

UPI and its non-compliance with Indonesian Manpower Law

Although the following primarily concerns the termination of employment of JP on October 9th 2006 and TC on October 11th 2006 by Ukrida Penabur Internasional, a programme of Yayasan Bada Pendidikan Kristen Penabur of Jl. Tanjung Duren Raya No.4, Grogol, Jakarta Barat 11470, there are implications concerning all former and current expatriates employed supposedly as native speaker English teachers (NETs).

The 'Act of the Republic of Indonesia, Number 13 Year 2003 concerning Manpower' (hereinafter the Act) covers the employment of expatriate workers such as the NETs. The following Articles are taken from an unofficial translation of the Act made by the Jakarta office of the International Labour Organisation (ILO) and found online at:

<http://www.ilo.org/public/english/region/asro/jakarta/download/18glrepin.pdf>

In December 1998, a *Letter of Intent* was agreed between the Government of Indonesia and the ILO, in which the Government reaffirmed its commitment to ratify all the ILO core Conventions with the ILO committing in turn to provide technical assistance for the ratification and implementation of those Conventions. Indonesia later became the first country in the Asian region to ratify all eight ILO core Conventions.

It may be argued that these conventions mainly concern *freedom of association and protection of the right to organize* and has no bearing on summary and arbitrary dismissal. This would be a fallacious argument.

Firstly, in the **Preamble to the Act, subsection (d)** states: *That protection of workers is intended to safeguard the fundamental rights of workers and to secure the implementation of equal opportunity and equal treatment without discrimination on whatever basis in order to realize the welfare of workers/ labourers and their family by continuing to observe the development of progress made by the world of business;*

Expatriate workers are treated as a 'special' workforce, with particular regards to the categories of employment, the process of registration and the issuing of visas and permits of such workers and the Skill & Development Fund fee (DPKK - *Dana Pengembangan Keahlian dan Ketramampilan*) of US\$100 per month levied on each expatriate worker by the Department of Manpower (Depnaker - *Departemen Tenaga Kerja*).

The latter is presumably covered by **Article 47**: *Employers are obliged to pay compensation for each worker of foreign citizenship they employ. This may not apply to government agencies, international agencies, social and religious undertakings and certain positions in educational institutions.*

There is no regulation which states that expatriate workers are excluded from any labour laws, either those of Indonesia or those of the ILO. If there were, it would run counter to **subsection (d)** quoted above.

Firstly, regarding **contractual obligations** implicit and explicit in the employment of TC and JP and all NETS by UPI:

Article 57

(1) *A work agreement for a specified period of time shall be made in writing and must be written in the Indonesian language with Latin alphabets.*

An Indonesian version has never been provided.

(2) *A work agreement for a specified period of time, if made against what is prescribed under subsection (1) shall be regarded as a work agreement for an unspecified period of time.*

The non-provision of any new work contracts for the period January 2005 until June/July 2006 is presumably covered in this sub-section.

(3) *If a work agreement is written in both the Indonesian language and a foreign language and then differences in interpretation between the Indonesian text and the one in the foreign language arise, then the Indonesian version of the agreement shall be regarded as the authoritative one.*

As no Indonesian version was ever tabled, this does not apply.

Article 58

- (1) *A work agreement for a specified period of time cannot stipulate a probation period.*
- (2) *If a work agreement as referred to under subsection (1) stipulates a probation period, however, the probation period shall then be declared null and void by law.*

UPI includes a probationary period of six months in an initial one year contract.

Both JP and TC, by virtue of having been employed for longer than the initial one year contract, must be considered to have 'passed' the probationary period on the grounds of satisfactory performance.

Article 59

- (2) *A work agreement for a specified period of time can be extended or renewed.*
- (7) *Any work agreement for a specified period of time that does not fulfill the requirements referred to under subsection (1), subsection (2), subsection (4), subsection (5) and subsection (6) shall, by law, become a work agreement for an unspecified period of time.*

Our presumption is that in the case of JP for the period of August 9th 2004 - July 15th 2006 and that of TC from August 8th 2004 to the present, the contracts we signed with UPI remained or, in the case of TC, remains valid.

In the case of TC, in the absence of a written agreement or letter of intent, the fact that he was awarded an increase in salary at the same time, the beginning of August 2006, as the other NET employees is an indication of the intent of UPI to continue with his employment for the same period of time as the other employees.

Article 63

- (1) *If a work agreement for an unspecified period of time is made orally, the entrepreneur is under an obligation to issue a letter of appointment (surat pengangkatan) for the worker.*
- (2) *The letter of appointment as referred to under subsection (1) shall at least contain information concerning:*
 - a. *The name and address of the worker;*
 - b. *The date the worker starts to work;*
 - c. *The type of job or work that the worker is supposed to do;*
 - d. *The amount of wage that the worker is entitled to.*

An oral agreement was made in early August at a meeting between Susiana Gunawan (SG), the UPI Business Manager, and TC who asked for a written agreement. This was never provided, in spite of SG's handshake and oral agreement to provide one.

Termination of Employment

The contract initially signed by both JP and TC in 2004, and in the case of TC considered to be still current, had **Terms and Conditions** attached. The contracts signed by all NETs except TC in 2006 had no new **Terms and Conditions** attached. It is therefore presumed that the original Terms still apply, as follow:

1.7 Suspension and Dismissal

- 1.7.1 *The Employer reserves the right to suspend an employee with or without pay if the alleged conduct by the Employee is deemed sufficiently serious.*
- 1.7.2 *The Employer may dismiss the Employee summarily and without notice if the Employee*
 - 1.7.2.1 *has concealed a criminal conviction for child abuse or other serious offence in Indonesia or elsewhere.*
 - 1.7.2.2 *is convicted of child abuse or other serious offence.*
 - 1.7.2.3 *has been convicted for an illegal act in Indonesia.*

None of the above applies to JP or TC.

Further 1.4 Non renewal of contract

The non renewal of contract will be made by the Board via the Head of Program and as a general rule the Employee will be told no later than 90 days prior to the last day of the contract. It is the

responsibility of the Head of Program to ensure that natural justice and due process are followed to minimize surprise, hardship and embarrassment to the individual concerned. Non-renewal of contract may occur:

1.4.1 *If the Head of Program is satisfied that there is sufficient evidence that the Employee has not performed at or to a satisfactory standard. In such instances the Head of Program will make a serious effort to assist the employee to correct weakness and to meet program standards. These standards are laid out in the documentation relating to Annual Performance Evaluation, which applies to all employees during a contract term.*

1.4.2 *If the grounds for non-renewal are not related to performance, the Head of Program, after consultation with the Board, will inform the individual concerned in writing as clearly as possible the reasons for non-renewal.*

This section refers to the non-renewal rather than termination of UPI contracts of employment. However, that UPI gave JP and TC thirty (30) days notice, rather than the agreed ninety (90) without clearly stated reasons is manifestly in breach of the contract agreed between both parties and given various articles of the Act is presumably on file with the appropriate government departments.

Furthermore, in correspondence Susiana Gunawan describes herself as Business Manager rather than Head of Programs which was the job title of Sonny Hartono who employees were given to understand she had replaced. However, as she does not occupy the office space he did and there is no connotation in her job title that she has competence to deal with education matters or to supervise NETs, it is unclear as to the status of her authority. At no time have employees been informed in writing by BPK Penabur of her responsibilities.

The Letters of Termination to JP and TC were signed by DN, a British citizen and the then Teacher Co-ordinator. Article 46 (1) states: *No worker of foreign citizenship is allowed to occupy positions that deal with personnel..*

Another consideration is that sponsorship of those NETs who have the required residence and work permits is by BPK Penabur and not UPI. Other than documentation from August 2004, the start of the programme, no evidence has been provided to NETs that UPI has the competence to hire and fire employees.

It is therefore argued that the termination of employment of JP and TC is completely *ultra vires*. The same can be argued for most of the 15 NETs who have left the employ of UPI since the start of the programme in August 2004.

That argument aside, UPI has infringed the following Articles of the Act.

Rules and Regulations

Article 106

(1) *Every enterprise employing 50 (fifty) workers or more is under an obligation to establish a bipartite cooperation institute.*

UPI may soon have 50+ NETs; however, at this time we can state with certainty that UPI employs more than 10 NETs, in which case **Article 108** applies:

(1) *Every enterprise which employs no less than 10 (ten) workers is under an obligation to create a set of enterprise rules and regulations that shall come into force after being made legal by Minister or another government official appointed to act on behalf of the Minister (unless (2) a collective work agreement already exists.)*

Article 110

(1) *Enterprise rules and regulations shall be formulated by taking into account the recommendations and considerations from the worker's representatives of the enterprise.*

There is little evidence that UPI has taken into account recommendations and considerations from the worker's representatives, other than the provision of 'pay slips' from March 2006 and pay being transferred into accounts before the end of the month.

Article 111

- (1) *Enterprise rules and regulations shall by no means run against any valid statutory legislation.*
- a. *The rights and obligations of the entrepreneur;*
 - b. *The rights and obligations of the worker;*
 - c. *Working conditions/ requirements;*
 - d. *Enterprise discipline and rule of conduct;*
 - e. *The period of their validity [during which the enterprise rules and regulations in question shall be valid];*
- The validity of enterprise rules and regulations shall last for no longer than 2 (two) years and shall be subjected to revision upon their expiration.*

Article 113

- (1) *Any changes to enterprise rules and regulations prior to their expiration can only be made on the basis of an agreement between the entrepreneur and the worker's representatives.*

At no time has there been an agreement between teacher representatives and UPI management regarding changes to the working conditions.

NB. From August 2004, the start of the UPI programme, until the posting of this article online in mid January 2007, there have been four Teacher Co-ordinators, two of whom, LH and FB, were active in representing the interests of the NETs. Both reported that no notice was being taken of NET recommendations. Both subsequently left suffering from ill health.

Article 114

The entrepreneur is under an obligation to tell and explain to the workers [all] the enterprise rules and regulations and [all] changes made to them [if any].

The only 'enterprise rules and regulations' known to exist are the Terms and Conditions and Job Description issued in August 2004, which, to our knowledge, since January 2005 have not been issued to newly recruited NETs.

Presumably the original Terms and Conditions of Employment were approved by the Minister of Manpower or *another government official appointed to act on behalf of the Minister* as stipulated in **Articles 112, 113(2) and 115**. They must, therefore, still be in force. It is clear that (bar one NET dismissed for the consumption of beer in his lunch break) all dismissals have been made in contravention of these rules.

Therefore **Article 62** regarding the termination of employment during the term of a contract is pertinent to the majority of those summarily dismissed:

If any one of both sides in a work agreement for a specified period of time shall terminate the employment relation prior to the expiration of the agreement, or if their work agreement has to be ended for reasons other than what is given under subsection (1) of Article 61 (e.g. death of employee), the side that terminates the relation is obliged to pay compensation to the other side. The amount of the compensation pay shall be the same as the amount of wages that the worker in the work agreement is entitled to receive from the point of termination until the expiration of the agreement.

That no pay or compensation has been paid to either JP or TC, including that specified in their Letters of Termination, is in direct contravention of this Article.

UPI's non-compliance with other sections of the Act.

Article 95

- (2) *Entrepreneurs who pay their workers' wages late either by design or because of neglect shall be ordered to pay a fine whose amount shall correspond to a certain percentage from the worker's wages.*

Until April 2006, salaries and overtime payments were consistently paid late.

Article 86

- (1) *Every worker has the right to receive:*
 - a. *Occupational safety and health protection;*
 - b. *Protection against immorality and indecency;*
 - c. *Treatment that shows respect to human dignity and religious values.*
- (2) *In order to protect the safety of workers and to realize optimal productivity, an occupational health and safety scheme shall be administered.*
- (3) *The protection as referred to under subsection (1) and subsection (2) shall be given in accordance with valid statutory legislation.*

1a and 2

Until August 2006 no health insurance was provided. This resulted in considerable stress for a few employees. In one case, an employee in Jakarta checked himself out of hospital suffering from concussion following a motorcycle accident as he was uncertain as to whether UPI would cover his medical expenses. Further, a colleague in Bandung had to sell a plot of land in order to pay for the hospital treatment of her sister, a fellow NET, who subsequently died.

3

To our knowledge, UPI has not registered its NETs with ASKES, the government health insurance programme, as required by law.

1c

The termination of employment of TC during the fasting month and just prior to Idul Fitri, with the knowledge that the family of TC celebrates this most important Muslim festival, had absolutely no regard to religious values, and, in fact, flouted them in a most non-Christian manner. It caused great distress to TC's wife and family.

Article 92

- (1) *Entrepreneurs shall formulate the structure and scales of wages by taking into account the functional and structural positions and ranks, the occupation, years of work, education and competence of the worker.*

There is no salary scale as might be expected in the employment of teachers. Each NET is expected to negotiate his/her pay with the business manager. This is considered by the NETs to be demeaning. (cf. **86.1c.** above)

Termination of Employment

Article 150

The provisions concerning termination of employment under this act shall cover termination of employment that happens in a business undertaking which is a legal entity or not, a business undertaking owned by an individual [sole proprietorship], by a partnership or by a legal entity, either owned by the private sector or by the State, as well as social undertakings and other undertakings which have administrators/officials and employ people by paying them wages or other forms of remuneration.

Although Yayasan Badan Pendidikan Kristen Penabur is the sponsor of work permits etc. of the NETS, Ukrida Penabur Internasional is the sub-organisation involved in the day-to-day management of the NET programme.

Any termination of employment that takes place for reasons referred to under subsection (1) shall be declared null and void by law. The entrepreneur shall then be obliged to reemploy the affected worker.

Article 153

This subsection refers to termination of employment on a number of grounds such as breast feeding, membership of a trade union or reporting to the authorities the crimes committed by the entrepreneur/employer. This last is not relevant as we are reporting the crimes after their termination of employment.

Perhaps the only sub-subsection that is relevant is (i) which states that termination of employment will be null and void *because the worker is of different understanding/ belief, religion, political orientation,*

ethnicity, color, race, sex, physical condition or marital status.

The dismissal of TC took place during Ramadhan. It is known that in order to have a legal marriage in Indonesia, TC adopted Islam.

Article 161

(1) In case the worker violates the provisions that are specified under his or her individual work agreement, the enterprise's rules and regulations, or the enterprise's collective work agreement, the entrepreneur may terminate his or her employment after the entrepreneur precedes it with the issuance of the first, second and third warning letters consecutively.

No violations of the work agreements of either JP or TC have been specified, nor have written warnings been issued to either. (Nor have oral warnings.)

The following is taken from the Letter of Termination of Employment issued to JP.

Jakarta, October 9, 2006

Dear JP

It is with regret that UPI have decided to issue you with 30 days notice of the termination of your employment from today's date. This is in accordance with section 12.3 of your contract.]

This states as follows:

Without prejudice to any other provisions for termination (which relate to criminal acts) contained in this Agreement, UPI is entitled to terminate this Agreement, and thereby the Employee's employment with UPI, by giving at least 30 days' written notice to the Employee.

In other words, no reason need be given and UPI has given itself the right to summarily dismiss any employee who signed the contract issued in July 2006. Details of the coercive tactics used by UPI to ensure that the contracts are signed are given elsewhere.

Article 169

A worker may make an official request to the institute for the settlement of industrial relation disputes to terminate his/her employment relationship with his/ her entrepreneur if:

(1) The entrepreneur has battered, rudely humiliated or intimidated the worker.

Article 170

Any termination of employment that is carried out without fulfilling what is stipulated under subsection (3) Article 151(a) and Article 168 (b) except subsection (1) of Article 158 (c), subsection (3) of Article 160 (d), Article 162 (e), and Article 169 (f) shall be declared null and void by law and the entrepreneur is obliged to re-employ the affected worker and pay all the wages and entitlements which the affected worker should have received.

(a) If the negotiation as referred to under subsection (2) fails to result in any agreement, the entrepreneur may only terminate the employment of the worker after receiving a decision/a permission to do so from the institute for the settlement of industrial relation disputes.

(b) An entrepreneur may terminate the employment of a worker if the worker has been absent from work for no less than 5 (five) workdays consecutively without submitting to the entrepreneur a written account.

(c) An entrepreneur may terminate the employment of a worker because the worker has committed (the following) grave wrongdoings.

(d) The entrepreneur may terminate the employment of the worker who after the passing of 6 (six) months are unable to perform his or her work as he or she should because of the legal process associated with the legal proceedings taking against him or her for the crime he or she is alleged to have committed.

*(e) If a worker resigns of his or her own will, he or she shall be entitled to compensation pay in accordance with what is stipulated under **subsection (4) of Article 156.** (Including **a.** Entitlements to paid annual leaves that have not expired and the worker have not taken (used); **c.***

Compensation for housing allowance, medical and health care allowance is determined at 15% (fifteen hundredth) of the severance pay and or reward for years of service pay for those who are eligible to receive such compensation.)

None of the above exclusions apply in the cases of either JP or TC. Therefore, their Termination of Employment is "null and void" and JP and TC are entitled to all the wages and entitlements which they (the affected workers) should have received.

This also indicates that both JP and TC should remain on the UPI payroll at least for the duration of the ongoing negotiations between the lawyers of the two parties and that UPI is responsible for the continued sponsorship of their residence and work permits and visas.

Further, another employee, RO, had his employment terminated in August 2006 on the grounds of continued sickness. However, this was not in line with **Article 170 (b)** which states: *An entrepreneur may terminate the employment of a worker if the worker has been absent from work for no less than 5 (five) workdays consecutively without submitting to the entrepreneur a written account.*

It is clear from the above that Yayasan Badan Pendidikan Kristen Penabur (BPK Penabur), through its programme known as Ukrida Penabur Internasional, demonstrates a flagrant disregard for Indonesian employment legislation.

Furthermore, in its failure to provide a mechanism for employee's interests and concerns to be considered, in its failure to provide a medical allowance and in its manner of terminating employment agreements, BPK Penabur shows absolutely no respect for human dignity.