



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/001/R1
Judgment No.: UNDT/2016/197
Date: 1 November 2016
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KHISA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for the Applicant:

Terhemen Iber

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction and procedural history

1. The Applicant is a Protection Officer with the Child Protection Unit in Torit, one of the duty stations of the United Nations Mission in the Republic of South Sudan (UNMISS). She filed an Application with the Dispute Tribunal on 4 January 2012 contesting both the decision to evict her and her actual eviction on 11 November 2011 from residential accommodation provided her by the former United Nations Mission in Sudan (UNMIS) from which UNMISS inherited the said accommodation in July 2011.
2. On 11 March 2013, the Dispute Tribunal issued a Summary Judgment in favour of the Applicant.¹ The Respondent filed an appeal against the said Judgment. On 2 April 2014, the United Nations Appeals Tribunal (UNAT) vacated the Summary Judgment and remanded the case for retrial by a different Judge.²
3. The Tribunal held a case management discussion on 4 March 2015.
4. On 5 March 2015, the Respondent was served with a deadline under Order No. 069 (NBI/2015) to file his Reply by 7 April 2015.
5. The Respondent filed his Reply on 7 April 2015.
6. The Tribunal commenced hearing the Application on 6 July 2015. At the commencement of the hearing and before any evidence had been heard, the Tribunal advised and the parties agreed that this matter could be resolved through mediation.
7. By Order No. 233 (NBI/2015), the Tribunal referred the case for mediation to the Mediation Division in the Office of the United Nations Ombudsman and the proceedings were stayed.
8. On 9 February 2016, the Mediation Division informed the Tribunal that the matter had not been settled in mediation.

¹ UNDT/2013/047.

² 2014-UNAT-422.

9. On 29 June 2016, the Tribunal decided³ that an oral hearing was not necessary for a fair and expeditious disposal of this case and that it would determine this case on the basis of the parties' pleadings and the entire documentary record of the case.

Facts

10. The Applicant is a national staff member and was initially recruited to work for UNMIS in Juba but was subsequently re-assigned to work in Torit. Upon her arrival in Torit, she was provided residential accommodation by the Mission in a prefabricated container.

11. By a memorandum dated 1 June 2011, the Deputy Director of Mission Support (DDMS) of UNMIS had informed the Applicant that UNMIS was entering its liquidation phase as from 15 July 2011. The memorandum stated also that due to the said liquidation, the provision of accommodation to UNMIS national staff would be discontinued. The Applicant was advised to vacate her residential accommodation by 15 July 2011.

12. On 17 June 2011, 17 national staff members in the Mission who were affected by the vacation notice, including the Applicant, wrote to the DDMS protesting the decision to discontinue provision of accommodation to them. 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 they vacate the accommodation provided by the Mission on or before 31 July 2011.

13. 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. Meanwhile the new Mission, UNMISS, had started its operations in July 2011 and inherited the premises, property and some staff members from UNMIS. On 10 October 2011, the UNMISS Director of Mission Support (DMS), Nicolas Von Ruben, wrote to the affected national staff members asking that they vacate the United Nations accommodation by 17 October 2011 at the latest.

³ 330 (NBI/2016).

14. On 19 October 2011, the affected national staff members were informed that due to an agreement between the South Sudan Ministry of Foreign Affairs (MoFA) and the DMS, they had until 10 November 2011 to vacate their various United Nations accommodations. On 31 October 2011, they wrote to the UNMISS Chief of Staff (CoS) and sought a reconsideration of the decision that they vacate their accommodation on 10 November 2011.

15. On 4 and 8 November 2011, they also wrote to the Management Evaluation Unit (MEU) requesting management evaluation of the decision by UNMISS that national staff vacate the UNMISS accommodation effective 10 November 2011. The MEU upheld the Mission's decision and informed the national staff members as such on 17 November 2011.

16. Early in the morning of 11 November 2011, the Applicant was forcefully evicted from her accommodation by a team made up of four male national staff members, one male international staff and one international female 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.

17. By a memorandum dated 14 November 2011, the DMS reminded the Applicant of the previous notices to vacate 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 USD82.00 per day.

18. 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.

19. On 18 November 2011, the DMS sent an eviction notice to the Applicant stating that she had up till 30 November to vacate her accommodation otherwise

her locks would be changed on that day if she did not leave. A number of emails were exchanged between the Applicant and the DMS regarding her forced eviction until 1 December 2011. The Applicant also sent a written complaint of her eviction to the Senior Legal Officer at the Mission on 25 November 2011.

Applicant's case

20. The summary of the Applicant's case is:

- a. Her redeployment in the first instance from her original place of recruitment (Juba) was against the rules.
- b. Her eviction from a lawful tenancy was forceful, selective and prejudicial.
- c. The increases in rent were oppressive, vindictive, arbitrary and unilateral.
- d. The UNMISS staff trespassed on her person, property and premises.
- e. Her human rights to fair hearing, human dignity, privacy and freedom from discrimination were violated.
- f. Her eviction was a reckless violation of the core United Nations principle of gender sensitivity and was repugnant to natural justice, equity and good conscience.
- g. In evicting her, the UNMISS Administration acted as a judge in its own cause.

21. The Applicant sought reliefs as follows:

- a. A declaration that the actions of the Respondent in forcefully evicting her from her lawful tenancy without due process are 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 requiring the Respondent to restore the Applicant to her lawful tenancy unconditionally.
- d. An order of perpetual injunction restraining the Respondent by himself or acting through his servants, agents, privies, or assigns from forcefully evicting the Applicant from her lawful tenancy without due process.
- e. An order of perpetual injunction restraining the Respondent from arbitrarily and unilaterally increasing rent without recourse to the laid down parameters.
- f. An order for the Respondents to release the Applicant's salary forthwith.
- g. The Tribunal to award the sum of USD 10,000,000 as damages.

Respondent's case

- 22. The Respondent's case is summarized below.
 - a. The Respondent does not contest the case on the merits. However, the Respondent disputes that the Applicant is entitled to compensation for moral injury.
 - b. The Respondent accepts that the Administration should not have removed the Applicant from the accommodation on 11 November 2011 in the way it did.
 - c. The Applicant seeks a declaration that the "arbitrary and unilateral increase in rent" is unlawful, and an order preventing the Applicant from increasing her rent. The Applicant has not challenged any increase in rent in the Application. The question of the rent to be paid by the Applicant is not properly before the Dispute Tribunal, and this remedy should not be awarded.

- d. The Applicant also seeks orders directing the Administration to restore the Applicant to “her lawful tenancy” and preventing the Administration from “forcefully evicting” the Applicant from her “lawful tenancy”. These requests misunderstand the nature of accommodation provided for staff. There is no tenancy. Instead, the 2006 UNMIS information circular allowed some of the national staff living in certain locations to reside in the provided accommodation as a temporary measure given the lack of accommodation available to national staff in the localities.
- e. The Administration decided to discontinue the practice of providing national staff with accommodation due to logistical and administrative constraints it was facing. In order to mitigate any potential problems arising for national staff, the implementation of this decision was postponed on a number of occasions, and salary advances to pay rent in the local market were available.
- f. The Applicant has made no averments to support her claim that the Respondent should release the complainant’s salary or provided any evidence that her salary has been withheld. Accordingly, there is no basis to make such an order.
- g. The Applicant seeks a sum of USD 10,000,000 as damages. This remedy should be rejected. The Appeals Tribunal has held in the case of *Zhouk*⁴ that compensation can only be awarded if the staff member actually suffered damages. The Applicant bears the burden of proving that she suffered moral injury as a result of this specific contested decision. The Applicant has not provided any evidence that she suffered moral injury. The Applicant has not averred any long term consequences arising from the incident beyond the embarrassment of the incident itself. In the absence of any such evidence, no compensation should be awarded.
- h. In view of the foregoing, the Respondent requests the Tribunal to refuse the remedies sought by the Applicant.

⁴ 2012-UNAT-224.

Considerations

23. In her Application and supporting documents the Applicant raised a variety of issues which formed the basis of the reliefs she sought. The said issues include: (a) the matter of whether she held a tenancy with UNMISS, (b) oppressive and vindictive increase in her rental payments by UNMIS, (c) the circumstances of her forced and unlawful eviction amounted to trespass to her person and property, and (d) that her fundamental rights were breached in the course of her eviction.

24. The Respondent contended that the Applicant was never a tenant of UNMISS and that she did not in fact challenge any increase in rent. He admitted that his eviction of the Applicant on 11 November 2011 was wrongful but argued that she was not entitled to any compensation because she had not proved that she actually suffered any damages.

25. The Tribunal will interrogate these issues by reviewing them in the light of the facts and circumstances of this case.

Did the Applicant hold a tenancy or lease of UNMIS or UNMISS at any time?

26. There is evidence that the Applicant who is a national staff member was initially recruited by UNMIS from Juba but later redeployed to work in Torit, another duty station. Upon arrival in Torit, she was provided with accommodation by the Mission in a prefabricated container. She lived in the said container for about three years until she was forcefully evicted on 11 November 2011.

27. This provision of accommodation by UNMIS was based on the Mission's policy to make accommodation available to a certain category of national staff members pursuant to the provisions of Information Circular (IC) No. 28/2006. The IC was dated 23 April 2006 and titled 'Provision of UNMIS Accommodation to National Staff Employed in the Regions.' It was issued by the then Special Representative of the Secretary-General (SRSG) Jan Pronk.

28. The said IC set out the policy regarding provision of UNMIS accommodation to national staffs employed in the regions at a location other than their place of recruitment or residence. It also stated that such national staffs who

qualify for accommodation would be charged US\$5 per day which sum would be deducted from their monthly salaries.

29. A legal contractual relationship exists when one party agrees to give property owned by him or her (landlord/lessor) to another party (tenant/lessee). The contractual relationship guarantees the tenant/lessee the use of property owned by the landlord/lessor for a specified period or a period determinable at the will of either party in consideration of rent or other compensation. Such a legal contractual relationship may be in writing or implied.

30. While the Applicant has continuously referred to the existence of a tenancy between her and UNMIS in this case, the Respondent has stridently argued that there was no tenancy. With regard to the question as to whether a landlord/tenant relationship actually existed between the Applicant and UNMIS at any time, the simple answer is that considering the entire circumstances surrounding the grant of accommodation to the Applicant by the Mission, a proper legal tenancy indeed existed between the parties.

31. Even though there was no written tenancy agreement governing the relationship, a tenancy is implied. However, the implied landlord/tenant relationship did not preclude UNMIS from lawfully recovering possession of the pre-fabricated container accommodation rented to the Applicant due to the logistical and administrative constraints pleaded.

Was the forced eviction of the Applicant by UNMISS unlawful? Could UNMISS have recovered possession in a lawful manner?

32. The Tribunal takes judicial notice of the fact that UNMISS came into being on 9 July 2011 pursuant to the Security Council Resolution 1996 (2011). At paragraph 16 of that Resolution, the Secretary-General was requested to transfer appropriate functions performed by UNMIS together with appropriate staff and logistics necessary for the new functions to be performed in the new Mission.

33. Evidence adduced by the Tribunal shows that the Applicant was allocated accommodation by UNMIS based on a policy on allocation of accommodation to national staff employed in the regions at locations other than their place of

recruitment or residence. The said allocation of accommodation to the Applicant had taken place before the new Mission, UNMISS, came into being.

34. It is clear from the records that the new Mission which had inherited the assets of UNMIS did not intend to continue with the policy of allocating accommodation to any national staff members. While in the process of liquidation, UNMIS gave written notices to the Applicant and other national staff occupying official accommodation in Torit to vacate the premises and return possession, ostensibly to make way for the new mission.

35. The Applicant's case is that she was forcefully evicted from the accommodation. According to her pleadings, the eviction took place early in the morning of 11 November 2011. Six people (four male national officers, one male international staff and a female international volunteer at the Mission) had charged into her accommodation while she was ill on bed rest and half-clad.

36. They proceeded to push her out amid verbal abuses and then locked the door of her accommodation while she was only able to pick up a dress to cover herself. The intruders did not allow her to take personal effects such as hygiene accessories, clothes, money, office keys or any of her property. The Applicant was later assisted by another staff member who arranged and paid for hotel accommodation in town for her.

37. The Respondent does not deny the forced eviction of the Applicant. Rather the said Respondent pleaded in his Reply that on 11 November 2011, the Applicant was removed from the Mission's accommodation and her keys confiscated. He pleaded further that he accepted that the Administration should not have removed the Applicant from the accommodation in the way that it did.

38. Even where a proper tenancy exists, a landlord can lawfully recover possession of his/her premises for good reason. But in seeking to recover possession, he must first give notice to the tenant to vacate the premises. Such a notice ought to be properly followed by an eviction notice in which the tenant is advised that the landlord intends to recover possession by physically having him/her removed on a particular date or by changing the locks of the accommodation.

39. In the instant case, there is no doubt that at least three notices to vacate the official accommodation were given to the Applicant and other affected national staff members between 1 June and 10 October 2011. There were also correspondences from the Applicant and other affected staff members to the new UNMISS and a management evaluation request by the said affected staff members on the subject.

40. UNMISS sent an eviction notice to the Applicant on 18 November 2011, seven days after her forceful eviction. In that eviction notice, UNMISS informed the Applicant that the final date for the change of locks to her accommodation was to be 30 November 2011. As already stated, the Respondent accepted that the Administration should not have removed the Applicant in the way that it did.

41. A landlord must recover possession in a lawful manner even if his tenant is a tenant-at-will who does not pay rent and holds the tenancy at the pleasure of the said landlord. Moreover a lawful recovery of possession is not carried out by people acting like thugs. While the Mission may not have had the luxury of employing the services of a sheriff or a bailiff, it ought to have set up a trained and well-instructed eviction team. The membership of the said team and its modus operandi should have been published for the information of the affected staff members.

42. In the instant case, UNMISS could have lawfully recovered possession of the accommodation by sending an eviction notice to the Applicant after the expiry of the last notice to vacate the accommodation and then proceeding to simply have an eviction team change the locks of the prefabricated container. Instead, what happened here is that the Respondent had put the cart before the horse by using people who acted like thugs to forcefully evict the Applicant and then sending her an eviction notice one week later.

43. The Tribunal finds and holds that the Mission's decision to recover possession of the residential accommodation which was its property and which was allocated to the Applicant was well within its rights and discretion. The Tribunal therefore will not order that the residential accommodation in issue be returned to the Applicant. However, the Tribunal also finds and holds that the forced eviction of the Applicant in the circumstances in which it was done was unlawful.

Did the forced eviction occasion any injury to the Applicant or constitute a breach of her human rights?

44. It was argued on behalf of the Respondent that even though the forced eviction and the manner of the said eviction of the Applicant from UNMISS official accommodation on 11 November 2011 was wrong, the said Applicant is not entitled to any compensation. The Respondent's Counsel argued further that the Applicant did not provide evidence that she suffered moral injury or any long-term consequences arising from the incident of the forced eviction. According to Counsel, all that the Applicant suffered was some embarrassment arising from the manner of her forceful eviction.

45. The Applicant submitted on her part that the circumstances and manner of her forced eviction constituted trespass to her person and property and occasioned a breach of her human rights to privacy and dignity of the human person, among other human rights breaches.

46. The Tribunal has reviewed the circumstances and manner of the forced eviction of the Applicant which is admitted by the Respondent. It is shocking that it can be argued for the Secretary-General of the United Nations that a half-clad sick woman who is forcefully evicted by a group of six people in the early hours of the morning amid verbal abuses and not allowed to take her clothes and hygiene accessories suffered only some embarrassment. This argument in itself is not only a huge embarrassment to the Organization but is wholly irresponsible.

47. Even though this Tribunal has no criminal jurisdiction, it makes no hesitation in holding, considering the evidence before it that what happened to the Applicant in the process of her forced eviction by the agents of UNMISS in the morning of 11 November 2011 constituted not only human rights violations but also criminal and civil wrongs. The thug-like invasion by six strange people who amid verbal abuses physically pushed the sick and half-clad Applicant out of the accommodation in order to take possession of it amounted to criminal assault and battery. It constituted also the tortious wrong of assault or trespass to person.

48. The forceful and unlawful eviction additionally violated Article 17 of the International Covenant on Civil and Political Rights (ICCPR). The said Article 17

of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family or home. The fact that the Respondent had not duly given an eviction notice to the Applicant nor constituted a proper eviction team to recover possession following the notice meant that the Applicant's privacy was wrongfully interfered with.

49. Those who act administratively for the Respondent/Secretary-General and the lawyers who represent them in cases such as this must be careful not to trivialize the great values and respect for human rights on which the United Nations Organization is built.

Other reliefs sought by the Applicant

50. The Applicant had prayed that she be compensated for paying increased rents and for the withholding of her salaries by the Respondent. No evidence was led by the said Applicant to show that apart from a threat to deduct increased rent from her salary in the event of not vacating the Mission's accommodation, any increased rents were charged or salaries withheld. The Respondent has denied that the Applicant's salary was withheld or that any increased rents were charged her. The Tribunal therefore finds no merit in that claim.

51. With regard to whether the Applicant can be compensated for moral injury, a staff member whose fundamental or other rights are infringed upon by the agents of the Respondent is entitled to have an effective remedy granted by this Tribunal.

52. Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case. The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal.⁵ In *Solanki*⁶, UNAT held that compensation must be set by the UNDT following a principled approach and on a case-by-case basis.

⁵ *Morsy* 2013-UNAT-298, para. 25 and *Appleton* 2013-UNAT-347, para. 27.
⁶ 2010-UNAT-044, para. 20.

Judgment

53. The Applicant's human rights were violated by UNMISS Administration. She also suffered assault and battery in circumstances so scandalous that they should never have happened under the watch of the UNMISS Administration. Due to the egregiousness of the violations, the Respondent is ordered to pay the Applicant three months net base salary, at the rate applicable when she was unlawfully evicted, as compensation.

54. 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.

55. All other pleas are rejected.

(Signed)

Judge Nkemdilim Izuako

Dated this 1st day of November 2016

Entered in the Register on this 1st day of November 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi