



**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. Ms. Gudrun Fosse contested the decisions not to return her to her original functions following her temporary assignments and not to issue personnel actions to recognize her two temporary assignments. She sought, inter alia , her return to he



9. In a letter dated 24 November 2017, the Under-Secretary-General for Management (USG/M)

applying the UN Common System of Salaries and Allowances dated 1 January 2012 (Inter-Organization Agreement).

13. On 19 April 2018, in response to the Secretary-General's challenge of receivability of her UNDT application, Ms. Fosse sought leave to file an amended application with the UNDT, in which she maintained her claim that the two personnel action forms characterized her assumption of the responsibilities of the coordinator as "reassignment" and not as "temporary assignment". In respect of her claim of "constructive dismissal", Ms. Fosse now sought an unspecified amount of financial compensation, in lieu of specific performance, considering her changed position upon transfer to the SCBD.

14. In Judgment No. UNDT/2019/135 dated 20 August 2019, the Dispute Tribunal rejected Ms. Fosse's application. It held that her claim for the issuance of two personnel action forms was moot, as the Administration had already issued them. It also considered the issue that Ms. Fosse had raised about the nature of her assumption of the responsibilities of coordinator to be moot, because there was no possible remedy that could have a concrete effect given that, following her transfer to the SCBD, Ms. Fosse was not entitled to return to her functions as the Chief of OSS nor could the UNDT make such an order. Furthermore, the Dispute Tribunal found that Ms. Fosse's claim of constructive dismissal was not receivable *ratione materiae*, as she had not submitted that claim for management evaluation.

### **Submissions**

#### **Ms. Fosse's Appeal**

15. The Dispute Tribunal failed to exercise its jurisdiction in rejecting the additional arguments that Ms. Fosse raised in her application and her motion to amend her pleadings to seek compensation instead of rescission or specific performance. In her management evaluation request and UNDT application, Ms. Fosse challenged the identical underlying facts and administrative decisions. "What differed between the [m]anagement [e]valuation [r]equest and the UNDT application was simply the legal qualification of administrative decision subject to challenge," as Ms. Fosse qualified the decision not to return her to the post of Chief of OSS as a constructive dismissal. Constructive dismissal was raised not as a new cause of action or a new claim, but as a new legal qualification or description of an

earlier identified administrative decision based on the same underlying facts that had been challenged before, and reviewed by, the MEU.

16. This same legal argument should apply *mutatis mutandis* to Ms. Fosse's request for compensation that she raised for the first time before the Dispute Tribunal. Since a management evaluation is not a first instance judicial review, it is sufficient to simply identify the administrative decision at issue without the need to exhaust all legal grounds and qualifications for the application to be receivable. The principle of concentration of grounds does not, and should not, apply to management evaluation. It is a better approach to allow the staff member to refine legal grounds and offer new evidence in his or her UNDT application, especially when the staff member had filed a request for management evaluation without legal assistance.

17. Ms. Fosse requests that the Appeals Tribunal find her UNDT application receivable and remand the case to the Dispute Tribunal for review on merits.

**The Secretary-General's Answer**

18. The appeal is not receivable because Ms. Fosse has no cause of action. As the Administration has issued the two personnel action forms that she requested, there is no matter left to be reviewed by the Appeals Tribunal. Where a contested decision is reversed, corrected or superseded, 9(T)0.5 c 0.127 (u .007.1 (w)(er)-1.86.(ed)-7.-3 (e)1.th)-3.7 6TJO a

21. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

**Considerations**

22. Our Statute provides in Article 2(1) that the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in Tu

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provisions of Staff Rule 11.2(a) and (c) and the well-established jurisprudence of the Appeals Tribunal, which recognize management evaluation as a mandatory first step in the appeals process and a prerequisite to invoke the UNDT's jurisdiction,<sup>5</sup> the UNDT was within its jurisdiction and committed no error when it deemed Ms. Fosse's claim as not receivable on the basis that it had not been the subject of her request for management evaluation.

29. There is no merit in Ms. Fosse's argument that she has only presented a new legal qualification descriptor of the challenged identified administrative decision, i.e., the decision not to return her to her original functions as the Chief of OSS, based on the same underlying facts she had properly challenged before the MEU. To the contrary, Ms. Fosse's claim of constructive dismissal, as a proper cause of action, encompassing her request for compensatory relief based on the alleged harm thereof, was clearly distinctive in its nature and did not form part of her request for management evaluation. Otherwise stated, it did not merely constitute a new legal qualification of the "previously correctly identified administrative decision", as Ms. Fosse wrongly contends, but a new request meant to expand the scope of the relief sought through her application to the first instance Tribunal so as to cover a claim for compensation based on legal and factual settings at variance with the ones contained in her request for management evaluation.

30. Further and most determinative, as per our jurisprudence, the Dispute Tribunal is not competent to award compensation of the specific kind, namely for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury, without a previous claim for such damage and compensation. If no request for such compensation is made, the Dispute Tribunal lacks jurisdiction to award this kind of compensation *sua sponte*.<sup>6</sup>

31. In her submissions to the UNDT, Ms. Fosse claimed that she had suffered illegality and requested, by way of relief, that the Tribunal: i) order the Administration to issue two Personnel Actions reflecting her two temporary assignments during the period of 2014-2017;

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<sup>5</sup> *9 X N D V R v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-699, para. 13, citing *Faye v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-654, para. 31; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293, para. 27.

<sup>6</sup> *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 20; *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288, para. 19; see also *Ten Have v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-599, para. 15.

ii) order the Administration to return her responsibilities as the Chief of OSS, or in the alternative, iii) reassign her to a suitable vacant position at the same level within the Department of Management in New York.

32. Thus, Ms. Fosse plainly restricted her claims, at the time of expressing her concrete pleas in her application, to the afore-mentioned reliefs. She did not make any specific request for compensation for material damages or non-pecuniary damage (moral harm) as a consequence of the harm she suffered on account of her alleged constructive dismissal. Ms. Fosse, on 19 April 2018, filed for the first time a motion requesting leave to amend her application in relation to the remedy, seeking to amend her initial claim from specific performance to compensation in lieu. Nevertheless, as already noted above, this submission was not merely a new legal qualification of the “previously correctly identified administrative decision”, as Ms. Fosse wrongly contends, but a new request meant to expand the scope of the relief sought through her application to the first instance Tribunal so as to cover a claim for compensation. Ms. Fosse was not precluded from requesting such a compensatory relief from the very beginning, but she never did.

**Judgment**

33. The appeal is dismissed, by majority with Judge Colgan dissenting, and Judgment No. UNDT/2019/135 is hereby affirmed.
34. Judge Colgan appends a dissenting opinion.

Original and Authoritative Version: English

**Judge Graeme Layton Colgan's dissenting opinion**

1. I respectfully disagree with the Judgment of the majority and will set out briefly the facts relevant to it, the nature of that disagreement and my reasons for dissenting. I should make it clear that the following remarks do not address the merits or otherwise of Ms. Fosse's claims; rather, they concern the Organisation's processes for the resolution of employment disputes leading to litigation. I should also say that the majority of this Tribunal panel feels compelled understandably to follow precedent, but with which I do not agree. Finally, in opening, I do not wish to be understood as denigrating the desirability and need for management evaluation of many administrative decisions affecting the United Nations staff members. And, of course, in this case there was such an evaluation undertaken.

2. Ms. Fosse moved across a number of roles within the Organisation in respect of some of which it kept no relevant records of those changes. Even when Ms. Fosse requested that the Administration do so and provide her with these records, there was no response from the Organisation. Eventually, Ms. Fosse sought management evaluation of the Organisation's failures or refusals to provide these records of her employment and of its decision not to return her to her original role. The Organisation, in its management evaluation exercise, acknowledged in effect the validity of her complaints regarding the lack of documentation and assured her that these would be provided to her. However, it continued to decline her request that she be returned to her original position within the Organisation.

3. When, however, the paperwork addressing her moves within the Organisation was sent to her, she was classified as having been "reassigned" between positions, whereas she contended that she had been "assigned" from one to another. There whersh

which she had sought the remedy of specific performance, she sought by motion to re-formulate her claim in the UNDT to reflect that change in her circumstances brought about by her transfer. It is that separation from service, which Ms. Fosse says was in truth at the instigation of the Organisation by its breaches of her contract and so was a constructive dismissal, for which she wished to seek monetary compensation but not specific performance.

5. The UNDT rejected Ms. Fosse's claim in relation to the job-change documentation as being "moot" and, in particular, because the Organisation had by then provided her with this information. It rejected her claim to remedies for constructive dismissal because Ms. Fosse had not submitted that claim for management evaluation.

6. Until she departed the Organisation, which was after she had filed her original claims with the UNDT, Ms. Fosse could not make a claim that she had been constructively dismissed: that separation was necessary to constitute a dismissal. So, it follows that Ms. Fosse could not have claimed this cause of action, or the remedies flowing from it, until after she had lodged her original claims with the Dispute Tribunal. To compel her then to return to the MEU for further management evaluation of the correctness of an administrative decision which the MEU had already dismissed would have been a time-wasting and very probably a futile exercise. It would have involved going through an arid formality only for the sake of doing so. The parties' time, energies, and financial resources would have been better spent addressing the issues between them.

7. For the following reasons, I would not uphold the UNDT's Judgment on the ground of mootness. First, although the Organisation did belatedly provide documentation to her addressing her role changes, the Appellant's claim is that the information provided is materially wrong and affects her record of service adversely. To be truly moot, such information as was provided to Ms. Fosse would have had to be that whiivathtioeb pat ( d)-nf-1.3 (h (e)-43

staff members to put to the Organisation for management evaluation in order to pass that preliminary threshold to filing proceedings in the Dispute Tribunal. That in turn requires an examination of the statutory basis of the management evaluation exercise and what it requires of staff members to enable them to challenge administrative actions affecting their employment.

9. Article 8 of the Dispute Tribunal Statute, and Staff Rule 11.2 which mirrors it, simply say that an application shall be receivable if the applicant has previously submitted the contested administrative decision for management evaluation if that is required. It is the contested administrativ

brought before the Disputes Tribunal, to pass over the Tribunal's jurisdictional threshold. If that is the effect of the majority's judgment, then I respectfully disagree. If it is also the established jurisprudence of this Tribunal, then I also respectfully consider that it is wrong.

12. It is correct in one narrow and technical sense to say that Ms. Fosse's constructive dismissal claim, so categorized, was not submitted for management review1niu7 (2)0. Tf0 ens.[( )Tj02H8 (u