



## Introduction

1. The Applicant is a staff member of the United Nations Economic and Social Commission for Western Asia (ESCWA).
2. On 22 January 2013, he filed the current application for suspension of action, pursuant to art. 13 of the Rules of Procedure of the Tribunal seeking to suspend ESCWA's decision to cancel the vacancy announcement for the Chief of Security post. According to the Applicant, the cancellation of the vacancy announcement is imminent.
3. The Application was served on the Respondent the same day and he was given the opportunity to file comments, if any, by 25 January 2013. The Tribunal, by Order No. 021(NBI/2013) dated 23 January 2013, ordered suspension of the administrative decision for five working days pending review of the Respondent's submissions.
4. In a reply dated 25 January 2013, the Respondent argued that the application was moot because ESCWA had not decided to cancel the job opening and that the recruitment process was ongoing. In light of the Respondent's reply, the Applicant filed a Motion for disclosure of documents pursuant to art. 18.3 of the Tribunal's Rules of Procedure. Specifically, the Applicant requested that all communication in connection with the cancellation of the vacancy announcement between Ms. Zorana Maltar, Officer-in-Charge ESCWA Division of Human Resources Section, and Mr. David Iyamah, Chief of Administrative Services Division, ESCWA, and the Office of

6. On 29 January 2013, the Tribunal held a oral hearing. The Applicant and his counsel participated via teleconference. The Respondent's counsel attended in person. Pursuant to art. 17.1, the Tribunal called Mr. David Iyamah, Chief of Administrative Services Division, ESCWA to give testimony.

#### Facts

7. In May 2010, the Applicant was appointed to the post of Deputy Chief of Security, ESCWA, in Beirut at the P-4 level. Since 23 May 2012, he has been on a Special Post Allowance ("SPA") for the P-4 Chief of Security post.

8. In June 2012, he applied for the post of P-4 Chief of Safety and Security Section, ESCWA advertised under vacancy Announcement no. 12-SEC-ESCWA-23595-R-BEIRUT ("the contested post"). On 16 October 2012, he was informed that he had been placed on a roster of pre-approved candidates.

9.

suitability, DSS recommended the selection process be cancelled and that the contested post be re-advertised. Soon after this communication from DSS, Mr. Iyamah telephoned the Director of Strategic Planning and Staffing Division ("D/SPSD"), OHRM, regarding the cancellation of the vacancy announcement for the contested post. On 14 January 2013, Mr. Iyamah followed up with the D/SPSD on their telephone conversation regarding the cancellation of the selection process. The D/SPSD responded on 16 January 2013 that she was in discussions with DSS and that she would revert "soonest".

13. On 22 January 2013, the Applicant filed a second request for management evaluation contesting the decision by OHRM to cancel the vacancy announcement. He also filed the current application for suspension of action seeking suspension of the same decision.

#### Receivability of the application

14. Article 2.2 of the Statute of the Dispute Tribunal (Statute) and article 13 of the Rules of Procedure (Rules) empower the Tribunal to grant an interim relief by way of a suspension of action in relation to an administrative decision that impacts on the contract or terms of employment of an individual provided the criteria of *prima facie* unlawfulness, urgency and irreparable damage are satisfied.

15. It has been submitted by the Respondent that there is no administrative

16. When the Administration starts a process of recruitment that may afford a potential candidate a promotion in his/her current employment and that candidate is successful in his/her application, a decision not to carry that process to the end will be an administrative decision that impacts the contract or terms of employment of that staff member. Should the rule be different when the Administration signifies its decision not to carry the recruitment process to its logical end but without actually taking the decision not to do so?

17. The Tribunal cannot take such restrictive view of what can constitute an administrative action. To allow such an act to subsist would be to give a blanket mandate to the Administration to circumvent the rules relating to administrative decisions and the rules on interim relief. Although the decision to cancel the vacancy notice has now been thrown to OHRM, the available evidence shows clearly that the process has been initiated by ESCW and the Applicant has a reasonable apprehension that once the decision is implemented it will impact his terms of employment negatively.

18. In light of the foregoing, the Tribunal finds that the current application is receivable because the decision being contested by the Applicant is an administrative decision that is related to his contract of employment.

#### Considerations

19. Applications for suspension of action are governed by article 2 of the Statute and article 13 of the Tribunal's Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, *prima facie* unlawfulness, urgency and irreparable damage, must all be satisfied for an application for suspension of action to be granted.

20. There is no dispute that suspension of action application is in the nature of an injunction. Within the compass of an injunction which is basically a rule to prevent an adverse action there also lies the well-established principle which is that an individual can also come to the court to seek an order to prevent an impending

adverse action or harm. This is known as a *Quia Timet* injunction. A *Quia Timet Injunction* is an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced. In *Fletcher Bealey* (1884) [28 Ch.D. 688 at p. 698] the court stated that the necessary conditions for properly grant an injunction in such cases are proof of imminent danger; proof that the threatened injury will be practically irreparable; and proof that whenever the injurious circumstances ensue, it will be impossible to protect plaintiff's interests.

#### Prima facie unlawfulness

21. The issue to be addressed here is whether the legal framework under which the selection process for the contested post was conducted authorized the cancellation of the vacancy announcement.

22. It is worth noting that when considering an application for suspension of action, the Tribunal is only required to determine, based on a review of the evidence presented, whether the contested decision appears to be unlawful at first glance.

#### *Applicant's submissions*

23. The Applicant submits that the decision to cancel the vacancy announcement is unlawful because pursuant to the *spira* Manual for the Recruiter, a vacancy announcement cannot be cancelled if a candidate has been approved by the Central Review Body ("CRB"). He further argues that this position has been confirmed by the Tribunal in *Contreras* UNDT/2010/154.

24. Additionally, he asserts that the decision to cancel the vacancy announcement is based on bias and extraneous reasons. In respect, he claims that his candidacy has been unfairly and irregularly excluded from the previous selection process by ESCWA.

*Respondent's submissions*

25. The Respondent asserts that the applicable law is moot since ESCWA has not made a decision to cancel the job opening. He has merely sought advice from OHRM. In this respect, he argues that the Tribunal can only suspend the implementation of an existing decision and that in the absence of a decision cancelling the job opening for the post of Chief of Security, ESCWA it remains open. According to the Respondent, the recruitment process is ongoing.

*Considerations*

26. The applicable legal instrument in the current case is ST/AI/2010/3 (Staff selection system). This administrative instruction establishes the staff selection system, which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat. Pursuant to section 2.3 of this administrative instruction, once a list of qualified candidates have been endorsed by the central review body ("CRB"), the head of department/office/mission may select any one of those candidates for the advertised job opening, subject to the provisions contained in sections 9.2 and 9.5. The other candidates are then placed on a roster of pre-approved candidates for consideration for future job openings at the same level within an occupational group and/or with similar functions.

27. After the hiring manager has assessed the candidates to determine whether they meet the technical requirements and competencies of the job opening, he/she is required, under sec. 7.7, to submit a list of qualified candidates to the appropriate CRB through OHRM. OHRM then ensures that in making the proposal, the hiring manager has complied with the selection process.

28. Under sec. 9.2, after the CRB reviews the proposal for filling the vacancy to make sure that candidates have been evaluated on the basis of the relevant evaluation criteria and that the applicable procedures have been followed, the head of department/office selects the candidate considered to be best suited for the Post.

29. The Tribunal notes that sec. 9.2 obliges the hiring manager to inform OHRM or the Department of Field Support when the position to be filled involves “significant functions in the management of financial, human and physical resources and/or information and communications technology” of the proposed selection so that the approvals required by Secretary-General’s bulleting ST/SGB/2005/7 may be obtained prior to selection. Nonetheless, specific language of ST/AI/2010/3 does not permit a head of department/office to cancel a selection process if s/he is not satisfied with the list of recommended candidates. Additionally, ST/AI/2010/3 does not contain any provision authorizing the vetting or clearance of candidates by DSS, especially on the basis of the candidates’ availability, experience and suitability as was done by DSS.

30. Further, chapt. 11.4 of the *Aspira* Recruiter’s Manual states the following:

No job opening will be cancelled following a submission to the Central Review body and endorsement of at least one (1) recommended candidate. In this respect, reference is made to a judgment made in the UN Tribunal on cancellation of a vacancy announcement. (UNDT – Judgment No: UNDT/2010/153, Case No.: UNDT/NBI/2009/04.

31. In *Verschuur* UNDT/2010/153<sup>3</sup>, Respondent argued that the decision to cancel a vacancy announcement is within the discretionary authority of the head of office or programme manager. The Tribunal held very crisply that “[n]owhere in the Rules is this discretion to cancel a vacancy



Respondent to any staff regulation or rule administrative issuance that would

## Irreparable damage

### *Submissions*

39. The Applicant submits that he would suffer irreparable harm in that his career prospects will be affected. He submits that suspension of action is the only remedy available to him which can prevent the Administration from unlawfully cancelling the vacancy announcement with the sole purpose of not appointing him to the post. Additionally, implementation of the decision will render his management evaluation request moot.

40. The Respondent made no submissions on irreparable damage.

### *Considerations*

41. If the order for suspension is not granted the Applicant runs the risk of not being able to be considered for the post for which he applied and as his counsel rightly pointed he might not have such chance again in the near future. *The Honki* UNDT/2009/016 this Tribunal stated:

In deciding whether an interim meas

Case No. UNDT/NBI/2013/003

Order No.: 029 (NBI/2013)

47. When there is no reply or the reply amounts to a “no reply”, as in the present case, the Tribunal will have to hold a hearing as was done in the present case. When faced with a situation where there is no reply the Tribunal is placed in an invidious situation given the very tight time limits for the determination of the application.

48. In the present matter,