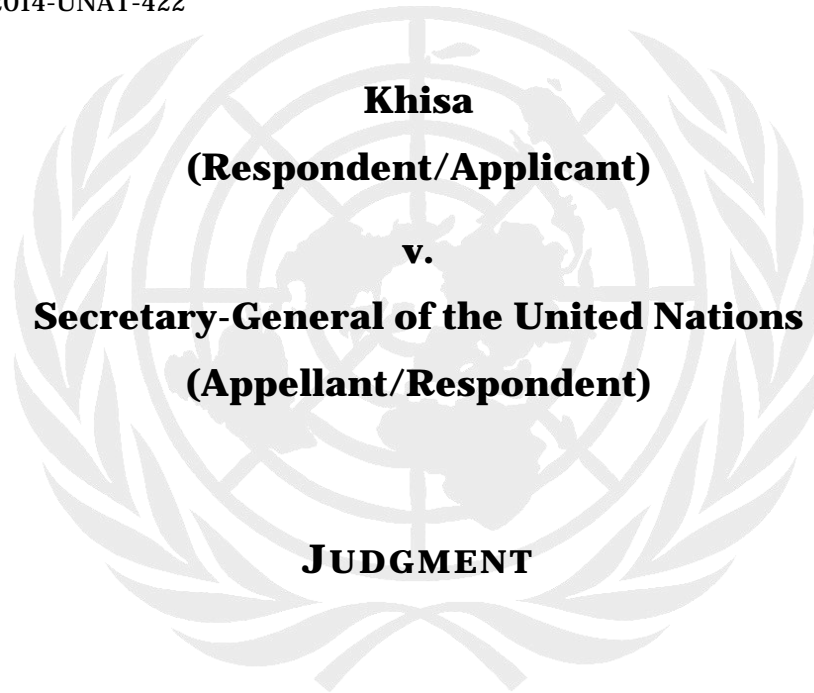




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-422



**Khisa
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Mary Faherty,
Judge Richard Lussick

Case No.: 2013-476

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Not applicable

Counsel for Appellant/Respondent: John Stompor

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/047, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 11 March 2013, in the case of *Khisa v. Secretary-General of the United Nations*. The Secretary-General submitted his appeal on 10 May 2013; Ms. Janet Khisa did not file an answer.

Facts and Procedure

2. The Dispute Tribunal made the following findings, which are not contested by the Secretary-General:¹

... The Applicant is a Protection Officer with the Child Protection Unit of the United Nations Mission in South Sudan (UNMISS) in Torit, South Sudan.

... She is contesting the decision to evict her from her United Nations provided accommodation in Torit on 11 November 2011[1]. She filed the current application with the ... Dispute Tribunal ... on 4 January 2012.

Facts

... The Applicant, a national staff member, was initially recruited to work for UNMISS in Juba but was subsequently re-assigned to work in Torit. Upon her arrival in Torit, she was provided accommodation (i.e. a room in a prefabricated container) by UNMISS.

... By a memorandum dated 1 June 2011, the Deputy Director of Mission Support (DDMS) of the then United Nations Mission in Sudan (UNMIS) informed the Applicant that since UNMIS was entering its liquidation phase, effective 15 July 2011, provision of accommodation to UNMIS national staff would be discontinued. The Applicant was therefore advised to vacate her ... provided accommodation by 15 July 2011.

... On 17 June 2011, 17 national staff members, including the Applicant (the affected national staff members), wrote to the DDMS protesting the decision to discontinue provision of accommodation to UNMIS national staff members. On 27 June 2011, the Officer-in-Charge of the Office of the DDMS (OIC/DDMS) informed the affected national staff members that the implementation date for the decision was being postponed to 31 July 2011. The OIC/DDMS requested that the affected national staff members vacate the ... accommodation before or on 31 July 2011.

¹ The following text is taken from Judgment No. UNDT/2013/047, paras. 1-16.

... Subsequent to the OIC/DDMS memorandum of 17 June 2011, several meetings were held between UNMIS and the national staff members in an effort to resolve the issue. On 10 October 2011, the UNMISS Director of Mission Support (DMS), Nicolas Von Ruben, wrote to the affected national staff members requesting that they vacate the ... accommodation by 17 October 2011 at the latest.

... On 19 October 2011, the affected national staff members were informed via email that due to an agreement between the South Sudan Ministry of Foreign Affairs [(MoFA)] and Mr. Von Ruben, they had until 10 November 2011 to vacate their various ... accommodations. On 31 October 2011, the affected national staff wrote to the UNMISS Chief of Staff questioning the agreement between the MoFA and the Mission and seeking reconsideration of the decision to make them vacate their accommodation on 10 November 2011.

... On 4 and 8 November 2011, the affected national staff members wrote to the Management Evaluation Unit (MEU) requesting management evaluation of the decision by UNMISS that the affected national staff vacate the UNMISS accommodation effective 10 November 2011. [The] MEU informed the affected national staff members on 17 November 2011 that their request was not receivable because it had been submitted after the two-month statutory time limit and was thus time-barred.

... According to the Applicant, early in the morning of 11 November 2011, she was evicted from her ... accommodation by four men (also national staff members) and one woman (a United Nations Volunteer). Her accommodation was locked and she was prevented access to her personal effects, money and office keys for a prolonged period of time. She reported the incident to UNMISS senior managers the same day.

... By a memorandum dated 14 November 2011, Mr. Von Ruben reminded the Applicant of the previous notices in relation to vacating her accommodation and informed her that 16 November 201[1] would be the final deadline for implementation of the decision. She was informed that if she vacated the premises by 16 November, she would not incur the daily accommodation fee of USD 82.00 per day.

... In a response dated 17 November 2011, the Applicant protested against her eviction of 11 November 2011 and pointed out Mr. Von Ruben's failure to address the method of eviction. She complained about still being locked out of her accommodation with no access to her possessions and demanded an apology and compensation for 'all the wrongs and inconveniences caused' to her. Additionally, she requested a thorough investigation into the matter.

...

... Between 18 November and 1 December 2011, the Applicant and Mr. Von Ruben wrote to each other several times in relation to her eviction. On 25 November 2011, the Applicant lodged a written complaint with the UNMISS Senior

Legal Officer regarding her eviction of 11 November 2011.

Procedural history

... The Applicant filed the current application on 4 January 2012 ...

... On 15 February 2012, the Respondent filed a Motion for Leave to have Receivability considered as a Preliminary Issue. The Tribunal directed the Applicant to file a response to the Motion on Receivability by 2 March 2012, which she did.

3. In Judgment No. UNDT/2013/001, rendered on 8 January 2013, the Dispute Tribunal found the application receivable. The Dispute Tribunal considered the submissions of the Secretary-General that the application was not receivable, *ratione materiae* or *ratione temporis*, because: the impugned act was not an administrative decision under Article 2(1)(a) of the Dispute Tribunal Statute; the Applicant failed to request management evaluation in a timely fashion; she failed to clearly identify the impugned decision such that it was not apparent she was protesting the 11 November 2011 incident; and, moreover, that even if she had properly and timely filed a request for management evaluation of that incident, she was then premature in appealing to the UNDT.

4. The UNDT found, however, that the Applicant's eviction on 11 November 2011 was

an administrative decision for the simple reason that it was the actual implementation of the Mission's initial administrative decision to compel the national staff members to vacate the ... accommodation for operational reasons. Based on the available evidence, the [Dispute] Tribunal concludes that the eviction decision was a unilateral decision taken by the administration in the Applicant's case, which had direct legal consequences for her in that she was left without housing and access to her personal items.

5. With respect to the Applicant's request for management evaluation, the UNDT set out the following detailed record:²

... The record shows that after the Applicant was locked out of her accommodation, she sent a complaint, via email, to the UNMISS Chief of Staff (UNMIS COS) on 11 November 2011 about the incident and to inform him of her intention to 'seek legal redress ...'. She forwarded this email to an intern in MEU with the following message '[t]his is the situation of things and as its is [sic] am out and i don't have even i [sic] cloth to wear on my body'. She also sent an email to a Legal Assistant (MEU LA) working for MEU, which stated the following '[a]s its now [sic]

² The following text is taken from Judgment No. UNDT/2013/001, paras. 36-42.

am thrown out and I don't even have were [sic] to sleep this night'. The MEU LA forwarded the Applicant's email to an MEU Legal Officer, who in turn forwarded it to Mr. Von Ruben the same day for '[his] info and any action, as appropriate'.

... By a letter dated 17 November 2011, [the] MEU responded to the Applicant regarding the request for management evaluation of 4 and 8 November 2011, which had been submitted by the national staff members who were affected by the Mission's decision that they vacate their ... accommodation. The MEU response made no mention of the Applicant's 11 November 2011 eviction.

... In response to the 17 November letter, the Applicant emailed the following documents to MEU on 22 November 2011:

- (i) an undated and unsigned letter responding to the 17 November 2011 letter from [the] MEU;
- (ii) an eviction notice dated 14 November 2011 from Mr. Von Ruben addressed to the Applicant;
- (iii) the Applicant's response, dated 17 November 2011, to the eviction notice;
- (iv) Mr. Von Ruben's response of 18 November 2011 to the Applicant's letter of 17 November 2011;
- (v) the Applicant's response of 21 November 2011 to Mr. Von Ruben's letter of 18 November; and
- (vi) a memorandum dated 31 October 2011 from the affected national staff members to the Chief of Staff regarding the Mission's decision to discontinue the provision of accommodation to UNMIS national staff and to make them vacate the premises.

... The Applicant's undated and unsigned response that was attached to the 22 November 2011 email to [the] MEU, emphasized that the request of the group should be differentiated from the formal complaint she had filed in respect of the incident that occurred on 11 November 2011. She then went on to state that '[o]nce again, I am attaching herewith a copy for your kind action. Kindly recall that I have kept you posted of all developments since then.' The [Dispute] Tribunal infers from this last sentence that the Applicant was referring to her emails of 11 November 2011

...

...

... [A]lthough the Applicant did not specifically state in her 22 November response that she was requesting management evaluation of the 11 November incident, she specifically sought the 'kind action' of [the] MEU in relation to this incident. At this point, in the [UNDT's] view, the Applicant had put [the] MEU on notice that she was expecting some form of action from it. Thus if the Applicant's communication to MEU was not in a proper/satisfactory format, [the] MEU had an

obligation to advise her as to the proper format a request for management evaluation needed to be in so she could have resubmitted her request.

... Based on the totality of the evidence (i.e. the email messages of 11 November 2011 detailing the contested decision and the letter and other attachments to her 22 November email), the [Dispute] Tribunal concludes that it can be reasonably inferred that the Applicant requested management evaluation of the 11 November 2011 incident.

6. The UNDT agreed with the Respondent that, to the extent the Applicant sought management evaluation of her eviction, her application to the Dispute Tribunal was premature, being filed two days prior to the expiration of the 45 day period for management evaluation, but concluded that would “not be in the interest of justice to reject applications indiscriminately solely on the basis that they were filed prematurely without taking into consideration the particular and/or exceptional circumstances that may exist in each of these cases”:

the decision to either reject or accept an application which has been filed prematurely should be made on a case by case basis after a critical review of the relevant facts have been carried out. It would be a miscarriage of justice for the Tribunal to conclude generally that any and all applications that are filed during the pendency of management evaluation are automatically not receivable.

Thus, given its statutory powers under Articles 19 and 36 of the Rules of Procedure of the UNDT, “and due to the exceptional circumstances of th[e] case”, the Dispute Tribunal accepted as receivable the application contesting the Applicant’s forced eviction.

7. Approximately two months later, the Dispute Tribunal issued Judgment No. UNDT/2013/047, the Judgment currently appealed before the Appeals Tribunal, as a “Summary Judgment”.

8. In Judgment No. UNDT/2013/047, the Dispute Tribunal noted that the Secretary-General had initially sought leave to reply on receivability grounds only and did not submit a reply on the merits of the case either within his statutory deadline of thirty calendar days, as set out in Article 10.1 of the UNDT Rules of Procedure, or after the UNDT held that the case was receivable. Pursuant to Article 10.1, which provides that “[a] respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, except with the permission of the Dispute Tribunal”, the UNDT found that the Secretary-General was not entitled to participate in the proceedings before it, and proceeded

to summary, or default, judgment, premised upon its understanding of Articles 9 and 19 of the UNDT Rules of Procedure.

9. On the merits of the matter, the UNDT held that it was not asked to adjudicate the decision to discontinue accommodation for national staff members but, rather, the manner of the Applicant's eviction. Taking into consideration such international legal instruments as the Charter of the United Nations, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the Dispute Tribunal found "it is the obligation of the Organization to: (i) ensure that the human rights of its staff members are not violated; (ii) take preventive and remedial steps to uphold said human rights; and (iii) provide an effective remedy to those staff members whose rights have been violated". The UNDT concluded that an eviction, if essential, could not be carried out in a way which violated "the dignity, human rights and security" of the Applicant or her rights of due process. As the Applicant was the only staff member evicted, the UNDT found that her forced eviction was not unavoidable. Having concluded that her rights were egregiously violated, the UNDT awarded the Applicant compensation in the amount of six months' net base pay.

Submissions

The Secretary-General's Appeal

10. The Secretary-General submits that the Dispute Tribunal erred in not providing him with an opportunity to respond on the merits of the case. He contends that the principle of *audi alteram partem*, the rules of natural justice and the jurisprudence of the Appeals Tribunal create a right to submit a Reply.

11. The Secretary-General further submits that he relied on case management directions from the UNDT that, if the application were found receivable, "the [Dispute] Tribunal [would] issue an appropriate Order requiring the ... Reply". In the absence of such an Order, which was never issued, the Secretary-General argues that the deadline for submission of a Reply on the merits was suspended.

12. The Secretary-General advises the Appeals Tribunal that he was unaware the UNDT was considering the merits of the case until the Summary Judgment was issued.

13. The Secretary-General requests the Appeals Tribunal to “annul” the “Summary Judgment” in its entirety and to remand the case to the UNDT, for consideration by another Judge, with instructions that the Organization be permitted to file a Reply and participate fully in the proceedings.

Considerations

14. The Appeals Tribunal finds that a substantial error in procedure was committed by the first instance Tribunal in that due process of law was not granted to the Administration, justifying the annulment of the impugned “Summary Judgment” and requiring the case to be remanded to be tried on its merits by a different Judge.

15. The Secretary-General correctly submitted that the Dispute Tribunal erred in not providing him with an opportunity to respond on the merits of the case, before issuing its “Summary Judgment”.

16. In fact, the principle of *audi alteram partem* was affected, since the Administration was only heard on the issue of receivability of the case, and could not therefore anticipate that the UNDT was going to decide also on its merits.

17. The UNDT did not follow its own e-mailed case management directions, which provided that if the application on receivability were to be decided in favour of the admissibility of the submission, “the Tribunal [would] issue an appropriate Order requiring the ... Reply”.

18. Such an order was never issued. Therefore, the Secretary-General’s argument about the suspension of the deadline for submission of a Reply, on which he relied, is substantiated.

19. The case management at first instance would have been better achieved and conducted through an appropriate judicial order, clarifying for the parties how the Dispute Tribunal would proceed and what they could expect from it.

20. The UNDT should have not issued a default “Summary Judgment” on the merits of the case. It should have restricted itself to the issue of receivability and, after finding the matter admissible, determined how the trial on the merits would continue. This procedure

would have afforded both parties equal opportunity to express themselves and present the necessary arguments and evidence.

21. Not having proceeded in that way, the Judgment under appeal must be vacated insofar as it decides on the merits of the case.

Judgment

22. The UNDT Judgment is vacated and the case is remanded to another UNDT Judge to be tried on its merits after both parties have had the opportunity to make their case.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar