



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/001

Judgment No.: UNDT/2013/001

Date: 8 January 2013

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KHISA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Terhemem Iber

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

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.
2. She is contesting the decision to evict her from her United Nations provided accommodation in Torit on 11 November 2012. She filed the current application with the United Nations Dispute Tribunal (“the Dispute Tribunal”) on 4 January 2012.

Facts

3. 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.
4. 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 UN provided accommodation by 15 July 2011.
5. 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 UN provided accommodation before or on 31 July 2011.

6. 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 UN provided accommodation by 17 October 2011 at the latest.

7. 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 and Mr. Von Ruben, they had until 10 November 2011 to vacate their various UN provided 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.

8. 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 to require UNMISS national staff to vacate UNMISS accommodation effective 10 November 2011. 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.

9. According to the Applicant, early in the morning of 11 November 2012, she was evicted from her UN provided 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. The Applicant alleges that at the time of her eviction, she was half naked and sick.

10. By a memorandum dated 14 November 2011, Mr. Von Ruben reminded the Applicant of the previous notices in regard to vacating her accommodation and

informed her that 16 November 2011 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.

11. 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.

12. By a letter dated 17 November 2011, MEU responded to the request for management evaluation of 4 and 8 November 2011 submitted by the affected national staff members. On 22 November 2011, the Applicant responded to MEU's communication of 17 November 2011.

13. Between 18 November and 1 December 2012, 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

14. On 6 December 2011, the Applicant wrote to the Nairobi Registry of the Dispute Tribunal seeking intervention. Between 6 and 14 December 2011, the Registry emailed the Applicant several times with information on how to properly file her application through the Tribunal's web-based "eFiling portal".

15. The Applicant filed the current application on 4 January 2012, which was served on the Respondent on 6 February 2012 with a deadline of 7 March 2012 for the filing of a Reply. This deadline was subsequently extended to 9 March 2012 due to technical difficulties.

16. 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 Motion on Receivability by 2 March 2012. She filed a response to the Motion on 2 March 2012 and a second response on 26 March 2012. The Respondent did not file a Reply.

17. After a careful review of the submissions of the parties, the Tribunal did not deem it necessary to hold an oral hearing in this matter.

Issues

18. This judgment will examine the following issues:

- i. The admissibility of the Applicant's 26 March 2012 response on the issue of receivability; and
- ii. The Respondent's Motion on Receivability.

Considerations

The admissibility of the Applicant's 26 March 2012 response to the Respondent's Motion on Receivability

19. The importance of abiding by prescribed time-limits is well established in the jurisprudence of the Tribunal. In *Morsy* UNDT/2009/036, the Tribunal stated that:

Time limits exist for reasons of certainty and expeditious disposal of disputes in the workplace. An individual may by his own action or inaction forfeit his right to be heard by failing to comply with time limits...

20. The Respondent filed a Motion for Leave to have Receivability considered as a Preliminary Issue on 15 February 2012. Consequently, the Tribunal directed the Applicant to file a response to this Motion by 2 March 2012. The Applicant filed said

response on 2 March 2012 and then, without seeking leave of the Tribunal, she decided to file a second response on 26 March 2012.

21. In view of the Applicant's failure to seek leave prior to the filing of her 26 March 2012 response and its annexes, the Tribunal has decided to reject this submission.¹

The Respondent's Motion for a determination on Receivability

22. On 15 February 2012, the Respondent filed a Motion for leave to have receivability considered as a Preliminary Issue. The Respondent submits that the application is not receivable *ratione materiae* and *ratione temporis* for the following reasons: (i) the actions complained of are not administrative actions under Article 2.1(a) of the Dispute Tribunal Statute; and (ii) the Applicant failed to submit a request for management evaluation within the time frame required by staff rule 11.2(a) and (c). The Respondent further submits that pursuant to *Siaw* UNDT/2012/149, the Applicant had a duty to identify the decision she was contesting with sufficient clarity and specificity but failed to do so. The Respondent claims that even though she had corresponded with MEU, it was not reasonably apparent that she was seeking to submit a request for management evaluation with respect to the 11 November 2011 incident.

23. Lastly, the Respondent submits that should the Tribunal find that the Applicant submitted a management evaluation request with respect to the contested decision, the Application is not receivable because it was filed prematurely. In this respect, the Respondent submits that the Application was received by the Tribunal two days before the expiry of the 45-day deadline for the Secretary-General to communicate his response to the request for management evaluation.

24. The Applicant submits that the contested decision is an administrative decision in that it was unilateral, of individual application and carried direct legal

¹ See *Nwuke* Order No. 053 (NBI/2011) and *Abu Ras* UNDT/2012/183.

consequences for her. She submits that the facts surrounding the contested decision have been admitted by the Respondent. She further submits that she requested management evaluation of the contested decision within the time frame required by staff rule 11.2(a) and (c).

Was the Contested Decision an Administrative Decision?

25. Article 2.1(a) of the Statute of the United Nations Dispute Tribunal (UNDT Statute) provides that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual:

To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance [...].

26. In Judgment No. 1157, *Andronov* (2003), the former United Nations Administrative Tribunal defined an administrative decision as follows:

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences [...]

27. In *Andati-Amwayi* 2010-UNAT-058, the United Nations Appeals Tribunal (“Appeals Tribunal”) held that:

What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

28. In the present case, UNMIS was entering its liquidation phase and as such, a decision was taken by the Administration to discontinue the provision of accommodation to UNMIS national staff effective 15 July 2011. This decision, along with the decision that the national staff members vacate the UN provided accommodation by 15 July 2011, was communicated to the Applicant on 1 June 2011. Following several extensions, the affected national staff members were informed by UNMISS Administration that they had until 10 November 2011 to vacate their various UN provided accommodations.

29. The Mission's initial decision to provide accommodation to national staff members was predicated on the fact that: (i) the national staff were employed in regions/locations other than their places of recruitment or residence; and (ii) they faced difficulties in finding suitable living accommodation within the new locality². Thus, the provision of accommodation by the Mission to these national staff members formed an integral part of their employment in the regions. As such, the decision to discontinue the provision of accommodation to these staff members was an appealable administrative decision because it impacted on their contracts.

30. The Tribunal notes that on 11 November 2011, the Mission's administrative decision to discontinue the provision of accommodation and to compel the national staff members to vacate the premises in accordance with the 10 November deadline was merely implemented vis-à-vis the Applicant in that she was evicted from her accommodation.

31. Consequently, the Applicant's eviction 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 UN

² Application, Annex 4.

provided accommodation for operational reasons. Based on the available evidence, the 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.

32. The Tribunal finds therefore that the eviction of the Applicant from her UN provided accommodation by UNMISS personnel was an administrative action under Article 2.1(a) of the Tribunal's Statute.

Did the Applicant request management evaluation of the contested decision?

33. Under Article 8.1(c) of the Tribunal's Statute, the jurisdiction of the Dispute Tribunal can only be invoked in certain cases if a contested administrative decision has been previously submitted for management evaluation. Thus, a mandatory first step for an applicant prior to the submission of an application to the Dispute Tribunal is to request a management evaluation of the contested administrative decision.

34. Further, staff rule 11.2(a) provides: "A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a) shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision . . ."

35. In cases such as *Syed* 2010-UNAT-061, *Kovacevic* 2010-UNAT-071, *Trajanovska* 2010-UNAT-074 and *Jennings* 2011-UNAT-184, the United Nations Appeals Tribunal ("the Appeals Tribunal"), has dismissed appeals due to the Applicants' failure to request management evaluation of the decisions they were contesting. Did that happen in this case?

36. 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] 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”.

37. By a letter dated 17 November 2011, 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 various UN provided accommodation. The MEU response made no mention of the Applicant’s 11 November 2011 eviction.

38. 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 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.

39. The Applicant’s undated and unsigned response that was attached to the 22 November 2011 email to 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 Tribunal infers from this last sentence that the Applicant was referring to her emails of 11 November 2011, which are discussed above at paragraph 36.

40. In *Pirnea* UNDT/2012/068 the Respondent submitted that the Applicant's request for Daily Subsistence Allowance ("DSA") was not receivable because he did not request a management evaluation of the payment of the DSA specifically. The Tribunal held that a proper reading of the request for the management evaluation indicated that the Applicant referred specifically to entitlements and that while the word DSA was not used, the "entitlements" which the Applicant claimed were due to him also encompassed the DSA entitlement.

41. Similarly, in the present case, although 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 MEU in relation to this incident. At this point, in the Tribunal's view, the Applicant had put 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, 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.

42. 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 Tribunal concludes that it can be reasonably inferred that the Applicant requested management evaluation of the 11 November 2011 incident.

Was the Application filed prematurely with the Tribunal?

43. Pursuant to article 8.1(d)(i) of the Statute³, an application shall be receivable if:

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

43. The Tribunal concluded earlier that the Applicant requested management evaluation of the contested decision on 22 November 2011. She then filed her Application with the Tribunal on 4 January 2012, which is equivalent to a response period of 43 calendar days instead of the 45 calendar day response period provided for under art. 8.1(d)(i). Thus, the Application was filed prematurely.

44. The Respondent appears to be arguing that since the Tribunal's Statute has no express provision to contend with an application that has been filed before the expiry of the management evaluation response period, the automatic response of the Tribunal should be to dismiss such applications. In light of the foregoing, should the Tribunal reject, as a matter of course, every single application that is filed prior to the expiry of the management evaluation period? The Tribunal wishes to humbly remind the Respondent of the following:

45. Art. 36 of the Rules of Procedure of the Tribunal provides that:

All matters that are not expressly provided for in the rules of procedures shall be dealt with by decision of the Dispute Tribunal on

³ See also art. 7 of the Rules of Procedure of the Tribunal on Time limits for filing applications.

the particular case, by virtue of the powers conferred on it by article 7 of its statute.

46. Additionally, art. 19 of the Rules of Procedure provides that:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

47. The Tribunal cannot be subservient to the time that the MEU will take before responding to an applicant or in case there is no response till the time a response was expected. The jurisdiction is set in motion once an application that satisfies all the criteria in the Statute and/or the Rules are complied with. There is no rule that requires the Tribunal to wait for the action or inaction of the MEU before assuming jurisdiction in a case. If that were the case then the very principle of the independence of the UNDT which is at the core of the present justice system would be seriously compromised.

48. The Tribunal finds that it would also 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. Thus, 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.

49. In the current case, should the Tribunal sanction the Respondent's request to reject the current application as not being receivable solely on the ground that it was filed 2 days before the expiry of the 45 calendar day response period?

50. Due to the exceptional circumstances of this case, the Tribunal does not consider that it would be in the interest of justice to dismiss the application on this basis. In coming to this conclusion, the Tribunal has taken note of the following exceptional circumstances:

a. The Application was filed 2 days in advance of the management evaluation response period;

b. The Respondent's submission that MEU did not undertake management evaluation of the contested decision because according to MEU it was not apparent from the Applicant's correspondence that she was seeking management evaluation;

c. The Applicant was deployed to a duty station, Torit, other than her place of recruitment and residence, Juba, and as such, she faced difficulties in finding suitable living accommodation;

d. The Applicant's allegation that she was evicted from her accommodation early in the morning by four male UNMISS staff members. She further alleges that she was half naked and sick at the time;

e. The Applicant's allegation that after her eviction, she was denied access to her personal effects and money for a lengthy period of time;

f. The Applicant's allegation that she was the only staff member who was actually evicted from her accommodation;

g. Mr. Von Ruben's contentious statement in his letter of 18 November 2011 that "the events that took place on 11 November 2011 instead of 30 November 2011 were strictly due to a misunderstanding within O/DMS"; his apology for the "inconveniences this situation may have caused"; and his subsequent insistence that she vacate premises, which she no longer had access to; and

h. Mr. Von Ruben's remarkable explanation contained in his letter of 22 November 2011 to the Applicant that the "misunderstanding" in his letter of 18 November strictly referred to the date stipulated for the change of locks.

51. On the basis of articles 19 and 36 of the Rules of Procedure of the Tribunal and due to the exceptional circumstances of this case, the Tribunal has decided not to dismiss the current Application on the grounds that it was filed 2 days before the expiry of the management evaluation response period.

Decision

52. In view of the foregoing, the Tribunal concludes that the Application challenging the decision to evict the Applicant from her UN provided accommodation is receivable.

Observation

53. In light of the very serious allegations made by the Applicant with respect to the time, manner/method and the individuals involved in her eviction, the Tribunal finds it quite perturbing that the Respondent engaged in all kinds of calisthenics to ensure that the current application would be dismissed for lack of receivability. The Respondent initially submitted that the Application was not receivable because the contested decision was not an administrative decision and in the alternative, that the Applicant had failed to request management evaluation. The Respondent subsequently came up with the argument that the Application was not receivable because it had been filed prematurely.

54. The Tribunal does not consider it to be good managerial practice for a dignified Organization, such as the United Nations, to sweep allegations that border on human rights violations against a staff member under the rug by merely covering itself in the cloak of non-receivability.

55. In light of the Tribunal's finding that the Application is receivable and in light of the nature of the allegations being made by the Applicant, the Tribunal is of the considered view that it would behoove the Respondent to engage the Applicant on an informal basis to resolve the matter.

(Signed)

Judge Vinod Boolell

Dated this 8th day of January 2013

Entered in the Register on this 8th day of January 2013

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi