

THE UNITED NATIONS APPEALS TRIBUNAL

15. On 18 May 2018, Ms. Mboob was formally notified of the decision to terminate her FTA effective 30 June 2018. At the time, her FTA was set to expire on 6 March 2019. On the same day, however, HRS also found out that Ms. Mboob was on sick leave, and as such, the Chief of HRS wrote to her informing her that should her sick leave be certified past 30 June 2018, her appointment would be extended until she was deemed fit to go back to work or until she had exhausted her sick leave entitlement. Ms. Mboob then remained in employment until 22 June 2019, and the administrative decision to terminate her employment on 30 June 2018 was never implemented.

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number of available posts. In the present case, given that there were nine P-4 posts and only seven staff members that needed placement, there was an excess of available posts, and based on the applicable rules, all staff members should have been retained. There was no need to score them individually. It thus held that OCHA did not follow the proper procedures and moving Ms. Mboob to Phase 4 was illegal and no suitability review was applicable to her.

21. The UNDT held further that there were other flaws during Phase 4 as it did not provide for “recommended with reservation” and “recommended without reservation” in the agreed methodology for the restructuring exercise, and yet, Ms. Mboob was not selected for Post Number 30517464 because another candidate was “recommended without reservation”. This distinction should not have been taken into consideration as there was no provision for such in the agreed upon rules.

the Organization beyond the expiry of her FTA. The UNDT could not order rescission of a decision that was never implemented. Ms. Mboob did not challenge the decision to terminate her employment or to separate her from service on 22 June 2019.

26. In the alternative, the Secretary-General maintains that the UNDT erred when it awarded two years' net base salary plus moral damages. The Secretary-General argues Ms. Mboob only had eight months and six days left on her FTA, and therefore, the award of two years' net base salary was very much in excess of what Ms. Mboob could have legitimately expected if the Contested Decision had been rescinded. Because Ms. Mboob received remuneration until the very last day of her original FTA, the difference between the remuneration she had actually received and the remuneration she would have received had the Contested Decision been rescinded is zero. Therefore, the Secretary-General submits Ms. Mboob should only be compensated for any moral damages that she had sustained.

Ms. Mboob's Answer

27. Ms. Mboob notes that the UNDT's findings regarding the restructuring exercise being carried out in an unlawful manner are not contested by the Secretary-General, who has opted to limit the issues on appeal to the question of mootness and the quantum of compensation payable.

28. It is not disputed that the Secretary-General has raised the issue of mootness for the first time on appeal. Ms. Mboob submits that it is impermissible to s | .Tj -0.015 Tc 0.015 Tw7-41.49m.8223.8426 (

30. The staff member further argues the UNDT did not err in awarding two years' net base salary in lieu of rescission plus USD 5,000 in moral damages. Ms. Mboob points out that weighing the gravity of the Administration's error when considering alternative compensation is neither inappropriate nor punitive. Furthermore, UNAT routinely awards damages in excess of the time remaining on a FTA, and in doing so, the Tribunal is in no way usurping the authority of the Secretary-General but is rather engaging in a reasoned assessment of damages.

Considerations

31. In *Crotty*, this Tribunal concluded that where a contested administrative decision has become moot, the UNDT will have no jurisdiction in terms of Articles 2 and 8 of the Dispute Tribunal Statute (UNDT Statute) to determine an application before it. Article 2 provides that the UNDT shall be competent, *inter alia*, to hear and pass judgment on an application appealing against an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. Article 8 provides that an application shall be receivable if the UNDT is competent to hear and pass judgement on it pursuant to Article 2 of the present statute; the applicant is eligible to file an application; the applicant has previously submitted the contested administrative decision for management evaluation, where required; and the applicant complies with the applicable guidelines. When the contested administrative decision ceases to have any legal effect, the decision has been rendered moot and there is no longer a live issue upon which the UNDT is competent to pass judgment.

32. Ms. Mboob contends that the Secretary-General may not raise the defense of mootness for the first time on appeal. In *Staedtler*,⁴ we held that a party should not be permitted to introduce new arguments on appeal asserting that the UNDT erred on questions of fact or law with respect to allegations, which were not raised before the UNDT for its consideration. It is ordinarily impermissible to raise a new point on appeal that is not covered by the pleadings or was not canvassed in the evidence before the UNDT, unless the point is jurisdictional in nature. A question of jurisdiction may always be advanced on appeal for the first time. The reason for the jurisdictional exception is obvious. The principle of legality prohibits the UNDT from assuming a competence that it does not have. The UNDT cannot exceed its competence and pass judgment where it has no jurisdiction to do so.

⁴ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 24

33. A finding of mootness is to the effect that the dispute between the parties is not justiciable. The doctrine of justiciability is an expression of the fundamental principle that courts and tribunals should decide only cases entailing a real controversy which the facts of the case require to be decided. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy. A finding of non-justiciability is essentially a finding that the tribunal lacks jurisdiction (the authority or competence) to decide the matter.

34. The question then is whether the UNDT had jurisdiction to decide Ms. Mboob's application.

35. After Ms. Mboob filed her application with the UNDT, on 25 September 2018, she remained in the employment of the Organization for a further nine months. Yet she continued with her challenge to the decision to terminate her FTA with effect from 30 June 2018, which was not implemented. She expressly indicated in her application that she had requested management evaluation on 8 June 2018 in relation to this decision and identified the contested decision as the decision "to separate by way of termination of appointment" on 30 June 2018, of which she was notified on 18 May 2018. The ultimate decision to separate her on 22 June 2019 was not referred to management evaluation and did not form the basis of any challenge before the UNDT.

36. Hence, the decision to terminate Ms. Mboob on 30 June 2018, prior to the expiry date of

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37. The continuation of her employment for a further year and the additional unsuccessful attempts to place her in another position confirm that the Contested Decision to

Judgment

41. The Secretary-General's appeal is granted, and Judgment No. UNDT/2020/219 is reversed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Murphy, Presiding
Cape Town, South Africa

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 6th day of May 2022 in New York, United States.