



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KHISA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

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 that the affected national staff vacate the 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 2011, 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. She reported the incident to UNMISS senior managers the same day.

10. 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 2012 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 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

14. 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.

15. 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.

16. By Judgment No. UNDT/2013/001 the Tribunal ruled that the Application is receivable.

Issue

17. This judgment will examine whether it is appropriate for the Tribunal to grant summary judgment in favor of the Applicant in light of the absence of a reply from the Respondent and if so, what remedies should be ordered.

Failure to file a Reply

18. Article 10.1 of the Tribunal's Rules of Procedure (UNDT Rules) provides that:

The respondent's reply shall be submitted within 30 calendar days of the date of receipt of the application by the respondent. The signed original reply and the annexes thereto shall be submitted together. The document may be transmitted electronically. 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.

19. The UNDT Rules clearly enunciate the time frame within which the Respondent is obliged to submit a Reply. They also clearly articulate the penalty to be imposed in the event of non-compliance i.e. the Respondent not being entitled to take part in the proceedings.

20. In the present case, the Application was received by the Registry on 4 January 2012 and 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.

21. On 15 February 2012, the Respondent filed a Motion for Leave to have Receivability considered as a Preliminary Issue. He however did not file a reply within 30 calendar days of the date of receipt of the application i.e. on or before 9 March 2012, as required by article 10.1 of the UNDT Rules.

22. It is significant that the only available remedy for the Respondent who fails to file a reply within the prescribed timeline is to seek leave of the Tribunal to be entitled to take part in the proceedings. In the present case, the Respondent was not predisposed to seek said leave of the Tribunal. Instead, on 30 March 2012, he filed a Motion for Leave to Reply to the Applicant's Response on Receivability.

23. Further, although the Tribunal ruled two months ago (on 8 January 2013) in Judgment No. UNDT/2013/001 that the Application is receivable, the Respondent, to date, remains untroubled about the absence of his reply. The absolute silence from the Respondent is even more dismaying in light of the fact that the Tribunal urged him, as early as 15 August 2012, to engage the Applicant on an informal basis to resolve the matter due to the grave nature of the allegations she has made.

24. While receivability may be an issue in a case, the Respondent should not and may not use this as a pretext to shirk his statutorily prescribed obligations. In other words, the Respondent may not use the alibi of receivability to re-write the Tribunal's Rules of Procedure. When a Reply is due in accordance with art. 10.1 of the UNDT Rules, the Respondent is required to comply with his obligation. He may not choose to file a Motion to have receivability considered as a preliminary issue or any other motion in lieu of his Reply and then sit back and wait until it better suits his schedule to file said Reply. He may, however, choose to file said Motion in tandem with his Reply.

25. Contrary to what the Respondent may think or expect, it is not the responsibility of the Tribunal to spoon-feed the parties that come before it. In this respect, it is not within the remit of the Tribunal to remind the Respondent when to submit his reply after the Application has been served on him. This is clearly set out in the UNDT Rules. Neither is it the duty of the Tribunal to chase the Respondent to seek leave to file his reply. In the cases where the Respondent deems it necessary to file a reply or seek leave, he does so without having to be urged or prompted. In the present case, the Tribunal can only infer from the Respondent's actions that he did

not deem an answer to be necessary otherwise he would have filed one in a timely manner.

26. The Tribunal wishes to remind the Respondent that the importance of the parties 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...

Conclusion

27. While the Tribunal has an overriding objective to serve the interests of justice, it cannot condone the Respondent's failure to comply with his statutory obligation nor his subsequent carelessness and/or apathy in the present case. Consequently, the Tribunal finds that the Respondent is not entitled to participate in the proceedings in accordance with art. 10.1 of the UNDT Rules.

Summary judgment

28. Article 19 of the UNDT Rules provides that, the Tribunal may at any time “*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.*”

29. Article 9 of the UNDT Rules requires summary judgment to be entered only where the material facts of a case are not in dispute and a party is entitled to judgment as a matter of law. It provides also that:

[...] The Dispute Tribunal may determine, on its own initiative, that summary judgment is appropriate.

30. By its nature, summary judgment is a default judgment, which essentially acknowledges that there are no disputes of fact that need to be resolved by a trial. Ultimately, it is for the Tribunal to consider the facts and the law to determine the

outcome of the case to ensure that justice is achieved in all the circumstances of the case.

31. Is there a dispute as to the material facts in this case? The Tribunal finds that there are none in light of the fact that the Respondent has not deemed it necessary to join issues with the Applicant on the merits of this matter. Since the Respondent chose, of his own free will, to ignore his duty to file a reply within 30 days, the Tribunal is entitled to rely solely on the Applicant's pleadings in reaching its final decision in this matter.

Conclusion

32. In accordance with articles 9 and 19 of the UNDT Rules, the Tribunal finds and holds that under the unique circumstances of this case, it is appropriate for summary judgment to be granted in favor of the Applicant.

Decision

33. The Tribunal will make no definitive pronouncements on the lawfulness of the Mission's decision to discontinue the provision of accommodation to the affected national staff as this issue has not been placed before the Tribunal for adjudication. However, the manner in which the Applicant was compelled to vacate her accommodation is properly before the Tribunal and accordingly, appropriate pronouncements will be made on this issue.

34. General Assembly resolution 63/253 emphasized that the new system of justice should be "consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members". Thus, the Tribunal is entitled to take into consideration international legal instruments that protect against forced evictions and violations of other related human rights when deliberating on matters before it.

35. The Preamble of the Charter of the United Nations reaffirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,” and determines “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.

36. Art. 17 of the International Covenant on Civil and Political Rights and art. 12 of the Universal Declaration of Human Rights stipulate that, “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”, and that “[e]veryone has the right to the protection of the law against such interference or attacks”.

37. Consequently, 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.

38. The record shows that the Applicant was provided accommodation (i.e. a room in a prefabricated container) by UNMISS upon her re-assignment from Juba to Torit, South Sudan. The record also shows that in June 2011, the national staff members, including the Applicant, who had been provided with UN accommodation, were formally notified that since UNMIS was entering its liquidation phase effective 15 July 2011 the provision of accommodation would be discontinued. The Applicant, along with the other affected staff members, was therefore advised to vacate her UN provided accommodation by 15 July 2011. On 19 October 2011, this deadline was subsequently extended to 10 November 2011.

39. On 31 October 2011, the affected national staff wrote to the UNMISS Chief of Staff, Mr. Paul Egunsola, seeking reconsideration of the decision to make them vacate their accommodation on 10 November 2011 and on 4 and 8 November 2011, they sought management evaluation of the decision.

40. Unfortunately, none of these actions taken by the affected national staff was enough to prevent what happened to the Applicant.

41. Early in the morning of 11 November 2012, four men (also national staff members) and one woman (a United Nations Volunteer) forcefully evicted the Applicant from her UN provided accommodation. She described the eviction in this manner:

As at the time when the aforementioned incident took place, a group of five [sic] men, all staff of UNMISS at Torit Team Site, comprising of Mr. Bernard Abaya (National Security Officer), Mr. Sergey Lado (National staff, Engineering), Mr. Bernet Kenyi (National Civil Affairs Officer), Mr. Farah Mohammed (International staff) and a woman, Leticia Matei (GSS UNV, International staff) bumped into [the Applicant's] room while she was half naked, sick on bed rest [sic].

[The Applicant] tried to cover up but it was too late and the commotion was much. She was pushed aside and it was then that she learnt that they came to lock up her room on the orders of the State Coordinator (SC) and the Sector Admin Officer (SCAO).

[The Applicant] struggled to pick up one dress before the door was locked by them. Since then the room remains under lock and key and she has been denied access even to her personal effects, including clothes, sanitation and hygiene accessories, money and the office keys.

It was a harrowing and terrifying experience – the [Applicant] was traumatized – physical force was applied in pushing [the Applicant] off, [the Applicant] was not allowed any movement, nor to pick anything. Verbal abuses were also rained on the [the Applicant].

42. The State Coordinator (SC), Ms. Winnie Babuhuga, and the Sector Administrative Officer (SCAO), Mr. Assefa Belay, are both staff members of UNMISS.

43. At 1012 hours on 11 November 2011, the Applicant reported her forced eviction to Mr. Egunsola by email. This email was copied to Mr. Von Ruben.

44. After a telephone conversation with Mr. Egunsola, the Applicant wrote to him again on 14 November 2011 to protest “the selective nature” of her eviction in light

of the fact that the other affected national staff had not been evicted from their accommodations. She went on to inform Mr. Egunsola that “[i]t is criminal for me to be locked out of my rented accommodation without due process over the weekend. This wrong full [sic] act has caused hardship and inconveniences on me and am requesting for intervention from you in the interest of justice and fair play [...]”. This email was also copied to Mr. Von Ruben.

45. Nonetheless, on the same day, Mr. Von Ruben wrote to the Applicant to remind her of the previous notices in relation to her vacating the accommodation and informed her that 16 November 2011 would be the final deadline for implementation of the decision. Paradoxically, Mr. Von Ruben informed her that if she vacated the premises by 16 November, she would not incur the daily accommodation fee of USD 82.00 per day!

46. Additionally, Mr. Von Ruben wrote the following to the Applicant on 18 November 2011:

Thank you for your note dated 17 November 2011. I take due note of its contents and wish to clarify that the events that took place on 11 November 2011 instead of 30 November 2011 were strictly due to a misunderstanding within O/DMS. We sincerely apologize for the inconveniences this situation may have caused and have requested Mr. Belay to meet with you, not only to apologize again on our behalf, but also to offer our assistance to alleviate these difficult circumstances and facilitate, to the extent possible, your move from UNMISS premises.

...

While the matter is being looked into, I must inform you that the provisions of my memorandum dated 14 November 2011 must be complied with, including the need to vacate the premises by 16 November 2011. Failure to do so will entail a higher deduction from your salary for the occupation of the UNMISS accommodation and locks will be changed on 30 November 2011.

47. On 22 November 2011, Mr. Von Ruben’s informed the Applicant that the “misunderstanding” in his letter of 18 November strictly referred to the date

stipulated for the change of locks. In the Tribunal's humble view, UNMISS Administration, in the form of its Director of Administration, Mr. Von Ruben, was zealously rubbing salt into the Applicant's wounds, which must have been quite raw from the insensitivity that she was receiving regarding her plight. Not only was Mr. Von Ruben completely playing down the eviction of the Applicant to make it seem as if it was only the lock on her door that was changed on 11 November 2011, he was also so impervious to her plight that he felt it necessary to remind her for the umpteenth time to vacate the premises!

48. Whilst UNMISS Administration may have had the right to request the affected national staff to vacate the premises due to the upcoming liquidation process this did not grant the Mission *carte blanche* to execute the vacate order in the most arbitrary and unsavoury manner possible. Based on Mr. Von Ruben's memorandum of 18 November 2011, the Tribunal infers that the penalty, which had been communicated to the affected staff members, for failing to vacate the premises voluntarily was supposed to be a higher salary deduction for the occupation of the UNMISS accommodation and the changing of the locks on 30 November 2011. Forced eviction was not one of the options set out in Mr. Von Ruben's memorandum. Once UNMIS decided to resort to eviction to achieve its goal, the Mission had an obligation to ensure that the removal was not carried out in a manner that violated the dignity, human rights and security of the Applicant.

49. The Tribunal holds that basic due process requirements dictated that the Applicant should have been notified that the failure to vacate the premises as requested would result in her being forcefully evicted. Said notification would then have included the precise date and time that the eviction was to be executed. This would have given her opportunity to either: (i) knowingly assume the risk of being manhandled by four men in the early morning hours; (ii) vacating the premises on her own without any hassle; or (iii) challenging the decision by seeking a suspension of action. Additionally, four male staff members of UNMISS proceeded to evict a female staff member from her accommodation in the early morning, pushing and

verbally abusing her and then denying her access to her personal effects can only be characterized as extremely improper and a violation of not only her due process rights but also her human rights.

50. In view of the fact that the Applicant is a woman, UNMISS should have put in place special mechanisms to protect her from the unwarranted action she was subjected to. This, however, was not the case. Instead, she appears to have been the only national staff member who was forcefully evicted from her accommodation even though there were a substantial number of national staff members who were affected by the Administration's June 2011 decision.

51. Was this forced eviction unavoidable? The Tribunal does not believe so in light of the fact that the Applicant was the only staff member evicted from her accommodation. Whatever action was taken against the other affected staff members should have been applied to her.

52. Accordingly, the Tribunal finds that the Applicant's rights were violated in an egregious manner and that she is entitled to an effective remedy.

53. The 'right to an effective remedy' is well documented in international human rights instruments. Under art. 8 of the Universal Declaration of Human Rights, "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted him by the constitution or by law". Additionally, according to Article 2(3)(a) of the International Covenant on Civil and Political Rights, 'any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity' (emphasis added). Article 13 of the European Convention on Human Rights uses similar language: '[e]veryone whose rights and freedoms as set forth in this Convention are violated *shall have an effective remedy*' (emphasis added). Under Article 25 of the American Convention on Human Rights 'Everyone has the right to *simple and prompt recourse*, or any other effective recourse, to a competent court or tribunal for *protection* against acts that violate his

fundamental rights.’(Emphasis added). Thus, the notion that where there is breach of a right a remedy must ensue is axiomatic.

Remedies sought

54. The Applicant is seeking the following remedies:

- a) A declaration that the action of the Respondent in forcefully evicting her from her lawful tenancy without due process was unlawful and therefore null and void;
- b) A declaration that the arbitrary and unilateral increase in the rent of the tenancy by the Respondent in violation of all known parameters and procedures is oppressive, vindictive, unlawful and therefore null and void;
- c) A directive from the Tribunal mandating the Respondent to restore the Applicant to her lawful tenancy unconditionally;
- d) An order of perpetual injunction restraining the Respondent from forcefully evicting the Applicant from her lawful tenancy without due process;
- e) An order of perpetual injunction restraining the Respondent from arbitrary and unilateral increase in rent without recourse to the laid down parameters;
- f) An order for the Respondent to release the Applicant’s salary forthwith; and
- g) The sum of USD10 million as damages in favour of the Applicant.

Judgment

55. In light of the Tribunal’s conclusion that the Applicant’s due process and human rights were violated by UNMISS Administration and due to the egregiousness of the violation, the Respondent is ordered to pay the Applicant six months net base salary, at the rate applicable as of the date of this judgment, as compensation.

56. This sum shall be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Vinod Boolell

Dated this 11th day of March 2013

Entered in the Register on this 11th day of March 2013

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi