



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1215

**Mamissa Mboob
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Sabine Knierim
Case No.:	2021-1529
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Mamissa Mboob: Robbie Leighton, OSLA

Counsel for Secretary-General: Noam Wiener

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Mamissa Mboob (Ms. Mboob) filed an application with the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) challenging the decision of the Administration to terminate her Fixed Term Appointment (FTA), following the abolition of her post as part of a restructuring and downsizing exercise.
2. On 30 December 2020, the Dispute Tribunal issued Judgment No. UNDT/2020/219,¹ finding the termination of Ms. Mboob's appointment unlawful on account that the Administration had failed to follow the proper procedures during the restructuring exercise. The tribunal ordered rescission of the contested decision and set *in lieu* compensation at two years' net base salary. In addition, the UNDT also granted the staff member an award of USD 5,000 in moral damages.
3. The Secretary-General has now filed an appeal with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) arguing *inter alia* that the UNDT erred when it found that Ms. Mboob was eligible for compensation as a consequence of her termination.
4. For the reasons set out below, we uphold the appeal.

Facts and Procedure

5. On 7 March 2013, Ms. Mboob joined the Office for the Coordination of Humanitarian Affairs (OCHA) in Geneva on a two-year FTA as a P-4 Humanitarian Affairs Officer.
6. Four years into her appointment, in June 2017, OCHA published a document setting forth its plan for restructuring, which was meant to refocus the Organization on its core functions while also phasing out certain activities that were out of scope or unnecessary duplications.
7. In November 2017, the Organization shared with staff members the methodology agreed upon by the Staff Management Committee for the 2018 restructuring exercise. It included the following five phases:²

¹ *Mboob v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/219 dated 30 December 2020 (Impugned Judgment).

² Impugned Judgment, para. 4.

a. Phase 1 (Review Phase): based on the 2018 budget proposal submissions, the 2017 positions and the 2018 budget structure and posts were to be compared to determine the list of affected posts, and the proposed list of functional group titles to be used to create functional group/retention-review groups would be prepared. An overall review of the 2018 posts versus OCHA staff within the functional groups was to provide an indication of the impact on staff in the respective groups;

b. Phase 2 (Mitigating Measures Phase): contract buy-out (agreed termination) would be offered to eligible staff members; staff on temporary assignments, reimbursable loans or on secondment with OCHA would be asked to return to their parent organization;

c. Phase 3 (Retention Phase): in the event that there were to be a need for a downsizing (i.e., the number of staff in a particular function and at a particular grade within the affected area being restructured exceeds the number of posts available), staff members would be retained according to staff rules 9.6(e) and 13.1(d). First, staff members who received at least satisfactory performance in the last five years and who had not been subjected to a disciplinary measure in the past five years would be considered first. Second, among staff members who met the above-mentioned criteria, staff members would be retained in the following order: (1) permanent appointment holders, (2) continuing appointment holders, (3) staff recruited through a competitive examination under staff rule 4.16 serving on a fixed-term appointment, and (4) staff on fixed-term appointment. When there were more staff members than available posts within the same group, a comparative review would be conducted based on the length of continuous service in the UN Common System (one point for every month) and performance (12 points for a rating of “exceeds performance” for every performance cycle in the last five full performance cycles);

d. Phase 4 (Placement Phase): the remaining staff members were to be placed on a suitable unencumbered post with a reasonable expectation of funding within OCHA. The Human Resources were to conduct a matching exercise based on the terms of reference provided by relevant programme managers and affected staff members’ Personal History Profiles (“PHP”), performance documents, and their personal preferences/constraints. The list of suitable candidates for each vacancy in order of retention would be presented to the Heads of Offices/Divisions, who then were to make recommendations for placement/reassignment respecting the order of retention and taking into account the evaluation criteria for the vacant position and relevant personal circumstances of the staff member. Placement options included placement at the same or the lower level or temporary vacancies. The list of staff on permanent, continuing or fixed-term appointments not placed within OCHA was to be shared with the Office of Human Resources Management (“OHRM”) for consideration for positions across the Secretariat. Staff members not placed within OCHA or the Secretariat were to have the option to take Special Leave Without Pay (“SLWOP”) for up to 12 months; and

e. Phase 5 (Termination and Separation): all staff members not placed at the end of the placement phase were to be separated according to Chapter IX of the Staff Regulations and Rules.

8. During Phase 1 (Review Phase), the post encumbered by Ms. Mboob was identified to be cut from the 2018 budget.

9. As Ms. Mboob did not express an interest for an agreed termination under Phase 2 (Mitigating Measures Phase), she was automatically moved to Phase 3 (Retention Phase). During Phase 3, Ms. Mboob ranked 20th out of 26 P-4 Humanitarian Affairs Officers in Geneva.

10. On 12 January 2018, the Chief, Human Resources Section (HRS), OCHA, informed Ms. Mboob that she was being moved to Phase 4 (Placement Phase) and that her profile would be reviewed for placement against compatible posts. Per the instructions she received, Ms. Mboob submitted the necessary documentation, including her updated PHP, and expressed her preference to stay in Geneva for family reasons.

11. During Phase 4, there were nine P-4 posts with OCHA in Geneva, but only seven P-4 staff members needed placement. Therefore, there was an excess of posts compared to the number of staff members who needed placement. However, Ms. Mboob did not get placed into any of them. She was not recommended for eight of them and was recommended with reservation for one of the posts (Post Number 30517464). However, eventually another staff member who was also on a FTA and whose post was abolished was recommended for this post without reservation.

12. On 22 March 2018, HRS informed Ms. Mboob that no suitable post had been found for her within OCHA and that her name and PHP would be shared with the United Nations Office in Geneva (UNOG) and OHRM for possible placement. HRS also noted should Special Leave without Pay (SLWOP) not be a feasible option for her, then the Administration would request termination of her FTA with an effective date of 30 June 2018.

13. On 24 March 2018, Ms. Mboob sent an e-mail to HRS expressing her interest for any P-4 post in Geneva, and she also expressed that she would be open to consider P-3 posts as well.

14. On 4 April 2018, Ms. Mboob filed a first request for management evaluation. She challenged the failure of the Administration to retain her against a P-4 post in the new structure and the decision to terminate her appointment as of 30 June 2018.

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.

16. From that date until her actual separation on 22 June 2019, Ms. Mboob was considered for seven positions in OCHA and two outside of OCHA, but she was not found to be suitable for any.

17. On 8 June 2018, Ms. Mboob filed a second request for management evaluation of the decision to terminate her FTA. By letter dated 27 June 2018, in response to the second management evaluation request, the Management Evaluation Unit informed Ms. Mboob of the Administration's decision to uphold the contested decision.

18. On 25 September 2018, Ms. Mboob filed an application with the UNDT challenging the decision to terminate her FTA with effect from 30 June 2018 (Contested Decision). In her application, Ms. Mboob indicated that she had requested management evaluation on 8 June 2018 and identified the Contested Decision as the decision "to separate by way of termination of appointment" of which she was notified on 18 May 2018.

19. After being on certified sick leave from 10 March 2018 to 21 June 2019, Ms. Mboob separated from the Organization on 22 June 2019. Ms. Mboob did not challenge the decision to separate her from service on 22 June 2019 and persisted with her challenge to prematurely terminate her FTA with effect from 30 June 2018, even though that decision was not implemented.

20. On 30 December 2020, the UNDT issued the Impugned Judgment, finding that the termination was unlawful for the Administration had failed to follow the required procedures during the restructuring exercise. The UNDT held that the Administration erred when it failed to retain Ms. Mboob during Phase 3 (Retention Phase). The subsequent comparative review, which included a scoring system, only applied when the number of affected staff members exceeded the

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. This, the UNDT reasoned, provided additional support for the conclusion that the restructuring exercise was not conducted lawfully.

22. The UNDT accordingly concluded that the Administration had failed to make all reasonable and good faith efforts to afford priority consideration to Ms. Mboob for the posts outside OCHA for which she had expressed an interest. It concluded therefore that the decision to terminate the FTA was unlawful. The UNDT ordered the rescission of the Contested Decision and having regard to the serious nature of the irregularities, it set *in lieu* compensation at two years’ net base salary and awarded Ms. Mboob USD 5,000 as compensation for moral harm.

23. On 1 March 2021, the Secretary-General filed an appeal against Judgment No. UNDT/2020/219. On 30 April 2021, Ms. Mboob filed her answer.

Submissions

The Secretary-General’s Appeal

24. The Secretary-General submits the UNDT erred in law and in fact when it found that Ms. Mboob was eligible for compensation as a consequence of the termination of her FTA.

25. The Secretary-General on appeal for the first time raises a special plea of mootness. The Contested Decision was supposed to take effect on 30 June 2018, eight months before the FTA expiration date of 6 March 2019. However, Ms. Mboob was only separated on 22 June 2019. The Contested Decision was never implemented, with the consequence that the application appealing against the Contested Decision was moot because Ms. Mboob remained in service of

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 raise a defense on appeal that was not raised before the UNDT.

29. Ms. Mboob also argues that the principles of mootness enunciated by the Appeals Tribunal in *Crotty*,³ do not apply in this appeal. *Crotty*, she argues, is distinguishable because in that instance, the decision to terminate was rescinded and the staff member was transferred to a different post and remained in the employ of the Organization. This is not the case here. She submits the instant case clearly presented a live controversy as to whether the decision causing her mental illness was lawful or not. She was indeed separated, and it is only that the timing of her separation was delayed due to an illness caused by the Organization.

³ *Crotty v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-763.

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 her FTA, was never implemented, and Ms. Mboob was only separated from service a year later, in June 2019, three months after the expiry of her FTA in March 2019. As there was no challenge to that decision, the justifiability of her separation from service on 22 June 2019 was not examined by the UNDT. Importantly, there has been no evaluation or determination of whether she had any legitimate expectation of the renewal of her FTA on its expiry through the effluxion of time. In addition, there is evidence indicating that Ms. Mboob was considered for seven positions in OCHA and two positions outside OCHA in the one-year period between the initial decision to separate her in June 2018 and her ultimate separation from service in June 2019. The record of evidence does not disclose whether these facts impacted positively or negatively on the reasonableness or lawfulness of the ultimate administrative decision to separate her from service on 22 June 2019.

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 terminate her FTA prematurely (following abolition of her post as part of the 2018 OCHA restructuring exercise) was no longer the real controversy requiring decision by the UNDT. The Contested Decision was rendered moot by the decision on 18 May 2018 to extend Ms. Mboob's sick leave beyond 30 June 2018, which impliedly rescinded the Contested Decision.

38. Consequently, the UNDT should have found that the Contested Decision to terminate her FTA prematurely, lawful or not, was never implemented; and that her appointment was not terminated due to an unlawful decision to terminate FTA prematurely but after the expiry of her FTA through the effluxion of time followed by a period of extended sick leave. Because the Contested Decision was never implemented, the UNDT could not rescind that decision, and the application should have been dismissed as moot.

39. Moral damages of USD 5,000 were awarded to Ms. Mboob by the UNDT on the basis of a medical report dated 13 June 2018, showing a link between her illness and the Contested Decision. Compensation for harm can be awarded only if three elements are present: (i) harm; (ii) an illegality; and (iii) a nexus between the illegality and the harm.⁵ A contested decision that was not implemented and thereby became moot, whatever its procedural deficiencies, does not amount to an illegal administrative decision having adverse direct effects. There is accordingly no basis for an award of moral damages.

40. The appeal of the Secretary-General must accordingly succeed.

⁵ *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20.

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.

(Signed)

Weicheng Lin, Registrar