



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/106  
Order No.: 338 (NY/2010)  
Date: 31 December 2010  
Original: English

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Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

PHILIPPART

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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ORDER

SUSPENSION OF ACTION

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Counsel for Applicant:  
Esther Shamash, OSLA

Counsel for Respondent:  
Kong Leong Toh, UNOPS

## Introduction

1. On 23 December 2010 the Applicant filed an application for a suspension of action of the decision not to extend his contract beyond its expiration on 31 December 2010. The Applicant filed a request for management evaluation on the same day.
2. On 28 December 2010 the Respondent filed a response to the Applicant's application. On 30 December 2010 a hearing was held, at which the Applicant's Counsel was present personally. Counsel for the Respondent and the Applicant attended via telephone link from Denmark and Laos respectively. On the morning of the hearing the Respondent filed and sought to introduce further documents, which due to the urgent nature of the proceedings, were introduced to the case record (although, as discussed below, there were objections as to the admissibility of certain evidence contained sought to be introduced in these submissions).
3. In his reply the Respondent reserved the right to raise the issue of receivability, contending that it was unclear whether the Applicant had filed a valid request for management evaluation. At the commencement of the hearing, Counsel for the Respondent stated that he was not pursuing this issue.

## Facts

4. From 5 June 2005 to 15 February 2009 Applicant worked as an Associate Expert with the UN Office on Drugs and Crime ("UNODC").
5. On 16 February 2009 the Applicant began working as a consultant with the UN Office for Project Services ("UNOPS"), for the United Nations Inter-Regional Crime and Justice Research Institute ("UNICRI") in Laos. He was on a two-month

6. On 1 July 2009 the Applicant was appointed as a Programme Manager with UNOPS, on an appointment of limited duration (“ALD”), for UNICRI. The Applicant’s letter of appointment, on 30 July 2009, stated that the contract was of one year and six months’ duration and was set to expire on 31 December 2010. The letter of appointment stated at Part II that “[t]he appointment shall expire on [31 December 2010] without prior notice, unless extension is mutually agreed and executed [by the Applicant and UNOPS]”. In Part V, the Special Conditions, the letter of appointment also stated *inter alia*:

This appointment is limited to service with UNOPS in the capacity of Programme Manager under UNOPS Project 00071445, and therefore gives [the Applicant] rights and obligations solely vis-à-vis UNOPS.

...

This appointment carries no expectancy of renewal or of conversion to any other type of appointment in any activity of UNOPS or any other UN Organization.

From the parties’ submissions, it is apparent that “UNOPS project 00071445”, which the Applicant was appointed to, is a project entitled “Specialised Training of the Judiciary and Law Enforcement Authorities to Address Organised Crime and Global Challenges Enhancing Capacity Building of the Lao Criminal Justice System” (“the Project”). The Respondent’s submissions also

8. On 26 August 2010 the Donor sent ~~ad~~ to the OIC, UNICRI, expressing, *inter alia*, dissatisfaction that 70% of the ~~Donor~~-supplied funds for the Project had been spent, without any tangible output ~~and~~ with significant delays to the Project. The letter further stated that the ~~OS~~ report of 17 August 2010 had not provided enough detail on the reasons for the ~~ys~~ ~~an~~ or a satisfact



14. On 3 December 2010 the Applicant wrote to his superiors to ask whether the UNICRI office in Laos would be closing at the end of the year. On 4 December 2010 the Head of Training and Advanced Education wrote back to the Applicant, stating:

[A]pparently the Donor is asking for further information before cutting the funds. Could you please contact them and ask what kind of information they need or in which form? In fact, from their letter it's not clear at all. By the way, it's not clear as well why they are asking for such information if a negative decision from their side seems to be already taken.

15. On 6 December 2010 the Applicant received a separation letter from UNOPS, dated 2 December 2010 and effective 31 December 2010. The letter did not refer to the reasons or circumstances of the end of the Applicant's appointment, but merely dealt with administrative arrangements in relation to his separation.

16. On 8 December 2010 an agency called "Lux-Development" (that is, apparently a separate entity to the Donor) wrote to the OIC, UNICRI referring to a project (unrelated to the project referred to at para. 5 of this Order) entitled "Strengthening the Rule of Law through Legal University Education". This letter informed the OIC that this agency had decided to terminate the agreement relating to this project and provided a 90-day notice period, from 9 December 2010 to 8 March 2011. At the hearing, the Respondent sought to introduce this letter into evidence, stating that it was relevant as it showed that the Government of Luxembourg intended to withdraw financial support for Laotian projects regardless of whether or not the Applicant was personally performing. The Applicant's Counsel objected to this being introduced as evidence on the basis that a separate Government agency's decision to withdraw funding on a separate project was irrelevant to the Project. I reserved my determination as to whether or not the letter was admissible or of any probative value; this question is discussed further below in the considerations on *prima facie* unlawfulness.

17. On 9 December 2010 the Applicant wrote to the OIC and the Head of

required, further corroborate that as late as 14 December 2010, no decision had yet been made by the Donor to discontinue funding for the Project. This is to say, that on 2 December 2010, at the time that the Applicant's separation letter was sent, it was not actually known whether or not there would be continued funds available for the project. It follows from this that UNICRI's representation to the Applicant, according to which his contract could not be extended due to a lack of funding, is disingenuous.

b. The Applicant has a right that a decision not to extend his appointment be decided based on accurate information. As established in *Corcoran* UNDT/2009/071, when the Administration "gives a justification for [the] exercise of discretion, the reasons must be supported by the facts".

c. In this instance, the Applicant's right that the administrative decision not to extend his contract be well-founded and reasonable has been violated. UNICRI's inaccurate statements regarding the reasons for his non-extension give rise to the inference that the decision not to extend his contract was motivated by some ulterior and unlawful motive. Further, in making the decision to write directly to the Donor, laying the blame for delays in implementation of the Project squarely on the Applicant's door without so much as consulting him (or giving him a chance to rebut), and absent any mechanism of performance review that might substantiate these claims, management has not only breached the Applicant's right to be treated in good faith, but has caused considerable harm to his future career prospects. That the administration has chosen not to extend the Applicant's contract at the UN, and at the same time has seen fit to so closely prejudice his chances of gaining future employment by unilaterally writing an unsubstantiated letter to the Donor about his alleged under-performance, demonstrates a reckless disregard for the staff member's professional reputation, is inappropriate and unprofessional, and is a breach of the Administration's obligation to treat its



staff fairly and in good faith, and to refrain from arbitrary decisions, or decisions inconsistent with proper administration.

*Urgency*

d. The Applicant's contract is due to terminate on 31 December 2010. Once he is separated he will no longer be able to pursue his case effectively, and he will be out of work which will have severe economic consequences on his well-being (see *Rasul* Order No. 23 (NBI/2010)).

*Irreparable harm*

e. The Applicant has a solid performance record in the UN for several years, as demonstrated by his performance evaluations. If the Applicant's contract is not extended, he will be forced to separate from service. Under these circumstances, he will no longer be able to pursue his case effectively, and this will impact on his future chances of continuing his work for the UN. Further, his future employment prospects outside of the Organisation will also be adversely affected due to the letter sent by UNICRI to the Donor. This unilateral decision, if allowed to stand, will cause him irreparable harm.

Respondent's submissions

22. The Respondent's primary contentions may be summarised as follows:

*Prima facie unlawfulness*

a. The Applicant served on an ALD which was due to expire on 31 December 2010. An ALD does not carry any expectancy of renewal.

b. The Applicant's contract was not extended due to a lack of funding, not underperformance as he suggests. UNICRI is a project-based Institute and project officers' salaries, including the Applicant's, are fully covered by funds directly linked to projects funded by donor countries. The Applicant's project





The Dispute Tribunal shall be competent to hear and pass judgement 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.

24. 24. Article 13.1 of the Tribunal's Rules of Procedures states as follows:

The Dispute Tribunal shall order a suspension of action 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.

25. In accordance with the plain reading of the Statute and Rules of Procedure, the Tribunal must determine whether an Applicant satisfies the requirements of *prima facie* unlawfulness, particular urgency and irreparable harm, in which case the Tribunal shall suspend the contested decision. Each of these requirements will thus be examined below.

#### *Urgency*

26. Given that the Applicant's contract expires on 31 December 2010, the circumstances are urgent. Further, he has been diligent in taking action in relation to the decision—he was notified on 1 December 2010 of his potential separation, but it was unclear, as explained below, whether or not this would actually occur. He did not receive the separation letter until 6 December, and enquired as to the reasons on 9 December 2010 before filing a request for management evaluation and the present application two weeks later. The Tribunal finds that the element of urgency is satisfied and the Respondent correctly conducted his at the hearing of the matter.

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that the Applicant's performance (whether good or bad) is essentially irrelevant, as the Project was bound to be terminated due to the Donor's position.

31. The Tribunal must therefore assess, at the *prima facie* standard required in proceedings such as the instant one, the propriety of the events leading to and the reasons given for the non-renewal of the Applicant's contract. This includes assessing the likelihood of the reasons proposed by the Respondent (the lack of continued funding) against that proposed by the Applicant (alleged performance inadequacies).

32. I note firstly that it is clear from the evidence and the record currently before the Tribunal that no final decision has been made with regard to the funding or the continuation of the Project. I say so for the following reasons:

a. This is clearly evident from the Donor's letter dated 26 August 2010 to the OIC rejecting the report of activities by UNICRI as it:

[D]oes not provide sufficient detail on the reasons for the delays and the expenses incurred, nor does it provide a satisfactory proposal for the continuation of the project ...[and therefore] cannot [be accepted] in its present form.

This letter concludes that:

[I]n accordance with paragraph 7 of the project document, we would like to be informed if and when the product is subject to examination by the United Nations internal audit division or the United Nations board of ordered auditors and receive communication of its results. We

obligation, pursuant to article 4 of the convention [agreement] of 19 February 2009, to request that UNICRI produce a report of activities in due form within a month, in the absence of which the [the Donor] finds itself obliged to resile from the convention [agreement] [emphasis added]”.

c. There is no formal notice from the Donor terminating the Project.

33. Next, I address the Respondent’s argument that the Applicant received his salary from UNOPS funds (rather than the Donor’s funds) from September 2010 and that it is therefore clear that there is no funding for his ongoing position, which justifies his non-renewal. This argument does not advance the Respondent’s case, primarily because, as already mentioned, there is no reservation or condition in the Applicant’s letter of appointment that his contract shall only continue as long as funds are provided by the Donor. On the contrary, the letter of appointment speaks expressly of the possibility of a mutually agreed renewal, and in terms of limitations only states that the Applicant’s employment is in respect of the particular Project, which, in the absence of any termination from the Donor, I find it reasonable to conclude remains ongoing at this stage. This is unlike the situation in *UNDT/2009/096*, in which the Applicant was employed on condition that her “fixed term appointment is limited to service with [specific office] and subject to availability of funds”. The Applicant in the instant case is appointed for the duration of the Project, which according to the evidence currently before the Tribunal has not been terminated. The Applicant should, moreover, not in these circumstances be expected to query where the funds comprising his salary came from.

34. Even having found that the Applicant’s appointment was not purely subject to the Donor continuing to provide funds, I will turn to the question of whether the Respondent has satisfactorily proved that there was a lack of continued funding, of which the Respondent was aware at the time of the contested decision. The Respondent’s argument is difficult to accept in light of the evidence. Firstly, the Donor sent a letter to UNICRI on 19 November 2010 threatening to withdraw from the agreement by which the Project was constituted in the absence of UNICRI





36.

38. I make further mention of a matter relating to the Applicant's performance as it may be relevant for the parties—particularly the Respondent—in their handling of further proceedings, if any. The Applicant suggests that his non-renewal was actually a result of the OIC and the Head of Training and Advanced Education at UNICRI having decided that his performance did not meet the requisite standard, an opinion evident from the sentiment communicated by them to the Donor in the letter of 15 October 2010. From a simple reading of the letter it is clear that the supervisors saw the Applicant's performance as an issue which was serious enough to jeopardise the Project. Amongst other things, they stated to the Donor that the Applicant had:

- a. failed to submit assessments or reports as required to allow the Project to proceed;
- b. failed to develop training curriculae in line with the Project's output requirements;
- c. caused delays to the Project as a result of his under-performance;
- d. required other UNICRI staff to perform duties which were his responsibility; and
- e. submitted revised budgets unilaterally in conflict with UNICRI policies.

39. The above criticisms were made of the Applicant to representatives of the Donor, which also happened to be the Government of which the Applicant is a national. They were made without the Applicant being advised of them and certainly without him being given an opportunity to rebut or defend himself in relation to them. Further, the tone employed by the Applicant's supervisors to him personally did not suggest that they held this opinion—apart from the email of 7 September 2010 asking him to propose ways to deal with the Project's delays, no criticism of the Applicant by his supervisors is before the Tribunal. On the contrary, the Head of Training and Advanced Education's email of 1 December 2010 notifying the Applicant of the potential non-extension of his contract mentions nothing of underperformance, instead stating that the reasons for the Donor's decisions are unclear and that "apparently, [the Donor] ha[s] no intention to find a solution for the project's sake". Aside from being disingenuous, the Head of Training and Advanced Education's tone is misleading as it suggests that it is entirely out of the Applicant's hands whether or not the Project will continue to be funded when in fact the Head of Training and Advanced Education had suggested to the Donor that the Project's failure was precisely the Applicant's fault. The fact that this was misleading was evident from the testimony that the Applicant gave that he was greatly surprised when he found out, through external contacts, of the Donor's criticisms of his performance.

40. It is also evident from documents regarding UNOPS' performance evaluation procedures (UNOPS Performance Results & Assessment Guidelines of January 2010), provided by the Respondent subsequent to the hearing at the request of the Tribunal, that there were procedural failures in relation to the assessment of the Applicant's performance. Without going into detail, these procedures require that all staff up to a D-2 equivalent level who serve at least six months in the assessment period be assessed, that unsatisfactory performance (which can result in separation) be recognised and addressed and that staff members have an opportunity to acknowledge and/or challenge unsatisfactory performance evaluations before an impartial rebuttal panel. These requirements are prerequisites to separation based on unsatisfactory performance, and it is clear that none occurred in respect of the

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*Utkina* in support of his contention that any loss to professional reputation or harm to career prospects can be fully compensated by an award of the appropriate compensation. The *Utkina* case is clearly distinguishable as there was no adverse comment made regarding the applicant in the case and her performance records were highly favourable. In this case, the Applicant was deprived of any consultation, let alone the appropriate evaluation procedure and his reputation has been seriously compromised and career prospects damaged.

44. I am not necessarily persuaded by the Applicant's argument that if he is separated from service it will be more difficult for him to advance his case in a substantive application before this Tribunal. I do, however, find that the Respondent has impugned the Applicant's professional

takes, administrative arrangements ~~can~~ be made to accommodate appointments of temporary duration after 31 December 2010.

46. The Applicant was appointed to and for the Project. No acceptable evidence has been put before me that the Project ~~has~~ been terminated. In light of the prevailing circumstances and the lengthy and very strong criticisms regarding the Applicant's performance, a reasonable inference ~~can~~ be drawn that the non-renewal of his contract was improperly based on performance-related conclusions or some other improper and undisclosed grounds. The Applicant has satisfied the requirements of the Statute and Rules of Procedure for granting of a suspension of action pending management evaluation and this relief will be granted.

#### Conclusion

47. It is ordered that a suspension of action on the decision not to renew the Applicant's contract ~~after~~ its expiry on 31 December 2010 is hereby granted, pending management evaluation.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 31<sup>st</sup> day of December 2010