UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/003
Order No.: 029 (NBI/2013)
Date: 30 January 2013
Original: English

Before: Judge Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

JANNOUN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Alexandre Tavadian, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat
Bérengère Neyroud, ALS/OHRM, UN Secretariat

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 Human Resources Management (OHRM) in New York be disclosed.

5. By Order No. 025 (NBI/2013), the Tribunal granted the Applicant's motion and ordered the Respondent to produce the requested evidence. In his response to Order No. 025, the Respondent informed the Tribunal that he does not currently have the requested documents in his possession and that the consultation between ESCWA and OHRM with respect to the job opening took place via teleconference.

6. On 29 January 2013, the Tribunal held an 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-3 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. On 29 October 2012, ESCWA wrote to the Department of Safety and Security ("DSS") to request clearance of the selected candidate, which was subsequently denied.

10. On 12 December 2012, he requested management evaluation of the decision not to select him for the contested post ("the contested decision"). The outcome of this request for management evaluation is still pending.

11. On 27 December 2012, ESCWA informed the selected candidate that the Offer of Appointment had been revoked due to the absence of clearance from DSS. On the same day, the Officer-in-Charge of the Administrative Services Division ("OIC/ASD") forwarded the names of the remaining recommended candidates, including the Applicant, to DSS for clearance prior to the submission of the names to the Executive Secretary, ESCWA, for selection.

12. In a response dated 05 January 2013 to the OIC/ASD, the Director, DSS, stated that after a careful review of the candidates' availability, experience and

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 OHRM 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 ESCWA 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 decision because no decision has been taken by the Administration to cancel the vacancy announcement. In this respect, the Respondent submits that ESCWA has merely sought advice from OHRM on the issue. That is taking a very cursory view of the purport of articles 2.2 of the Statute and 13 of the Rules. It has been decided in a number of cases what an administrative decision is. For example the United Nations Appeals Tribunal (the "Appeals Tribunal") has held in *Andati-Amwayi* 2010-UNAT-058 that "[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision".

16. When the Administration starts a process of recruitment that may afford a potential candidate a promotion in his or 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 on 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 action 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. Though 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 ESCWA 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, i.e. *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 the 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 a further 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 v. Bealey (1884) [28 Ch.D. 688 at p. 698] the court stated that the necessary conditions to 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 *Inspira* 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 this 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 application is moot since ESCWA has not made a decision to cancel the job opening but 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 sec. 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 s/he considers to be best suited for the Post.

29. The Tribunal notes that sec. 9.2 obligates 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, the 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 *Inspira* Recruiter's Manual[1] 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[2], 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 on the part of the Programme Manager provided for".

32. Mr. Iyamah gave evidence that he was aware of the prohibition placed on managers by chapt. 11.4 and yet, to the Tribunal's surprise, he still proceeded to seek "advice" from OHRM on a matter that Administration has ruled on as being prohibited! In this respect, the Tribunal notes that it has not been directed by the

[1] This is the manual for the recruiter on the staff selection system (release 3.0 of 10 October 2012). See also chapter 11.3 of the Hiring Manager's Manual (release 3.0 of 10 October 2012).
[2] See also *Contreras*, UNDT/2010/154.

Respondent to any staff regulation or rule or administrative issuance that would permit OHRM to authorize the cancellation of a vacancy announcement subsequent to CRB endorsement of qualified candidates.

33. In light of the foregoing, the Tribunal finds that the legal framework under which the selection process for the contested post was conducted does not authorize the cancellation of the vacancy announcement.

34. Thus, the Tribunal finds, in accordance with article 2 of its Statute and article 13 of its Rules of Procedure, that the Respondent's decision to cancel the vacancy announcement for the contested post is *prima facie* unlawful and that the Applicant has met his burden of proof in this respect.

Particular urgency

Submissions

35. The Applicant claims that he was informed on 21 January 2013 by the Administration that the vacancy announcement is to be cancelled imminently.

36. The Respondent made no submissions on urgency.

Considerations

37. Mr. Iyamah wrote to the Director, Strategic Planning and Staffing Division in OHRM on 14 January 2013 to remind her of their telephone conversation held the previous week on the cancellation of the selection process. She responded on 16 January 2013 reassuring him that she would revert "soonest".

38. In view of the fact that the word "soon" can mean shortly, rapidly, quickly or almost immediately, the Tribunal concludes that the cancellation of the vacancy announcement may be imminent. Thus, there is particular urgency in this matter.

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 position for which he applied and as his counsel rightly pointed he might not have such a chance again in the near future. In *Tadonki* UNDT/2009/016 this Tribunal stated:

> In deciding whether an interim measure should be ordered, courts in most national jurisdictions are guided by the following principles:
>
> (i) There must be a serious issue to be tried and the claim must not be frivolous and vexatious;
>
> (ii) The Tribunal should consider the balance of convenience. This requires the Tribunal to consider the adequacy of damages and whether, if the Applicant were to succeed on the merits of the case, he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the action of the Respondent. If the Tribunal considers that damages would be an adequate remedy and the Respondent is capable of paying such damages then an injunction will not be granted.

42. Additionally, the Tribunal held in *Tadonki* that:

> The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is

> able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

43. In view of the foregoing, the Tribunal finds that the Applicant has established the element of "irreparable damage".

Conclusion

44. The Applicant has raised a *prima facie* case that the decision was arguably unlawful, that the matter is of particular urgency and that he will suffer irreparable damage from its implementation.

Decision

45. In view of the foregoing, the application for suspension of action is granted pending a response from the Management Evaluation Unit on the Applicant's request for management evaluation.

Closing remarks

46. When the Tribunal is in the presence of an application for suspension of action, the Respondent must be informed of the same and the decision must be made within 5 working days of communication of the application to the Respondent. A delay is given to the Respondent to reply and invariably, the Respondent will file a comprehensive reply, which enables the Tribunal to deal with the application from an informed perspective. It is on rare occasions that the Tribunal will hold a hearing when it is seized of a well-reasoned reply from the Respondent.

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 a scanty 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, after the Tribunal had perused the reply of the Respondent, it was clear that issues were joined only on the fact that there was an absence of an administrative decision. A hearing was held at short notice and surprisingly enough, in the course of the testimony of Mr. Iyamah, a vital piece of evidence was referred to that related to a 5 January 2013 recommendation of DSS to cancel the vacancy announcement. Regrettably, this vital piece of evidence was withheld from the Tribunal by Mr. Iyamah until 29 January 2013 even though an Order had been issued directing the production of evidence by the Respondent on 28 January 2013.

49. In all cases before the Tribunal, the Respondent is the Secretary-General but decisions are taken in his name by a host of agents. If such an agent, ESCWA in the present case, decides to withhold information from the Secretary-General then the latter is placed in a very difficult situation before the Tribunal. Why Mr. Iyamah decided to hide this very vital piece of information from the counsel appearing for the Respondent will be a matter for the Secretary-General to determine.

Signed

Judge Vinod Boolell

Dated this 30th day of January 2013

Entered in the Register on this 30th day of January 2013

Signed

Jean-Pelé Fomété, Registrar, Nairobi