UNITED NATIONS DISPUTE TRIBUNAL

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

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

PHILIPPART

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

SUSPENSION OF ACTION

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 the 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 contract, and received month-long extensions in April and May 2009, with a further brief extension until 30 June 2009.

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 therefore to expire on 31 December 2010. The letter of appointment stated at Part III that "[t]he appointment shall expire on [31 December 2010] without prior notice, unless an extension is mutually agreed and executed [by the Applicant and UNOPS]". Under 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 indicated that the funds for the Project, as for UNICRI projects generally are provided by an external entity—in this case one related to the Government of Luxembourg entitled "Fonds de Lutte contre les Stupéfiants" ("the Donor"). However, the Applicant's letter of appointment did not indicate that the continuation of his appointment was subject to the provision of these Project-specific funds from the Donor.

7. On 23 July 2010 the Officer-in-Charge ("OIC"), the Head of Training and Advanced Education Section, and the Programme Coordinator at UNICRI went on mission to Luxembourg to provide the Government (and, it appears, the Donor) with details and updates on UNICRI projects in Laos, including the Project. Following these meetings, on 17 August 2010 the OIC provided a written report on the Project to the Donor.

8. On 26 August 2010 the Donor sent a letter 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 OIC's report of 17 August 2010 had not provided enough detail on the reasons for the delays, nor a satisfactory plan for the continuation of the Project, and that therefore the Donor did not accept the report. The letter objected to the charging to the Project of UNICRI's headquarters' staff salaries and the travel expenses incurred when the OIC, the Head of Training and Advanced Education, and the Programme Coordinator of UNICRI had traveled to Luxembourg on 23 July 2010. The Donor requested more information and noted that it reserved the right to organise an audit-type evaluation of the Project's expenditure further stating that, in light of the complaints outlined in the letter, it would not disburse the next installment of Project funds.

9. The Donor's letter of 26 August 2010 was received by UNICRI on 7 September 2010. Immediately on receipt of this letter, the Head of Training and Advanced Education, UNICRI, emailed the Applicant stating that UNICRI had received a letter from the Donor regarding its concerns with delays in the Project. The Head of Training and Advanced Education requested the Applicant, as Project Manager, to send her a proposal to deal with the concerns relating to these delays. It is unclear whether the Applicant responded, although for the purposes of this Order this factual matter does not require determination.

10. In response to the Donor's letter of 26 August 2010, the Head of Training and Advanced Education wrote on 15 October 2010 to the Donor providing reasons for the delays in the Project and defending UNICRI's handling of its implementation. The reasons provided were numerous and included a change in the management at UNICRI, but the Head of Training and Advanced Education noted that problems with the Project were the result of, "most of all, the under-performance of the Programme Manager [i.e. the Applicant]". The letter contained many other serious criticisms

impugning the Applicant's performance by the Head of Training and Advanced Education.

11. On 19 November 2010 the Donor sent UNICRI a letter demanding further details regarding the Project within a month, threatening to otherwise withdraw funding. This letter is written in French, but at the hearing of the matter the parties agreed that an appropriate translation, as provided by the Registrar of the Tribunal and agreed to by both parties, was as follows:

> We note with regret that the report of activities (February 2009 – July 2010) has not been revised and that our questions and remarks mentioned in our letter of 26 August [2009] have still not found an appropriate or satisfactory response. As a consequence, we consider that UNICRI does not abide by the modalities of the convention [agreement] signed between the parties. It is for this reason that we see ourselves under the 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 Luxembourgeoise party [the Donor] finds itself obliged to resile from the convention [agreement].

12. On 30 November 2010 the Applicant emailed parties which he said included the Head of Training and Advanced Education, UNICRI, to advise that "information [was] circulating" that the Donor would not provide further financial support for the Project. He referred to this as "alarming" and asked for advice on how to proceed.

13. On 1 December 2010 the Head of Training and Advanced Education, UNICRI, emailed the Applicant, saying that the information the Applicant had provided was not a surprise, and noting that while UNICRI was aware of this decision by the Donor, she did not know the reasons for it, and the Donor had given no explanations. She further stated:

> Under the present circumstances and if the above information is confirmed (i.e. cut of funds from Luxembourg side), we regret to inform you that we won't be in the position to extend your contract after December [2010].

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 entitled "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 this 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 Training and Advanced Education at UNICRI to inquire as to the motives for the non-extension of his contract, as well as about the Project's status and funding.

18. On 10 December 2010 the Head of Training and Advanced Education responded to the Applicant that, as per her letter of 1 December 2010, the Applicant's contract would not be extended "due to the forthcoming cut of funds on [the Project] and frozen activities". She further stated that decisions on what would happen with the office in Laos had not been taken as no response had been received from the Donor.

19. On 14 December 2010 the Head of Training and Advanced Education emailed the Donor, noting again that UNICRI had been asked for a more detailed report and requesting further information by 16 December 2010 in order that this could be provided.

20. On 23 December 2010 the Applicant filed an application for suspension of action as well as a request for management evaluation.

Applicant's submissions

21. The Applicant's primary contentions may be summarised as follows:

Prima facie *unlawfulness*

a. On 19 November 2010 the Donor requested further information from UNICRI, and demanded that this information be produced within a period of one month, prior to taking a decision to discontinue funding for the project. It follows that by 19 December 2010, a decision had not yet been made by the Donor regarding the discontinuation of funding for the Project, and consequently, that no decision could have been made by UNICRI on this basis. The Head of Training and Advanced Education's emails of 10 and 14 December 2010, requesting information about the reporting details the Donor

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 reason 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 at 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 seriously 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

and position was entirely funded by the Government of Luxembourg, but UNICRI was instructed not to use any more of this funding since August 2010, including for salaries. As a result, the Applicant's salary was paid by UNOPS, despite all activities on the Project having been frozen. The Applicant was aware of funding troubles and had informed UNICRI of the difficulties with funding the Project based on his own conversations with the donor country.

c. The Applicant had not been given any legitimate expectation of renewal of his contract. The surrounding circumstances suggested that the Applicant's contract would not be extended.

d. In addition to the freeze on current funding, no further funding has been provided by the Government of Luxembourg beyond the end of December 2010. There is therefore no project in relation to which the Applicant could be employed beyond 31 December 2010, even if the suspension of action were to be granted.

e. In the letter of 15 October 2010 from UNICRI to the Donor, the management of UNICRI was simply responding to the Donor's rejection of the financial report and narrative which UNICRI had sent to them on 26 August 2010. There is no link between those comments in the letter and the non-renewal of the Applicant's contract, nor has the Applicant provided any persuasive evidence that supports the existence of such a link.

f. In the email dated 1 December 2010, the Applicant was informed that, despite repeated requests, no reply had been received from the Donor and that in those circumstances the Applicant's contract would not be extended beyond the end of December 2010. The attempt to request further clarification from the Donor on 14 December was simply an attempt to see if there was any possibility of resolving the situation. It does not mean that the Applicant's non-renewal was not based on accurate information. The information

available to the Applicant and the management of UNICRI suggested that funds were not available for the continuation of the Applicant's post. The Applicant himself was aware of the difficulties with funding for the project based on his own communications with the Donor. The letter of separation sent to the Applicant on 2 December 2010 was therefore entirely consistent with principles of sound administration, as it gave the Applicant notice of the fact that his contract would not be renewed beyond its expiry date.

Urgency

g. The Application cannot be said to be of particular urgency as the activities of the relevant project are frozen and the Applicant would not have any duties to perform even if the suspension of action were granted.

Irreparable harm

h. In accordance with the reasoning in *Utkina* UNDT/2009/086, the Applicant will not suffer any irreparable harm by virtue of the non-renewal of his contract for the following reasons. Firstly, there is no project upon which the Applicant could be employed even if his contract were extended. There can be no damage to career prospects by the non-renewal of a contract in circumstances where there is no work for the Applicant to perform. Secondly, if the Applicant maintains that he has suffered damage to his reputation by virtue of the comments sent to the Donor on 15 October 2010, these comments bear no connection to the non-renewal of his contract. Furthermore, the Applicant has not shown that any harm which may result from the comments on his performance would meet the standard of irreparable harm within the jurisprudence of the Tribunal.

Consideration

23. Article 2.2 of the Tribunal's Statute states as follows:

> 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 its Statute and Rules of Procedure, the Tribunal must determine whether an Applicant satisfies *all* of 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 conceded this at the hearing of the matter.

Prima facie *unlawfulness*

27. The Tribunal has held that, given the interim nature of the relief the Tribunal may grant when ordering a suspension of action, the threshold an Applicant must meet is that of a fairly arguable case as to the lawfulness of the contested decision, notwithstanding that it may be open to some doubt (see, e.g., *Buckley* UNDT/2009/064, *Corcoran* UNDT/2009/07).

28. As stated in the Applicant's letter of appointment, and in accordance with staff regulation 4.5(c) and provisional staff rule 4.13(c), fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. Provisional staff rule 9.4 further states that fixed-term appointments "shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". Exceptions to this rule have been found by the Tribunal, however, in cases such as where an express representation to the staff member of renewal or appointment is found, in the event of an abuse of the discretion whether to renew, or because of some other illegality relating to the non-renewal.

29. The Applicant's case is that the stated reason for his non-renewal—that there was no funding available for his post—is a false one. The Applicant suggests that the true reason for his non-renewal is that the Head of Training and Advanced Education and/or the OIC at UNICRI did not find his performance to be satisfactory, as detailed in the letter to the Donor of 15 October 2010. The Applicant says that this assessment is both procedurally deficient (in terms of any performance appraisal process) and, in any event, incorrect. His argument may thus be understood to be that if a false reason has been given (i.e. lack of funds), there can be no legitimate reason, or otherwise it would have been given instead of the false one—therefore the decision must be unlawful for having been made for an improper reason.

30. The Respondent's case, on the contrary, is that the Applicant's contract was not renewed, due to the withdrawal of the Donor's support. The Respondent argues

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 reason 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 furthermore reserve the right to organise an independent evaluation in coordination with the Lao counterpart and UNICRI. In view of the above comments and observations, you will understand we are not able at this stage to disperse the second instalment is mentioned in the report of activities.

b. The further letter from the Donor addressed to UNICRI on 19 November 2010 expressed regret that the report of activities had not been revised and that the issues raised in the 26 August 2010 letter had not been addressed satisfactorily. The Donor pointed out that if UNICRI did not abide by the agreement signed by the parties, "we see ourselves under the

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 *Utkina* 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

producing a report of activities in due form by 19 December 2010. Although the Tribunal is not seized with a copy of this agreement between UNICRI and the Donor, it is reasonable to infer that there is an obligation on the Donor's part to provide funding, in consideration of UNICRI's performance of its complementary obligation to produce various outputs relating to Judicial Training. Two things are evident from this correspondence of 19 November: (1) the Donor had committed not to make a firm decision to continue or discontinue the funding until at least 19 December 2010; and (2) there was a possibility for UNICRI to comply and provide the required report, in which event the funding would continue.

35. As a result, when the Head of Training and Advanced Education and the OIC at UNICRI wrote to the Applicant on 1 December 2010 foreshadowing that his contract would not be extended past 31 December 2010, they could not (and did not) state this conclusively, as they must have been aware that the Donor would not make this decision until at least almost three weeks later. Indeed, the Applicant's supervisors expressly recognised the conditionality of the situation, stating that (emphasis added) "*if* the … cut of funds from Luxembourg side" was confirmed they would not be in a position to extend his contract. The logical converse of this statement is that if the cut of funds was not confirmed, they would be in a position to extend the Applicant's contract. The conditional "if" meant the potential outcome of non-renewal may not have been unavoidable, and it therefore makes sense that the Applicant would have wanted to query on 3 December 2010 (a Friday) what was going to happen with the office in Laos. In response to his query, his Head of Training and Advanced Education wrote back to the Applicant on 4 December 2010 (a Saturday), stating that the Donor was asking for further information before cutting funding and asking the Applicant to write to the Donor in this regard—again confirming that the decision had not been made by the Donor yet. Regardless of this, upon his return to work on Monday, 6 December 2010, the Applicant received a separation letter from the Human Resources department of UNOPS.

36. The timing of events—specifically the date of the separation letter from UNOPS, i.e. 2 December 2010—suggests strongly that the Human Resources department had been advised to commence separation procedures while the Applicant was still being asked to write to the Donor to attempt to secure a continuation of funding on 4 December 2010. Certainly, it is clear that separation procedures had been commenced well prior to 19 December 2010, when UNICRI was supposed to find out whether or not funding would continue and would only then have been in a position to confirm this. Further, when the deadline stated in the letter of 19 November 2010 arrived, the Donor did not state a firm decision to continue or discontinue the funding. Certainly, there is nothing before the Tribunal to suggest this, and Counsel for the Respondent made no submission that this was the case. Quite on the contrary, the Respondent tendered a document evincing that the Donor government's related agency had on 8 December 2010 discontinued the funding of another project in Laos by way of an official termination notice, giving a period 90-day notice period. This clearly illustrates that projects of this nature are terminable in accordance with strict notice periods of some months as would be reasonably expected in agreements of this nature. Although the Applicant objected to the relevance of this document, I find that if anything it supports the Applicant's case (in this respect), as nothing is before the Tribunal to suggest a similar termination notice (or, indeed, any termination notice) has been served on UNICRI in respect of the Project. As noted, the Respondent was unable to furnish the equivalent or any similar letter with regard to the Project and the result of this is that the Project has not been terminated and the funding cannot be said conclusively to have been withdrawn, despite the existence of speculation that it may be.

37. Certainly, there was no definite knowledge on the Respondent's part that funding would not continue at the time the Applicant received his separation letter on 6 December 2010. The Respondent's actions in deciding not to renew or extend the Applicant in light of a potential discontinuation of funding may have been prudent on a practical level—this is not disputed. However, it was certainly not true at the time the Applicant was officially advised of his non-renewal that the Respondent knew

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 this 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 and 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 letter criticising 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

Applicant based on what is before the Tribunal. Therefore, had it have been argued that the Applicant was justifiably not renewed on the basis of performance, *prima facie* unlawfulness would still have been made out.

41. As stated in *Utkina* UNDT/2009/096, a decision need not be shown to be based *solely* on improper motives to be declared unlawful; it will be enough if an Applicant can show that the decision was influenced by some improper considerations and was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith. However, unlike *Utkina*, and also unlike *Wysocki* UNDT/2009/073, both of which cases found the non-renewal decision to have been properly based on lack of continuing funds, in the present case it is evident that the decision not to renew the Applicant was influenced by at least some improper considerations. For the above reasons, the Tribunal is satisfied of the *prima facie* unlawfulness of the decision.

Irreparable harm

42. Generally, harm will fail to satisfy the requirement that it be irreparable if it can be adequately compensated financially (see *Fradin de Bellabre* UNDT/2009/004, *Utkina* UNDT/2009/096). The Applicant must, however, be able to refer to a specific nature of harm that would result if the decision were implemented (see *Fernandez de Cordoba Briz* Order No. 186 (NY/2010)). The Dispute Tribunal has found that irreparable harm will result from a non-renewal and subsequent separation in circumstances similar to those in this case—see for example *Kasmani* UNDT/2009/063 and *Rasul* Order No. 23 (NBI/2010).

43. The Respondent's arguments in relation to irreparable harm are straightforward—that the Applicant fails to meet the test, as the harm, if any, may be compensated financially. The Applicant on the other hand states that if the decision is not suspended, not only will the Applicant be unemployed (which has been found by the Dispute Tribunal to constitute of itself irreparable harm), his future career prospects will be irreparably damaged. The Respondent places reliance on the case of

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 that case and her performance records were highly favourable. In this case, the Applicant was deprived of any consultation, let alone the appropriate evaluation procedures, 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 reputation by way of the letter of 15 October 2010. As a result, particularly given the criticism was made to those in the public service of a Government of which the Applicant is a national, it is reasonably appreciable that the Applicant will suffer irreparable harm in terms of damage to his reputation if he is unable to fully seek redress in relation to the comments made in that letter. I note the Respondent's contentions that the Applicant could later seek redress before the Tribunal if the pending management evaluation is not satisfactory to him, and that any criticism was not, in any event, related to the non-renewal. However, I find that if the Applicant has already been separated it will potentially be much more difficult for him to maintain to third parties that his non-renewal was not performance-related under these particular circumstances, even if the Tribunal were to award some sort of subsequent declaratory relief. Accordingly, I find it reasonable to conclude that if the contested decision is not suspended, irreparable harm to the Applicant's reputation and employability will result.

45. I note finally that the Respondent made an argument that the Applicant could not have continued on an ALD due to changes made in recent amendments to the Staff Rules—specifically with regard to staff rule 13.6(b) which states that there will be no 300-series appointments from 2011. This argument gains no traction for the Respondent's case, as it is clear that, regardless of the form the Applicant's contract

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 the 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 31st day of December 2010