equivalent" qualification. In view of the fact that there is no definition of "equivalence" which constrains the Administration, the appropriate test for "equivalence" should be "functional equivalence for the purpose of the post".

35. In this respect, the Applicant argues that in *Hastings* 2011-UNAT-109, an express request was made for an exception to the educational requirements, pursuant to staff rule 12.3(b), and that the Tribunal deemed it to be a legal error to fail to give consideration to such a reasonable request. To this end, the Applicant asserts that the Administration failed to give proper consideration to reasonable requests from him and MINURSO for an exception to be made under staff rule 12.3(b) regardless of any proof of equivalence that may or may not have been offered. The Applicant maintains that said failure amounts to a legal error.

36. The Applicant submits that it is a matter of discretion whether or not a particular qualification is the equivalent to a High School Diploma and that this discretion is to be exercised fairly by the Organization, not by an external body. In allowing the government of Morocco to decide on the equivalence of the Applicant's qualifications, the Organization failed to exercise its own discretion.

37. The Applicant argues that the decision was tainted by extraneous considerations, namely the Applicant's involvement in the National Staff Committee and the strike which took place on 23 May 2011.

*Respondent's submissions*

38. The Respondent submits that the contested decision not to renew the Applicant's appointment was lawful. To this end, the Respondent avers that in order to recruit staff of the highest standards of competence as required under art. 101.3 of the United Nations Charter, minimum academic qualifications for each vacancy are established at the outset of the recruitment process and that the selected candidate for a post has the onus of establishing that the information regarding their academic qualifications and work experience, as set out in the Personal History Profile (PHP), is correct.

39. The Respondent argues that the Applicant's contention that the Administration did not properly consider his request under staff rule 12.3(b) is without merit. According to the Respondent, the Applicant failed to produce the necessary certification to support his request and, as a consequence, the Administration determined that his request could not be granted. The Respondent stresses that this case is distinguishable from *Hastings* because in that case, the Administration believed, incorrectly, that no exception to the Staff Rules was legally possible and that belief precluded any exercise of discretion by the Administration.

40. The Respondent submits that the Administration gave the Applicant several opportunities to provide documentation certifying that he possessed qualifications that are recognized in Morocco to be equivalent to a high school diploma but he failed to do so. Given the Applicant's failure to provide the required certification, FPD/DFS and OHRM advised MINURSO that the necessary procedures had been followed in determining that the Applicant did not have the academic qualifications required for the post. Thus, when the Government of Morocco did not certify that the Applicant's training was equivalent to a High School Diploma, the Respondent was entitled not to grant an exception under staff rule 12.3(b) and not to renew the Applicant's contract.

41. The Respondent asserts that his reliance on the Government of Morocco's certification of equivalency was a lawful exercise of his discretion. The means chosen by the administration to determine equivalence is a discretionary matter involving human resources policy for the staffing of the Organization. Accordingly, the Tribunal does not have the competence to review decisions that are regulatory in nature (*Cherif* 2011-UNAT-165), nor to implement administrative objectives, policies and goals (*Andati-Amwayi* 2010-UNAT-058). Thus the Tribunal cannot review the Administration's decision regarding the means by which it determined the equivalency of the Applicant's military experience and training.

42. The Respondent further avers that the decision not to renew the Applicant's appointment was not tainted by personal animus resulting from the Applicant's involvement in the National Staff Committee. Furthermore, the decisions regarding the Applicant's qualifications were taken in New York by DFS/FPD, and not by MINURSO.

#### *Considerations*

43. Staff rule 12.3(b) provides that:

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

44. In *Hastings* UNDT/2009/030, the Tribunal considered whether an exception could be made to section 5.2 of ST/AI/2006/3 (Staff selection system). The Tribunal held that:

The imperative of the paramount considerations for the employment of staff in article 101.3 of the Charter and staff regulation 1.1(d) means that it is conceivable that in certain circumstances an exception would have to be made to meet those paramount considerations. For example, where an otherwise ideal candidate with the highest standards of efficiency, competency and integrity does not meet them.

45. The Tribunal also noted in *Hastings* that the Administration had not shown any guidelines that it had used to evaluate the Applicant's eligibility for an exception. Consequently, the Tribunal held that:

[...] it is more likely than not that the Applicant's case for an exception was not properly considered and accordingly the decision of the ASG to reject her application on the basis that no exceptions were possible to section 5.2 was not lawful.<sup>1</sup>

46. The United Nations Appeals Tribunal (the UNAT) stated the following in *Hastings* 2011-UNAT-109:

We believe that the "exception" language is just as much for the ability of the Administration to have flexibility in staffing decisions as it is for the staff, which is probably why the Administration conceded that exceptions could be made.

47. In the present matter, the Respondent conceded that an exception could be made to the education requirement in the vacancy announcement by asking the Applicant to provide proof of an equivalency to the high school diploma.

48. Consequently, the Applicant submitted attestations relating to training he received in the Royal Air Forces School Base in Morocco in 1977. He is also the holder of an Elementary Certificate in Technical management obtained in 1979 and a Superior Certificate in Technical management obtained in 1980. From April to September 1984, he was selected to carry out training as an Inventory Management Specialist in the United States. A letter dated 20 April 2010 emanating from Mr. Jeffrey Wyatt, Lieutenant Colonel, Chief of the Office of Security Co-operation, US Embassy in Morocco confirmed this fact.

49. It is on record that the subject of military equivalences in education was undergoing review and that RVU was waiting for clear guidelines from

equivalent to a high school diploma, he was unable to explain or elaborate on the procedures, guidelines, rules or criteria that led to this rejection. As a matter of fact, the Respondent submitted that,

The Staff Regulations and Rules do not establish a test for [what] constitutes equivalent qualifications for a high school diploma. Given the diverse education backgrounds of staff members, the determination of equivalent qualifications is made on a case-by-case basis.

50. Additionally, the Respondent submitted that since the Administration did not have the capacity to determine whether the Applicant's military qualifications and experience were equivalent to a high school diploma in Morocco, it relied on certification to this effect from the authorities in Morocco. While the Respondent enjoys broad discretion in relation to staffing matters, the Tribunal notes that this authority is not unlimited and must be exercised fairly. Thus, the Tribunal must determine whether it was a proper exercise of discretion for the Respondent to rely on the Government of Morocco to provide certification of equivalency.

51. Art. 100.1 of the Charter of the United Nations (the Charter) stipulates that:

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

52. Art. 101.1 of the Charter stipulates that:

The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

53. Art. 101.3 of the Charter provides in relevant part that:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

54. Articles 100 and 101 of the Charter relate to the Secretariat. They are both located in Chapter XV of the Charter, which sets out the components of the Secretariat and the responsibilities of the Secretary-General, who is the Chief Administrative Officer of the Organisation<sup>2</sup>. The language used in articles 100 and 101 does not leave one in doubt as to the obligations of the Respondent and the boundaries within which he must operate. The Secretary-General is not only required to appoint staff of the United Nations but to perform this duty without resort to any government or authority external to the Organisation. Thus, for the Respondent to assert that he relied on a government in the performance of his duties is to admit that he violated the Charter of the United Nations.

55. While the Respondent may use his discretionary authority to gather information from external authorities, the Tribunal finds that it is not a proper exercise of said authority to allow 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. For an employer to remain truly independent and balanced, it is important for it to set its own comprehensive guidelines and policies on the criteria to be used in the selection process.

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58. The Vacancy Announcement (VA) that the Applicant applied to in 2009 for the post of Fuel Assistant stipulated that “successful completion of High School Diploma is essential. Post-secondary education would be an advantage”.

from the fact that the Respondent's willingness to grant the exemption was focused solely on the Applicant's ability to produce qualifications equivalent to a high school diploma. The error can also be seen from the MEU response that neither the Applicant's performance nor references (other than recognized certificates of such education) could waive the basic educational requirements of the vacancy announcement. MEU ultimately concluded that the Applicant's "performance on the job is irrelevant to this case".

66. How can the Applicant's performance on the job be irrelevant in the face of art. 101.3 of the Charter?

67. The Tribunal finds that under the unique circumstances of this case, that is, the requests from MINURSO recognizing the Applicant's suitability for the post and the Mission's dire operational needs, for the Respondent to have properly complied with staff rule 12.3(b), the Applicant's existing educational qualifications along with his professional qualifications and language skills should have been considered regardless of whether or not they were equivalent to a high school diploma.

### **Conclusion**

68. In view of the foregoing, the Tribunal concludes that the Applicant's request for an exception under staff rule 12.3(b) was improperly considered because the exercise of the Secretary-General's discretion was made contingent on th



**Judgment**

70. The Application is granted.

71. In light of the Tribunal's conclusion that the Respondent erred in not renewing the Applicant's appointment, the Respondent is ordered to pay the Applicant six months net base salary, at the rate applicable as of the date of this judgment, as compensation.

72. This sum shall be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Vinod Boolell

Dated this 19<sup>th</sup> day of April 2013