



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.

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

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

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 Mission. 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 4nisadsa 6(e)-.6(c.089-

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

(“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

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.

h.

55. In light of the Tribunal's finding that the Application is receivable and in light of the nature of the allegations bein00in0